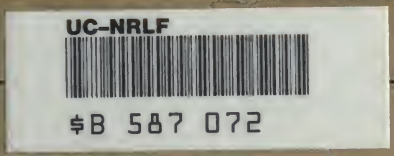


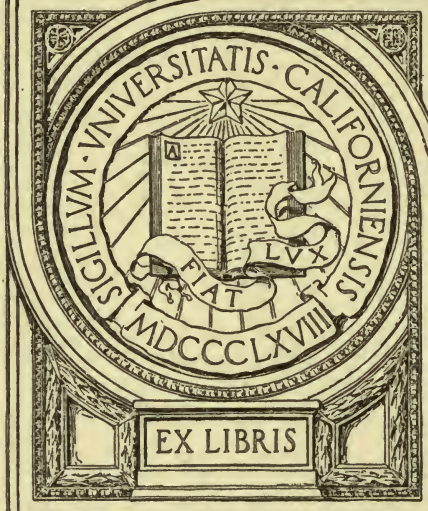
THE QUESTION OF ABORIGINES

IN THE LAW AND PRACTICE OF NATIONS

INCLUDING
A COLLECTION OF AUTHORITIES
AND DOCUMENTS

By
ALPHEUS HENRY SNOW

WASHINGTON
GOVERNMENT PRINTING OFFICE
1919



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PREFATORY NOTE.

The following is submitted to the Department of State, pursuant to a request made by letter dated April 29, 1918, that the author should "undertake the task of collecting, arranging, and, so far as [he] may deem necessary, editing the authorities and documents relating to the subject of 'Aborigines in the Law and Practice of Nations.'"

The author has discovered no treatise on the question, nor even any chapters in any book on international law or the law of colonies, to serve as a model or guide. He has therefore been compelled to develop the subject and arrange the authorities and documents according to his own judgment.

December 20, 1918.

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THE QUESTION OF ABORIGINES IN THE LAW AND PRACTICE OF NATIONS.

CHAPTER I.

DEFINITION OF ABORIGINES.

So far as the author of this report has been able to discover, no definition of the word "aborigines" as a term of the law and practice of nations has been made by any text-writer of recognized standing, or by any international body whose usage would determine its meaning. It therefore becomes necessary to formulate such a definition from an examination of the meaning attached to the word by lexicographers and by a study of the context of public documents of recognized authority in the law and practice of nations in which the word is used.

The following definition, formulated in that manner, is adopted for the purposes of this report:

Aborigines are the members of uncivilized tribes which inhabit a region at the time a civilized State extends its sovereignty over the region, and which have so inhabited from time immemorial; and also the uncivilized descendants of such persons dwelling in the region.

As a term of the law and practice of nations, "aborigines" is primarily a term of that division of the general public law which is not strictly national or strictly international, and which is concerned with the relations between a State recognized as one of the civilized States and uncivilized tribes under its sovereignty. Aborigines are distinguished from "colonists," the latter term including the citizens of civilized States who settle in the region. The relations of aborigines with each other, with the colonists, and with the colonizing State are necessarily subject to a special régime established by the colonizing State for the purpose of fitting the aborigines for civilization, and opening the resources of the land to the use of the civilized world. All civilized States which assume sovereignty over regions inhabited by aborigines undertake a civilizing work which, while varying in its details, is identical in its general nature and in the fundamental principles to be applied. Hence the dealings of individual civilized States with aborigines under their respective sovereignties are matters of common interest to all nations, and the

law and practice of nations properly concerns itself with the common and international aspects of such national action.

(*a*) *Meaning of the word as shown by an examination of lexicons.*

The word "aborigines" is of course the Latin word *aborigines* taken over without change into the English language. The history and meaning of the word in Latin are given in the Latin-English Lexicon by E. A. Andrews as follows:

The Aborigines, the nation which, previous to historical record, descended from the Apennines, and advancing from Carseoli and Reate into the plain drove out the Siculi, the ancestors of the Romans. To them, as not of Greek origin, belongs the un-Greek element in the Latin language. Cf. Müll. Etrusk. 1.16 *sq.*; Cic. Rep. 2.3; Sall. Cat. 6. * * * Pliny also uses it as an appellative, * * * the original inhabitants, ancestors, 4.21.36. Its etym. is doubtful. It is commonly derived from *ab-origo;* but, acc. to Aur. Victor, it is either of Greek origin, from ἀπό and ὄρη, those who came from the mountains, or fr. *ab-errare*, the wanderers; which last derivation Fest. also, p. 16, approves.

Webster's Dictionary thus defines the word:

Aborigines (Lat. *Aborigines*, from *ab* and *origo*, especially the first inhabitants of Latium, those who originally (*ab origine*) inhabited Latium or Italy). The first inhabitants of a country.

The same dictionary defines "aboriginal," used as a substantive, as "an original inhabitant; one of the aborigines"; and the adjective "aboriginal" as meaning "first; original, primitive; as the aboriginal tribes of America."

The Century Dictionary thus defines "aborigines":

The first inhabitants of a country, applied especially to the aboriginal inhabitants of Latium, the ancestors of the Roman people; * * * the primitive inhabitants of a country; the people living in a country at the earliest period of which anything is known.

The same dictionary defines the adjective "aboriginal" as "pertaining to aborigines; hence, primitive, simple, unsophisticated."

The following are meanings applied to the word and some of its derivatives by the Oxford Dictionary:

Aborigines. A purely Latin word, applied to those who were believed to have been the inhabitants of a country *ab origine*, i. e., from the beginning * * *.

1. The original inhabitants of a country; originally, the race of the first possessors of Italy and Greece, afterwards extended to races supposed to be the first or original occupants of other countries.'

2. The natives found in possession of a country by Europeans who have gone thither as colonists.

Aborigen, Aborigin, a form occasionally occurring as a singular to aborigines, which has no singular in L. * * *. But the tendency is to treat aborigines as a purely Eng. word, and make the singular *aborigine.*

Aboriginal, A, adj. 1. First or earliest so far as history or science gives record; primitive; strictly native; indigenous. Used both of races and natural features of various lands.

2. (Spec.) Dwelling in any country before the arrival of later (European) colonists.

3. Of or pertaining to aborigines, to the earliest known inhabitants, or to native races.

B. subs. (with pl.). An original inhabitant of any land, now usually as distinguished from subsequent European colonists.

Aboriginalism. The due recognition of native races.

The New Standard Dictionary (ed. of 1913) gives the following definitions:

Aborigines. The original or earliest known inhabitants of a country. * * * L. the primeval Romans.

Aboriginal. Of or pertaining to the aborigines; native to the soil; savage in respect of culture; indigenous; primitive; hence simple, unsophisticated.

Aboriginalism. The doctrine that savage races may be civilized, and hence should be respected.

Aborigine (rare). One of the aborigines.

Aborigen. Singular form of *aborigines*, which in Latin has no singular; assumed from regarding the word as English, and now often used.

(*b*) *Meaning of the word as shown by official documents.*

From the foregoing survey of the work of the lexicographers it is evident that the lexicons furnish little aid toward the formulation of a scientific definition of aborigines as a term of the law and practice of nations. It therefore becomes necessary to study the usage of the word in legal and political literature. Such a study apparently reveals that the establishment of the word as a legal and political term with a precise meaning occurred in the period between 1835 and 1837, under the following circumstances:

Through the efforts of a series of reform organizations in Great Britain, the first of which began its operations in 1791, the African slave trade was prohibited to the citizens of Great Britain by act of Parliament in 1807, and in 1833 African slavery was abolished in the British colonies. During this long period of agitation these reformers had been led to study the whole question of the contact of the civilized States with the uncivilized races. Great Britain was exercising sovereignty over regions inhabited by uncivilized races in Canada, South America, Africa, Australia, New Zealand, and the islands of the Pacific. Other European States, the United States, and the States of South America exercised similar sovereignty. In spite of the varying details in dealing with each of the uncivilized tribes, it was perceived that the problem was one of the contact of civilization with uncivilization; that there were certain general principles universally applicable, and that the question was in some respects and to some extent one of common interest to all nations.

Influenced by this broader aspect of the question, a part of the anti-slavery group in 1835 separated itself from the rest, and formed

themselves into a society which called itself the British and Foreign Aborigines Protection Society, the remainder continuing their general anti-slavery propagandist work as a society calling itself the British and Foreign Anti-Slavery Society. These two societies kept their separate identity and continuously carried on their work on their separate lines until 1909, when they merged into one, by the name of the British Anti-Slavery and Aborigines Protection Society, which still exists.

By the influence of the Aborigines Protection Society the question of aborigines in the law and practice of nations was agitated in 1835 in the British House of Commons, and largely through the influence of Thomas Fowell Buxton, who was a member of the House of Commons and one of the leaders of the society, a select committee on the subject was appointed. After taking a large amount of evidence, this committee, which received the name of the Select Committee on Aboriginal Tribes, made its report in 1837. Gladstone was a member of the committee, and it is said that he drafted the report.

It was by this report, apparently, that the word "aborigines" received its definite sanction as a term of the law and practice of nations. In judicial decisions and diplomatic and legislative documents prior to that time the word is used sporadically and in a sense not invariably, though generally confined to uncivilized persons indigenous to the soil of a certain region. This report clearly confined it, as a legal term, to this sense.

By the terms of the resolution of the House of Commons the committee was authorized "to consider what measures ought to be adopted with regard to the native inhabitants of countries where British settlements are made, and to the neighboring tribes, in order to secure to them the due observance of justice and the protection of their rights, to promote the spread of civilization among them, and to lead them to the peaceful and voluntary reception of the Christian religion."

In the second paragraph of the report it is said:

> The extent of the question will be best comprehended by taking a survey of the globe, and by observing over how much of its surface an intercourse with Britain may become the greatest blessing, or the heaviest scourge. It will scarcely be denied in word that, as an enlightened and Christian people, we are at least bound to do to the inhabitants of other lands, whether enlightened or not, as we should in similar circumstances desire to be done by; but beyond the obligations of common honesty, we are bound by two considerations with regard to the uncivilized: First, that of the ability we possess to confer upon them the most important benefits; and secondly, that of their inability to resist any encroachments, however unjust, however mischievous, which we may be disposed to make. The disparity of the parties, the strength of the one and the incapacity of the other to enforce the observance of their rights, constitutes a new and irresistible appeal to our compassionate protection.

The committee recognized that the question of aborigines was not a mere national one, but was one common to all colonizing nations, and virtually one of drawing a just line between that which is due to aborigines as human beings and original occupants of the soil on the one part and that which is due to the civilized world on the other part, and especially of preventing abuses of power by civilized states and their citizens as respects the uncivilized peoples. Thus it is said:

> It is not too much to say that the intercourse of Europeans in general, without any exception in favor of the subjects of Great Britain, has been, unless when attended by missionary exertions, a source of many calamities to uncivilized nations. Too often, their territory has been usurped, their property seized; their numbers diminished, their character debased, the spread of civilization impeded. European vices and diseases have been introduced among them, and they have been familiarized with the use of our most potent instruments for the subtle or violent destruction of human life, viz., brandy and gunpowder. * * *
>
> It is difficult to form an estimate of the less civilized nations liable to be influenced for good or for evil by contact and intercourse with the more civilized nations of the earth. It would appear that the barbarous regions likely to be more immediately affected by the policy of Great Britain are the south and west of Africa, Australia, the islands of the Pacific Ocean, a very extensive district of South America at the back of the Essiquibo settlement between the rivers Orinoco and Amazon, with the immense tract which constitutes the most northerly part of the American continent and stretches from the Pacific to the Atlantic Ocean.

Throughout the first part of the report, which is a statement of the facts relating to the abuse of civilized power, brought out by the evidence taken by the committee, the word "aborigines" is not used. Where it would naturally be expected, the words "savages," "barbarous peoples," "heathens," "uncivilized nations," "tribes," "native inhabitants," or "natives" are used. The word "aborigines" first occurs in the heading of the second part of the statement of facts. This heading is as follows:

> Effects of fair dealing, combined with Christian instruction, on aborigines.

Under this heading, the opening statement reads:

> In the foregoing survey we have seen the desolating effects of the association of unprincipled Europeans with nations in a ruder state. There remains a more gratifying subject to which we have now to direct our attention—the effect of fair dealing and of Christian instruction upon heathens. The instances are, unhappily, less numerous than those of an opposite character, but they are not less conclusive; and in reviewing the evidence before us, we find proof that every tribe of mankind is accessible to the remedial process and that it has actually been partially applied and its benefits experienced in every quarter of the world; so that, the main feature of the case before us being the ravages caused by Europeans, enough has been incidentally disclosed to show that those nations which have been exposed to our contamination might, during the same period, have been led forward to religion and civilization. Independently of the obligations of conscience to impart the blessings we enjoy, we have

abundant proof that it is greatly for our advantage to have dealings with civilized men rather than with barbarians. Savages are dangerous neighbors and unprofitable customers, and if they remain as degraded denizens of our colonies they become a burden upon the State.

We have next to express our conviction that there is but one effectual means of staying the evils we have occasioned, and of imparting the blessings of civilization, and that is the propagation of Christianity, together with the preservation, for the time to come, of the civil rights of the natives.

We have seen that a mere acquaintance with civilized men by no means prepares savages to receive Christianity, and that kind of civilization which alone can be advantageous to them or ourselves. * * * We further find, in the evidence before us, that benevolent attempts have been made to instruct savages in the arts of civilized life, for the purpose of improving their condition and gradually preparing them for the truths of the Gospel, and that these attempts have been signally unsuccessful. * * * So complete, indeed, has been the failure of the merely civilizing plan with various tribes of Indians, that intelligent Americans have been led to adopt the conclusion that it is necessary to banish the Indians from the neighborhood of the white population, on the supposition that they are not capable of being reclaimed or elevated into a civilized or well-ordered community.

This was not the opinion of William Penn, whose conduct toward the Indians has been deservedly held up as a model for legislators, and who "notwithstanding he purchased their lands" by an equitable treaty, "did not desire their removal," but "admitted them to full participation in the benefit and protection of the laws," and who also took pains to promote their religious instruction, and to render the intercourse with their white brethren beneficial to them. That the good which he contemplated has been frustrated by many untoward circumstances we are aware, but we do not therefore doubt the feasibility of producing a permanent impression upon uncivilized men. We consider that the true plan to be pursued is that which we find recommended by the Church Missionary Society, in their instructions to two of their emissaries:

"In connection with the preaching of the gospel you will not overlook its intimate bearing on the moral habits of a people. * * * Seek to apply it to the common occupation of life; and instead of waiting to civilize them before you instruct them in the truths of the gospel, or to convert them before you aim at the improvement of their temporal condition, let the two objects be pursued simultaneously."

Following the statement of facts the committee inserted its "conclusions." Holding that its investigation had proved that "the effect of European intercourse had been, upon the whole, a calamity on the heathen and savage nations," it urged in eloquent language that Great Britain should make itself a leader in the movement to make the contact between the civilized and the uncivilized races a benefit to both and a means of increasing the general civilization and welfare.

After the "conclusions," the committee considered under the heading of "suggestions" the fundamental principles of the just relationship between civilized and uncivilized races and the methods and processes suitable for carrying these principles into effect. It is in the text of these "suggestions" (which in the nature of things

must have been the last paper drafted by the committee), that the word "aborigines" is used as a technical term. It would appear that the committee, while unable to agree in accepting that term during the main part of its deliberations, had found it so necessary to have a generic term applicable to the uncivilized natives in the colonies of all civilized States, that they finally agreed to sanction and adopt the word "aborigines" for this purpose.

The word occurs in the opening paragraph of the "suggestions," which reads as follows:

Having thus adverted to some of the more remarkable of those incidents by which the intercourse between the British colonies and the aborigines in their vicinity have been characterized, it remains to consider how the recurrence of similar calamities can be most effectually averted.

It is obviously difficult to combine in one code rules to govern our intercourse with nations standing in different relationships with us. Some are independent communities; others are, by the nature of treaties or the force of circumstances, under the protection of Great Britain, and yet retain their own laws and usages; some are our subjects, and have no laws but such as we impose.

To this variety in circumstances must be added a variety as great in their moral and physical condition. They are found in all grades of advancement, from utter barbarism to semi-civilization.

To propose regulations which shall apply to our own subjects and to independent tribes, to those emerging from barbarism and to those in the rudest state of nature, is a task from which your committee would shrink, were it not that all the witnesses, differing as they do upon almost every other topic, unite in ascribing much of the evil to the uncertainty and vacillation of our policy. Your committee can not too forcibly recommend that no exertion should be spared and no time lost in distinctly settling and declaring the principles which shall henceforth guide and govern our intercourse with those vast multitudes of uncivilized men who may suffer in the greatest degree or in the greatest degree be benefited by our intercourse.

The regulations which we would suggest for that purpose are either general or special; that is, they either extend to all parts of the globe in which we are brought into contact with uncivilized tribes or they apply to the particular case of some one settlement. In the first place, therefore, we will advert to these general regulations which we have to suggest, and which may be reduced under nine separate heads.

The following extracts from the text of these nine general principles will illustrate the committee's usage of the term "aborigines":

The protection of the aborigines should be considered as a duty particularly belonging and appropriate to the executive government as administered either in this country or by the governors of the respective colonies. * * *

The settlers in almost every colony, having either disputes to adjust with the native tribes, or claims to urge against them, the representative body is virtually a party, and therefore ought not to be a judge in such controversies. Or if the members of the colonial legislature are not chosen by the people, but selected by the government, there is still a similar objection to their interference with the aborigines. * * *

Whatever may be the legislative system of any colony, we therefore advise that, as far as possible, the aborigines be withdrawn from its control.

In the formation of any new colonial constitution, or in the amendment of any which now exist, we think that the initiative of all enactments affecting the aborigines should be vested in the officer administering the government; that no such law should take effect until it has been expressly sanctioned by the Queen. * * *

Your committee would take occasion to observe that, so far as regards that portion of the aborigines who may inhabit the country beyond our colonial frontiers, the provincial legislatures have no authority to make enactments; and thus far, therefore, there will be less difficulty in retaining the government of our relations with the aborigines in more impartial hands. * * *

All contracts for service into which any of the aborigines may enter with any of the colonists should be expressly limited in their duration, to a period which should, in no case, exceed 12 months. * * *

So far as the lands of the aborigines are within any territories over which the dominion of the Crown extends, the acquisition of them by her Majesty's subjects, upon any title of purchase, grant, or otherwise, from their present proprietors, should be declared illegal and void. * * *

When the British law is violated by the aborigines within the British dominions, it seems right that the utmost indulgence compatible with a due regard for the lives and property of others should be shown for their ignorance and prejudices. * * *

In the case of offences committed beyond the frontiers, British subjects are amenable to colonial courts—the aborigines are not. * * * It would, therefore, on every account be desirable to induce the tribes in our vicinity to concur in devising some simple and effectual method of bringing to justice such of their own people as might be guilty of an offence against the Queen's subjects.

As a general rule, * * * it is inexpedient that treaties should be frequently entered into between the local governments and the tribes in their vicinity. * * * The safety and welfare of an uncivilized race require that their relations with their more cultivated neighbors should be diminished rather than multiplied. * * * To the preceding statement an exception is to be made as far as respects the pastoral relation formed between Christian missionaries and the aborigines. To protect, assist, and countenance these gratuitous and invaluable agents is amongst the most urgent duties of the governors of our colonies. On the other hand, those by whom the missionaries are selected and employed, can not be too deeply impressed with a sense of the responsibility under which that choice is made. Without deviating into discussions scarcely within the province of a parliamentary committee, it may be observed that piety and zeal, though the most essential qualifications of a missionary to the aborigines, are not the only endowments indispensable to the faithful discharge of his office; in such situations it is necessary that, with plans of moral and religious improvement, should be combined well matured schemes for advancing the social and political improvement of the tribes, and for the prevention of any sudden changes which might be injurious to the health and physical constitution of the new converts.

The British and Foreign Aborigines Protection Society has always based itself upon the Report of the Parliamentary Committee of 1837, and in its proceedings and publications, and those of its allied societies in other countries, the word "aborigines" has been persistently used in the sense in which it is used in that report. In its national acts, however, Great Britain has used the word "natives"

almost exclusively. The United States, having had to deal only with the American Indians, has in its national action described them merely as "Indians"; and the same is true of Canada. France, and the Latin countries use exclusively the word *indigènes*. Germany and the Germanic countries use exclusively the word *eingeborenen*.

It is only when the problem of the contact between civilized and uncivilized races is considered as distinct from its relation to any one civilized state, and as a matter of common interest to all civilized states that the word "aborigines" is coming into general use. As a Latin word it fits into all languages. The Englishman, accustomed to the word "natives," the American thinking in terms of "Indians," the Frenchman using invariably the term *indigènes*, and the German employing the word *eingeborenen* can find in the word "aborigines" a term which all can adopt in discussing the common problem which each nation is called upon to meet and solve in its colonizing activities.

The final act of the Berlin African Conference of 1884–85 in the original (French) version uses the word indigénes, and the official English translation the word "natives." In the preamble of the final act of the Brussels Conference, the original (French) version uses the expression *de protéger efficacement les populations aborigènes de l'Afrique*. In the official English translation the paragraph in which these words occur is thus worded:

> Being equally actuated by the firm intention of putting an end to the crimes and devastations engendered by the traffic in African slaves, of efficiently protecting the aboriginal population of Africa, and of securing to that vast continent the benefits of peace and civilization.

Assuming that the above definition of aborigines is correct, the question of aborigines in the law and practice of nations is:

First. What are the general principles of the law of nations which the colonizing states respectively have recognized and applied and now recognize and apply, as governing their respective relations with the uncivilized tribes which were inhabiting the regions colonized by them at the time they respectively assumed the sovereignty of the regions?

Second. To what extent and on what principles have civilized states cooperated with each other in recognizing and applying these principles?

CHAPTER II.

HISTORICAL INTRODUCTION.

The instructions of the Department in regard to the making of this study of authorities and documents state that "the plan does not, in general, contemplate research prior to the period of the Congress of Vienna," but that this limitation is not imperative. The peace of 1763 between Great Britain and France, involving as it did the transfer of territory inhabited by aboriginal tribes, would seem to have been the occasion of an investigation into the law of nations on this subject which resulted in the formulation of the basic principles subsequently applied by the European nations and the United States. Therefore the peace of 1763, rather than the Congress of Vienna, is in this study taken as beginning of the modern law on the subject.

The views held by Great Britain and France in 1763 are evidenced by the fact that in the peace treaty they disposed of the territory inhabited by Indian tribes without any reference to them; thus assuming that aboriginal tribes had neither a title to the soil nor sovereignty. The royal proclamation of 1763, making the fundamental dispositions of the vast hinterland north and west of the American colonies, reserved to the British Government the exclusive right to purchase and extinguish the rights of the Indian tribes as occupants of the soil, and forbade the settlement of Europeans on territory occupied by the Indians until after the Indian right had been extinguished by tribal conveyance to the British Government; so that no title to land could be obtained by any person or corporation by an Indian conveyance. The British Government dealt with the Indian tribes on this territory by so-called "treaties," according to which the tribes accepted the protection of Great Britain and agreed to have no dealings with other European States.

Meantime all the western European powers were in contact with the tribes of middle Africa. Their citizens were engaged in deporting African negroes to the West Indies and to the English, French, Spanish, and Portuguese colonies of America to supply the demand for labor. Slavery was universally recognized as an institution not contrary to the law of nations, though open to prohibition by any State. The African negroes were sold into slavery. The deportation was accompanied with inhumane and atrocious practices, the negroes being captured and conveyed by force and the transportation across

the ocean being effected without regard to the fact that they were human beings.

The democratizing and humanitarian movement of the last quarter of the eighteenth century, and especially the American declaration of the fundamental rights of man, contained in the preamble of the Declaration of Independence, led to a discussion of slavery and the slave trade, and thus to a consideration of the principles of the law of nations regarding the relations of civilized States to uncivilized peoples.

In the ordinance for the government of the Northwest Territory of 1787 slavery was abolished in the Territory, and one of the "Articles of Compact" covered the two subjects of education and the relations with the Indian tribes, thus suggesting a relationship to them not merely of protection but of tutorship. This article asserted the obligation of the United States and the governments established in the Northwest Territory to deal justly with the Indians as persons domesticated within the United States, but not forming a part of its citizenship.

The Articles of Confederation and the Constitution recognized the Congress as the organ of the United States in dealing with the Indian tribes, and by implication provided for the abolition of the slave trade, so far as the United States was concerned, in 1808. By implication slavery and the slave trade were recognized as permissible by the law of nations, but a distinction was made between slave trade and slavery, the former being placed in the way of abolition at a definite time and the time of abolition of the latter being left uncertain.

The French declaration of the rights of man in 1791, followed by the decree abolishing slavery in the French colonies in 1794—which remained in force until the restoration of slavery by the Napoleonic government in 1802—stirred up discussion in Europe over the whole question of the relationship of the civilized States to uncivilized peoples.

A body of influential persons in England conceived the plan of establishing a colony at Sierra Leone to be settled by negroes reclaimed from the slave-trading operations. It was the purpose to civilize these negroes and use them as the means of extending civilization. This colony came in contact with the African company of merchants and traders, whose members were engaged in the slave-trading operations. The Sierra Leone experiment failed, but by the efforts of the reformers Great Britain forbade the slave trade to its citizens in 1807.. The colony was turned over to the British Government, and the persons who had composed the Sierra Leone company formed themselves, in 1807, with the cooperation of a number of per-

sons of social and political prominence, into the African Association. This was a propagandist association and was well supported financially. It employed its own counsel and had a great influence with the British Government. During the Napoleonic wars, French commerce on the sea ceased, and with it the French slave trade. The Spanish, Portuguese, and American ships engaged in the trade were captured by British naval vessels as engaged in a trade contrary to the law of nations, taken into Sierra Leone, and there condemned by the vice-admiralty court. The Spanish and Portuguese governments insisted that neither slavery nor the slave trade was contrary to the law of nations, and that the abolition of either by any nation did not affect other nations. This was held by the admiralty courts in Great Britain to be the case, but they upheld the right of British naval vessels to capture the slave-trading ships of any nation that had itself prohibited the trade to its own citizens. Thus, according to this doctrine, after 1808, when the United States abolished the slave trade, its slave-trading ships were subject to capture by British naval vessels.

In this situation Great Britain, at the Congress of Vienna, moved for a declaration of the European powers in favor of abolishing the slave trade. It was decided that non-colonizing powers, as well as colonizing powers, might participate in this declaration, since it was not merely a colonial question, but one which concerned the interests of humanity. First, however, Great Britain acknowledged the legality of the slave trade under the law of nations, by a treaty with Portugal providing for payment of damages for capturing her slave ships, and the powers then joined in the famous declaration in favor of the abolition of the slave trade. The United States, in its treaty of peace with Great Britain after the war of 1814, had made a declaration to the same effect some two months before the declaration of the Congress of Vienna.

Negotiations looking toward cooperative action of the States concerned to stop the slave trade continued at the subsequent congresses of the powers, but were of no avail, because all the powers, and especially France, were unwilling to agree to an extension of the right of search and capture at sea, hitherto acknowledged only as a belligerent right, so that it should apply in time of peace to ships engaged in a trade outlawed by the nations. Russia, at the Congress of Aix-la-Chapelle, proposed an international commission of surveillance, to be composed of delegates of all the powers, to be located on the coast of Africa, to be subject to the regulation of European congresses, and to wield the power of an international fleet provided by all the European States, for the capture of slave-trading ships, such ships to be subject to condemnation by the international commission sitting as an international prize court. But the powers

objected to this as an arrangement in derogation of national sovereignty.

Meantime as the nations one by one abolished the slave trade as respects their own citizens the horrors of it increased. More and more vicious characters engaged in it, as it took on the character of a smuggling operation; and the necessity of concealing the victims by means of cargo and by devices specially intended for concealment made the conditions of transportation of negroes a scandal to the civilized world.

The difficulty of abolishing the slave trade on the sea led to the perception that it could really be abolished only by abolishing it on land and sea alike. The study of the conditions essential to abolishing it on land led to a study of the conditions of aboriginal life, especially in Africa, and this opened the way for the study of the whole question of aborigines, both as related to the individual civilized States exercising sovereignty over them and as related to civilized States collectively and generally.

While this situation existed in Europe, the United States had had occasion to consider its relations with the Indians. Washington, Adams, and Jefferson had pursued a policy of dealing with the Indian tribes in the Northwest Territory on such an elevated plane that the Indian "treaties" came near to recognizing the tribes in the so-called "Indian country" as States. This "Indian country" lay between the United States and Canada. In the peace negotiations between the United States and Great Britain in 1814 the British Government proposed as a term of peace the recognition of the "Indian country" as an Indian buffer state under the protection of Great Britain and the United States. The "treaties" of the United States with the Indian tribes were pointed to by the British commissioners as evidencing the recognition of the collective tribes as a native state. This claim was met by the commissioners of the United States by showing that the United States had always claimed and acted under the principles of the law of nations as recognized by France and Great Britain in 1763, and that the Indian tribes were domesticated communities of the United States, which it customarily dealt with by agreement or treaty, but which were subject to its sovereignty and plenary jurisdiction and entitled to its protection.

Under President Monroe, this understanding of the relations of the United States with aboriginal tribes eventuated in a general movement for ameliorating the condition of the Indians and of the negroes. The plan was to colonize the Indians in the Western Territory under the protection and sovereignty of the United States, and the negroes in Africa, under the protection and patronage of the

United States. The removal of the Indians was undertaken by President Monroe, and the Indian question was discussed in Congress and in the press; the conclusions of the American Government, adopted in 1814, being confirmed more and more strongly as lawyers and statesmen examined and reexamined the question. The plan for colonizing the negroes in Africa was taken up by national and State organizations and was patronized by the Government, which assisted by means of its naval vessels and by sending out agents of a consular character to supervise the settlements of negroes in Africa.

Meantime test cases were brought before the Supreme Court of the United States. Claims, asserted under grants of land to individuals made by Indian tribes, in opposition to later United States patents of the same land, compelled the Supreme Court, under Chief Justice Marshall, in 1823 (Johnson *v.* McIntosh, 8 Wheaton, 543), to examine the whole question of aborigines in the law and practice of nations. The result was that the Indian tribes were declared to hold the relationship to the United States of domesticated communities, in the nature of municipal corporations, without other right in the land than that of uncivilized occupancy—a right which was not transferable to any individual, civilized or uncivilized, and which was subject only to extinction by tribal conveyance made to the State exercising the sovereignty. A little later, in a case involving Indian tribal rights by treaty (Cherokee Nation *v.* Georgia, 5 Peters, 1) the court, again speaking by Chief Justice Marshall, described the Indians as "wards of the Nation," thus substituting for the relationship of mere "protection," the more humane idea of "guardianship."

In 1826, in the case of *The Antelope*, 10 Wheaton, 66, the Supreme Court, in a case involving the right to capture a ship engaged in slave trading, speaking by Chief Justice Marshall, held that neither slavery nor the slave trade was contrary to the law of nations; the fact that it was under the ban of the proposal of the Congress of Vienna for universal abolition by uniform and cooperative national action not having changed the law as it stood before the proposal was made.

The labors of the English reformers regarding slavery having eventuated in 1833 in the abolition of slavery in the British colonies by compensation paid to slave owners, a part of them, as has been said, turned their attention to the wider question of the rights and duties of civilized States toward aborigines in general, calling themselves the British and Foreign Aborigines Protection Society; the others devoting themselves to the problem of stopping the operations of the smuggling slave traders at sea and the slave-raiding expeditions on land. In 1842 the principal maritime States succeeded in

agreeing upon a reciprocal right of search of their vessels for suspected slave trading, this right being restricted to identified naval ships and being permissible only within a specified zone of the ocean.

Reference to the report of the British Parliamentary Committee on Aboriginal Tribes of 1837 has already been made. It was not a definitely legal document, and purported to examine the question rather as a practical one of a social and ethical character. It accentuated the moral duties of colonizing States, but did not venture upon a consideration of how far these responsibilites had been by international recognition transformed into legal obligations of international trusteeship and guardianship.

The American negro settlements on the west coast of Africa maintained a precarious existence and an indefinite international status. They resembled colonies of the United States to some extent, but the United States, on account of the Monroe doctrine, denied itself sovereignty over them and asserted their independence under its patronage. Their international independence was at last recognized and the State of Liberia came into existence. The United States has stood in the position of "next friend," or international patron, disclaiming sovereignty or control of any kind, but holding itself morally obligated to use its good offices on behalf of Liberia in all international complications. It has thus maintained a species of international guardianship—a benevolent surveillance without claim of sovereignty or responsibility. The question of Liberia is plainly not one of the relationship of civilized states to aboriginal tribes, since the inhabitants, though of aboriginal descent, are civilized.

After the Civil War the abolition of slavery in the United States made possible clear legal thinking and definite action on the question of the law of nations relating to aborigines. President Grant, in his first message, reasserted that the Indians were "wards of the Nation" and set about the task of making a settlement of the Indian problem. Congress established a Board of Indian Commissioners as a commission of surveillance for all the Indian tribes, with advisory powers under the Secretary of the Interior. At the same time it reformed the Indian agencies and abolished for the future the practice of dealing with the Indian tribes by treaty. The Supreme Court has at all times asserted and reasserted the principle that the Indian tribes are the wards of the Nation and has liberally interpreted the guardianship so as to enable the United States efficiently to protect and train the Indians.

The Berlin African Conference of 1884–85 marked a definite acceptance by the civilized States of a legal relationship towards aboriginal tribes of a personal and fiduciary character—a responsibility which was at once individual and collective. The declaration of the

conference regarding aborigines left no doubt on this point. The principle of the law of nations that such tribes are wards of the society of nations, and that the sovereignty of civilized States over them follows the dispositions of territorial sovereignty made by the civilized States among themselves, was upheld.

The Berlin African Conference, by its declaratory action of a legislative nature, gave an international character to the whole territory of middle Africa—the conventional basin of the Congo so-called. By this international action this great territory became to some extent what may be called a zone of international jurisdiction under international surveillance. The United States, claiming a special interest in this region by reason of the discoveries of Stanley, an American citizen, but renouncing individual sovereignty and guardianship over it in deference to its policy declared by Monroe, took the lead in the movement to place the region under the over-sovereignty and chancellorship of all the cizilized States collectively. Seconded by some of the European States, it succeeded to a certain extent. In its effort to convert middle Africa into an international territory for the benefit of the aborigines, it utilized the International Congo Association, a private association of an international character, which had gained political influence in middle Africa by treaties with the aboriginal tribes. Six months before the Berlin Conference the United States recognized the association as a State which was to act as the medium for internationalizing middle Africa. During the Berlin African Conference the other States, inspired by the benevolent plans and purposes of the United States toward Negro Africa, recognized the association as a State. The international character thus impressed upon the Congo basin by the national acts of recognition was made more specific by the express recognition of the conference. The international character of middle Africa was thus protected by what was virtually a covenant running with the land. The plan of the United States for an international neutralization of the territory received only a shadowy recognition in the final act of the conference, and the plan of Germany for an international commission of surveillance met a similar fate.

The Brussels African Conference of 1889–90 applied the principle of international cooperation concerning common measures for abolishing the slave trade and for protecting the aborigines inhabiting the great zone of middle Africa between the desert on the north and the Cape region on the south against the two most powerful agents of their self-destruction—intoxicants and firearms.

The period since 1890 has been marked by a definite acceptance and application by all civilized States of the principle of guardianship of aborigines. The demand for unskilled labor has assisted in the

acceptance of this humane conception of the relationship—the guardianship of aborigines having the effect not only to satisfy the conscience but the economic needs of the civilized States. Numerous colonial conferences, both national and international, have been held, some of them dealing with the question of the methods to be applied in the guardianship of aborigines. International agreements for collective guardianship have been made, as in the case of the Samoan Islands, illustrating the dangers of international control as distinguished from international cooperation and surveillance.

Above all, the entrance of the United States into the work of colonization, with the fullest recognition and most complete application of the principles of guardianship and tutorship of aboriginal tribes, has profoundly stimulated the civilized States to a more and more complete acceptance and fulfillment of their international responsibilities in this respect.

CHAPTER III.

ABORIGINES AS THE WARDS OF THE STATE WHICH EXERCISES SOVEREIGNTY OVER THEM.

The nature of the relationship between a civilized State exercising sovereignty over a region and the aboriginal tribes inhabiting there was thus stated in 1821, in a report made to the Secretary of War under the direction of President Monroe by Rev. Jedediah Morse, a special commissioner appointed to visit and report upon the Indian tribes in the United States:

The Government, according to the law of nations, having jurisdiction over the Indian territory, and the exclusive right to dispose of its soil, the whole Indian population is reduced, of necessary consequence, to a dependent situation. They are without the privileges of self-government, except in a limited degree, and without any transferable property. They are ignorant of nearly all the useful branches of human knowledge, of the Bible, and of the only Savior of men therein revealed. They are weak and ready to perish; we are strong, and with the help of God, able to support, to comfort, and to save them. In these circumstances the Indians have claims on us of high importance to them and to our own character and reputation as an enlightened, just, and Christian Nation. In return for what they virtually yield, they are undoubtedly entitled to expect from our honor and justice protection in all the rights which they are permitted to retain. They are entitled, as "children" of the Government, for so we call them, peculiarly related to it, to kind paternal treatment, to justice in all our dealings with them, to education in the useful arts and sciences, and in the principles and duties of our religion. In a word, they have a right to expect and to receive from our civil and religious communities combined that sort of education, in all its branches, which we are accustomed to give to the minority of our own population, and thus to be raised gradually and ultimately to the rank and to the enjoyment of all the rights and privileges of freemen and citizens of the United States. This I conceive to be the precise object of the Government. If we fulfill not these duties, which grow naturally out of our relation to Indians, we can not avoid the imputation of injustice, unkindness, and unfaithfulness to them—our national character must suffer in the estimation of all good men. If we refuse to do the things we have mentioned for the Indians, let us be consistent and cease to call them "children," and let them cease to address our President as their "great father." Let us leave to them the unmolested enjoyment of the territories they now possess and give back to them those which we have taken away from them.

* * * * * * *

As the Government assumes the guardianship of the Indians, and in this relation provides for their proper education, provision also should be made for the exercise of a suitable government and control over them. This government unquestionably should be in its nature parental—absolute, kind, and

mild, such as may be created by a wise union of a well-selected military establishment, and an education family. The one possessing the power, the other the softening and qualifying influence, both combined would constitute, to all the purposes requisite, the parental or guardian authority.

In 1830 the Committee on Indian Affairs of the United States House of Representatives, to whom was referred that part of the President's message recommending the removal of the southern tribes of Indians to a reservation in the United States territory west of the Mississippi, said in their report (21st Cong., 1st sess., H. R. Rep. No. 227, Feb. 24, 1830):

Principles of natural law and abstract justice are appealed to by some to show that the Indian tribes within the territorial limits of the States ought still to be regarded as the owners of the absolute property in the soil they occupy, and that they are to be regarded as independent communities, having all the attributes of sovereignty except such as they have voluntarily surrendered. * * *

It is not * * * so important to attempt a definition of the nature and obligation of any abstract principles, about which there will always be conflicting opinions, as to state, with as much precision as possible, the interpretation of those principles, which is to be found in the maxims and practices of those civilized societies which settled this part of America, and of those which have since sprung up, in relation to Indian rights.

The proofs of what that interpretation has been are to be found in the charters, laws, constitutions, and general policy of the various governments, colonial, State, and Federal; and to those, it would seem, we must look for the only admissible tests of the extent of Indian rights, on the one hand, and of the rights and powers of the States and of the Federal Government on the other.

The nature and condition of things as they actually exist must be taken as the groundwork of the future policy and action of the Government upon this subject, and not what, in our opinions, they should have been.

The foundations of the States which constitute this confederacy were laid by Christian and civilized nations, who were instructed or misled as to the nature of their duties by the precepts and examples contained in the volume which they acknowledged as the basis of their religious rites and creed. To go forth, to subdue and replenish the earth, were received as divine commands or relied on as plausible pretexts to cover mercenary enterprises by the Governments which gave the authority and the adventurers who first discovered and took possession of the New World. Whether they were right or wrong in their construction of the sacred text, or whether their conduct can in every respect be reconciled with their professed objects or not, it is certain that possession, actual or constructive, of the entire habitable portion of this continent was taken by the nations of Europe, divided out, and held originally by the right of discovery as between themselves and by the rights of discovery and conquest as against the aboriginal inhabitants. In the Spanish Provinces, the Indians became the property of the grantee of the district of country which they inhabited; and this oppression was continued for a considerable period. Although the practice of the Crown of England was not marked by an equal disregard of the rights of personal liberty in the Indians, yet their pretensions to be the owners of any portion of the soil were wholly disregarded. The English colonies and plantations are known to have been settled and governed

under various charters, commissions, and instructions issued by the Crown to individuals and companies, some of which contained grants of extensive districts, to be held in absolute property, accompanied by certain political powers and privileges; while others contained grants of political privileges only. This difference in the nature and extent of the rights granted gave rise to the distinction between proprietary and regal governments among the colonies. Although the paramount sovereignty of the mother country was reserved in all the charters, yet, as in those which included a grant of the absolute property in the soil there was no reservation of any part of it to the natives, they were left to be disposed of as the proprietors thought proper. It is matter of history that the Crown, having the power under such restrictions as the spirit of the English institutions imposed to regulate the affairs of those colonies which were originally and of others which afterwards came under its control, by the forfeiture or surrender of their original charters, permitted the Indians in all of them to be governed or otherwise disposed of by the colonial authorities without any interference on its part until within a very short period before the Revolution. Thus it happened that in all the colonies the maxims and conduct adopted and pursued in relation to the Indians were substantially the same. Humanity and the religious feeling of the early adventurers forbade that they should be thrust with violence out of the land. The trade with the great tribes of the interior was profitable, and the peculiar mode of warfare practiced by the Indians soon brought the colonists to perceive the advantage of cultivating peaceable relations with all of them. This interest, however, was found, in the progress of the new societies, to be opposed to another great interest, which was that their resources should be increased and the demands of the cultivator supplied by appropriating the wild land within their limits as speedily as possible. The difficulty that was felt in reconciling these two interests lies at the foundation of the policy which was adopted in relation to the Indians, and the expedients which were resorted to in order to effect an object so important constitute the evidence of what the policy of the country was from that time up to the formation of the Constitution. One of those expedients was to appear to do nothing which concerned the Indians, either in the appropriation of their hunting grounds or in controlling their conduct, without their consent. It is not intended to be asserted that this device was employed by all the colonies from their first settlement. It came, however, to be a general principle of action upon this subject at some period or other of their progress, and was adhered to when found practicable and in any degree consistent with their interests, but in several instances, some of which occurred at an early and others at a later period, the public interests were believed to require a departure from it; but in all the acts, first of the colonies and afterwards by the States, the fundamental principle that the Indians had no rights by virtue of their ancient possession either of soil or sovereignty has never been abandoned, either expressly or by implication.

The rigor of the rule of their exclusion from those rights has been mitigated, in practice, in conformity with the doctrines of those writers upon natural law who, while they admit the superior right of agriculturists over the claims of savage tribes in the appropriation of wild lands, yet, upon the principle that the earth was intended to be a provision for all mankind, assign to them such portion as, when subdued by the arts of the husbandman, may be sufficient for their subsistence.

In the case of Johnson *v.* McIntosh, 8 Wheaton, 543, decided by the Supreme Court of the United States in 1823, the court, speaking by Chief Justice Marshall, regarded the relationship of the Euro-

pean discoverers to the aboriginal tribes of America as based primarily on the rules of international law concerning conquest in war, as modified by the humanitarian instincts of the conquerors and the needs of the situation due to the mental and moral backwardness of those living in a tribal state. In the opinion the court said:

> The tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people was impossible, because they were as brave and high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence.
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> What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society; or of remaining in their neighborhood and exposing themselves and their families to the perpetual hazard of being massacred.
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> Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighborhood of agriculturalists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the Crown originally claimed title, being no longer occupied by its ancient inhabitants, was parceled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the Crown, or mediately through its grantees or deputies.
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> That law which regulates and ought to regulate, in general, the relations between the conqueror and the conquered was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.
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> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land and can not be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right and the usages of civilized nations, yet if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two peoples, it may, perhaps, be supported by reason and certainly can not be rejected by courts of justice.

In the case of Cherokee Nation *v.* State of Georgia, 5 Peters, 1, 16, decided in 1831, the Supreme Court held that the Cherokee Nation was not a "State" within the meaning of the provision of the Constitution of the United States giving the court jurisdiction in controversies in which a State of the United States or the citizens there-

of and a foreign State, citizens or subjects thereof, are parties. The court, speaking by Chief Justice Marshall, said:

> The Indian Territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws it is so considered. In all our intercourse with foreign nations, in our commercial relations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them and managing all their affairs as they think proper. * * *
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> Though the Indians are acknowledged to have an unquestionable and therefore unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our Government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our Government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations as well as by ourselves as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility.

In the report of the British Parliamentary Committee on Aboriginal Tribes of 1837, to which reference has been made, though there was no definition of the relationship of civilized States to aboriginal tribes under their sovereignty as that of guardianship and tutorship, the duties of civilized States which it insisted upon as arising out of the relationship were precisely those of guardianship and tutorship. They spoke of the "responsibility" and "obligation" of Great Britain, and based this obligation upon "the ability which we possess to confer upon them the most important benefits," and "their inability to resist any encroachments, however unjust, however mischievous, which we may be disposed to make." "The disparity of the parties," they said, "the strength of one and the incapacity of the other to enforce the observance of their rights, constitutes a new and irresistable appeal to our compassionate protection."

The following letter written by Lord John Russell, as prime minister, on August 23, 1840, to Sir George Gipps, the governor of New South Wales, illustrates the views held by the British Government of that day on the subject of the relations between Great Britain and the aboriginal tribes under its sovereignty (British Parl.

Papers, 1844, Accounts and Papers, vol. 34 (Colonies), Papers relating to the Aborigines, Australian Colonies, pp. 73, 74):

DOWNING STREET, *25 August, 1840.*

SIR: In my dispatch No. 128, of the 5th instant, I referred to the proposals of the Church Missionary Society, and the report of the Colonial Land and Emigration Commissioners thereupon, declining at the same time to furnish you with positive instructions on the subject of the aborigines. In so acting, however, I felt that while it was not expedient absolutely to fetter your discretion, suggestions from Her Majesty's Government for your guidance might further and promote the great object in view.

I proceed now to communicate some remarks on the report and on the general subject.

1. We should run a risk of entire failure if we should confound in one abstract description of aborigines the various races of people, some half civilized, some little raised above the brutes, some hunting over vast tracts of country, others with scarcely any means or habits of destroying wild animals at all, who have encountered the discovering or invading nations of Europe over the face of the globe. One tribe in Africa often differs widely in character from another at 50 miles distance; the red Indian of Canada and the native of New Holland are distinguished from each other in almost every respect. We, indeed, who come into contact with these various races, have one and the same duty to perform toward them all, but the manner in which this duty is to be performed must vary with the varying materials upon which we are to work. No workman would attempt to saw a plank of fir and cut a block of granite with the same instrument, though he might wish to form each to the same shape. You, however, who are acquainted with the circumstances in which you have to act can decide in what manner you can best execute the intentions of the Queen's Government to do justice and show kindness to the natives of the colony over which you preside.

2. There appears to be great difficulty in making reserves of land for the natives, which shall be really beneficial to them. Two sources of mischief mar the most benevolent designs of this nature; the one arising from the inaptitude of the natives to change their desultory habits and learn those of settled industry; the other from the constant inroad of Europeans to rob, corrupt, and destroy them. Between the native, who is weakened by intoxicating liquors, and the European, who has all the strength of superior civilization and is free from its restraints, the unequal contest is generally of no long duration; the natives decline, diminish, and finally disappear. The Church Missionary Society propose, in order to prevent these mischiefs, that they should hold land in Wellington Valley in trust for the natives and that all interference on the part of other settlers should be prevented. To the remarks of the commissioners on this plan I would only add that it might be useful and would certainly be just to engage to the missionaries that if the Crown should think proper at any time to resume the land in Wellington Valley a full compensation or allowance shall be made to the society for all improvements which they may have made of a permanent character. Anything which can be done without violation of principle to induce the Church Missionary Society to continue their work should be done. Nothing can be more painful or more laborious or more dangerous than to take up a post in the midst of a race of suspicious, ignorant, and indolent savages and to defend their cause and their existence against rapacious, violent, and armed Europeans, yet such is often the position of the missionaries. None but a strong feeling of religion would induce good men to undertake such a task. But in giving such men all

encouragement every precaution should be taken against those who, counterfeiting the same holy and religious zeal, become speculators in colonial agriculture and lose sight of the sacred purpose for which alone they have been intrusted with the funds of the society.

3. The commissioners recommend that a small force should be stationed for the protection of the missionaries and natives. I think it may be advisable to give the men employed in this service double pay and reduce them to their former service and pay on any evidence of misconduct.

4. The best chance of preserving the unfortunate race of New Holland lies in the means employed for training their children. The education given to such children should consist in a very small part of reading and writing. Oral instruction in the fundamental truths of the Christian religion will be given by the missionaries themselves. The children should be taught early; the boys to dig and plough, and the trades of shoemakers, tailors, carpenters, and masons; the girls to sew and cook and wash linen, and keep clean the rooms and furniture. The more promising of these children might be placed, by a law to be framed for this purpose, under the guardianship of the governor, and placed by him at a school, or in apprenticeship, in the more settled parts of the colony. Thus early trained, the capacity of the race for the duties and employments of civilized life would be fairly developed.

5. There remains, as connected with this subject, the vast and perhaps insuperable difficulty of the conflict carried on, with little intermission, between the colonists and the natives. The colonist occupies a larger tract of land than he has the means to guard; his cattle stray and are killed by the natives; he collects a force and revenges his loss on the first tribe he encounters. Again, the natives, finding the cattle unwatched, drive away a herd, and deprive the colonist of his wealth; a new source of retaliation and bloodshed. It is but too clear that the only effectual remedy for this lamentable evil is an organized force adequate to keep both parties in check and confine each to the limits which the Government shall assign. But this remedy is so expensive and requires so much vigilance, so much temper in every soldier or constable, and the territory to be traversed is so large, that it is after all imperfect.

6. I have not yet touched on the application of the land fund to the protection of the aborigines. It is my opinion that 15 per cent of the yearly produce of sales should be so applied. It will be for you to consider the details of the appropriation; but I must for the future require that on or before the 15th of January in every year a report should be made to you, for the information of Her Majesty and of Parliament, stating all the transactions of the past year relating to the condition of the natives, their numbers, their residence at any particular spot, the changes in their social condition, the schools, and all other particulars, including the state and prospects of the aboriginal races.

In the case of United States *v.* Rogers, 4 Howard, 567, decided in 1846, where the question was as to the jurisdiction of the United States courts to punish crimes committed in the Indian Territory by members of the Indian tribes, the Supreme Court, speaking by Chief Justice Taney, in upholding the jurisdiction of the court, said:

The country in which the crime is charged to have been committed is a part of the territory of the United States, and not within the limits of any particular State. It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them as a place of domicile for the tribe, and they hold and occupy it with the assent of the United States and under their authority. The native tribes who were found on this continent at the time

of its discovery have never been acknowledged or treated as independent nations by the European Governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parceled out, and granted by the Governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as subject to their dominion and control.

It would be useless at this day to inquire whether the principle thus adopted is just or not, or to speak of the manner in which the power claimed was in many instances exercised. It is due to the United States, however, to say that while they have maintained the doctrines on this subject which had been previously established by other nations, and insisted upon the same powers and dominion within their territory, yet from the very moment when the General Government came into existence to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavored by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices.

In the case of United States *v.* Kagama, 118 U. S., 375, decided in 1886, a statute making the murder of an Indian by another Indian on an Indian reservation within the limits of a State or Territory a crime punishable by the United States courts, was upheld as an exercise of the general sovereignty of the United States over the Indian tribes as wards of the Nation. The fact that the Indian reservation was in a State was held to be immaterial, the State having been formed out of territory originally belonging to the United States. The court said:

The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character.

Following the policy of the European Governments in the discovery of America toward the Indians who were found here, the Colonies before the Revolution and the States and the United States since have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itelf, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of the paramount authority. When a tribe wished to dispose of its land, or any part of it, or the State or the United States wished to purchase it, a treaty with the tribe was the only mode in which this could be done. The United States recognized no right in private persons, or in other nations, to make such a purchase by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

In the opinions of these cases [Cherokee Nation *v.* Georgia, 5 Peters, 1, and Worcester *v.* State of Georgia, 6 Peters, 575], they are spoken of as "wards of the Nation," "pupils," as local dependent communities. In this spirit the United States has conducted its relations to them from its organization to

this time. But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by acts of Congress. This is seen in the act of March 3, 1871, embodied in section 2079 of the United States Statutes:

"No Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

In upholding the validity of the statute, the court said:

It does not interfere with the process of the State courts within the reservation, nor with the operation of State laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation.

It seems to us that this is within the competency of Congress. The Indian tribes are the wards of the Nation. They are communities dependent on the United States, dependent largely for their daily food, dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen. * * *

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

In the opinion the court likened the Indian tribes to municipal corporations. It said (pp. 379, 380):

These Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from or exist in subordination to one or the other of these. The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise and which are liable to be withdrawn, modified, or repealed at any time by Congress. * * * This power of Congress to organize territorial governments and make laws for their inhabitants arises not so much from the clause in the Constitution in regard to disposing of and making regulations concerning the territory and other property of the United States as from the ownership of the country in which the Territories are and the right of exclusive sovereignty, which must exist in the National Government and can be found nowhere else. Murphy *v.* Ramsey, 114 U. S., 15, 44. * * *

The Indian reservation in the case before us is land bought by the United States from Mexico by the treaty of Guadaloupe Hidalgo, and the whole of California, with the allegiance of its inhabitants, many of whom were Indians, was transferred by that treaty to the United States.

In the case of Cherokee Nation *v.* Southern Kansas Railway Company, 135 U. S., 641, decided in 1889, the court held that the United States had eminent domain in the Cherokee Reservation for granting a right of way to a railroad. Speaking of the Cherokee Indians, the court said:

From the beginning of the Government to the present time they have been treated as "wards of the Nation," "in a state of pupilage," "dependent political communities."

After considering the treaties with these Indians, the court said:

Neither these nor any previous treaties evinced any intention upon the part of the Government to discharge them from their condition of pupilage or dependency and constitute them a separate, independent, sovereign people, with no superior within its limits.

In the Matter of Heff, 197 U. S., 488, decided in 1905, the court held that an Indian who by legislative action of the United States had been emancipated from its guardianship as a member of the tribe, was no longer amenable to the special laws regarding Indians. In the opinion it was said:

Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship shall be abandoned. It is not within the power of the court to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear, the question is at an end.

* * * * * * *

But it is contended that although the United States may not punish under the police power the sale of liquor within a State by one citizen to another, it has such power if the purchaser is an Indian. And the power to do this is traced to that clause of the Constitution which empowers Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." It is said that commerce with the Indian tribes includes commerce with the members thereof, and Congress having power to regulate commerce between white men and the Indians retains that power, although it has provided that the Indian shall have the benefit of and be subject to the civil and criminal laws of the State and shall be a citizen of the United States. But the logic of this argument implies that the United States can never release

itself from the obligation of guardianship; that so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of national and therefore State citizenship, the benefits and burdens of the laws of the State, may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the State, and release him from obligations of obedience thereto. Can it be that because one has Indian and only Indian blood in his veins, he is to be forever one of a special class over whom the General Government may in its discretion assume the rights of guardianship which it has once abandoned, and this whether the State or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound.

In the case of Tiger *v.* Western Investment Company, 221 U. S., 286, decided in 1911, a provision of the United States statutes giving the Secretary of the Interior supervision over conveyances of land made by Indians, was held constitutional.

The court, after a full examination of the authorities said (p. 315):

Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the Government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.

The privileges and immunities of Federal citizenship have never been held to prevent governmental authority from placing such restraints upon the conduct or property of citizens as is necessary for the general good. Incompetent persons, though citizens, may not have the full right to control their persons and property. The privileges and immunities of citizenship were said, in the Slaughter House Cases (16 Wall, 36, 76), to comprehend protection by the Government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless to such restraints as the Government may prescribe for the general good of the whole.

In the case of Perrin *v.* The United States, 232 U. S., 478, decided in 1914, the Supreme Court held that Congress has power to prohibit the introduction of intoxicating liquors into an Indian reservation wheresoever situated, and to prohibit traffic in such liquors with tribal Indians whether upon or off a reservation, and whether within or without the limits of a State.

The court said (p. 486):

As the power [of Congress in dealing with the Indian wards and adopting measures for their protection] is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but must be founded upon some reasonable basis. * * * On the other hand, it must also be conceded that, in determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts.

In the case of Woodward *v.* de Graffenried, 238 U. S., 284, decided in 1915, the Supreme Court reviewed at length the proceedings of

Congress from 1893 to that date looking to the abolition of the tribal title to the lands in the Indian reservations assigned to the tribes by the United States, especially the action of the so-called "Dawes Commission," and the act of Congress of June 28, 1898, resulting from the labors of that commission, known as the Curtis Act. Of this act the court said (p. 306):

> The manifest purpose of this act was not to displace but to recognize the communal titles, and to administer the use of lands for the equal benefit of the members of the tribes according to the true intent and meaning of the early treaties; the effect being to do what the tribal governments ought to have done but were failing to do.

In the case of Williams *v.* Johnson, 239 U. S., 414, decided in 1915, the court, in construing an act of Congress relating to allotment of Indian tribal lands, said (p. 420):

> It has often been decided that the Indians are wards of the Nation and that Congress has plenary control over tribal relations and property, and that this power continues after the Indians are made citizens, and may be exercised as to restrictions upon alienation.

In the case of United States *v.* Nice, 241 U. S., 591, decided in 1916, the Supreme Court, in holding constitutional the act of Congress of January 30, 1897, prohibiting the sale of liquor to allottee Indians, said (pp. 597, 598):

> The power of Congress to regulate or prohibit traffic in intoxicating liquor with tribal Indians within a State, whether upon or off an Indian reservation, is well settled. It has long been exercised and has repeatedly been sustained by this court. Its source is twofold: First, the clause in the Constitution expressly investing Congress with power "to regulate commerce with the Indian tribes," and second, the dependent relation of such tribes to the United States.
>
> Of the first it was said in United States *v.* Holliday, 3 Wall., 407: * * * "Commerce with the Indian tribes means commerce with the individuals composing those tribes. * * * The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolutely without reference to the locality of the tribe, or of the member of the tribe with whom it is carried on. * * * This power residing in Congress, that body is necessarily supreme in its exercise."
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> And of the second it was said in United States *v.* Kagama, 118 U. S., 375, 383: "These Indian tribes are the wards of the Nation. They are communities dependent upon the United States. * * * From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power."
>
> What was said in these cases has been repeated and applied in many others.
>
> Of course, when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris*, the tribal relation may be dissolved and the national guardianship brought to an end, but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial. Citizenship is not incompatible with

tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection.

The principle that the relationship between a civilized State and the aboriginal tribes under its sovereignty is analogous to that between a guardian and his ward is accepted and acted upon by all civilized States. This will more fully appear from the authorities cited in the following chapters.

In countries unsuited for extensive colonization by the citizens of civilized States, the modern practice of nations, while fully recognizing that the civilized State exercising the sovereignty over a region has a plenary power of guardianship over the aborigines, which it may exercise directly if it sees fit, tends to maintain the power of the tribal organization and to utilize these forms for the purposes of its paternal and tutorial government. Sir H. H. Johnston, the British commissioner to make a settlement of the Government of the Uganda Protectorate, after the conquest and the submission of King Mwanga, in 1894, thus described the measures adopted for utilizing the tribal organizations as the nuclei of future administrative districts or States:

We should aim at the establishment of an administration over the Uganda Protectorate economical and yet efficient. The natives, especially those speaking Bantu languages—because these Bantu peoples consist of settled agriculturists—should be assisted and encouraged to govern themselves as far as possible without too much interference on the part of European officials. The presence of this European element in the administration should be restricted, as far as possible, to the administration of justice to foreigners, the collection of revenue, the regulation of finance, the management of railways and steamers, the supervision of public works, and the direction of scientific enterprise in connection with the resources—animal, vegetable, and mineral—of the Protectorate. For instance, by the agreement of March 10, 1900, the Kingdom of Uganda, which is equivalent to the Uganda Province, is divided into 20 districts or counties. Each district or county is placed under the administration, so far as native affairs are concerned, of a chief appointed by the King of Uganda, but requiring to have his appointment confirmed by the principal representative of His Britannic Majesty's Government. These 20 chiefs are under the control of the King of Uganda, who is assisted in his Government by a native council or parliament elected on lines laid down by the British Government. The power of life and death is reserved to the principal representative of His Britannic Majesty in the Uganda Protectorate, who may also intervene when it is necessary to modify excessive punishments of any kind. The taxation was limited by the same agreement to a hut and gun tax. These taxes are collected by the chiefs of the districts and handed over to the European officials. The King, native ministers, and subsidiary chiefs of districts receive their subsidies or salaries direct from the British Government and are not allowed to exact further payments from their native subjects. Almost similar arrangements now exist in the countries of Toro, Ankola, and Busoga, and parts also of the Nile and the eastern Provinces. Throughout, the native King or chief is encouraged to govern his people directly on humane principles, with

only that amount of interference from the nearest European official as may protect the natives from injustice or cruelty. In this way it may be hoped that each district need, as a general rule, only require the appointment of a British collector and assistant collector so far as local government and the collection of revenue are concerned. The Protectorate, from a civil point of view, is divided into six Provinces, and these again into numerous districts. With the exception of the divisions of the Province of Uganda (which in some cases are small in area), the average size of a district is an area of about 5,000 square miles. In the eastern districts of the Protectorate, where the population is less settled and less inclined to civilization than the Bantu-speaking peoples of the west and center, the representative of the British administration is obliged to do a great deal more in connection with the direct government of the natives than is the case where exist well-recognized native rulers, such as the Kings of Uganda, Toro, and Ankole, or the chiefs of Kavirondo, Busoga, and parts of the Nile Province. Even here, however, as in the case of the Masai, we are striving to induce the members of one homogeneous tribe to recognize a single chief as their supreme ruler so far as native administration is concerned. We are, in fact, endeavoring to teach the natives to govern themselves, without too much interference from us, within the limits of law and order and a regard for the principles of civilization. The Government naturally dissociates itself from partisanship in matters of religion. It has been necessary, however, to define in some countries districts which shall be or remain under Mohammedan direction, and others which shall be governed by Christian chiefs, following either the Anglican or the Roman forms of Christian faith. (Brit. Parl. Papers, 1901, vol. 48, Cd. 671.)

Where aboriginal tribes are located in a country suitable for permanent settlement by citizens of civilized States, the modern practice is to discourage tribal organization and to deal with the aborigines as individuals under guardianship.

CHAPTER IV.

THE RELATION BETWEEN THE POWER OVER ABORIGINAL TRIBES AND THE POWER OVER COLONIES GENERALLY.

In order to determine the relation between the power which a civilized State exercises over the aboriginal tribes under its sovereignty and that which it exercises over all its colonies and dependencies it is necessary to examine the law and practice in force in each of the colonizing States concerning the administration of all its colonies and dependent communities. Such a survey follows.

THE UNITED STATES.

The Constitution of the United States (Art. I, sec. 8), in its enumeration of the "legislative" powers granted to the Congress, makes no special mention of power over colonies and dependencies. By this section, however, Congress is given the power to raise and support an army and navy and declare war—powers which from their nature may result in the acquisition of territory, inhabited or uninhabited, and the administration of it and its inhabitants. In Article IV, which contains a delegation to Congress of the special powers incidental to the sovereignty of the United States which are not strictly "legislative," Congress is granted power (sec. 3) "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States" and "to admit new States into the Union."

The President (Art. II, secs. 1 and 2) is given "the executive power," and the power to make treaties by and with the consent of the Senate, and he is made Commander in Chief of the Army and Navy—powers which in connection with the powers of Congress above mentioned, apply in the acquisition of territory inhabited and uninhabited, and also in the administration of the territory and its inhabitants, at least during the time that it is subjected to military government or to civil government under military rule.

In a long series of cases, beginning with that of American Insurance Co. *v.* Canter, 1 Peters, 511, and ending with the case of Downes *v.* Bidwell, 182 U. S., 244, the Supreme Court has held that the United States, by the law of nations, and as incidental to its sovereignty, has power to acquire and administer territory and populations outside its domestic territory and population in any manner

permitted by the law of nations—by discovery, occupation, cession, or conquest—and that the constitutional provisions above mentioned are recognitions and declarations of this power and specifications determining the relations and powers of the organs of the Government of the United States in exercising the power.

Moreover, it has held that the powers of the United States, in making the fundamental dispositions of jurisdiction and soil, as the basis of local administration and private ownership of the land, are, according to the law of nations, political powers with no limitations except that they must be exercised to promote the fundamental principles of democracy, republicanism, and equality of opportunity which are the basis of the American governmental system. It has also held that as respects the dispositions relating to the social relationships of the inhabitants of acquired territory, involving the fundamental rights of the individual to life, liberty, and the pursuit of happiness, the power of the United States, under the law of nations, is to be exercised by applying all the provisions of the Constitution which can reasonably and beneficially be applied, taking into consideration the needs of the local populations.

The Supreme Court has also held that the power which the United States has, by the law of nations and its Constitution, over all colonies and dependencies is "plenary" for the accomplishment of the object sought to be obtained. (Binns *v.* United States, 194 U. S., 486.) These objects can only be, and are, the extension of democracy, republicanism, and equality of opportunity. "Plenary" power is the power which an agent has who is delegated to accomplish a certain object, and whose mandate is limited only by the needs of the situation. An agent with plenary power—an agent plenipotentiary—represents the principal with full power to do all which the principal might reasonably do in the accomplishment of the object intended. Plenary power is not absolute power, but power limited to the needs of the situation. It implies that the supreme organs of the United States for exercising the power of the United States—its Congress, its President, its Supreme Court—acting for the United States, in fulfilling its fiduciary relationship under the law of nations respecting its colonies and dependencies, have full powers to do all which the United States might reasonably and legally do under the law of nations, consistently with fundamental principles of its Constitution and the fundamental principles of human society recognized by all civilized States.

As the Constitution contains a Bill of Rights imposing certain prohibitions or conditions upon the action of all the organs of the Central Government respecting individuals under the sovereignty of the United States, all of the provisions of this Bill of Rights, which are of universal application, are applicable in all the colonies

and dependencies of the United States from the moment of their acquisition.

The Supreme Court has approved, as applicable to all places under American sovereignty, a formulation of the fundamental and universal principles of the Constitution protecting the individual against governmental action in violation of the fundamental rights of life, liberty, and the pursuit of happiness. This statement of principles thus constitutes a fundamental bill of rights of all the inhabitants of the colonies and dependencies of the United States, legally limiting the United States in the exercise of its plenary powers to administer these regions and their populations. As it is needful to apply all these principles in the fulfillment of the agency, this statement in no way interferes with the plenary powers of the United States in this respect. This statement, formulated by the President through the Secretary of War in 1900, was originally promulgated in the instructions of April 7, 1900, to the Philippine Commission. It was substantially followed by Congress in the Philippines government act of July 1, 1902, and was approved by the Supreme Court as a general or universal bill of rights in Kepner *v.* United States, 195 U. S., 100, 122, 123. The preamble and statement are as follows:

> In all the forms of government and administrative provisions which they are authorized to prescribe, the commission should bear in mind that the government which they are establishing is designed not for our satisfaction or for the expression of our theoretical views, but for the happiness, peace, and prosperity of the people of the Philippine Islands; and the measures adopted should be made to conform to their customs, their habits, and even their prejudices to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government.
>
> At the same time the commission should bear in mind and the people of the islands should be made plainly to understand that there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom, and of which they have unfortunately been denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law; and that these principles and these rules of government must be established and maintained in their islands for the sake of their liberty and happiness, however much they may conflict with the customs or laws or procedure with which they are familiar. * * *
>
> Upon every division and branch of the government of the Philippines, therefore, must be imposed these inviolable rules:
>
> That no person shall be deprived of life, liberty, or property without due process of law;
>
> That private property shall not be taken for public use without just compensation;
>
> That in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence;

That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted;

That no person shall be put twice in jeopardy for the same offence or be compelled in any criminal case to be a witness against himself;

That the right to be secure against unreasonable searches and seizures shall not be violated;

That neither slavery nor involuntary servitude shall exist except as a punishment for crime;

That no bill of attainder or *ex post facto* law shall be passed;

That no law shall be passed abridging the freedom of speech or of the press or the right of the people to peaceably assemble and petition the Government for a redress of grievances;

That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof; and

That the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed.

The Congress, by special legislation, makes such dispositions of jurisdiction and soil in the colonies and dependencies as it deems proper, and also such rules and regulations concerning civil rights of person and property as it may deem needful, subject to the constitutional limitations above mentioned. During the period of acquisition and pacification the Congress delegates plenary powers to the President, who conducts military government, or civil government under military rule, until the pacification is complete. The Congress then provides for each colony or dependency an organic law, which forms the written constitution of the particular colony or dependency, delegating to the local administration such powers as it deems needful. In the organic law, or by subsequent amendments, or by special laws, the Congress regulates all such matters as it deems needful to so regulate; and the action of Congress, within the constitutional limitations, is the supreme law of the land for each colony or dependency. The Congress, after pacification, delegates to the President such powers as it sees fit, it apparently being the doctrine at the present time that the grant of "the executive power" to the President does not include a sublegislative power, under the superintendence of the legislature, over the colonies and dependencies, for the fulfillment of the fiduciary relationship of the United States toward them. (Cf. Lincoln *v.* United States, 202 U. S., 484.)

It is accepted without question that the grant of "the judicial power" of the United States to the Supreme Court and such inferior courts as the Congress may from time to time ordain and establish (Art. III, sec. 1), and the definition of the judicial power as extending to cases "arising under the Constitution, the law of the United States, or treaties" (Art. III, sec. 2), authorizes the Supreme Court and the courts established by Congress to hear and determine cases involving the relations with or matters arising in the colonies and dependencies, and authorizes Congress to establish a court or courts

in the United States having appellate jurisdiction over the courts in colonies or dependencies.

Alaska and Hawaii have a status similar to that of the former "organized Territories" contiguous to the Union, and are in charge of the Secretary of the Interior, the education of the aborigines being under the direction of the Bureau of Education; the Philippines, Porto Rico, and San Domingo (the latter during the "customs receivership") are in charge of the Secretary of War, through the Bureau of Insular Affairs; the Panama Canal Zone is in charge of the Panama Canal Office in Washington; and the Virgin Islands, Tutuila, Guam, the Wake Islands, and Midway Island are in charge of the Secretary of the Navy.

By the original Philippines Government act of July 1, 1902, the non-Christian aboriginal tribes in the Philippines were placed under the exclusive jurisdiction of the Philippine Commission. By the act of August 29, 1916, this jurisdiction is transferred to the Philippine legislature, these tribes being represented in the Philippine senate by senators appointed at large by the governor-general. The act also prescribes the maintenance of a Bureau of Non-Christian Tribes. This bureau is under the direction of the Philippine secretary of the interior.

GREAT BRITAIN.

In Great Britain the accepted doctrine seems to be that the Parliament of Great Britain has supreme legislative power without legal limitation, not only within the domestic territory of the State, but over and within all the colonies and dependencies, and that by custom Parliament exercises this power according to certain traditional fundamental principles, within limitations determined by itself and according to its views of the local needs and the requirements of the general welfare. This doctrine was declared by act of Parliament as respects the American Colonies in 1766. By the declaratory act passed simultaneously with the act repealing the stamp act it was asserted as the fundamental principle of the relationship between Great Britain and the Colonies that the Parliament "had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the Colonies and people, subjects of the Crown of Great Britain, in all cases whatsoever." The question between Great Britain and the Colonies, as it was finally formulated in 1776, was whether Great Britain had a power of supreme legislation over them in all cases whatsoever—a legally unlimited power—or a plenary power as the agent and fiduciary of the Colonies to legislate as might be needful to preserve a mutually beneficial relationship between all parts of the Empire and between the Empire and the rest of the world. Great Britain in

1778 offered to adopt the American theory in practice but was unwilling to accept it as a statement of the law of nations. This has apparently ever since been the position taken by Great Britain. The supreme legislative power of Great Britain over its colonies and dependencies is in fact exercised as it would be if it were recognized as a fiduciary power limited by the British constitution and the law of nations to the needs of the situation, but plenary for the accomplishment of the object of all colonization, which is the extension of civilization; but though in fact so exercised, it is still regarded as exercised under limitations which are not imposed by any law but which are wholly self-imposed.

Alpheus Todd, in his book on "Parliamentary Government in the British Colonies," makes the following statements regarding the power of Parliament over the colonies and dependencies (pp. 26, 172):

> As a matter of abstract right, the mother country has never parted with the claim of ultimate, supreme authority for the imperial legislature. * * *
>
> The colonial possessions of the British Crown, however acquired and whatever may be their political constitution, are subject at all periods of their existence to the legislative control of the imperial Parliament. But in practice, especially in the case of colonies enjoying representative institutions and responsible government, the mother country, in deference to the principle of self-government, has conceded the largest possible measure of local independence and practically exerts its supreme authority only in cases of necessity or when imperial interests are at stake.

The power of the British King in council (the British Crown) respecting the administration of the colonies is held to be a legally limited power. The legal limitations under which the King in council acts in the administration of colonies and dependencies under the British constitution and the law of nations were declared in 1774 by the Court of King's Bench, speaking by Chief Justice Mansfield, in the test case of Campbell *v.* Hall, Cowper, 204. In that case it was held that the King in council had legislative power over and in the colonies and dependencies, but that, inasmuch as this power was "subordinate to his own authority as a part of the supreme legislature," he was legally limited in the exercise of this power, so that he could not make any law for any colony or dependency, by order in council or otherwise, which was "contrary to fundamental principles" or which should attempt to make any exception "from the laws of trade or the authority of Parliament" or to grant "privileges exclusive of his other subjects." It was also held that the subordinate legislative power of the King in council ceased altogether as respects a given colony at the moment this colony received a charter providing for its self-government under representative institutions, even though this charter was itself granted by order in council.

Mr. Todd, in the book above mentioned, thus describes the power of the King in council over the colonies and dependencies (pp. 125–128):

The right of the Crown, as the supreme executive authority of the Empire, to control all legislation which is enacted in the name of the Crown in any part of the Queen's dominions is self-evident and unquestionable. * * *

In respect of the colonies, the royal veto upon legislation has always been an active and not a dormant power. The reason of this is obvious. A colony is but a part of the Empire, occupying a subordinate position in the realm. No colonial legislative body is competent to pass a law which is at variance with or repugnant to any imperial statute which extends in its operation to the particular colony. Neither may a colonial legislature exceed the bounds of its assigned jurisdiction or limited powers. Should such an excess of authority be assumed, it becomes the duty of the Crown to veto or disallow the illegal or unconstitutional enactment. * * *

The Crown, moreover, is the chief executive authority of the Empire and the instrument for giving effect to the national will, as the same has been embodied in the acts of the imperial Parliament or sanctioned by Parliament upon the advice of responsible ministers. * * *

Furthermore, the Crown occupies toward the colonial dependencies of the Empire a paternal relation, which, at least in the earlier stages of their political existence, justifies and requires that the mature experience and enlarged political insight of the statesmen who guide public affairs in the mother country should be utilized to the benefit of their fellow subjects in the colonies while they are gradually attaining to a knowledge of the practical business of legislation in their limited sphere. * * *

It is evident that the prerogative, by virtue of which the Crown is authorized to supervise and control the acts of all subordinate legislatures throughout the Empire, is held for the especial benefit of the colonies as well as for the security of the nation at large. * * *

Subject, however, to the constitutional oversight and discretion of the Crown—by which all colonial legislation is liable to be controlled and annulled, if exercised unlawfully or to the prejudice of other parts of the Empire—complete powers of legislation appertain to all duly constituted colonial governments. Every local legislature, whether created by charter from the Crown or by imperial statute, is clothed with supreme authority, within the limits of the colony, to provide for the peace, order, and good government of the inhabitants thereof. This supreme legislative authority is subject, of course, to the paramount supremacy of the imperial Parliament over all minor and subordinate legislatures within the Empire.

The judicial power of Great Britain, which by the British constitution is regarded as vested in the British Crown, is, so far as supreme jurisdiction in cases of a legal nature arising in the colonies or out of the colonial relationship are concerned, vested in a judicial committee of the privy council. Mr. Todd says, regarding this tribunal (pp. 220, 221):

The sovereign, as the fountain of justice, is constitutionally competent to receive petitions and appeals from all her colonies and possessions abroad, upon whatever regulations and conditions may be defined and imposed by the authority of the Crown in council.

Such petitions or appeals are referred to the consideration either of the judicial committee of the privy council, or of some other committee of that body, upon whose report the decision of the sovereign is pronounced. The reference may be made either upon appeal from an inferior colonial court or on a petition or claim of right or on a petition praying for the redress of a grievance that is not within the prescribed jurisdiction of other courts or departments of state but which the Crown is willing to entertain.

The organic acts for colonies and dependencies may be made by order in council or by statute of the Britsh Parliament. An organic law made by statute necessarily supersedes any charter granted by order in council. The organic laws of the Dominion of Canada, the Commonwealth of Australia, and the Union of South Africa were made by such statutes.

Aboriginal tribes in non-self-governing colonies and in the other dependencies are under the administration of the Crown by orders in council or by regulations made by the local governors under authority delegated to them by order in council and subject to supervision and disapproval by the Crown. In several of the British colonies the office of protector of the aborigines has been instituted, the office being in some cases conferred on a single official and in others on a commission or board. These officials or boards have in some cases been made responsible to the home Government, in some cases to the governor, in some cases to both. While this arrangement has not been without some good results, the conclusion seems to be that in non-self-governing colonies the concentration of responsibility for the aborigines in the hands of the home Government, acting through the colonial secretary and the local governor, works for their best interests. This arrangement involves great care in the selection of those colonial governors who have to deal with aboriginal tribes, so that they shall be humane, sympathetic, and at the same time firm; the delegation to them of plenary power; and the support of them by an armed constabulary force adequate to enable them to enforce their just commands with certainty and promptness and thus to preserve the dignity and prestige of the State as at once the guardian and the sovereign.

Self-governing colonies insist upon managing their own relations with the aboriginal tribes, claiming this right under the law of nations as an incident of self-government. This principle was finally settled in 1898 in the case of Western Australia. (Correspondence relating to the Aborigines, Western Australia, British Parliamentary Papers, 1897, vol. 6, Cd. 8350; ib., 1899, vol. 55, Cd. 5743.)

In the early days, under self-government in the Australian colonies, the aborigines were substantially extinguished, and in the colonies of southern Africa the contact betweenthe Europeans and the aboriginal tribes would doubtless have been equally disastrous for the latter

had not their numbers and the nature of the climatic conditions permitted them to survive. The aboriginal tribes of New Zealand suffered severely in their contact with the self-governing colonies there. In modern times it would appear the self-governing British colonies have accepted with seriousness the responsibility of guardianship of aborigines with regard to which plenary power is now delegated, and have taken carefully deliberated and suitable measures to fulfill their duties in this respect. (See British Parliamentary Papers since 1895. Native Affairs in the Respective Colonies, *passim.*)

Modern publicists in Great Britain and in its colonies tend, with increasing emphasis, to regard the relationship of the State to its colonies and dependencies as having a jural character not wholly or even principally determined by the British constitution. The relationship is commonly spoken of as a "trusteeship" for the colonies, and the necessary implication is that this trusteeship arises under a law. This law can only be the law of nations or a constitutional law which the British Empire itself has evolved as distinct from the constitution of Great Britain. (The Administration of Dependencies, by Alpheus H. Snow, pp. 532–536.)

FRANCE.

In France, by the constitution of 1791, the colonies were declared not to be "comprised in the constitution." By the constitution of 1794 they were declared to be "integral parts of the Republic" and "subject to the same constitutional law." The constitution of 1800 provided that "the régime of the colonies shall be determined by special laws." In 1802 the French Legislature delegated all this power to the Napoleon by a statute which provided that "the régime of the colonies is submitted for ten years to the regulations which shall be made by the Government." The constitution of 1814 provided that "the colonies shall be ruled by particular laws or regulations." In the constitution of 1830 it was provided that "the colonies shall be governed by particular laws." In the constitution of 1848 the provision was as follows:

> The territory of Algeria and the colonies is declared French territory, and shall be ruled by particular laws until a special law places it under the régime of the present constitution.

(The Administration of Dependencies, by Alpheus H. Snow, pp. 474–479.)

The constitution of 1852, under the third Empire, provided (art. 27) that the Senate should "regulate by a *sénatus-consulte* the constitution of the colonies." The Senate (art. 25) was made "the guardian of the fundamental pact and the public liberties." It was required (art. 26) "to oppose itself to the promulgation of laws

repugnant to or inconsistent with the constitution, or with religion, morality, liberty of worship, individual liberty, the equality of citizens before the law, the inviolability of property, or the principle of the unremovability of magistrates."

The Emperor (art. 6) was declared to be the chief of the State, with power "to command the land and sea forces, to declare war, make treaties of peace, alliance, and commerce, to name all officials, and to make regulations and decrees for the execution of the laws." (*Bulletin des Lois*, 1852, 1re *semestre*, p. 60.)

By a *sénatus-consulte* of 1854, the Senate, with the concurrence of the Emperor, made an organic law for Martinique, Guadaloupe, and Réunion, by which these colonies (secs. 4 and 6) were placed in some respects under the régime of *sénatus-consultes*, and in some respects under the control of the Emperor, his power being exercised by regulations. The other colonies (sec. 18) were to be regulated by decrees of the Emperor, "until there shall have been a determination in respect to them made by *sénatus-consulte*."

As the constitutional laws of France passed since the beginning of the Republic in 1875 have not made any provision concerning administration of the colonies and dependencies, the principles established by the constitution of 1852 have been ever since followed.

Arthur Girault, in an introduction to the collection of the organic laws of the French colonies in *Lois Organiques des Colonies*, published in 1906 by the *Institut Colonial International* of Brussels (pp. 14–16), says:

> As respects the colonies of the first grade (*grandes colonies*), this *senatus-consulte* gives certain guaranties, since it specifies the cases in which a law or a *senatus-consulte* shall be necessary to effect legislation concerning them. Moreover, it grants to each of them a council general, whose powers in financial and tariff matters were largely increased by the *sénatus-consulte* of July 4, 1866. * * * As regards the secondary establishments, no guaranty is accorded to them; they are subjected in an absolute manner to the régime of decrees. (Art. 18 of the *sénatus-consulte* of 1854.)
>
> Guiana, which it was desired to make a penal colony, passed in 1854 from the category of colonies of the first grade into that of secondary establishments. This second category was soon enlarged by reason of the acquisition of New Caledonia and Cochin China. At the same time Senegal was extended into the interior. Hence arose an anomaly which has become more emphasized under the third Republic, and which constitutes the great vice (*le grand vice*) of the legislative régime of the French colonies—little islands, considered as colonies of the first grade, enjoy guaranties refused to immense territories treated by legislation as secondary establishments.

Referring to the establishment of the ministry of the colonies by statute of the French Parliament in 1894, and the subsequent tendency toward government without constitutional guaranties, he says:

> Attention was turned toward the three great parts of our colonial empire—Indo-China, Madagascar, and French West Africa. At the head of each of these colonies was placed a governor general, to whom was granted a very

great power of initiative, and very extensive powers, without counterpoise. This system of government has succeeded thus far by reason of the high character of the men whom the Government of the Republic has made in some sense viceroys. But it has the possibility of becoming singularly dangerous in the future.

The organization of the immense colonies acquired under the third Republic is contained entirely in the decrees promulgated under section 18 of the *sénatus-consulte* of 1854, which has reference to secondary establishments. The *sénatus-consulte* of 1854, although it has lost its constitutional validity since the fall of the Empire, has always remained in force, the Chambers not having voted a constitution for the colonies. There is thus a very serious hiatus (*lacune*) [in French public law]; the régime of decrees offering no guaranty against arbitrary rule. Unfortunately there has never been up to this time any serious discussion in regard to supplying the omission.

The French Parliament, though it abstains by a constitutional custom from interposition by statute in the administration of colonies and dependencies, exercises a considerable supervision by reason of its control of financial legislation and the exercise of the right of interpellation of ministers.

By statute of the French Parliament of February 24, 1875, Martinique, Guadaloupe, Réunion, and French India were given each a senator in the French Senate. By the law of June 16, 1885, Cochin China was given two deputies in the lower house of France, Guadaloupe two, French Guiana one, French India one, Martinique two, Réunion two, and Senegal two. (*Lois Organiques des Colonies*, published by the *Institut Colonial International*, 1906, vol. 2, pp. 44, 45.)

There is attached to the office of the minister for the colonies a superior council for the colonies, composed, according to the decree of September 19, 1896, of two senators and two representatives of the self-governing colonies, representatives of the chambers of commerce in the leading cities of France, and certain specified high officials in the colonial and foreign offices.

The ancient doctrine that the colonies and dependencies are outlying provinces or territories of the State seems still to be accepted by official France. The differences between the administration of the domestic territory and population of France and that of the colonies and dependencies are attributed to differences in the local circumstances. The French writers until recently have regarded the relationship of the colonies and dependencies to France as wholly a constitutional one and have not considered it as a relationship under the law of nations. There are signs, however, that this doctrine is being undermined by criticism and that it is to be sooner or later supplanted by one more correct and scientific. Thus, for example, Jules Harbord, in his book on *Domination et Colonisation*, published in 1910, contends that the power exercised by France outside its domestic territory is a power of domination, which, by reason of its absolutistic nature, can be exercised by a republic as a matter of

right only in case the republic recognizes that its absolutism implies a fiduciary relationship and actively engages itself in the education and guidance of the people of the colonies and dependencies so as to develop the aborigines and bring about an association between them and the colonists on terms just to both. There are in France several modern writers who adopt this line of reasoning concerning the nature of the power of a State over its colonies and dependencies. These writers treat the relationship of a State to the aboriginal tribes as a manifestation of its general fiduciary relationship to all its colonies and dependencies, the trusteeship increasing in intensity with respect to aborigines and becoming a guardianship by reason of their greater needs.

THE NETHERLANDS.

In the Netherlands the constitution (arts. 61 and 62) provides as follows:

> The King exercises the supreme administration (*opperbestuur*) of the colonies and possessions of the Kingdom in the other parts of the world. Rules concerning the governmental administration of these countries are prescribed by statute. Their monetary system is regulated by statute. Other questions concerning the colonies and possessions are regulated by statute when there appears to be need for such action.
>
> Each year the King causes to be presented to the States General a detailed report regarding the administration of the colonies and possessions and the situation of each of them. The method of administering and auditing the financial resources are regulated by statute.

(*Lois Organiques des Colonies* (*Institut Colonial International*), vol. 3, p. 145.)

For the Netherlands East Indies the States General have established an organic law (*Regeerings-Reglement*). This law, in 132 articles, was enacted in 1854 and is still in force substantially unaltered. The States General also adopted at about the same time an organic law for Surinam in 169 articles, which, with amendments made in 1884, 1901, and 1903, is still in force. (*Ib.*, *pp.* 146–330.)

The King, in making ordinances, acts through a minister of the colonies and by his advice and that of the other members of the Cabinet. The relations with the aborigines in the Netherlands East Indies are for the most part regulated by the governor general, acting with the advice of a local council, called the Council of the Indies. This council is chosen by the King and acts under regulations made by him. Its sessions may be private or public. The governor general is obliged to consult the council as respects certain specified important matters and may call them into consultation on any subject. (*Ib.*, 138, 139, 152, 169.)

BELGIUM.

The Belgian constitution of 1830 made no mention of colonies, and so long as it remained in force it was doubted whether Belgium could

acquire and govern possessions beyond the seas. By the constitution of 1893 it was provided (art. 1) as follows:

> The colonies. overseas possessions, or protectorates which Belgium may acquire are regulated by special statutes. Belgian troops intended for the defense of such regions can be recruited only by voluntary engagement. (*L'Organisation Coloniale Belge*, by Charles de Lannoy, 1913, p. 17.)

M. de Lannoy asserts that the effect of the provision of the constitution above quoted is "that the colonies do not have the benefit of the constitutional guaranties," and that "a Belgian statute is applicable in the colonies only when made so applicable by a decision of the legislative body, which, is in fact itself a colonial statute."

Belgium acquired the independent State of the Congo as a colony on September 9, 1908, and simultaneously the Legislature enacted an organic law for Belgian Congo called "the colonial charter." (*Ib.*, p. 16. For text of the charter see the same volume, pp. 289–303.)

The colonial charter declares that the Belgian Congo has "a personality distinct from that of [Belgium]." It allows the colony to use the flag and seal of the Independent State of the Congo. (*Ib.*, pp. 289, 303.)

M. de Lannoy thus describes the organs of legislation of Belgian Congo and their functions:

> Article 7 of the colonial charter proclaims that statutes [enacted by the Belgian Legislature] are the supreme law on every subject [with which they deal] *la loi intervient souverainement en toute matière.* But this does not mean that the Parliament must itself enact the multifarious laws which the government of a colony requires. * * * As the delegates of the Belgian Nation, it is for deputies and senators to intervene in the affairs of Belgian Congo only to the extent that the interests of their constituents require—that is to say, to the extent that the acts of the colonial administraion may engage Belgium financially or morally. If they go beyond that, they transform themselves into administrators and undertake a task which persons who make it their career are far better fitted to perform.
>
> It is then not contrary to the principles of representative parliamentary government, and it is indispensable to the success of colonization to give to the chief executive plenary powers and consequently to add to those which he exercises in the domestic territory of the nation the legislative power, reserving to the Parliament the right of intervening to safeguard, in a given case, the interests of the nation. This is the system adopted by Belgium, as also by the majority of the colonizing powers. "The King," says article 7 of the colonial charter, "exercises the legislative power by way of decrees, except as respects those subjects which have been regulated by statute." * * *
>
> The King must, therefore, exercise in person the legislative power which is delegated to him. The only exception is, that he may authorize the governor general, though only when the matter is urgent, to suspend temporarily the execution of decrees and make ordinances having the force of law.

Speaking of the colonial council, which is established by the colonial charter to advise the King in making decrees, M. de Lannoy says:

The selection, organization, and operation of the council are regulated as follows (Charter, arts. 24 and 25; statutes of Mar. 29, 1911, and Dec. 9, 1912):

The colonial council is composed of the minister of the colonies as president and 14 councilors; the president having a vote, and in case of a tie the casting vote. A vice president selected by the King from among the members of the council presides in his absence. Eight councilors are selected by the King. Six are chosen by the legislative chambers—three by the Senate and three by the Chamber of Deputies by secret ballot and majority vote. One of the councilors named by the King and one of those named by the two chambers alternately retires each year. * * * The functions of members of the Chamber of Deputies or of the Senate are incompatible with their participation in the council. No official of the colonial administration is permitted to serve on it.

The council gives its opinion in the form of a reasoned report, within a time fixed by its organic regulations. The report shows the number of the dissentients and the reasons of their dissent.

The charter gives to the council no right * * * to inform Parliament by an annual report of the comments which the operations of the administration and its manner of executing the statutes may suggest. * * * It is in the reports of the council attached to decrees and its published deliberations and resolutions that the representatives of the nation must search for information on these subjects.

The colonial charter (art. 6) established a special commission for the protection of the aborigines, having as one of its functions to make suggestions to the King regarding legislation for the aborigines. This council consists of an indefinite number of persons, is presided over by the attorney general attached to the court of appeals at Brussels, and is required to meet at least once a year. This commission holds its sessions at places determined by its president and is composed of leading members of the European part of the population of the colony—administrative officials, clergymen, judges, merchants, and planters. Inasmuch as the district of Katanga has since 1910 a government of its own, so that now "the [Belgian] Congo is divided into two independent governments," the commission tends not to exercise a surveillance over Katanga, and de Lannoy recommends a second commission having surveillance over that district exclusively. (*Ib.*, 291, 254–258.)

The colonial charter (art. 5) requires the governor general to watch over the mental and moral well-being of the aborigines, using the language of the Berlin African act. The function of the King in legislating for the aborigines is supplemented by the provision of the colonial charter, which keeps alive a great body of the customary law of the aboriginal tribes. This provision (art. 4) is as follows:

Aborigines of Belgian Congo who have not been naturalized enjoy the civil rights which are recognized as belonging to them by the legislation of the colony and by their customs, in so far as these customs are not contrary to the colonial legislation or to the public order. Aborigines of neighboring countries who have not been naturalized are assimilated to [those of Belgian Congo in this respect]. (*Ib.*, p. 290.)

M. de Lannoy, speaking of this part of the colonial law, which exists without the intervention of the organs of the Belgian State, says:

> The unwritten or customary law has in Belgian Congo a vast field of action It regulates, and will for a long time yet continue to regulate, the greater part of the relations of the aborigines with each other, and in some cases the relations between aborigines and nonaborigines. It forms the ordinary source of the civil law for the aborigines who have not been naturalized.

ITALY.

In Italy the constitution makes no mention of colonies. It establishes the method of organizing the legislature, executive, and judiciary, but does not prescribe their powers. (Modern Constitutions, by W. F. Dodd, vol. 2, pp. 5–16.)

In 1882, when Italy first acquired possessions in eastern Africa, the Italian Parliament enacted a statute giving these possessions the name of Erythraea, and declaring that "there is hereby established on the west coast of the Red Sea an Italian colony subject to the sovereignty of Italy (*una colonia italiana sottoposto alla sovranita dell' Italia*), the exact territory being specified. It was provided that all the legislative, administrative, judicial, and economic affairs of the colony should be governed by royal or ministerial decrees, according to the importance of the subject matter, the regulations to be such as should be adapted to the local conditions, and authority was given to change these rules according to the results of experience. It was also provided that the religious beliefs and practices of the aboriginal inhabitants should be respected, and that their personal status, family and matrimonial relations, succession, and all their civil relations should be regulated by their own customary law, so far as it was not inconsistent with universal morality or the public order, or in violation of an express act of legislation made by the Italian authorities.

In 1903 a new organic law was passed by the Italian Parliament. By this act a colonial council was created in connection with the ministry of foreign affairs, and the King, by advice of the governor of the colony and the colonial council, was given legislative power in subordination to the Italian Parliament, in all matters not affecting the personal and family status of Italians. As regards the aborigines the following provision was made:

> The personal status of the aborigines and their relations of private law are regulated according to the local customs, religions, and races. The aborigines are to continue to be subject to the special penal law, based upon local customs, except so far as modifications shall be made in this law by decree of the governor, containing a statement of the reasons on which they are based (*decrét motivée*).

The colonial council was composed of three members *ex officio*—the under secretary of state for foreign affairs as president, the director of the colonial office, and the commissioner of emigration—an officer of the army or navy of high rank, an official of high rank in the treasury department, and six members "of recognized competence, who have had administrative experience, nominated by the secretary of foreign affairs and elected by the council of ministers." Provision was also made for calling experts in special matters to sit in the council without vote.

(*Lois Organiques des Colonies* (*Institut Colonial International*), vol. 3, pp. 400–403.)

SPAIN.

In Spain the constitution (art. 89) provides as follows:

The colonies shall be governed by special laws, but the Government is authorized to apply to them, with the modifications which it may think proper, the laws promulgated or which may be promulgated for the peninsula, giving an account to the Cortes.

As respects the power of the King, it is provided (arts. 50 and 54) as follows:

The power of executing the laws shall be vested in the King, and his authority shall extend to everything which conduces to the preservation of public order at home and the security of the State abroad, in conformity with the constitution and laws.

The King shall also have power to issue decrees, regulations, and instructions which may be conducive to the execution of the laws.

(Modern Constitutions, by W. F. Dodd, vol. 2, pp. 210, 210.)

Of the few remaining islands and colonies of Spain the Canary Islands have the status of a domestic province under a statute enacted in 1912. The Spanish colony on the west coast of Africa, the islands near the coast, and the Spanish zone in Morocco are governed by decrees of the King, and by regulations of the local governors under delegation of power made by the King.

(*Spanisches Staatsrecht*, by Adolfo Posada, 1914, p. 184.)

(Statesman's Year-book, 1918, pp. 1284–1285.)

PORTUGAL.

The constitution of the Portuguese Republic, adopted in 1911, provides (secs. 67, 84) as follows:

In the administration of the overseas Provinces the régime of decentralization shall prevail, under special statutes adequate to the state of civilization of each of them (*adequadas ao estado de civilação de cada uma dellas*).

The first Congress of the Republic shall elaborate and enact the following laws:

* * * (d) The organic laws of the overseas Provinces.

(*Revue de Droit Public*, vol. 29, pp. 775–791.)

By article 26 of this constitution the Congress of the Republic is given the exclusive power of "making laws, and of interpreting, suspending, and abrogating them," and by article 47 the President is empowered to "make decrees, instructions, and regulations necessary to the proper execution of the laws"; the Congress being given also the power (art. 26) to "sanction the regulations decreed in execution of the laws."

Marnoco e Souza, in his commentaries on this constitution, published in 1913 (pp. 594–604), in reference to these provisions, holds that they delegate a limited legislative power to the President in subordination to the Congress, and that the Congress may, by its legislation in the form of organic acts, create local representative legislatures in the colonies or confer such local legislative powers as it may see fit upon colonial governors.

JAPAN.

The constitution of Japan contains no reference to the administration of colonies.

(The Political Development of Japan, by G. E. Uyehara, 1910, pp. 277–284.)

The Parliament enacts special laws for the colonies, including organic acts. Subject to the supreme power of the Parliament, the Emperor has power to decree ordinances. In Formosa, the Japanese Parliament has delegated the local legislative power to the governor general in council, his ordinances being reported to the minister for the colonies to be laid before the Emperor for his sanction.

(Japanese Rule in Formosa, by Gosaburo Takikoshi, 1907, pp. 32, 37, 232–234.)

In Formosa, the relations with the aborigines are in charge of a bureau of aboriginal affairs, which has performed the national duty of guardianship by "a method of pressure and conciliation, alternately applied."

(Report of the Bureau of Aboriginal Affairs of Formosa for 1911, p. 7.)

(Japan: The Rise of a Modern Power, by Robert P. Porter, 1918, p. 232.)

CHAPTER V.

THE RELATION BETWEEN THE POWER OVER ABORIGINAL TRIBES AND THE POWER OVER COLONIES GENERALLY.

(Continued.)

GERMANY.

The constitution of Germany in force in 1884 when, by reason of the acquisition of large districts of territory in Africa it became necessary to establish a system of colonial administration, contained the following provisions concerning administration of territory and populations outside the domestic territory of Germany (Art. IV, secs. 1, 7).

The following matters are subject to the supervision of the Empire (*Reich*) and to its legislative power:

Regulation * * * of colonization and emigration to lands external to Germany (*ausserdeutschen Länder*) * * *.

The establishment of a general system of protection (*eines gemeinsamen Schutzes*) of German trade in foreign countries, of German navigation, and of the German flag on the high seas; and of a common consular representation (*vertretung*), which shall be established by the Empire (*Reich*).

The presidency of the union (*das prasidium des Bundes*) is vested in the King of Prussia. Whoever is King of Prussia bears the title of German Emperor. The Emperor is to represent the Empire (*Reich*) in all its relations under the law of nations (*Völkerrechtlich*); and in the name of the Empire to declare war and conclude peace, to enter into alliances and other treaties with foreign States and to accredit and receive ministers.

These provisions are not regarded by leading German publicists as the source of the power of the State to acquire and govern colonies and dependencies; this power being regarded as an incident of the sovereignty of the State.

(*Die Rechtsverhältnisse der Deutschen Schutzgebiete*, by Karl von Stengel (1901), pp. 32, 33.)

(*Einführung in die Kolonialpolitik*, by Otto Köbner, 1908, pp. 71 to 85.)

In 1886 the German Parliament, after two years' consideration, enacted a statute which was entitled "the law concerning the jural relations of the protected territories" (*das Gesetz betreffend die Rechtsverhältnisse der Deutschen Schutzgebiete*). This statute by its terms referred to the statute enacted by the German Parliament

in 1879 entitled "the law concerning the German consular jurisdiction" (*das Gesetz betreffend die Deutschen Konsulargerichtbarkeit*). The circumstances which led to the building of German colonial policy upon the principles of consular jurisdiction were as follows:

For a long time prior to 1879, the custom prevailed among civilized States of obtaining by treaty, under application or threat of force, from States of non-European origin and civilization which were recognized as States outside of the community of nations, but in political and social relationship with that community, a right of protection (*schutzrecht*) for their subjects and for Europeans generally, and also for certain of the native inhabitants employed as factors, brokers, domestic servants, or farm laborers, called protegés (*schutzgenossen*); this "protection" being exercised by the consuls of the European powers.

By the law concerning consular jurisdiction it was provided that "all citizens of the German Empire residing or being within the consular judicial districts and their protected associates (*schutzgenossen*) are subject to the jurisdiction of the consular courts."

The custom of protection of native inhabitants by consuls had been instituted by Venice and Genoa in this sixteenth century, and had proved a successful means of carrying on a colonization the principal object of which was the development of commerce. Speaking of this custom Frances Rey, in his book *La Protection Diplomatique et Consulaire* (1899, p. 87), says:

> The [native] protegés were for Venice and Genoa a considerable element of political influence and at the same time a source of wealth; for, belonging to the same race as the rest of the population, they served as natural intermediaries between the natives and the Italian merchants. The privileges which they enjoyed enabled them rapidly to become rich, and for the most astute of them, the status of protegé was only a temporary one, leading to being elevated to the local nobility or obtaining the much-prized title of citizen of one of the two great maritime powers.

This protection was altogether a personal relationship, and was in effect only so long as the person was in the actual service of a citizen of the protecting State. (*Ib.*, edict of the Sultan of Turkey of 1863, p. 522.)

In 1884 the custom had for a considerable time prevailed among civilized States of making treaties of "protection" with chiefs of aboriginal tribes, whereby the chief, in behalf of his tribe, placed himself and his tribe under the "protection" of the State which had acquired or was about to acquire sovereignty of the region by occupation, the protection in form being that of the sovereign ruler of the State in its name. Such tribes and their territory were called "colonial protectorates," "native protectorates," or "protected native

States." These treaties recognized in form the "sovereignty" of the chief of this tribe or the ruler of the native State; but as they generally provided for a "resident" or a "resident commissioner" within the native State, who exercised a real control under the form of advice, these "protectorates" were legally nothing more than colonies in which the native organization was temporarily utilized as a means of administration until the growth of the body of colonists and the development of ways of communication made possible the direct administration of the aborigines by the colonizing State.

(*Essai sur les Protectorats*, by Franz Despagnet, pp. 240–254.)

At this time, also, the custom prevailed of granting to corporations of colonizing States letters patent of protection (*schutzbriefe*), or royal charters of privileges, whereby these companies were granted political and administrative powers over specified regions where they had acquired a claim of title by treaty with the chiefs of aboriginal tribes or the sovereign of a half-civilized State, the privileges so granted being exercised under the protection of the colonizing State.

In 1879 the consular jurisdiction had become a matter of so much importance to Germany's foreign trade that the matter, which had previously been regulated by statutes regarded as inadequate, was taken up and a carefully elaborated statute on the subject was enacted, as above mentioned.

In 1880, 12 States, including the United States, assembled in conference at Madrid and agreed upon a convention with Morocco, defining the rights which they should have in Morocco, through their respective consular jurisdictions, concerning the protection of those of the native inhabitants of Morocco who were employed by citizens of these States as factors, brokers, domestic servants, or farm laborers.

The necessity of Germany's taking action to establish a colonial policy by statutory measures arose in 1884 from the fact that German merchants had entered into treaties with aboriginal tribes on the east and west coasts of Africa, by which the chiefs of these tribes purported to grant tracts of land to them with powers of local administration; and also from the fact that other States, whose citizens claimed by discovery in Africa or under similar treaties with chiefs of aboriginal tribes on the coast and in the interior, made claim of sovereignty over the regions in which the German merchants had thus established themselves. The International Congo Association was seeking recognition as an African State having sovereignty over the immense Congo Basin, and on April 22, 1884, received recognition from the United States. On the next day France, claiming a part of this basin by discovery and by treaties with aboriginal chiefs, made an arrangement with the association by which the claims of France were conceded and by which it also obtained the right of pre-

emption of the claims of the association if the latter should ever sell. This arrangement was notified to the powers in May, 1884.

On June 26, 1884, during the debate in the Reichstag on the treaty of trade and navigation with Korea, the German Government, speaking by the chancellor of the Empire, made the following declaration of the principles of the colonial policy of Germany which it proposed should be adopted. The material parts of Prince Bismarck's statement were as follows:

We are for the first time, through the undertakings of the merchants of our North Sea ports, coupled with purchases of land and followed by applications for the protection of the Empire (*Reichschutz*) compelled to subject to a closer examination the question whether we are able to promise this protection of the Empire to the desired extent. I repeat that I am opposed to colonies—I will say rather to the colonial system, as most of the States have carried it on during the last century, the French system, as one may say at the present time—against colonies which have as their basis a piece of land, then the seeking to draw emigrants thither, to establish there officials and erect fortified places; that to-day I have not yet given up my former views in opposition to this kind of colonization, which may be useful for other lands but is not practicable for us. I believe that colonial projects can not be built up artificially, and that all the examples brought forward in the committee as discouragements to action simply showed that a false path had been entered upon; that, so to say, it had been attempted to build a harbor where there was no commerce, to build a city where there were no inhabitants and to which it was sought to attract them.

Entirely different is the question, first, whether it is judicious, and, second, whether it is the duty of the German Empire, as respects those of its citizens who have entered upon such undertakings in reliance upon the protection (*schutz*) of the Empire, to extend to them this protection and a certain amount of assistance in their colonial undertakings, so that those structures which have grown out of the superabundant energy of the whole German body, in foreign lands, may be granted our trusteeship (*pflege*) and protection (*schutz*). And to this I say yea, with little confidence, however, from the standpoint of prudence—I can not foresee what may come from this—but with absolute confidence from the standpoint of the duty of the State (*der staatlichen Pflicht*) * * *.

It has been said that our colonial undertakings will be very costly and will bring our distressed treasury into an even worse condition than it is at present. This is, of course, correct if we, as has formerly been the case in such experiments, should start out by sending a multitude of higher and lower officials to the regions in question and then establish a garrison there and build barracks, harbors, and forts. This is not even remotely our policy; least of all, not mine. My policy, which is approved by His Majesty the Emperor, is to commit to the activity and the adventurous spirit of our seafaring and trading fellow citizens the responsibility for the material development of the colonies (*Kolonien*) as well as for bringing them into existence, and not so much in the form of annexation of overseas Provinces forced upon the German Empire as in the form of protection by letters of privilege (*freibriefen*), after the manner of the English royal charters, thus committing to those interested in the colony the authority to govern themselves in all essential respects, there being assured to them the faculty of a European jurisdiction for Europeans

and protection of them to the extent that we are able to give it without standing garrisons. It seems to me, further, that in a colony of this kind there should be, as the representative of the authority of the Empire (*vertreter der Autoritat des Reiches*), an official having the title of resident or consul.

After stating that it was the policy of Germany not to encroach upon the regions to which other European States had tenable claims and announcing that the German Government had received word that Great Britain, the other claimant to the territory in question, had withdrawn its claim in favor of Germany, he continued:

Our policy is, therefore, not to establish Provinces but mercantile undertakings of such a character that when completely developed they shall constitute a sovereignty which shall remain in feudal relationship (*lehnbar*) exclusively to the German Empire as a permanent mercantile sovereignty under the protection (*protektion*) of the Empire and to protect (*schützen*) these undertakings in their free development, not only against attacks of their immediate neighbors but also against oppression or injury of the other European powers.

We hope that the tree, through the efforts of the gardeners who plant it, will in all respects thrive. If it does not and the plant is a failure, it subjects the Empire to little injury, for the amounts which we are required to expend are of slight consequence. * * *

This is the difference: Under the system which I have called the French, the administration supplied by the State continuously has to decide whether the undertaking is a proper one and bids fair to be a successful one; under this system we commit to the trading body, the private individual, the free choice as to the manner of carrying on the undertaking, and if we see that the tree does take root, grow, and thrive, and if it asks the protection (*schutz*) of the Empire, we stand by it, and I can not see how we can rightfully deny it such protection.

(Proceedings of the German Reichstag for 1884, vol. 2, pp. 1061, 1062.)

From this time forward, although the word colony (*kolonie*) continued to be used in the German political and legal language (as Prince Bismarck himself had used it in his statement of German policy), the technical word applied to all the German establishments in Africa and the Pacific Ocean was *schutzgebiete*—protected territories.

The title of the act of 1886 was "An act respecting the jural relations (*Rechtsverhältnisse*) of the German protected territories (*Schutzgebiete*)." The first article was as follows:

The power of protection (*schutzgewalt*) is exercised by the Kaiser in the name of the Empire (*in namen Reichs*).

This statute, as has been said, was formed by applying the statute of 1879 relating to consular jurisdiction with certain modifications. In 1888 an amending statute was passed, and in 1900 both the statute relating to consular jurisdiction and that relating to protected territories were revised, the new statute concerning protected territories receiving the short title of *schutzgebietegesetz*—"the protected territories law."

(Reichsgesetzblatt, 1879, p. 197; 1886, p. 75; 1888, p. 71; 1900, p. 213 and p. 809.)

Though the statute concerning the protected territories was, by the action of the German Parliament in 1900, still further divorced from the statute concerning consular jurisdiction, it was still left so that it referred to the latter statute in many respects. A brief but very careful and accurate statement of the legal and constitutional status of the German colonies, as held by leading German publicists, was made by Otto Köbner in an introduction to the documents concerning German colonial administration contained in the *Lois Organiques des Colonies*, published by the *Institut Colonial International* in 1906 (vol. 3, pp. 333–353). This statement is as follows:

Signification and exercise of the "Schutzgewalt."—The fundamental principle of German colonial constitutional law is expressed as follows in Article I of the law concerning the protected territories: "The Emperor exercises, in the name of the Empire, the *schutzgewalt* in the German colonies."

"*Schutzgewalt*," in the sense of the actual German colonial law, signifies nothing else than the full sovereignty of the State; that is to say, all the rights of sovereignty which belong to the State as sovereign. For in spite of the name *schutzgebiete* (protected territories) the German possessions overseas are, if one considers their actual juridical situation, not at all protectorates but colonies in the strictest sense of the word, in which the sovereignty of the State, exactly as in the mother country itself, has a character strictly territorial and theoretically unlimited.

This "*schutzgewalt*" belongs to the German Empire as a State; it is delegated, as respects its exercise, to the Emperor as the organ of the Empire, and the Emperor exercises it "in the name of the Empire."

Exercise of the legislative power for the colonies.—The *schutzgewalt*, representing as it does the aggregate of the sovereign rights, comprises the legislative power as one of its most important elements. By virtue of Article I of the law concerning the protected territories above mentioned this power is theoretically delegated to the Emperor; and thus there is created for the legislation in the colonies a juridical situation departing in essential respects from the principles of the organization of the legislative power in the mother country.

In the mother country the legislative power of the Empire is exercised, in pursuance of Article V of the constitution of the Empire, by the Bundesrat (federal council) as the constitutional representative of the confederated governments of the States forming the Empire, and the Reichstag (general assembly) as the representative of the people. Agreement of both houses by majority vote is necessary in order to bring into existence a law of the Empire. To the Emperor belongs, in the mother country, by article 17 of the constitution, the duty of promulgating and publishing the law thus voted, as well as the duty of seeing that the laws are faithfully executed.

In the colonies, on the contrary, the Emperor, under Article I of the law concerning the protected territories, is the legislative organ; the "imperial ordinance" is substituted for "the law of the Empire."

Relation between the colonial jurisprudence established by act of the German Legislature and that established by imperial ordinance—Extent of the power of the Emperor in making ordinances relative to the various subjects of colonial law.—This right of the Emperor to make ordinances is, however, limited as

regards the matters which concern the colonies, upon all the points respecting which the legislature has expressly acted; the general principle of public law being applied that a regulation made by statute is supreme over one established by executive ordinance.

The limitations upon the right of the Emperor to make ordinances vary according to the subject matter of the colonial law.

In the sphere of public law, strictly so called, * * * there is, in fact, very little limitation. The general sentiment seems to be that in the beginning of the development of new colonies such as Germany possesses it is better to leave to the central administration of the home Government the duty of taking the necessary dispositive measures. As respects these matters, involving as they do experimental arrangements, with the possibility of having to make rapid modifications in the measures taken to adapt them to the facts learned by experience, and to meet the needs of the development of the colony, it is impracticable and undesirable each time such a change is required to put in motion the whole legislative machinery of the State, a process which in all States, and particularly in Federal States, results in delay.

On the other hand, as respects those subjects of the law which have reference to the legal relations of the inhabitants of the colonies as individuals, where the question is of the protection of life, liberty, property, and other personal interests—that is to say, as respects matters within the domain of the private law, the penal law, civil and criminal procedure, and judicial organization—other considerations have prevailed from the outset. The general sentiment is that as respects this range of subjects a special legal protection is desirable. The most powerful legal protection which the modern State can give to the inhabitants of its colonies is that of a statute of its legislature. For this reason we find the regulations in the German colonies, on the subjects above mentioned, regulated by statute of the German Legislature.

The above general statements are, in practice, subjected to some modifications.

The juridical situation of the colonies as respects matters of public law. Within the domain of the public law, the right of the Emperor to make ordinances is limited only by a small number of statutory dispositions. The most important of these is that guaranteeing liberty of conscience and religious toleration in the colonies in favor of members of religious communities recognized by the German Empire. In the law concerning the protected territories there are legislative provisions relating to naturalization which partake of the nature of dispositions of public law, but the other branches of the administrative law of the colonies are regulated, with almost no exceptions, by ordinances.

The power of making ordinances is in practice subject to an important restriction, in so far as its exercise involves financial consequences. The law concerning the receipts and expenses of the protected territories of March 30, 1892, applied to the administration of the colonies the same principles of budgetary law as are applied in the mother country. Annual estimates are required to be made of the receipts and expenses of the colonies and to be brought together in a budget for the colonies. This budget is fixed by law before the commencement of the budgetary year; this budgetary law being enacted by the Bundesrat and the Reichstag the same as other laws.

From the above it results that, though the Emperor alone has power to organize for all and each of the colonies all the branches of the administration, nevertheless, inasmuch as nearly all these dispositions from their nature require appropriations of money in order to carry them into effect, there is continually an indirect intervention of the legislative organs of the mother country in the exercise of the power.

The juridical situation in the domain of private law, penal law, procedure, and the organization of the courts. Relation between the colonial law and the law of the consular jurisdictions. The civil law, the penal law, procedure, and the organization of the courts in the colonies are theoretically, as has been said above, to be regulated by statute; a contrary rule applying from that applied in the case of the public law of the colonies, using the term "public law" in the strict sense. But the special statutory regulations covering these parts of the law in the German colonies have not had the form of special legislation for the colonies, nor have they come about by a process of borrowing parts of the statutes applicable to Germany proper. These special statutory regulations have come into being by legislative acts declaring applicable in the colonies those arrangements, made by legislative action, which are in force within the territory of foreign States in which consular jurisdictions exist according to customary law, and in which a consular jurisdiction has been granted to Germany by treaty. By the law concerning the protected territories in its original form it was enacted that the provisions of the law concerning consular jurisdiction should apply in the colonies as respects the whole domain of the private law. In recent years, however, there has been a more and more distinct recognition of the fact that there are important differences between the legislative requirements of a consular jurisdiction and those of a colony. Consequently the revised law of 1900 concerning the protected territories no longer reproduces in their totality the provisions of the law concerning consular jurisdiction as covering the parts of the law above mentioned, but only declares applicable certain specified paragraphs of that law.

The German law concerning consular jurisdiction refers back to the legislation of Germany itself, but nevertheless subjects the laws so borrowed to some modifications. Thus it provides that, except so far as otherwise prescribed in the consular jurisdiction act itself, the German imperial statutes and the statutes of Prussia dealing with the subjects formerly covered by the Prussian civil code, shall be applicable, within the German colonies, in the domain of the civil law, civil procedure, insolvency, and commercial arbitration. There is one important exception, alike as respects the consular jurisdictions and the colonies, namely, as respects commercial matters; with regard to which the above-mentioned statutes of Germany are applied only in so far as the customary local commercial law does not otherwise provide.

In the sphere of the penal law and criminal procedure the provisions of the German law are alone applicable.

These provisions of the German law are, however, not applicable in so far as they suppose the existence of institutions which do not exist, or situations which do not arise, in the exercise of the consular jurisdiction, or in the administration of a particular colony. Matters of civil law and civil procedure which are for this reason not regulated by the German law, are determined from time to time by ordinance of the Emperor.

The law concerning consular jurisdiction, however, itself contains a number of provisions, different from those in force in Germany, in the matter of both civil and criminal law and procedure. It also establishes a form of judiciary quite different from that which exists in Germany. These provisions, as has been said, are for the most part applicable in the colonies.

It is evident that this reference of the law concerning colonies back to the law concerning consular jurisdiction, and the reference back of the latter law to the general statutes of Germany, make it doubtful just what legislative provisions are in force in the colonies. But, apart from this formal inconvenience, there is a further difficulty arising from the fact that it is becoming more and more settled, by actual experience, that the economic and juridical needs of the

colonies are essentially different and more numerous than are those of the persons who are the subjects of the consular jurisdiction. In the first stage of development of the German colonies, when the situation demanded that there should be provided, as quickly as possible, a complete body of colonial laws covering civil and criminal matters, it was proper, as a practical expedient, to take as a basis the consular law then in existence and proved to be suitable by experience. But, since that time, the economic and juridical development of the German colonies has made considerable progress, and the need of a new system of law is more and more making itself felt. It is for this reason that the representatives of the science of German colonial law, as well as those who are engaged in actual colonial administration, are exerting themselves to bring about a change, so that the German colonial law shall be emancipated from the consular law, and so that in the sphere of both the civil and the criminal law there shall be created by statute a German colonial law not dependent on any other part of the German law, but complete in itself and adapted to the particular needs arising in the process of colonial development. * * *

The legislation for the aborigines and other colored inhabitants. The body of laws above mentioned, covering civil and criminal law, procedure and organization of courts, is applicable only to the white population of the German colonies. Section 4 of the law concerning the protected territories provides that the aborigines are not, as a general rule, subject to all these provisions, but that they shall be subject to them only in so far as they shall have been made applicable to them by ordinance of the Emperor.

Section 4 of the law concerning the protected territories also provides that besides the "colored" population other parts of the population determined by ordinance of the Emperor may be put upon the same footing as the aborigines. By virtue of the authority so delegated to him, the Emperor has decreed that the members of all the foreign colored tribes (*die Angehörigen fremder farbiger Stämme*) shall be placed upon the same footing as the aborigines, subject to exceptions made by the governor of the colony with the approval of the chancellor of the Empire.

As respects the juridical situation of the aborigines and of all other colored people assimilated to them, the right of the Emperor to make ordinances by the delegation of the statute above mentioned is theoretically unlimited.

It should be remarked, however, that the juridical meaning of the expression "colored people" is not exactly the same as its anthropological meaning. By section 9 of the law concerning the protected territories it is permitted to the chancellor of the Empire to grant to certain aborigines the citizenship of the Empire (*Reichsangehörigkeit*); and in this case they have under all circumstances the juridical situation of German citizens. But there are also certain other elements of the population, "colored" in the physical sense of the word, who are placed, from the juridical point of view, on the same footing as the white citizens of civilized States. In conformity with the development of modern international law, it is provided expressly by ordinance of the Emperor that, as respects the German colonial law, Japanese are not to be considered as "members of colored tribes." Moreover, in German East Africa, by ordinance of the governor, Syrians, inhabitants of Goa, and Cinghalese Christians are, as respects their juridical status, regarded as not amenable to the system of laws provided for the aborigines, but to that provided for Europeans. The colored citizens of any State which is civilized and recognized as such by international law, are, under the German colonial law, without any formal prescription, placed upon the same footing as the whites; for

example, a negro who is a citizen of the United States of America is treated as such in a German colony, and not as a "colored" person.

The right of making ordinances delegated to the chancellor of the Empire. The ordinances of the chancellor of the Empire are another important source of German colonial legislation. His right to make such ordinances has two different juridical sources:

(a) *Delegation by the Emperor.* The exercise of the right of making ordinances delegated to the Emperor, as above stated, is by him delegated in many cases to the chancellor of the Empire. This practice has been adopted on a great scale and for all the colonies, and particularly as respects the regulation of the juridical situation of the aboriginal population. In certain important matters of law, also, the Emperor has made a similar delegation of power. Sometimes the delegation has been of a whole subject in the law; sometimes the Emperor has himself enacted the fundamental dispositions and left to the chancellor only the function of decreeing the measures necessary to execute these dispositions. The latter method has been applied in the legislation regarding real property in the colonies.

(b) *Delegation by statute.* The chancellor of the Empire has, by direct delegation by means of statute, an extensive right of making ordinances beyond that which is delegated to him by the Emperor. The law concerning the protected territories (sec. 15) provides that "it is the function of the chancellor of the Empire to make ordinances in execution of the statutes," and that "the chancellor of the Empire has jurisdiction to proclaim for the colonies or for specified parts of them police or civil regulations concerning the administration and to decree, as penalties for nonobservance of them, imprisonment not exceeding three months, reformative detention (*haft*), fine, or confiscation of specified articles." This power the chancellor of the Empire has used extensively. A considerable part of the German colonial law now in force, especially in the case of the administrative law, rests upon ordinances of this kind.

Under the authority of the chancellor of the Empire the affairs concerning the colonies are managed by two departments—the colonial division of the department of foreign affairs [since 1907 the department of the colonies, under a secretary for the colonies] and the department of the navy for the territory of Kiau-Tschau.

The right of making ordinances delegated to colonial governors. Finally a part of the colonial legislation, important both in extent and in nature, is constituted by ordinances of the governors of the different colonies. These ordinances are principally concerned with prescribing regulations having to do with the juridical situation of the aborigines; but, nevertheless, by means of this kind of ordinances, some important general dispositions have been made, principally within the domain of the administrative law, which apply to the white population as well.

The law concerning the protected territories does not itself delegate to the colonial governors the power to make ordinances; but it recognizes that the power may be delegated to them by those having the superior functions. It is necessary here to make the following distinction:

(a) In part the power of colonial governors arises from delegation by the Emperor. In a number of cases the Emperor has delegated his power of making ordinances regarding some matters of law by giving the chancellor of the Empire full powers and at the same time providing that the governor, by consent of the chancellor, shall have power to make ordinances necessary to regulate the matter.

(b) In part this power arises from delegation by the chancellor of the Empire. In section 15 of the law concerning the protected territories, which con-

tains the grant of the ordinance-making power to the chancellor of the Empire, it is expressly provided that the exercise of the power may be delegated by him to a colonial chartered company provided with a letter of protection (*schutzbrief*) granted by the Emperor, or to administrative officials in the colonies. * * * By virtue of this section, the exercise of the ordinance-making power, to the extent that it belongs to the chancellor of the Empire, has been delegated to governors of different colonies, notably to those of the Caroline Islands, Palaos and the Marianne Islands, to the vice governor at Ponape, and to the district administrators of Jap and Saipan.

The governors of the colonies of German East Africa, German Southwest Africa, Kamerun, and New Guinea are authorized to delegate their powers permanently to other officials of the colony as respects certain districts geographically delimited, with or without restrictions. * * *

The colonial council. * * * The *Kolonialrath* [colonial council] was established by a decree of the Emperor of October 10, 1890, in connection with the colonial division of the foreign office, as a "council of experts in colonial matters." The details concerning this council were established by decrees of the chancellor of the Empire of October 10, 1890, and April 14, 1895.

According to these provisions the members [the number of whom is not fixed] are chosen, by the chancellor, for a term of three years. The most important of the colonial companies are invited to nominate, from their members, for membership in the council. Likewise the central organizations of religious missions are represented by delegates in the council. The remaining members are chosen by the chancellor at his discretion from among those skilled in colonial science or experienced in colonial administration.

The colonial council is authorized (1) to give its opinion upon all matters which are submitted to it by the colonial division of the foreign office [now the colonial department], and (2) to make decisions in regard to propositions submitted to it by any of its members. * * * The council chooses from its membership a permanent committee, whose opinion, on certain subjects, may be required by [the colonial department], to be given verbally or in writing, without being referred to a session of the full committee. This committee is composed of [seven] members.

It follows from the foregoing that the colonial council is not a parliament having power to decree decisions as respects colonial affairs, but a consultative organ of the central colonial administration. It is, however, evident that the consultative assistance of specialists is of the greatest importance as respects questions of legislation. * * * The colonial council has authority only as respects the colonies of Africa and in the Pacific; not concerning the territory of Kiau-Tschau, which is under the department of the navy.

The councils of government in the different colonies. The creation of consultative organs of government in the different colonies, whose membership is drawn from the local population, and particularly representing its economic groups, is very useful, especially as regards the framing of the ordinances requiring investigation and deliberation, which are made by the colonial governors.

After such councils had come into existence in several colonies under different forms, a general regulation on the subject was made by the chancellor of the Empire by ordinance of December 24, 1903. This ordinance determined the constitution of "councils of government" and was applicable to German East Africa, German Southwest Africa, Kamerun, Togo, German New Guinea, and Samoa. In each of these colonies there was constituted a council of government composed in part of the governor and a certain number of colonial officials (official members) and in part of a certain number of the white inhab-

itants of the colony (non-official members) or their representatives. The number of official members can not exceed that of the non-official members. The official members are named by the governor; the non-official members are also designated by him, for a year at least, after he has first heard the professional groups which consider themselves interested. The governor is obliged to submit to the deliberation of the council of government before transmission to [the colonial department] (a) propositions for the annual budget; (b) projects of ordinances to be made by the governor or to be proposed by him, unless they concern matters not purely local. If the governor thinks it his duty, on account of danger of delay or for any other reason, to abstain, as a matter of exception, from submitting to the council of government a project of one of these kinds, he may bring it directly to the attention of the central administration. It is permissible also for the governor to submit to the deliberation of the council matters other than those which have been mentioned. If the governor is of opinion that a vote should be taken on a certain subject, or a nonofficial member desires a vote, it must be taken and the result must be recorded in the proceedings; but the governor is not bound by the result of the deliberation, even in case of a vote.

In the colony of Kiau Tschau, * * * by an ordinance of the governor dated March 13, 1899, three representatives of the civil community who are annually commissioned to this effect are joined to the council of government composed of all the chiefs of the different administrations for the deliberation of important colonial affairs.

The further extension of autonomy in colonial administration. It must be admitted as certain that the economic future of the colonies depends upon the suitable development of colonial organs of autonomous administration. Moreover, such an extension of autonomous administration has already been announced by the chancellor of the Empire as an important element of the colonial program. * * * There exists, however, no simple formula universally applicable by which this can be accomplished. * * * In colonies of temperate climate, where a fixed body of white colonists can establish itself permanently and constantly augment in wealth and numbers, the circumstances are much more favorable for colonial autonomy than in tropical possessions, which naturally white men will frequent only in limited numbers and where they will stay only as long as it may be necessary.

Paul Leroy-Beaulieu in his book, *De la Colonisation chez les Peuples Modernes* (5th ed., 1902, vol. 1, pp. 310–313), has defended the French system against the criticism of Prince Bismarck and has in his turn criticized the German system. He says:

The distinction which Prince Bismarck attempted to make between the French colonization, which was, according to him, essentially and traditionally military and based on principles of conquest, and the German colonization, which was to remain perpetually pacific and based upon the principles of commerce. has not the importance which the great chancellor of the Empire, whether sincerely or not, attributed to it. It has not been by the free will of France or in pursuance of a prearranged plan that the French colonization has had recourse to arms. The first establishments of the French * * * were simple trading stations. * * * But when citizens of a great civilized State are dispersed in the midst of savage or barbarous populations which have no fixed governments and no exact idea of the power of the European peoples, it is inevitable that sooner or later incidents will occur which make it necessary for the colonizing State to intervene in the internal affairs of the aborginal popu-

lation in order to impose upon them a reign of law and an orderly administration. There may be denials of justice to the aborigines by the European merchants or residents; they may commit thefts; they may massacre traders or colonists; they may insult the flag of the State—such are some the inevitable incidents which will happen more and more frequently if there is any hesitation about punishing them. Moreover, it is necessary when all is said, in spite of all the pacific resolutions which may be made at the outset, to establish solidly the political and administrative preponderance of the colonizing State upon the whole population of a territory within which a few European colonists have begun to secure a foothold. But besides this there are abuses which, inasmuch as they affect only the aboriginal population, leave the resident European population insensible and cold. Slavery, for example, the devastating wars between tribes or chieftaincies, the custom of human sacrifice—these disorders, in some sense a permanent feature of barbarism, necessarily draw down upon aboriginal peoples an intervention, continually more and more active and complete, of the European Government which is a witness of them and which, if it does not exert itself to repress them, makes itself an accomplice. To extirpate these crimes and horrors the State can not fall back on the slow action of religious propaganda, and much less on the very problematical and even slower action of instruction and education. * * * It is, therefore, to be expected—doubtless not within the next few years but at some later time—that the Germans will do more or less as the French have done, and following out to its logical consequences the colonizing policy will end by administering more or less directly and completely the barbarous peoples in the midst of whom they have established their flag.

The war with the Hereros and the Hottentots, which began in 1904 and continued until 1907, led to a general criticism of German colonial policy in Germany, and attempts were made by the Social-Democratic and Catholic parties in the Reichstag to have the *Schutzgebietegesetz* amended; the efforts of both being to introduce into the system a parliamentary regulation of the colonial administration, so as to decentralize it and to require it to exercise a guardianship over the aborigines. The Social-Democrats worked in the direction of having a special administration for the aborigines subordinate to the local administration made a permanent feature of the system; the Catholic group in the direction of extending missionary influence. The action of the Social-Democratic group is set forth in a book by Gustave Noske, entitled "*Kolonialpolitik und Socialdemokratie*," published in 1914. That of the Catholic group is narrated in the pamphlet on *Kolonien und Kolonialpolitik*, forming one of the series in the *Staatsbürger-Bibliothek* (Citizen's Library), published by the *Volksverein für das Katholisches Deutschland* (People's Association of Catholic Germany). In this latter publication it is said (p. 29):

The inducement of the aborigines to labor can not be accomplished without the cooperation of the missionaries. It is not enough to content ourselves with Commissioners for the *Aborigines* (*Eingeborenkommissarer*).

Anyone sent as commissioner should be regarded much more as a missionary than as a trustee (*pfleger*) or guardian (*vormund*) of the negro. Unless there

be a just and benevolent handling of the aborigines, any colonial policy must come to naught.

The German Government, in 1904, issued a memorandum concerning the policy respecting the aborigines and the Herero revolution (*Denkschrift uber Eingeborenpolitik und Hereroaufstand*), setting forth the difficulties which it had had in the administration of Southwest Africa. (Appendix to the *Deutsches Kolonialblatt* for Sept. 1, 1904.)

The result of the discussion was that, in 1907, the administration of all the colonies, except Kiau-Tschau, was transferred to the colonial division of the foreign office and placed in charge of a minister of the colonies, to whose department was attached the colonial council. The attempts to remodel the *Schutzgebietegesetz*, however, failed.

In the book by Alfred Zimmermann entitled "A History of German Colonial Policy" (*Geschichte der Deutschen Kolonialpolitik*), published in 1914, a careful and detailed statement is made of all the facts leading up to the enactment of the original statute of 1886, and of the subsequent events affecting the colonial policy of Germany.

CONCLUSIONS.

From the foregoing survey it is evident that all civilized States which administer overseas colonies and dependencies recognize that the relationship which each of them bears to these communities is of an essentially personal character, though it extends to property as well as person—the State as a personality exercising power over these communities as personalities under its jurisdiction; that the power is exercised by special legislation as may be "needful"; that the power is "adequate" to the needs of these personalities; and that it is limited by their needs and by the fundamental principles recognized by all civilized States and embodied in their constitutions.

That it is a relationship which has its source in the sovereignty of the State, and not in the domestic constitution of the State, is also recognized by the leading publicists, though it is also recognized that the domestic constitution may properly specify how the legislature, executive, and judiciary of the State may act in the exercise of the power and may impose proper restrictions on their action.

It is also recognized generally that the legislature is properly the supreme superintending organ of the State in exercising the power, though the executive is also almost invariably recognized as the proper ordinary organ for this purpose, either by specification contained in the constitution, or by implication from the grant of the executive power, or by delegation by the legislative of sublegislative power to the executive.

As a term to describe this relationship, the word "trusteeship" seems to be coming into use in the Anglo-Saxon world. (*Cf.* The Administration of Dependencies, by Alpheus H. Snow, pp. 534–536, 582–591.)

When "trusteeship" is used in this sense, it has not the meaning of trusteeship in the private law, but is used in a broad sense conforming to the literal meaning of the word. In the private law a trusteeship is the relation between persons arising out of the deposit of money or property by one with the other, with the object of having it produce an income to be paid over by the trustee in a specified manner to specified persons, or having it used in a specified manner for the benefit of specified persons or for specified objects. It is thus, in the sense of the private law, essentially a relationship concerning property rather than a relationship between persons. A trust, in its literal sense, is a relationship of an essentially personal character. In its modern derivative sense, especially as used in the politico-legal language of the present day, the word "trust" covers all the relations of a fiduciary character in which a person assumes a relationship of responsibility for or to another, as both the Oxford and Century dictionaries testify. In this broad sense, trusteeship is a generic term including all the fiduciary relationships relating to person or property, and thus includes the relationship of parent and child, husband and wife, guardian and ward, patron and apprentice, master and servant, as well as trustee and cestui que trust, agent and principal, bailee and bailor, depositary and depositor, partner and copartner, etc.

Using trusteeship as its literal sense and also to some extent in this generic sense, it seem to be the most appropriate word to decribe the relationship between a civilized State and all its colonies and dependent communities of whatever character.

The trusteeship of a civilized State for its colonies and dependencies is, however, a trusteeship essentially relating to person rather than property, and, therefore, the closest analogies which the private law furnishes for determining the problems of this trusteeship are those derived from the rules of the private law relating to patron and apprentice, and guardian and ward. The analogy of the relationship of parent and child, though often applied, seems to be figurative and inexact, though there are implications in the adjective "paternal" that are not without value by way of analogy.

It would seem, therefore, that the general nature of the jural relationship which a civilized State exercises over all its colonies and all its dependent communities, whether these communities be in colonies, or within its domestic territory or located externally to

both, is best described by the word trusteeship, using this word in its literal sense as implying a fiduciary relationship essentially personal, though extending to property as well as person; that the fiduciary power is plenary, in the sense that it is adequate to the needs of the situation of the particular personality to which it is applied, though limited to these needs; that as a power over political personalities it is an incident of the sovereignty of each civilized State, and is governed by the law of nations, though not by the body of rules which apply between civilized States to which the name international law is properly applied; and that the closest analogies to this relationship which occur in the private law are those of patron and apprentice and guardian and ward.

As respects self-governing colonies principally inhabited by persons of European origin, the closest analogy to be drawn from the private law would seem to be that of the relationship of patron and apprentice; as respects all other colonies and dependencies the closest analogy to be drawn from the private law would seem to be that of guardian and ward; the analogy becoming very close in the case of aboriginal tribes whose members, by reason of their lack of mental and moral development, occupy a relationship to civilized States akin to that which young children of civilized parents bear to the State.

The word "protectorship" implies a fiduciary relationship of a personal character, but is in its literal sense limited to defence against injury, and does not imply personal influence and control. In its literal sense, therefore, it is not applicable to describe the jural relationship of a civilized State to all its colonies and dependencies, since that relationship implies not only defence but active and continuous education and guidance. It is to be noted, however, that the French and English word "protection," and the German word *schutz*, were legal terms in the feudal law, from which law they apparently came into the public law of Europe. In the feudal law *protection* or *schutz* implied a personal relationship between a sovereign or a lord having the *dominium* or domain over territory and the *imperium* or empire over its inhabitants, whereby a complicated body of reciprocal rights and duties arose; the sovereign or lord being regarded as the protector of the rights of person and property of his subjects or vassals, and they rendering service, or compensation in lieu of service, in return. In this sense *protection* or *schutz* had very nearly the meaning of trusteeship, using that word in its broadest sense. That in the founding of the German colonial system this feudal sense of *schutz* was in the minds of those originally concerned seems probable from the fact that Prince Bismarck, in his original declaration of colonial policy, asserted that "the mercantile

sovereignty" with which it was proposed to endow the colonies was to be "in feudal relationship" (*lehnbar*) to the German Empire.

(As to the meaning of *protection*, *schutz* and *trust* in the feudal law, see *Staats-und-Gesellschafts Lexikon*, by Herman Wagener, vol. 12, pp. 121–148; article on "*Lehnrecht.*" Especially see p. 122, concerning the *antrustiones*, of the time of Charlemagne, who were persons in the close personal confidence of the King and members of his privy council.)

The most recent writer who has considered the relations of Germany to its protected territories (H. Gellmann, in his article on *Die Völkerrechtliche Okkupation*, written just before the war and published in the *Zeitschrift für das Privat-und-Öffentliche Recht*, of Vienna, in 1915 (Nos. 3 and 4, vol. 41), after an extensive examination of the jural principles of the relationship between civilized States and aboriginal tribes, concludes (pp. 707–708) that Germany, as protector (*Schutzherr*) of the protected territories (*Schutzgebiete*), stands in the relationship to them of "international guardianship" (*völkerrechtliche Vormundschaft*), and that a civilized State, in the exercise of this international guardianship, is "the organ of the power of the community of the law of nations by an irrevocable mandate." (*Das Reich ist Organ der Völkerrechtsgemeinschaft Kraft deren unentziehbaren Mandats*). He holds that a civilized State, in exercising power over its colonies and dependencies, is "neither a constitutional nor an international sovereign," but that its sovereignty is of a special character.

In a book entitled *Die Deutschen Schutzgebiete, Erwerb, Verwaltung und Gerichtsbarkeit* (The German Protected Territories, Their Institution, Administration, and Jurisdiction), by Hellmuth Kuhn, published in 1913, a survey is made of the whole literature on the subject of the jural relationship between Germany and its protected territories. He concludes that the *Schutzgebiete* are "colonies" in the generic sense, though the existing *Schutzgebiete* of Germany are rather to be classified as "dependencies" (p. 73). Kuhn regards these dependencies as subject to the plenary sovereignty of Germany. He cites (p. 63) two writers, Joel and Pann, as holding that the German protected territories have a relationship to Germany which is both under the law of nations and the constitutional law of Germany. He refers also to the view of Radlauer (p. 65), that "motherland and colonies have a separate political existence, as States, based on differing conceptions," and to his argument, supporting this view, that they must be regarded as States because they are "lands subject to external regulation and not territories forming part of a legislative unity," and because the inhabitants of these lands require for their proper government "the appli-

cation of special political principles as respects all their political activities." Kuhn quotes with approval the following words of Radlauer:

> The power over colonies is a constitutional paternal power over a daughter-land. * * * Just as a father, under the ancient German law, exercised the paternal power of guardianship (*Muntwalt*) over the affairs of his child, not in the name of the child, but for the child's use and benefit, though upon his (the parent's) responsibility, so the Empire in its protected territories exercises the sovereignty in its own name and upon its own responsibility.

The conclusion which would seem to follow from this whole survey is that the power which a civilized State exercises over all its colonies and dependencies is, according to the law of nations, a power of trusteeship, and that the power of guardianship over its dependent aboriginal tribes is one of the manifestations of this general power.

CHAPTER VI.

RIGHTS OF ABORIGINES AS RESPECTS THE LAND INHABITED BY THEM.

The question of the relation of the Indian tribes to the soil first came before the United States Supreme Court in 1810, in the case of Fletcher *v.* Peck, 6 Cranch, 121. John Quincy Adams and Joseph Story appeared for the defendant in error, in opposition to the claim under an Indian grant. In their argument they said:

> What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession. Vattel, b. 1, §81 and §209; b. 2, §97. Montesquieu b. 18, 2. 12. Smith's Wealth of Nations, b. 5, c. 1. It is a right not to be transferred but extinguished.

The majority of the court, speaking by Chief Justice Marshall, found it sufficient for the decision of the case to make the cautious statement that "the nature of the Indian title, which is certainly to be respected by all courts until it is legitimately extinguished, is not such as to be absolutely repugnant to a seizin in fee on the part of the State." The minority, speaking by Johnson, J., held that the Indian tribes within the States had the fee subject to a right of preemption by the States in which the land was located, and that this right of preemption could be conveyed by the State to the United States.

In the case of Johnson *v.* McIntosh, 8 Wheaton, 543, to which reference has already been made, an Indian title purporting to have been granted by the Indian tribes inhabiting the country to a body of private individuals when the United States were British colonies was held invalid.

The Supreme Court, speaking by Chief Justice Marshall, rendered a unanimous decision, covering in their opinion the historical aspects of every phase of the Indian land question from the standpoint of English and American law and the law of nations. The following extracts will illustrate the point decided by the court:

> The inquiry * * * is, in great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the courts of this country. * * *
>
> On the discovery of this immense continent the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all, and the character and religion of its inhabitants afforded an apology

for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the Old World found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new by bestowing on them civilization and Christianity in exchange for unlimited independence. But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. The principle was that the discovery gave title to the Government by whose subjects or by whose authority it was made, against all other European Governments, which title might be consummated by possession.

The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which by others all assented.

The relations which were to exist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interfere between them.

In the establishment of these relations the rights of the original inhabitants were in no instance entirely disregarded, but were necessarily, to a considerable extent, impaired. They were admitted to be rightful occupants of the soil, with a legal as well as a just claim to retain possession of it and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the rights of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.

After a long and careful examination of the practice of the nations of continental Europe and of Great Britain, and particularly of the practice of Great Britain in dealing with the lands occupied by the Indians in the American colonies, the opinion summarizes these practices as follows:

> Thus all the nations of Europe who have acquired territory on this continent have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians.

The practice of the United States is then examined at length and the court thus sums up the results of its examination:

> The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold and assert in themselves the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy either by purchase or by conquest; and gave

also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.

In the year 1888 the question of the Indian title to lands in Canada, as established by the peace treaty of 1763 between Great Britain and France and by the British royal proclamation of 1763 dividing the western territory into Provinces and providing for its government, came before the judicial committee of the British Privy Council on appeal from the Supreme Court of Canada in the case of St. Catharine's Milling Company *v.* The Queen, L. R., 14 App. Cas., 46. The lands in question having been occupied by certain Indian tribes since before 1763, and these tribes having surrendered by treaty their interest in them to the Dominion of Canada, in 1873, subsequently to the enactment of the British North America act of 1867. the question was whether the treaty operated as the extinguishment of a usufructuary right in these lands as Crown lands or was the conveyance of an actual title to the lands as the property of these Indian tribes; the Province of Ontario and its grantees, by the British North America act, being entitled to them on the one view of the law, and the Dominion of Canada and its grantees on the other. The judicial committee, in adopting the former view, said:

The capture of Quebec in 1759 and the capitulation of Montreal in 1760 were followed in 1763 by the cession to Great Britain of Canada and all its dependencies, with the sovereignty, property, and possession, and all other rights which had at any previous time been held or acquired by the Crown of France. A royal proclamation was issued on the 7th of October, 1763, shortly after the date of the Treaty of Paris, by which the Majesty King George erected four distinct and separate governments, styled, respectively, Quebec, East Florida, West Florida, and Grenada, specific boundaries being assigned to each of them. Upon the narrative that it was just and reasonable that the several nations and tribes of Indians who lived under British protection should not be molested or disturbed in the "possession of such parts of our dominions and territories as, not having been ceded to or purchased by us, are reserved to them or any of them as their hunting grounds," it is declared that no governor or commander in chief in any of the new colonies of Quebec, East Florida, or West Florida do presume on any pretense to grant warrants of survey or pass any patents for lands beyond the bounds of their respective governments, or "until our further pleasure be known" upon any lands whatever, which, not having been ceded or purchased as aforesaid, are reserved to said Indians, or any of them. It was further declared "to be our royal will for the present as aforesaid, to reserve under our sovereignty, protection, and dominion for the use of the said Indians all the land and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company." The proclamation also enacts that no private person shall make any purchase from the Indians of lands reserved to them within those colonies where settlement was permitted, and that all purchases must be on behalf of the Crown, in a public assembly of the Indians, by the governor or commander in chief of the colony in which the lands lie. * * *

Whilst there have been changes in the administrative authority, there has been no change since 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favor of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion that, inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which show that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the sovereign. The lands reserved are expressly stated to be "parts of our dominions and and territories," and it is declared to be the will and pleasure of the sovereign that "for the present" they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the bar with respect to the precise quality on the Indian right, but their lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of the case that there has been all along vested in the Crown a substantial and paramount estate underlying the Indian title, which became a *plenum dominium* whenever that title was surrendered or otherwise extinguished.

In the report of the Committee on Indian Affairs of the United States House of Representatives, submitted in 1830, and favoring legislation relating to the removal of the Indians to the Indian Territory, the legal aspects of the provision of such reserves for aboriginal tribes is considered. In that report (21st Cong., 1st sess., H. R. Rep. No. 227, Feb. 24, 1830), it was said:

The rigor of the rule of their exclusion from these rights [the rights of soil and sovereignty] has been mitigated, in practice, in conformity with the doctrines of those writers upon natural law, who, while they admit the superior rights of agriculturalists over the claims of savage tribes in the appropriation of wild lands, yet, upon the principle that the earth was intended to be a provision for all mankind, assign to them such portion as, when subdued by the arts of the husbandman, may be sufficient for their subsistence.

To the operation of this rule of natural law may be traced all those small reservations to the Indian tribes within the limits of most of the old States. The General Court of Massachusetts fell short of coming up to the principle of natural law, but went beyond the general maxims of the period, when, in 1633, it declared "that the Indians had the best right to such lands as they had actually subdued and improved." That Government, at the same time, asserted its right to all the rest of the lands within its charter, and actually parceled them out by grant among the white inhabitants, leaving to them the discretionary duty of conciliating the Indians by purchasing their title. The general assembly of Virginia asserted the unrestricted right of a conqueror, and, at the same time conceded what the principles of natural law were supposed to require, when, in 1658, it enacted "that for the future no lands should be patented until 50 acres had been first set apart to each warrior or head of a family belonging to any tribe of Indians in the neighborhood."

The recognition of this principle by the Federal Government may be seen, at this day, in those small reservations which are made to individual Indians, or

to the tribe itself, upon the relinquishment of the body of their lands. These reservations are made in deference to the principles of humanity, and because it has been found expedient to the interests of the Government making them. No respectable jurist has ever gravely contended that the right of the Indians to hold their reserved lands could be supported in the courts of the country upon any other ground than the grant or permission of the sovereignty or State in which such lands lie. The Province of Massachusetts Bay, besides the subdued land already mentioned, during the early period of its history, granted other lands to various friendly tribes of Indians. Gookin, the great protector and friend of the Indians, about the time these grants were made was asked, why he thought it necessary to procure a grant from the general court for such lands as the Indians needed, seeing that "they were the original lords of the soil." He replied that "the English claim right to the land by patent from their King." No title to lands that has ever been examined in the courts of the States, or of the United States, it is believed, has been admitted to depend upon any Indian deed of relinquishment, except in those cases where, for some meritorious service, grants have been made to individual Indians to hold in fee simple.

Some of the colonies found it necessary, for the preservation of peace upon their frontiers, to establish a general Indian boundary, beyond which the white inhabitants were forbidden to settle, until authorized by law. These lines were generally in advance of the settlements. They were also commonly established in conformity with the stipulations made with the Indians in conferences or treaties. That the Indian boundaries were regarded as temporary, and implied no abandonment of the principle upon which the country was settled, is clear from many circumstances attending them. In some cases the laws by which these lines were established did not forbid the appropriation of the lands embraced in them by patent. Patents, in two or three of the colonies or States, did actually issue under such circumstances; yet, these acts, implying, as they do, a most important act of ownership and sovereignty, have been solemnly adjudged valid by the judicial tribunals of the country most distinguished for their learning. But the most decisive evidence of the light in which these reservations have always been viewed, in regard to the question of title, is to be found in the fact, that the Crown or the proprietors of Provinces, before the Revolution, and the States, after that event, succeeding as they did to the sovereignty over all the lands within the limits of their respective charters, have asserted the exclusive right, in themselves, to extinguish the title to lands reserved to the Indians, until the Constitution was adopted. Since that time the Federal Government has acted upon the same principle in regard to the lands belonging to the Government. If the principles upon which this right is asserted, and the effect it has had in practice, be examined, it will be found to be a complete recognition of the original rule which the nations of Europe acted upon in the first partition and settlement of the country. Some of the States have incorporated this right in their constitutions, as a principle of primary importance. Laws have been passed in all the rest, in which there are Indian reservations, granted by the States, declaring the same exclusive right.

The committee do not understand that either the States or the Federal Government ever acted upon the principle that it was necessary to obtain the consent of the Indians before the right to exclude all competitors from the market of their lands could be asserted. It is asserted, upon the ground of ownership and political sovereignty, and can be sustained upon no other principles than those which our ancestors supposed to be well founded, when they denied to the Indians any right to more land than they required for their sub-

sistence by agriculture. The Indians are paid for their unimproved lands as much as the privilege of hunting and taking game upon them is supposed to be worth, and the Government sells them for what they are worth to the cultivator. The difference between those values is the profit made by asserting the original rights of discovery and conquest. The rigor of the original rule has been mitigated in the exercise of this right of preemption in regard to such lands as have been improved by the Indians, for the same reason that their right to such as they had subdued was respected by the colonists in the early period of their history. Improved lands or small reservations in the States are in general purchased at their full value to the cultivator. To pay an Indian tribe what their ancient hunting grounds are worth to them after the game is fled or destroyed as a mode of appropriating wild lands claimed by Indians has been found more convenient, and certainly it is more agreeable to the forms of justice, as well as more merciful, than to assert the possession of them by the sword. Thus the practice of buying Indian titles is but the substitute which humanity and expediency have imposed in place of the sword in arriving at the actual enjoyment of property claimed by the right of discovery and sanctioned by the natural superiority allowed to the claims of civilized communities over those of savage tribes. Up to the present time so invariable has been the operation of certain causes, first, in diminishing the value of forest lands to the Indians and, secondly, in disposing them to sell readily, that the plan of buying their right of occupancy has never threatened to retard in any perceptible degree the prosperity of any of the States. The extensive tracts of country at first withheld from the agriculturist by reservations in several of the old States have been gradually reduced by various cessions, made as they were required by the interests of the respective States, until the Indians in most of them already find themselves restricted to those small bounds which the law of nature as interpreted by our ancestors prescribed as their right. With what steadiness this policy has been adhered to by the States generally in regard to Indian reservations in which they claimed the absolute property may be seen by tracing its operation in any one of them, for in all the interest was the same, and the result could not vary materially. The governor of the only one of the old States, except Georgia, inhabited by any considerable number of Indians is by law a standing commissioner to treat with the Indians for any or all their lands.

In justice to the character of the early adventurers to this country, as well as to our own, it ought to be mentioned that, from the period of the origin of these States, the interests of the white population and those of the Indians were understood by the whites not to be inconsistent with each other in regard to the appropriation of forest lands.

In the report of Rev. Jedediah Morse, made to the Secretary of War in 1821, above quoted, the legality of the removal of the Indians to reservations is asserted and the plan recommended. In this report it was said:

The relations which the Indians sustain to the Government of the United States is peculiar in its nature. Their independence, their rights, their title to the soil which they occupy are all imperfect in their kind. Each tribe possesses many of the attributes of independence and sovereignty. They have their own forms of government, appoint their own rules, in their own way, make their own laws, have their own customs and religion, and without control declare war and make peace and regulate all other of their civil, religious, and social affairs. The disposal of their lands is always done by formal treaties

between the Government of the United States and the tribe, or tribes, of whom the lands are purchased. They have no voice, no representation in our Government; none of the rights of freemen, and participate with us in none of the privileges and blessings of civilized society. In all these respects Indians are strictly independent of the Government and people of the United States. Yet the jurisdiction of the whole country which they inhabit, according to the established law of nations, appertains to the Government of the United States; and the right of disposing of the soil attaches to the power that holds the jurisdiction. Indians, therefore, have no other property in the soil of their respective territories than that of mere occupancy. This is a common, undivided property in each tribe. When a tribe, by treaty, sell their territory they sell only what they possess, which is the right to occupy their territory, from which they agree to remove.

The complete title to their lands rests in the Government of the United States. The Indians, of course, can not sell to one another more than what they possess; that is, the occupancy of their lands. Nor can they sell anything more than occupancy to individual white people. Indian conveyances give no title to the soil. This title can come only from the power that holds the jurisdiction.

Besides, the territory necessary to give support to any given number of people in the hunter state, as it is designated, is vastly greater than is required to yield subsistence to the same number of people in the agricultural state. Here, again, the Indian title to their respective territories is imperfect in another respect. When the hunter state, from whatever cause, is relinquished and the agricultural state adopted, the Indians are entitled to no more of their territories, so changed, than is requisite to give them, from cultivating the earth, a support equal to that which they derived from their whole territory in the hunter state. The advantages of the agricultural over the hunter state are presumed to be a just equivalent to the Indians for the lands they are constrained to resign to the civilized state. Such appear to be the established laws and doctrines of our General and State Governments, in respect to our relation to the Indian tribes in our country, to their independence, their rights, and title to their lands.

In recent years the appreciation of the value of aborigines as laborers in developing a new region has led to the practice of protecting and educating them on reservations containing the native settlements, in the midst of or near to the settlements of the civilized colonists, so that their labor may be available. Such a system has been adopted in South Africa after a long and careful study of the problem of the aborigines of the region, apparently with benefit to all concerned. (See the Union of South Africa, with chapters on Rhodesia and the Native Territories of the High Commission, by W. Basil Worsfold, London, 1912, pp. 35 to 46.)

(See also British Parl. Papers, 1905 (Cd. 2399), vol. 55, p. 67, Report of the South African Native Affairs Commission.)

(British Parl. Papers, 1908 (Cd. 4119), vol. 70, p. 273, Report on Native Education in South Africa; ib. (Cd. 3889), vol. 72, p. 5, Report of South African Native Affairs Commission.)

(British Parl. Papers, 1914 (Cd. 7508), vol. 59, Union of South Africa: Correspondence relating to the Natives Land Act, 1913.)

The modern practice of nations in regard to making reserves of lands for the aboriginal tribes is much more favorable to the aborigines than was the practice of a century ago. Thus in the British protectorate of Uganda, a general land settlement was made after the pacification of the country and the submission of the King Mwanga to the sovereignty of Great Britain, which is described by Sir H. H. Johnston, the commissioner having charge of the settlement (British Parl. Papers, 1901, vol. 48 (Cd. 671), Africa No. 7, 1901, p. 14):

The general arrangement regarding the land settlement effected during the past 18 months is as follows: Where the country is inhabited by settled natives they are to retain—as individuals or tribes—in their exclusive possession the land they actually occupy or cultivate. All forests and all waste land have become the property of His Majesty's Government. In return for the surrender of these rights to the waste and uncultivated lands, in almost all cases, direct payments have been made to the chiefs or peoples. The exceptions to this rule have been few, and have been occasioned by unprovoked attacks on the part of the natives.

In imposing terms of peace these once hostile natives have been guaranteed the possession of the lands they occupied, but have been told that the right to the waste and uncultivated lands has been vested in His Majesty's Government by right of conquest.

In cases where the natives surrendered their rights voluntarily and without compensation, a promise has usually been given that in the event of the tribe increasing and multiplying to a considerable extent, the local government would endeavor to allot it further tracts from out of the waste and uncultivated lands to meet the increase of native population. In the Province of Uganda and the district of Toro, where the natives had attained a certain degree of civilization and where individual ownership of land is a matter of great importance, an attempt has been made to bring about a very elaborate allotment. Estates have been marked off, both large and small, by the local chiefs, in concurrence with the European administration, and it is hoped that the Uganda survey department may put a seal on this settlement by a survey which would place these boundaries beyond dispute.

I think I may say that nothing has tended to bring about friendlier relations between the European administration and the native population than this adjustment of the land question. What the natives dreaded in the advent of European control was that they would lose their lands and become the tenants of European landlords. In the case of tribes like the Masai, who do not cultivate the soil or do not even settle on it very definitely, grazing grounds to a fair extent have been allotted on much the same lines as though the land was under cultivation. There are, of course, parts of the protectorate, as I have already pointed out, absolutely without a settled population, which are only occupied temporarily by hunters in pursuit of game or in search of wild-bee honey.

Here the British Government has at its disposal valuable tracts which it can open for direct European colonization without in any way hurting the feeling of an indigenous race. Elsewhere in the protectorate, however, so long as the natives live loyally under our protection and pay the taxes which they have agreed to pay, great tenderness should be shown toward their feelings in regard to the land, for it is they who will, or should in the main,

support the charges in the administration. Of course, there remain in these countries enormous tracts of fertile soil which the Government may deal with freely and may hand over to European settlers and capitalists without any inquiry to native rights or aspirations at all, but we should be careful to mentally reserve at least half of this area of disposable ground for the future hoped-for increase in the native population.

The rule of the law of nations according to which aborigines have only a personal right of occupying the land inhabited by the tribes to which they belong, subject to the right of the State exercising the sovereignty to restrict them to lands which it sets apart and reserves for them, suitable for them as agriculturists, necessarily gives the aborigines an inferior station with respect to the colonists and exposes them to being cheated out of their lands by malevolent Europeans. To avoid this situation and this possibility, a practice has recently been put in operation in some of the British colonies by which the British Government grants all land on lease, reserving a rental, so that all transfers of land are subject to its sanction as general landlord. The aborigines are thus protected and the formation of monopolistic holdings is prevented. The land rental being paid by the colonists and the aborigines alike, there results a just division of the expenses of government between the two elements of the population. This practice was instituted in 1910 in Northern Nigeria by order of the British Government as the result of the inquiry and investigation of a governmental commission. The provisions of the land-tenure act are as follows:

Whereas it is expedient that the existing customary rights of the natives of Northern Nigeria to use and enjoy the land of the protectorate and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves and their families should be assured, protected, and preserved;

And whereas it is expedient that existing native customs with regard to the use and occupation of land should, as far as possible, be preserved;

And whereas it is expedient that the rights and obligations of the Government in regard to the whole of the lands within the boundaries of the protectorate of Northern Nigeria and also the rights and obligations of cultivators or other persons claiming to have an interest in such lands should be defined by law:

1. This proclamation may be cited as the land and native rights proclamation.

2. The whole of the lands of the protectorate of Northern Nigeria, whether occupied or unoccupied on the date of the commencement of this proclamation, are hereby declared to be native lands [certain lands being reserved by a proviso].

3. All native lands, and all rights over the same, are hereby declared to be under the control and subject to the disposition of the governor, and shall be held and administered for the use and common benefit of the natives of Northern Nigeria; and no title to the occupation and use of any such lands shall be valid without the consent of the governor.

4. The governor, in the exercise of the powers conferred upon him by this proclamation with respect to land, shall have regard to the native laws and customs existing in the district in which such land is situated.

5. A title to the use and occupation of land shall be termed a right of occupancy, and the grantee thereof shall be termed the occupier.

6. It shall be lawful for the governor—

(*a*) To grant rights of occupancy to natives of Northern Nigeria and to persons other than natives of Northern Nigeria;

(*b*) To demand a rental for the use of any native lands granted to any native or non-native; and,

(*c*) To revise the said rental at intervals of not more than seven years.

Such rights of occupancy may be for a definite or for an indefinite term, and may be granted subject to the terms of any contract which may be made between the governor and the occupier not inconsistent with the provisions of this proclamation, or any of them;

Provided, that the governor shall not (save in the case of a right granted in connection with a mining lease) grant rights of occupancy free of rent or upon any conditions which may preclude him from receiving the rent at intervals of not more than seven years.

7. An occupier shall have exclusive rights to the land granted to him against all persons except the governor.

8. It shall not be lawful for any occupier to alienate his right of occupancy by sale, mortgage, or transfer of possession without the consent of the governor first had and obtained. And any such sale, mortgage, or transfer effected without the consent of the governor shall be null and void.

9. It shall not be lawful for the governor to revoke rights of occupancy granted as aforesaid except for good cause. "Good cause" shall include—

(*a*) Non-payment of rent, taxes, or other duties imposed upon the land;

(*b*) Alienation by sale, mortgage, or transfer of possession without the consent of the governor; and,

(*c*) Requirement of the land by the Government for public purposes.

Provided always that—

(*a*) Should the rental demanded by the governor from the occupier be raised on revision, the occupier may surrender his rights and shall in that case be entitled to compensation from the governor to the value at the date of surrender of his unexhausted improvements; and,

(*b*) Should any occupier be compelled to surrender his rights owing to the requirement of the land by the Government for public purposes, he shall be entitled to compensation for the value at the date of surrender of his unexhausted improvements and for the inconvenience caused by his disturbance.

10. The devolution of the rights of an occupier upon death shall be regulated, in the case of natives, by the native custom existing in the locality in which the land is situated, and, in the case of non-natives, by the law of the deceased person's domicile.

11. (1) It shall be lawful for the governor, when granting a right of occupancy, to issue a certificate thereof under his hand and the seal of the protectorate in the form 1 set out in the second schedule hereto, or to the like effect. Any such certificate shall be deemed to be an instrument affecting land, and shall be registered in accordance with the provisions of Part II of this proclamation. (2) Any person entitled to a right of occupancy may apply for

a certificate, which may be granted in the same manner and subject to the same conditions as in subsection 1 hereof.

12. Every such certificate shall be deemed to contain provisions to the following effect:

(*a*) That the occupier binds himself to the governor to pay compensation for any damage caused to native individuals or communities in the exercise of the rights granted to him and to accept the ruling of the governor as to the amount of such compensation;

(*b*) That the occupier binds himself to pay to the governor the amount found to be payable in respect of any unexhausted improvements existing on the land at the date of his entering into occupation;

(*c*) That the occupier binds himself to pay to the governor the rent fixed by the governor and any rent which may be fixed on revision in accordance with the provisions of this proclamation.

13. In determining the rent to be demanded for any given land and on any subsequent revision of rent the governor shall take into consideration the rent obtained or obtainable in respect of any other like land in the immediate neighborhood, and shall fix the rent at the highest amount that can reasonably be obtained for the land; provided that in determining the amount of any rent, whether original or revised, the governor shall not take into consideration any value due to capital expended upon the land by the same or any previous occupier during his term or terms of occupancy, or any increase in the value of the land the rental of which is under consideration, due to the employment of such capital.

14. All claims arising under the provisions of this proclamation in respect of any right granted under a certificate of occupancy shall be prosecuted before the Supreme Court, which court shall have jurisdiction throughout the protectorate accordingly; and the chief justice of the protectorate shall have power to make rules as to the prosecution of such claims and matters relating thereto in the same manner as in matters concerning the ordinary jurisdiction of the court.

15. Nothing in this proclamation shall be deemed to affect the validity of any title to land or any interest therein acquired before the date of the commencement hereof, but all such titles shall have the same effect and validity in all respects as though this proclamation had not been enacted.

(Revised Laws of Northern Nigeria, 1910, ch. 65, p. 667.)

A land system similar to that of Northern Nigeria was put in force by the British Government in British New Guinea in 1906. All the land in the colony, except 21,920 acres of freehold, was acquired by the Crown and leased for 99 years, with free survey and free of rent for 10 years, rent being payable after 10 years.

(Papua, or British New Guinea, by J. H. P. Murray, London, 1912, pp. 339–344.)

In a publication of the International Colonial Institute of Brussels, in six volumes, which appeared between 1898 and 1905, entitled "The Land System in Colonies"—*Le Régime Foncier des Colonies*, the principles applied by the different States respecting the disposition of the land in countries inhabited by aboriginal tribes brought under their sovereignty were examined and the important statutes and regulations quoted in full. From this study it appears that the

system pursued by the United States in its dealings with lands occupied by aborigines is followed by all colonizing States. The extent of the lands regarded as "vacant," and hence as belonging to the colonizing State in fee simple, as "public lands," or "Crown lands" varies according to peculiar circumstances of each case. The rights respecting the land conceded by the colonizing State to the aboriginal tribes or communities and their members also vary in character according to the capacity of the aborigines and the nature of the aboriginal customs with regard to individual use or ownership of the land.

In colonies which contain large tracts of land suitable only for grazing purposes where the aborigines have flocks and herds and the principal business of the colonists is stock raising, the settlement of the land question is always difficult. The colonists and the aborigines are in such cases in economic competition with each other and, the native operations being unscientifically conducted, the competition tends to become bitter. Moreover, the need of the aborigines to have land for grazing induces them to claim large tracts, which the colonists are unwilling to allow them. Thus the economic competition tends to lead to war between the colonists and the aborigines, which invariably results in the more or less complete extinction of the aborigines. The settlement of the land question then proceeds on the basis of granting the survivors of the defeated tribes such compensation in reserves of land as the embittered feelings of the colonists will allow. Such has been the experience in the grazing regions of Australia and southwest Africa.

In States and self-governing colonies in regions suitable for white residence and capable of supporting a manufacturing and mining population, the civilized population tends to overwhelm the aborigines and to reduce their land holdings to a minimum. The close contact of the two elements of the population permits of the handling of the problem by direct means, and the tendency is, in case the aborigines have been heretofore deprived of a just proportion of the lands, for States and self-governing colonies to allot public land to them or even to acquire land by condemnation in order to satisfy their just claims as original occupants of the soil. This practice seems to have been adopted since about 1905 by the civilized States exercising sovereignty in the southern part of Africa. Especially where the labor problem becomes acute and the economic needs of the colonists coincide with the moral and legal duties of the colonizing State, this more liberal practice concerning the adjustment of the rights of the aborigines to land tends to prevail.

CHAPTER VII.

THE RIGHTS OF ABORIGINES TO PERSONAL LIBERTY AND PERSONAL PROPERTY.

(A) ENSLAVEMENT OF ABORIGINES.

The question of the right of aboriginal peoples to personal liberty is inextricably interwoven with the question of slavery and the slave trade, since it is only as respects aboriginal peoples, and on the ground of guardianship that slavery and the slave trade have ever been accepted as legal according to the law of nations. Slavery has been justified on the ground that a State may delegate to private persons its functions concerning the uncivilized persons under its sovereignty as political and civil minors. The situation of slaves has been regarded as resembling that of civilized minors, whom the State requires to be apprenticed to persons expert in an art or a science, so that they may be trained in the art or science. The slave trade has been justified as an incident of the power of the State to authorize or permit the enslavement of uncivilized persons. Slavery of uncivilized peoples has also been justified by the same course of reasoning that villeinage and serfdom were justified under the Roman and feudal systems, the foundation principle being that all society should be organized in grades of supremacy corresponding to the actual social stratification.

When the first negroes were persuaded to leave Africa and transported across the ocean to be the slaves of civilized individuals, who were themselves influenced in their actions by Christian priests, the institution of slavery and of the slave trade appeared to be but a means for the civilization of the African aborigines, especially when liberal provisions were made for the manumission of slaves or for their naturalization upon attaining to civilized knowledge and skill.

As the process of deporting negroes from Africa for enslavement increased in extent, and as slavery and the slave trade became more and more commercially profitable, these institutions began to reveal themselves in their true character as abominations inconsistent with the fundamental principles upon which civilization is based.

Nevertheless, when the question of the rights and duties of civilized States toward aboriginal populations came up for international decision in the middle of the eighteenth century, the unanimous con-

clusion was that each State was under no international obligation whatever as to the manner of exercising its guardianship over aborigines, and that under the law of nations neither slavery nor the slave trade was illegal, though, on account of its nature, its prohibition by any State to its own citizens could not be a cause of complaint by other States.

The declaration of the fundamental rights of the individual in the preamble of the American Declaration of Independence in 1776, the similar French Declaration in 1791, and the act of France abolishing slavery of 1794 (which continued in force till 1802, when the old system of slavery and the *code noir* were reestablished by Napoleon), led to a reconsideration of the principles of the law of nations as respects enslavement of aboriginal peoples, and to a movement for abolishing and outlawing the slave trade.

The act of the United States of 1794, prohibiting to American citizens the slave trade with colonies of foreign States, was followed by the entire prohibition of the slave trade by Great Britain to its citizens in 1807 and the entire prohibition of the trade by the United States to its citizens in 1808. These acts led to captures of slave-trading vessels, and the admiralty courts were called upon to declare and apply the principles of the law of nations in this regard.

In the case of *The Amedie*, decided in the British Court of Admiralty in 1811, it was said by Sir William Grant (Dodson's Admiralty Reports, p. 84, note):

> In all the former cases of [this] kind which have come before this court, the slave trade was liable to considerations very different from those which belong to it now. It had at that time been prohibited [as far as respected carrying slaves to the colonies of foreign nations] by America, but by our own laws it was still allowed. It appeared to us, therefore, difficult to consider the prohibitory law of America in any other light than as one of those municipal regulations of a foreign State of which this court could not take any cognizance. But by the alteration which has since taken place, the question stands on different grounds, and is open to the application of very different principles. The slave trade has since been totally abolished by this country, and our legislature has pronounced it to be contrary to the principles of justice and humanity. Whatever we might think as individuals before, we could not, sitting as judges in a British court of justice, regard the trade in that light while our own laws permitted it. But we can now assert that this trade can not, abstractedly speaking, have a legitimate existence.
>
> When I say abstractedly speaking, I mean that this country has no right to control any foreign legislature that may think fit to dissent from this doctrine, and to permit to its own subjects the prosecution of this trade; but we have now a right to affirm that *prima facie* the trade is illegal, and thus to throw on claimants the burden of proof that, in respect of them, by the authority of their own laws, it is otherwise. As the case now stands, we think we are entitled to say that a claimant can have no right, upon principles of universal law, to claim the restitution, in a prize court, of human beings claimed as his slaves. He must show some right that has been violated by the

capture, some property of which he has been dispossessed, and to which he ought to be restored. In this case the laws of the claimant's country allow of no property such as he claims. There can, therefore, be no right to restitution.

Commenting on the case of *The Amedie*, Sir William Scott, in the High Court of Admiralty in the case of *The Fortuna*, decided March 12, 1811 (Dodson, 81), said:

A late decision, in the case of *The Amedie*, seems to have gone the length of establishing a principle that any trade contrary to the general law of nations, although not tending to or accompanied with any infraction of the belligerent rights of that country whose tribunals are called upon to consider it, may subject the vessel employed in that trade to confiscation. The *Amedie* was an American ship employed in carrying on the slave trade; a trade which this country, since its own abandonment of it, has deemed repugnant to the law of nations, to justice and humanity, though without presuming so to consider and treat it, where it occurs in the practice of the subjects of a State which continues to tolerate and protect it by its own municipal legislation; but it puts upon the parties who are found in the occupation of that trade the burden of showing that it was so tolerated and protected; and on failure of producing such proof, proceeds to condemnation. * * * The principle laid down in that case appears to be that the slave trade, carried on by a vessel belonging to a subject of the United States, is a trade which, being unprotected by the domestic regulations of the United States, subjects the vessel engaged in it to a sentence of condemnation.

In the case of *The Diana*, decided in the British Court of Admiralty in 1813, the court, speaking by Sir William Scott, said (Dodson, 95):

This trade was at one time, we know, universally allowed by the different nations of Europe and carried on by them to a greater or less extent, according to their respective necessities. Sweden, having but small colonial possessions, did not engage very deeply in the traffic, but she entered into it as far as her convenience required for the supply of her own colonies. The trade, which was generally allowed, has been since abolished by some particular countries; but I am yet to learn that Sweden has prohibited its subjects from engaging in the traffic, or that she has abstained from it either in act or declaration. Our own country, it is true, has taken a more correct view of the subject and has decreed the abolition of the slave trade, as far as British subjects are concerned, but it claims no right of enforcing its prohibition against the subjects of those States which have not adopted the same opinion with respect to the injustice and immorality of the trade.

The principle * * * laid down by the superior court [in the case of *The Amedie*] * * * was that where the municipal laws of the country to which the parties belong have prohibited the trade, the tribunals of this country will hold it to be illegal upon the general principles of justice and humanity and refuse restitution of the property; but on the other hand, though they consider the trade to be generally contrary to the principles of justice and humanity where not tolerated by the laws of the country, they will respect the property of persons engaged in it under the sanction of the laws of their own country. The lords of appeal did not mean to set themselves up as legislators for the whole world, or presume in any manner to interfere with the commercial regulations of other states, or to lay down general principles which aim to overthrow their legislative provisions with respect to the conduct of their own subjects.

At the Congress of Vienna the British Government, which had succeeded in 1814 in making a treaty with France for the prohibition of the slave trade to its citizens at the expiration of eight years, endeavored to obtain a general pronouncement of the nations forming the Concert of Europe against the slave trade. The preliminary question, whether the slave trade should be declared to be illegal by the existing law of nations, or should be recognized as legal by the existing law but subject to abolition by the uniform and cooperative action of the nations as contrary to humanity under existing conditions, was settled by Great Britain making a treaty with the United States providing for compensation for all slaves of American citizens captured during the war and a treaty with Portugal fixing the damages to be paid by Great Britain for its illegal capture of the Portuguese ships.

Almost immediately upon the signing of the treaty between Great Britain and Portugal, a special series of meetings of the eight powers then assembled in the so-called Congress of Vienna was held to consider the measures to be taken by uniform and cooperative action to abolish the slave trade. The following are the material parts of the proceedings of these meetings (British and Foreign State Papers, 1815–16, pp. 946–948):

Lord Castlereagh renewed his proposition that the Congress take up the question of the measures to be taken to bring about the cessation universally of the negro slave trade. He stated that, in his opinion, it was not necessary to appoint for this purpose a committee properly so called, but that the proper course was to consider the question in the assembly of the eight powers. He proposed that each power should select one of its plenipotentiaries and that these persons should hold special sessions exclusively devoted to this object, making report of the result of their deliberations to the general assembly of the Congress.

The Count of Palmella [plenipotentiary for Spain] objected to this proposal, declaring that he saw no reason why the general arrangement theretofore observed by the Congress, that only the powers more or less interested in the matters under consideration should take part in the discussion of these matters, should not equally apply to the question of the abolition of the negro slave trade; a question which concerned exclusively the powers possessing colonies. He was opposed to the proposal to deliberate on the question in a committee composed of plenipotentiaries of the eight powers. He thought that the powers not possessing colonies, after having committed themselves to the principle of abolition, could not be considered as entirely impartial as respects those of the powers having colonies which were hindered in putting the principle into execution by their particular interests; and might, perhaps, influenced by a zeal praiseworthy in itself, hasten the progress of abolition at the expense of the States whose special circumstances obligated them to proceed with the greatest prudence.

The Chevalier Labrador [plenipotentiary of Portugal], stated that he shared the opinion of Count Palmella, and observed: That inasmuch as all the powers were already agreed upon the general principle of the abolition of the slave trade, it would be useless to make it a subject of discussion; that the only

matters to be considered were the measures for carrying the principle into effect, and, above all, the fixing of the date at which the trade should cease; that these matters, inasmuch as they involve entirely details and local considerations, could not properly be discussed except by the powers possessing colonies and that it would be, if not unjust, at least useless, to admit the other powers; that it was an easy matter to condemn the slave trade by general assertions of principle, but that those powers whose colonial systems had been based up to this time upon the importation of negroes, found themselves, so to speak, placed between two injustices, one toward the inhabitants of Africa, the other toward their own subjects, the agricultural proprietors in the colonies, whose interests would be seriously affected by a too sudden change in the present system; that this last consideration was of special importance for Spain, because the state of agitation prevailing in the Spanish colonies on the mainland in America imposed on the Spanish Government the duty of redoubling its efforts for the conservation of peace and prosperity in the islands of Cuba and Porto Rico. He concluded by declaring that his Catholic Majesty, though in the highest degree desirous of abolishing the slave trade, could not bind himself to the abolition of it at the end of a shorter time than eight years.

The plenipotentiaries of Russia, Austria, Prussia, and Sweden [Count Nesselrode, Prince Metternich, Baron Humboldt, and Count Lowenhielm] announced it as their opinion that as a question of public morality and of humanity the abolition of the slave trade undoubtedly interested all the powers; that those not possessing colonies did not pretend to direct the details of carrying into effect such a measure; but that inasmuch as there was a division of opinion among the powers directly interested in this matter as respects these details, and particularly as regards the date to be fixed for abolition, the intervention of the others will be always useful in order to conciliate the opinions and bring about a result conformable to the views of humanity at large.

Lord Castlereagh declared that England, though attaching to the abolition of the slave trade a very far-reaching importance, was nevertheless far from wishing to lay down the law in this respect to any other power; that the period of the duration of the trade and the manner of arranging gradually for the suppression of this traffic were undoubtedly questions upon which each power possessing colonies might properly have its particular views, but that a committee exclusively composed of the plenipotentiaries of these powers would not respond to the object which he had in mind in introducing the discussion of this matter; that it was a question of knowing authentically the sentiments and point of view of the principal powers in regard to a matter which was also of general interest; and that he regarded the manner of deliberation proposed by him as the only one suitable to furnish in this respect a satisfactory elucidation.

At the conclusion of the discussion Prince Metternich formulated the point on which the assembly was to pronounce in the following language: "Ought the matter of the abolition of the negro slave trade to be sent in the first instance to a committee composed of plenipotentiaries of the powers possessing colonies or ought it to be considered *ab initio* by the assembled plenipotentiaries of the eight powers?"

The plenipotentiaries of Portugal and Spain persisted in their opinion that if the discussion was adjudged to be absolutely necessary, only the ministers of the powers possessing colonies should be admitted to participate. Count Palmella asked, further, that in case the contrary opinion should prevail, there should be inserted in the minutes of the proceedings a statement to the effect that the plenipotentiaries of Portugal, without withdrawing from the common

deliberations, do not regard the question which is to be considered as one of public law. On the other hand, the plenipotentiaries of England, Russia, Austria, Prussia, Sweden, and France voted against the special committee and for the intervention of the eight powers in this question.

Lord Castlereagh, referring to his original proposal, said that he did not mean to insist on only one plenipotentiary of each power being admitted to the deliberations; that the number of those who should participate was immaterial; that his intention had only been to have certain special sessions devoted to this matter, in order that it might be considered in a consecutive manner and so as to fit in with the time required for other business.

At the conference on February 4, 1815, consideration was given the British proposition to establish a permanent commission of surveillance, which should hold its meetings in London and was to be composed of the diplomatic representatives of the eight powers at the Courts of London and Paris. The resolution was as follows (British and Foreign State Papers, 1815–16, pp. 963–966):

In order to place the powers in a position to carry out more effectively and more completely by amicable negotiations their beneficent intentions with regard to the abolition of the negro slave trade, as stated in their joint declaration, and in order to establish between themselves and with other governments, a concert which shall be adapted both to break up illegal slave trade on the coast of Africa, and at the same time to prevent infraction of the rights of any independent State by the armed vessels of another State, it is proposed:

That the ministers accredited to London and Paris by the powers now in conference and by other powers who may desire to join in the arrangement, be authorized to discuss conjointly the important matters above mentioned, and be directed to make a joint report at the end of each year, for the information of their respective courts, upon the situation as respects trade in African negroes, based upon the most recent information obtainable, and in regard to the progress made by the nations concerned in diminishing or abolishing the trade.

The Chevalier de Labrador [plenipotentiary for Spain], objected to such an arrangement, asserting that "everything which relates to the slave trade is a domestic matter for each State, and not at all within the jurisdiction of the congress, which has not been called together to regulate the legislation of the nations, or to decide questions of morality"; and that "consequently it is only by an act of pure condescension on the part of the powers which have colonies that the congress is considering the slave trade." He then announced that the King of Spain "would not accord to one or more powers the right of exercising upon his subjects any act of surveillance under the pretext that they have violated a rule which has been established."

Prince Metternich, evidently expressing the sentiments of the majority of the congress, said, as reported in the minutes:

He was of the opinion that the project advanced by Lord Castlereagh was not merely practicable and useful, but was really necessary, in order to follow

up and keep before the public the question under discussion and to prevent it from being again dropped and consigned to oblivion after the congress. He believed that in order to put each government in the position of taking part in the deliberations regarding the execution of measures and the development of new measures, and of knowing the state of things at any given period, it is necessary that there should be a central point where each State should be able to inform itself. For the same reasons he approved the feature of annual reports upon the progress made toward abolition and the obstacles encountered.

The views of Austria, advanced by Metternich, were approved by the plenipotentiaries of Russia and Prussia, but the colonial powers, other than Great Britain, objecting, the resolution failed.

Lord Castlereagh then proposed a plan for the economic boycott of States not joining in the abolition of the slave trade. His proposition was as follows:

As the concluding act of the deliberations regarding the means of causing the entire cessation of the slave trade, the powers now convened for this object are invited to pronounce (independently of their general declaration) their full and entire adhesion to the additional article of the treaty concluded at Paris between Great Britain and France as indicating, according to their opinion, the maximum period which can reasonably be needed or permitted for the continuance of the trade; and to declare that while recognizing the duty of respecting scrupulously the rights of other States, and entertaining the hope of agreeing amicably with them on this important branch of the question, the powers believe that they have the moral obligation, in case their attempts at amicable agreement should fail, not to permit that the consumption of colonial products in their territories should become the means of encouraging and prolonging gratuitously so pernicious a traffic; and to now declare that in view of the existence of such a moral obligation they reserve to themselves the right, in case the negro slave trade should be continued by any State beyond a period justified by the actual necessity of the case, to take suitable measures to obtain such colonial products either from the colonies belonging to the States which have not permitted a gratuitous toleration of the traffic, or from the vast regions of the globe furnishing the same products by the labor of their own inhabitants.

To this both Portugal and Spain objected. The minutes of the congress are as follows:

Count Palmella said that the project implied the intention of compelling those powers which were not able, for particular reasons, to abolish the trade within a certain number of years to submit themselves to the system of those who find themselves able to do so within the term, an intention which was not consistent with the principles accepted as the basis of the conferences and recognized in the declaration.

The plenipotentiary of Spain declared that if such a measure should be adopted by any power whatsoever, His Majesty, the King of Spain, without disputing with this power its right to act according to its own principles, would have recourse to just reprisals by inducing the passage of a prohibitive law against the most valuable branch of the commerce of the country whose Government had provoked this act of reciprocity.

The project for an international commission of surveillance to advise the powers in their cooperative measures for the abolition of the

slave trade having failed, the far more drastic proposition for economic boycott against any colonial power refusing to cooperate necessarily met the same fate. An arrangement was afterwards made whereby the ministers to the French and British courts held meetings in London to discuss the measures for the abolition of the slave trade.

The declaration of the congress was as follows (British and Foreign State Papers, 1815–16, pp. 971, 972):

Declaration of the Eight Courts, relative to the universal abolition of the trade in negroes, Vienna, February 8, 1815.

The plenipotentiaries of the powers which signed the Treaty of Paris of May 30, 1814, assembled in conference, having taken into consideration:

That the commerce known under the name of "trade in the negroes of Africa" has been regarded by just and enlightened men of all times as repugnant to the principles of humanity and of universal morality;

That the particular circumstances to which this commerce owed its rise, and the difficulty of suddenly interrupting its course, have had the effect to conceal to a certain extent the odious results which flow from its maintenance, but that at last the public voice has raised itself in all the civilized countries demanding that it be suppressed as soon as possible;

That since the character and details of this commerce have become better known and the evils of all kinds, which are incident to it, have been completely disclosed, several of the European Governments have taken a determined resolution to bring about its cessation, and that, one after another, the powers possessing colonies in the different parts of the world have recognized, either by legislative acts, or by treaties and other formal engagements, the obligation and the necessity of abolishing it;

That by a separate article in the last Treaty of Paris, Great Britain and France engaged themselves to combine their efforts at the Congress of Vienna to cause to be pronounced by all the powers of Christianity the universal and definitive abolition of the trade in negroes;

That the plenipotentiaries assembled in this congress can not better do honor to their mission, fulfil their duty, and manifest the principles which guide their august sovereigns, than in laboring to realize this engagement and in proclaiming, in the name of their sovereigns, the wish to put an end to an evil which has so long desolated Africa, degraded Europe, and afflicted humanity;

The said plenipotentiaries have agreed to open their deliberations in regard to the means of accomplishing an object so salutary by a solemn declaration of the principles which have directed them in this work.

In consequence of the foregoing, and being duly authorized to this act by the unanimous adhesion of their respective courts to the principle announced in the said separate article of the Treaty of Paris, they declare in the face of Europe that, regarding the universal abolition of the trade in negroes as a measure particularly worthy of their attention, in conformity with the spirit of the age and with the generous principles of their august sovereigns, they are animated by a sincere desire to cooperate in a most prompt and most effective execution of this measure by all the means at their disposition, and to act in the employment of these means with all the zeal and all the perseverence which they owe to so great and admirable a cause.

Too well instructed, however, in the sentiments of their sovereigns not to foresee that, however honorable may be the end in view, they will not pursue it without making just arrangements taking into account the interests, the

customs, and even the prejudices of their subjects, the said plenipotentiaries, recognizing at the same time that this general declaration can not prejudge the term which each power under its particular circumstances may regard as most convenient for the definitive abolition of the commerce in negroes, it follows from the foregoing that the determination of the time at which this commerce shall universally cease will be an object of negotiation between the powers, it being understood that no proper means to assure and accelerate the progress toward abolition will be neglected and that the reciprocal engagement contracted by the present declaration between the sovereigns who have taken part in it will be considered as fulfilled only at the moment when a complete success shall have crowned their combined efforts.

In bringing this declaration to the attention of Europe, and all the civilized nations of the earth, the said plenipotentiaries are confident of engaging all the other Governments, and especially those which, by abolishing the trade in negroes, have already manifested the same sentiments, to lend their assistance in a cause the final triumph of which will be one of the most admirable monuments of the age which has embraced it and which will have brought it to a glorious end.

At the conference at London between Austria, France, Great Britain, and Russia, from December 14, 1817, to February 12, 1818, and at Aix-la-Chapelle, from November 2 to November 18, 1818, to concert measures for the suppression of the slave trade (British and Foreign State Papers, 1818–19, pp. 21 to 88) Lord Castlereagh proposed, in behalf of Great Britain, two measures. The first was, the concession by all the powers of a reciprocal right of search of ships suspected of slave trade, limited to that part of the ocean to be described in the treaty frequented by slave ships, and regulated so as to avoid harshness; and the second, the establishment of international prize courts composed of representatives of the powers so contracting to be located on the coast of Africa and on or near the coast of America.

The same proposal was made to the United States. (British and Foreign State Papers, 1819–20, pp. 373–385.)

Prior to the conference at Aix-la-Chapelle Great Britain had succeeded in negotiating treaties to this effect with Spain, Portugal, and Holland. The United States had passed laws in 1818 and 1819, providing for the punishment of its own citizens engaged in the slave trade and for the care of rescued negroes.

Austria, France, Prussia, Russia, and the United States refused to enter into the proposed arrangement, regarding a reciprocal right of search as derogatory to sovereignty and likely to lead to ill-feeling and bloodshed. They considered an international court for the trial of crimes committed in time of peace on the high seas to be inconsistent with the constitutional right of the citizen to be tried by the courts of his own country; the act being criminal only by virtue of a national statute, and not by virtue of the law of nations.

At the conference of Aix-la-Chapelle, the plenipotentiary for Russia proposed the establishment of an international "institution," which would in fact have an international commission of surveillance. It was to consist of a body of delegates of the European powers, who were to have their headquarters at some suitable settlement on the west coast of Africa and to hold sessions there. The commission was to exercise the general surveillance over the measures for abolishing the slave trade, to see that the principles and rules agreed upon at international conferences were executed, and to adjudicate cases of alleged violation of such principles and rules with power of condemnation and punishment. The Russian plenipotentiary also proposed an international fleet to carry into effect the law and the decisions of the institution. This proposal was rejected by Great Britain. (British and Foreign State Papers, 1818–19, pp. 67 to 69.)

In an article by W. Alison Philips on The Congresses of 1815 to 1822, in the Cambridge Modern History (vol. 10, pp. 1–39), it is said, referring to the Congress of Aix-la-Chapelle:

> Of more general importance were the discussions on the two great questions of the slave trade and the Barbary pirates. On neither of these was any decision reached. The slave trade had been condemned in principle by the Congress of Vienna; and, as the outcome of endless *pourparlers*, nearly all the European States had given at least a formal assent to the British demand for its suppression. In practice, however, Great Britain alone showed any activity in carrying out the work; and the trade continued to flourish under the protection of national flags. The British Government now proposed a reciprocal right of search, to be carried out by war vessels specially designated by the powers for that purpose. But, in view of the overwhelming superiority of England at sea, this was taken as tantamount to a license to British cruisers to interrupt the commerce of all nations, and the powers rejected it. A counter proposal of the Emperor Alexander to establish an international board of control on the west coast of Africa, with an international fleet commissioned to suppress the trade, met with no better success.

These proceedings with reference to the abolition of the slave trade by uniform and cooperative action in which the United States participated led the United States to consider its policy as respects Africa. It was then engaged in endeavoring to settle satisfactorily its Indian problem by removing the Indians to the western territory, there to be governed as municipal communities composed of dependent persons in a state of wardship and pupilage. The act of 1819 required the President to keep American warships on the west coast of Africa to capture American ships engaged in the slave trade and enjoined upon the commanders to settle the rescued negroes in Africa. In President Monroe's message of December 17, 1819, he recommended that the United States agents be sent to the west coast of Africa to oversee the settlement of these negroes, but

> With the express injunction to exercise no power founded on the principle of colonization, or other power than that of performing the benevolent offices

above recited, by the permission and sanction of the existing government under which they may establish themselves.

The question of the legality of the slave trade under the law of nations came before the British civil courts in 1820 in the case of Madrazo *v.* Willes, (3 Barn. and Ald. 353). This was an action brought by a Spaniard against a commander of a British naval vessel for damages for the seizure of a ship and a cargo of slaves.

Abbott, C. J., delivering the general opinion, held that the British statute prohibiting the slave trade had no force except with reference to citizens of Great Britain, and that the ships of Spain, which at the time of capture permitted the trade, could not be seized by British naval vessels. Bayley, J., in a concurring opinion, said:

It is true that, if this were a trade contrary to the law of nations, a foreigner could not maintain this action. But it is not; and as a Spaniard can not be considered as bound by the acts of the British legislature prohibiting this trade, it would be unjust to deprive him of a remedy for the wrong which he has sustained.

Best, J., in his concurring opinion, said:

If a ship be acting contrary to the general law of nations, she is thereby subject to confiscation; but it is impossible to say that the slave trade is contrary to what may be called the common law of nations.

In the case of *The Antelope* (10 Wheat., 66), decided in 1825 by the United States Supreme Court, the question was whether certain Africans, originally shipped by Spaniards and Portuguese for sale as slaves and found on a Spanish ship, were freed by being brought into a United States port by a United States revenue cutter in time of peace. It was held by the court that as they were in a Spanish vessel and the slave trade was allowed by the laws of Spain, they must be given up to the consuls of Spain and Portugal to be returned to their owners.

Chief Justice Marshall, in delivering the opinion of the court, said:

The question whether the slave trade is prohibited by the law of nations has been seriously propounded, and both the affirmative and negative of the proposition have been maintained with equal earnestness.

That it is contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labor, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission. But from the earliest times war has existed, and war confers rights in which all have acquiesced. Among the most enlightened nations of antiquity, one of these was, that the victor might enslave the vanquished. This, which was the usage of all, could not be pronounced repugnant to the law of nations, which is certainly to be tried by the test of general usage. That which has received the assent of all, must be the law of all.

Slavery, then, has its origin in force, but as the world has agreed that it is a legitimate result of force, the state of things which is thus produced by general consent, can not be pronounced unlawful.

Throughout Christendom this harsh rule has been exploded and war is no longer considered as giving a right to enslave captives. But this triumph of humanity has not been universal. The parties to the modern law of nations do not propagate their principles by force; and Africa has not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves. Can those who have themselves renounced this law be permitted to participate in its effects by purchasing the beings who are its victims?

Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution in those principles of action which are sanctioned by the usages, the national acts, and the general assent of that portion of the world of which he considers himself as a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question, as has already been observed, is decided in favor of the legality of the trade. Both Europe and America embarked in it; and for nearly two centuries it was carried on without opposition and without censure. A jurist could not say that a practice thus supported was illegal, and that those engaged in it might be punished, either personally, or by deprivation of property.

In this commerce, thus sanctioned by universal consent, every nation had an equal right to engage. How is this right to be lost? Each may renounce it for its own people; but how can this renunciation affect others?

No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all by the consent of all, can be divested only by consent; and this trade, in which all have participated must remain lawful to those who can not be ordered to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it.

If it is consistent with the law of nations, it can not in itself be piracy. It can be made so only by statute; and the obligation of the statute can not transcend the legislative power of the State which may enact it.

If it be neither repugnant to the law of nations, nor piracy, it is almost superfluous to say in this court that the right of bringing in for adjudication in time of peace, even where the vessel belongs to a nation which has prohibited the trade, can not exist. The courts of no country execute the penal laws of another; and the course of the American Government on the subject of visitation and search would decide any case in which that right had been exercised by an American cruiser, on the vessel of a foreign nation, not violating our municipal laws, against the captors.

Great Britain abolished slavery in the British colonies in 1833, paying the owners of slaves compensation for them. The statute provided that the condition of slavery was to cease August 1, 1834, but the former slaves were to stand in the relation of "apprentices" to their former masters, some for four and some for six years. The "apprenticeship" proved an unsatisfactory relationship, and the abolition of slavery in the British colonies became complete for all former slaves on August 1, 1838.

Meantime France established a royal commission for the abolition of slavery in the French colonies which made an elaborate investiga-

tion and report, as a result of which a bill for abolition was passed and abolition became complete in 1848.

In 1841 Great Britain, Austria, France, Prussia, and Russia entered into a treaty open to all the powers for the suppression of the slave trade by granting to each a reciprocal limited right of visitation, search, and capture of ships engaged in the slave trade, restricted to certain identified naval vessels, carefully regulated and confined to delimited areas of the ocean. In 1842 the United States entered into a similar treaty with Great Britain which was supplanted by a treaty of April 7, 1862, for the more effectual suppression of the slave trade.

Anti-slavery congresses were held in London in 1840 and 1843, and in Paris in 1867.

In the final act of the Berlin African Conference of 1884–85, a declaration against the slave trade was made, as follows:

> Art. 9. Seeing that the slave trade is forbidden according to the principles of international law, as recognized by the signatory powers, and seeing also that the operations which, by sea or land, furnish slaves to this trade are likewise to be regarded as forbidden, the powers which do or shall exercise sovereign rights in the territories forming the conventional basin of the Congo declare that those territories shall not serve as a market or means of transit for the trade in slaves, of whatever race they may be. Each of the powers binds itself to employ all the means at its disposal for putting an end to this trade and for punishing those who engage in it.

The declaration that the slave trade is "forbidden," followed by the words "according to the principles of international law as recognized by the signatory powers," evidently meant that, so far as the signatory powers were concerned, the old principles of international law according to which the slave trade was a legal operation—or, at least, not an illegal one—had been changed as a result of their individual acts prohibiting the trade to their citizens and their cooperative and reciprocal action in concerting and executing measures for abolishing the trade. The declaration is thus not a statement that the slave trade is contrary to the law of nations, but only that so far as the signatory powers are concerned, as between themselves, it is so held and regarded.

In August, 1889, an international colonial congress, held in Paris in connection with the International Exposition, called attention to the situation in Africa. In the previous year Cardinal Lavigerie had held a series of meetings in the cities of Europe in which he described the nature and extent of the practice of slavery in Africa and informed the public of the atrocities connected with the slave trade which was still being carried on. As a result of the efforts of the various parties interested, an international anti-slavery conference was convened at Brussels in November, 1889, which, on July 2, 1890,

adopted a convention called a final act of the conference, providing further measures for abolishing African slavery and the African slave trade.

The States participating were the United States, Germany, Austria, Belgium, Denmark, Spain, the Independent State of the Congo, France, Great Britain, Italy, Holland, Persia, Portugal, Russia, Sweden and Norway, Turkey, and Zanzibar. The convention was open to the adherence of all States.

In the preamble the clauses declaring the motives and objects of the contracting powers were as follows:

> Being equally actuated by the firm intention of putting an end to the crimes and devastations engendered by the traffic in African slaves, of efficiently protecting the aboriginal population of Africa, and of securing for that vast continent the benefits of peace and civilization.
>
> Wishing to give fresh sanction to the decisions already adopted in the same sense and at different times by the powers, to complete the results secured by them, and to draw up a body of measures guaranteeing the accomplishment of the work which is the object of their common solicitude, etc.

The Berlin African conference had declared that "the slave trade is forbidden according to the principles of international law as recognized by the signatory powers." The Brussels act was declared to be intended to "give fresh sanction to the decisions already adopted in the same sense by the powers." It seems a fair inference that the Brussels conference adopted the carefully qualified declaration of the Berlin conference.

The Brussels conference (art. 62 of the final act) declared that "the contracting powers whose institutions recognize the existence of domestic slavery, and whose possessions, in consequence thereof, in or out of Africa, serve in spite of the vigilance of the authorities as places of destination for African slaves, pledge themselves to prohibit their importation, transit, and departure, as well as the trade in slaves."

The effect of this provision was evidently to recognize "domestic slavery" as an institution which might be allowed to continue without violating the law of nations, provided the State tolerating the institution did not increase the number of its "domestic slaves" by importation. A fair inference would seem to be that the contracting nations held that "domestic slavery" was not contrary to the law of nations, but that they intended to place any extension of "domestic slavery" under international cooperative prohibition.

The convention made a declaration of the measures which they regarded as needful to be taken to repress the slave trade in the interior of middle Africa, on the caravan routes in and leading to middle Africa, and on the sea, and the powers bound themselves severally to take the necessary national measures, uniformly and

cooperatively with the others, so as to give their several actions a unity of effect.

The zone of international influence in Africa established by the Berlin African conference was largely increased by the Brussels African conference. A plan urged by Great Britain for an international commission of surveillance to conciliate the powers concerning the measures to be taken in cooperation for abolishing the slave trade was defeated by the objections of France, though receiving the support of the other powers. The commission would have been consisted of a council of administration holding its sessions at Brussels and an international bureau located at Brussels. The council would have been composed of the diplomatic representatives of the powers accredited to Belgium. The bureau would have been the general secretarial office, organized and controlled by the council; the whole arrangement being similar to that made in 1899 by the Convention for the Pacific Settlement of International Disputes. The council would have had powers of surveillance and conciliation. The bureau, under the regulations of the council, would have served as a depositary of national and international documents and other informative material, as the common medium of communication, and as the record office. The financial support of the commission would have been assured by an agreement of the powers regarding the share to be contributed by each. Though the final act authorized surveillance by the diplomatic body at Brussels, yet, as no permanent secretarial office was established and no financial support arranged, the execution of the provisions of the final act was in fact left to the discretion of the States concerned.

(French Yellow Book, *Conférence Internationale de Bruxelles*, 1891. *Protocoles et Act Final*, pp. 245–278, 357, 388.)

The action of the Brussels African conference in making arrangements for the abolition of the slave trade has received the practically unanimous assent and concurrence of all civilized States. The general abolition of slavery as a social institution throughout the civilized world, and the close commercial relations of the nations, have brought about the extinction of the slave trade on the sea and in the civilized parts of the world.

From this survey of national and international action in modern times it would seem that enslavement of aboriginal persons can not yet be said to be, in an unqualified sense, contrary to the law of nations. Domestic slavery of such persons, under conditions assuring their humane treatment, may, it would seem, be tolerated by a State, without giving other States a right to claim, under the law of nations, that it is violating its duty of guardianship.

Slavery can not exist without some trade in slaves, but undoubtedly "the slave trade," in the technical sense, is now contrary to the uni-

versal, or common, law of nations. A State which should authorize its citizens to engage in it would, it would seem, clearly violate the law of nations. A State which should even tolerate traffic in slaves, as a social institution, in any place under its sovereignty, would undoubtedly at the present time subject itself to international repressive or punitive action, unless it could show, in its own defence, that it had done, and was doing, everything possible to abolish the traffic.

B. LIMITS SET BY THE LAW OF NATIONS TO THE EXERCISE BY A CIVILIZED STATE OF ITS AUTHORITY AS GUARDIAN OF ABORIGINES.

The analogy of uncivilized persons to the children of civilized persons, or to incompetent civilized persons, has in some cases been applied with such literalness in colonies of civilized States that the courts having jurisdiction of offenses committed by aborigines have been authorized by law to impose sentence of corporal punishment or of forced labor. As forced labor almost of necessity implies corporal compulsion in order to avoid a complete lack of discipline, the two forms of punishment seem to amount to the same thing.

In dealing with aborigines, the common experience of civilized States is that they find no inner compulsion of the mind urging the aborigines to acquire land and personal property as a means of pursuing happiness, by exchanging their labor for land and commodities. Modern psychology seeks to discover and apply methods for creating in the aboriginal mind such an inner compulsion; but practical men, leading the harsh life of colonists, seek results by more simple methods, and demand from the colonizing States the uttermost privileges of a parent or guardian as respects the aborigines—sometimes for their own gain, sometimes with a more worthy motive, sometimes as an absolute necessity of self-protection. A few civilized persons living among a body of persons who are strong of body and will, who may have the minds of children and the morals of incompetents or perverts, who may be ignorant of private property in land or things, and who may tend to commit theft by reason of their habituation to the tribal communism, whose ideas of life and death are often confused by their religious practices, must perforce act promptly, and if need be harshly. As the civilized community increases in size and strength it arrives at a point where it can study the problem as one of psychology. But in new colonies and in colonies where the civilized persons are few as compared with the aborigines, a civilized State may find that its duty to its colonists compels it to allow the local government and courts to protect them and discipline the aborigines by imposing punishments upon convicted aborigines such as a guardian might use in disciplining a child

who was an incompetent or a pervert. The duty of the civilized guardian to preserve itself and its authority and to train the minor incompetent committed to its charge, may justify the stretching of the parental and tutorial power to the utmost.

Accordingly, in new colonies where the civilized persons are few in comparison with the aborigines, civilized States have tolerated and still tolerate the sentencing of aborigines, upon conviction of a crime, to corporal punishment and to forced labor; generally, however, under restrictions intended to prevent the chastisement or physical compulsion from working a permanent bodily injury or a permanent impairment of health.

Thus by the native code of Natal, enacted by the governor and council in 1891, it was provided as follows (sec. 76):

> Kraal heads may inflict corporal punishment upon the inmates of their kraals for the purpose of correction and to maintain peace and for any other just cause. (Statutes of Natal 1845–1899, vol. 2, law 19, 1891.)

In 1896 the Colonial Legislature enacted an amendment to the native code providing (secs. 14 and 15) thus:

> Every contravention of this act or of the law No. 19, 1891 [the native code], or of any act amending the same, or of any rules and regulations made thereunder, shall be cognizable and may be tried in the court of the administrator of native law of the division in which the offense occurred or in which the accused may be found.
>
> Disobedience or disregard by any native of any duty, obligation, or prohibition imposed on him by law No. 19, 1891, or any of the sections of the schedule thereto, shall be deemed an offense. (*Ib.*, act No. 40, 1896.)

In 1897 the Colonial Legislature amended the native code and the law of 1896 as follows:

> Any person who shall contravene any of the provisions of the law No. 19, 1891, or of any act amending the same, or of any rule or order made thereunder, for which a special penalty has not been provided, shall, upon conviction in the court of an administrator of native law, be liable to a fine not exceeding 10 pounds sterling, or to be imprisoned with or without hard labor for any term not exceeding 6 months or to a whipping not exceeding 15 lashes. In the discretion of the court, imprisonment and whipping may be joined and form a part of the same sentence or any one of the said classes of punishment may be awarded alone, or imprisonment may be awarded with a fine as an alternative punishment or by way of default in the payment of any fine: *Provided, however,* That no woman shall be sentenced to be whipped. (*Ib.*, act No. 8, 1897.)

In the Belgian colony of the Congo the sentence of whipping as a penalty upon conviction of certain offences by the native tribunals, or by the European administrative tribunals acting in their stead, is apparently authorized by law. The jurisdiction of these courts to impose this penalty seems to date from an old ordinance which was kept alive by the organic act for the government of the Belgian Congo of October 18, 1908. (*Recueil Usuel de la Législation de l'État Indépendant du Congo*, vol. 6, p. 6; p. 565, sec. 36.)

A provision of law authorizing the imposition of the penalty of whipping occurs in a royal decree of May 2, 1910, made on the advice and with the approval of the Belgian colonial council, regarding the government of the administrative districts under the charge of the native chiefs. By this law the chief or the European administrators may inflict the penalty of flogging as a punishment of natives other than the old, the infirm, the women, and the children, on conviction of certain offences, and the punishment "is to be applied in the manner provided by the general regulations of the colony." (*Recueil Usuel de la Législation de l'État Indépendant du Congo*, vol. 7, pp. 179–190.)

An explanatory statement of the colonial council regarding the law of 1910 is published in connection with the law. (See also the publication above cited, vol. 3, pp. 202, 204, 289, 356; also vol. 6, p. 733; vol. 7, p. 114.)

In the decree concerning the reorganization of justice in the French Congo of March 17, 1903, sec. 14, it is provided as follows:

> In the localities situated outside the limits specified in the preceding article, crimes committed by the natives to the prejudice of other natives shall continue to be judged by the administrators until native tribunals are organized. It is, nevertheless, forbidden to them to pronounce sentence of corporal chastisement. In cases in which these penalties are provided there shall be substituted correctional imprisonment or fine. (*Journal du Palais, Lois Annotées*, 1901–1905, p. 678.)

In Madagascar, by the act of May 9, 1909, enacted by the French Government regulating administration of the native courts, the sentence of "forced labor" was authorized. (*Journal du Palais, Lois Annotées*, 1906–1910, p. 989.)

By the penal code of France (ch. 1, secs. 15 and 16) it is provided as follows:

> Men condemned to forced labor will be employed upon the most severe (*pénible*) labor; they will wear on their feet a metal ball (*boulet*); or will be fastened together by twos, when the labor at which they shall be employed will permit. Women and girls condemned to forced labor shall be employed only within a house of compulsion (*maison de force*). (*Codes et Lois pour la France, l'Algérie et les Colonies*, 6th ed., Paris, 1912; *Code Penal*, p. 4.)

In the Netherlands colony of Surinam, by a law enacted in 1863 and in force in 1895, the commissary of an administrative district was authorized to impose a penalty of from three days to three months of forced labor, with or without chains, on persons brought into the colony under contract in case of violation of the contract by rebellion, drunkenness, laziness, refusal to go to the hospital when sick, refusal to obey sanitary regulations, or leaving the place of employment without a passport. By an ordinance of the Government of the Netherlands made in 1895 for Surinam, a failure by any immigrant or native laborer to keep a clearing around his habitation was

made punishable by a fine and by imprisonment, with or without forced labor, for from 1 to 15 days. (*La Main-Oeuvre aux Colonies*, published by the *Institut Colonial International*, 1895, vol. 3, p. 485, note; pp. 771–773.)

Corporal punishment of aborigines is permitted in Rhodesia on conviction of certain offenses, the maximum penalty being 15 strokes or the rod (*verge*). (*Les Lois et l'Administration de la Rhodésie*, by Henri Rolin, 1913, p. 130.)

In Uganda the district magistrates may sentence aborigines to the penalty of whipping for a list of specified offenses, men over 45 and women being excepted, the whipping of men being with a "kiboko" not less than half an inch in diameter, and of boys under 16 with a "birch rod made of light twigs." (Laws of the Uganda Protectorate in force on Dec. 31, 1909, pp. 122–126.)

For the German colonies of Togoland, Kamerun, and southeast Africa, an ordinance was enacted by the German Government, on April 22, 1896, permitting the local courts to impose a sentence of whipping or flogging on the conviction of aborigines of certain named offenses; women, children, Arabs, and Indians being excepted. The kind of whip or rod to be used was specified, a maximum of strokes prescribed, and a provision was inserted that a physician should be present when the punishment should be inflicted, or, if that were impossible, a European, and that a record of all such punishments should be kept, and a copy transmitted to the German Government. This ordinance was put in effect in German Southwest Africa on November 8, 1896, natives of the better class being also excepted from its operation. (*Deutsche Kolonial Gesetzgebung*, vol. 2, pp. 215, 294.)

A general ordinance applicable to all German colonies was promulgated on February 27, 1896, by the Imperial Chancellor, forbidding the use of processes to extract confessions or declarations in judicial proceedings to which aborigines were parties, other than those permissible under the German statute relating to judicial procedure in Germany itself. By this ordinance the imposition in such judicial proceedings of unusual penalties was prohibited, and there was a special inhibition against *verdachtstrafen*—penalties imposed by courts upon suspicion or without full proof of the guilt of the accused. (*Deutsche Kolonial Gesetzgebung*, vol. 2, pp. 213, 214.)

By the German imperial statute of July 25, 1900 (*Reichsgesetzblatt*, 1900, No. 40), it was enacted that the aborigines of the German colonies should be subject to the jurisdiction of the courts provided for Europeans "only in so far as this is decreed by ordinance of the Emperor," and that "the aborigines may, by special ordinances of the Emperor, be placed on an equality with the other parts of the population." (*Deutsche Kolonial Gesetzgebung*, vol. 5, pp. 132, 143.)

By a circular letter of January 12, 1900, addressed to the colonies by the colonial division of the foreign office, concerning the final judgments against aborigines, a protest was made against their number and severity. It was insisted that the aborigines could be brought to know the advantages of the life of labor and of civilization by measures of persuasion and education, rather than by bodily punishment. It was also stated that the opinion in the Reichstag and among the public was, that such proceedings were giving a bad reputation to the German work of colonization. The governors of colonies were urged to see that the laws were obeyed, and that only proper bodily punishment was inflicted. (*Deutsche Kolonial Gesetzgebung*, vol. 5, p. 15. See also vol. 6, p. 233.)

The German colonial office, on July 12, 1907, through Dr. Dernburg as colonial secretary, sent a letter to all the governors of colonies saying that public opinion in Germany was stirred up by the cruel use of corporal punishment in the colonies, and asking for opinions how to establish a better system, in which bodily punishment should be reserved for a few kinds of specially heinous offences. (*Ib.*, vol. 11, p. 323.)

The same request was repeated in 1909, and the governors were urged to see that the purpose of the Government in restricting corporal punishment to certain heinous offences was carried out. (*Ib.*, vol. 13, p. 59.)

Under Japanese administration in Formosa, corporal chastisement as a penalty for violation of police regulations is authorized, as applied to Formosan and Chinese men over 16 and under 60 years of age, who have no residence in the island and are without means of subsistence.

(Japanese Rule in Formosa, by Yosaburo Takikoshi, tr. by George Braithwaite, 1907, p. 194.)

M. Henri Rolin, in his book on The Law of Uganda (*Le Droit de l'Uganda*), published in 1910, speaking of corporal punishment of aborigines of the more primitive type as a part of the system of administration adopted by civilized States as respects their tropical colonies, says (pp. 16–18):

> The colonies of tropical Africa are the political creations of modern European States—that is to say, of some of the most highly civilized States of our time—in one of the most backward regions of the globe. It is therefore not to be wondered at that these colonies, and especially their legislation, call to mind in some respects certain epochs of history and certain stages of the evolution of law which we are wont to speak of as "primitive"; nor that, on the other hand, these colonies and their legislation reflect some of the most modern and progressive tendencies. Such is, in fact, the character of these recent acquisitions made by Europe. They are adaptations of civilization to barbarous regions.
>
> In the colonies of tropical Africa, as at certain "primitive" epochs of political and juridical evolution, the organization of the public powers tends to take

the form of absolutism rather than of democracy. The military element plays a preponderant part, which, however, diminishes rapidly in importance after a few years. The accumulation of functions in one or a few persons is frequent. The maintenance of the aboriginal political organs gives rise to a superposition of authorities which calls to mind more or less the feudal system. From the point of view of the finances, the revenue from the public lands and trade monopolies, as well as the revenue from imposts, have an importance relatively much greater than in Europe at the present time. Imposts are paid often in the produce of the soil or in labor. The tenure of the land is in large part collective. The system of liberty of contract is less developed, especially as respects manual labor, due to the persistence of slavery and the evils which ramify from it. On the other hand, the rules of penal law are numerous, and corporal punishment as a penalty for crime, as well as collective punishment of aboriginal communities, are applied. There are in this situation certain undeniable analogies between the systems of law applied in the colonies of tropical Africa and the institutions of western Europe in the first centuries of the Middle Ages.

On the other hand, the colonial powers, yielding to the assimilative tendency which colonizing States are never able completely to resist, have introduced into the law of the middle African territories certain ideas essentially modern—that of commercial freedom guaranteed by the Berlin African act of 1885; that of the freedom of labor, opposed to the institution of slavery and the corvée; that of religious freedom guaranteed by the Berlin African act; and that of the duty of assuring the moral and material well-being of the aborigines, guaranteed by the same act. There exists also a tendency to put into effect the principle of the separation of powers, and that of the individuality of the penalty of crime; to proscribe corporal chastisements of a severe character; and to favor the development of the institution of private property. The enormous extension of the part taken by the colonizing State in the internal management of these tropical colonies is also a very modern feature.

The question underlying the rightfulness of corporal chastisement of aborigines as a penalty inflicted by courts for commission of offences by them, evidently is, how far a civilized State may go in restricting the fundamental rights of uncivilized persons to life and liberty by punishing them as being in a sense adult children. All needful restrictions are, it seems, legal; though a State cannot by law require cruel and inhuman punishment to be imposed, or persistently tolerate a cruel and inhuman administration of its law. On the general subject of the necessary limitation of the civil, as well as political, rights of aborigines, due to the undeveloped and undisciplined character of their minds, the Supreme Court of the United States has fully expressed itself. (*Ex parte* Crow Dog, 109 U. S., 556, decided in 1883.) In that case the facts were that Congress had, by an act reciting an agreement with a tribe of Indians, ratified an agreement with them stipulating the boundaries of their reservation, and providing for a degree of self-government subject to certain restrictions. One of the provisions was that "Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual

shall be protected in his rights of property, person, and life." Of this provision the court said:

> The pledge to secure to these people, with whom the United States were contracting as a distinct political body, an orderly government by appropriate legislation, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all, that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs. They were nevertheless to be subject to the laws of the United States, not in the sense of citizens, but, as they had always been, as wards subject to a guardian; not as individuals constituted members of the political community of the United States, with a voice in the selection of representatives and the framing of the laws, but as a dependent community who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor and by education, it was hoped might become a self-supporting and self-governing society.

It is thus evident that civilized States are inclined to allow to themselves and to each other a wide discretion in determining what restrictions upon the liberty of their aboriginal wards are needful in any given situation. Nevertheless the general appreciation of the fact that civilization advances only by correction of the mind is having its effect. All civilized States have placed slavery in all its forms—political, social and economic—more or less under their ban. The attitude of those which permit corporal punishment is apologetic, and justification is sought in some exceptional need of coercion in the particular case. The development of the law of nations in this respect would seem to be in the direction of the recognition of the tutorial duty of civilized States towards the aborigines under their sovereignty as imperative and unalienable,—as inevitably involved in the personal relationship of guardianship,—and the restriction of the personal liberty of aborigines only to the extent needful to enable the State to effect the necessary mental correction.

CHAPTER VIII.

THE DUTIES OF CIVILIZED STATES AS GUARDIANS OF ABORIGINES.

In the declarations of international conferences dealing with the relations between civilized States and aborigines under their sovereignty, the duties incident to this guardianship have not been definitely recognized as being of a tutorial character. The Berlin African conference indeed declared the obligation of the signatory powers "to watch over the perservation of the native tribes, and to care for the conditions of their moral and material well-being, and to help in abolishing slavery, and especially the slave trade." As respects the positive duty of the State to undertake directly the education and training of the aborigines in the arts and sciences of civilization and in the political principles on which all civilized society is based, the declaration is indefinite. It seems to have been contemplated that the education of the aborigines would be effected principally by religious and charitable associations of a private character. The provision on this subject is as follows:

> [The signatory powers] shall, without distinction of creed or nation, protect and favor all religious, scientific, or charitable institutions and enterprises created and organized for the above ends, or designed to instruct the natives, and to bring home to them the blessings of civilization. Christian missionaries, scientists, and explorers with their escorts, property, and collections shall likewise receive special protection.
>
> Freedom of conscience and religious toleration are expressly guaranteed to the natives as well as subjects and foreigners. The free and public exercise of all forms of divine worship and the right to build edifices for religious purposes and to organize religious missions belonging to all creeds shall not be limited or fettered in any way whatsoever.

The Brussels African conference declared that those in charge of the fortified stations to be established in Africa should have the following "subsidiary duties" (Art. II):

> * * * To initiate [the native populations] in agricultural labor and in the industrial arts so as to increase their welfare; to raise them to civilization and bring about the extinction of barbarous customs, such as cannibalism and human sacrifices.

The interest of all civilized States in colonizing enterprises was stimulated by the entry of the United States into the civilized world as a colonizing power. The general sentiment of the American people,

voiced by its statesmen, was that domination of distant communities by a Republic was permissible when needful and to the extent needful, but only provided the State recognized and fulfilled the positive and imperative duty of helping these dominated communities to help themselves by teaching and training them for civilization, as the wards and pupils of the nation and of the society of nations. Democracy and republicanism were not to be promulgated, the American people held, by destroying those who were ignorant of these principles or who disbelieved in them, but by the positive, helpful, propagandist work of republics in converting to these principles the nondemocratic and nonrepublican part of the world with which they were politically connected.

It is acknowledged by European writers that the year 1898 marks the beginning of a new epoch in the art and science of colonization, in which civilized States have recognized more and more definitely that guardianship of aboriginal tribes implies not merely protection, not merely a benevolence toward private missionary, charitable, and educational effort, but a positive duty of direct legislative, executive, and judicial domination of aborigines as minor wards of the nation and of equally direct legislative, executive, and judicial tutorship of them for civilization, so that they may become in the shortest possible time civil and political adults participating on an equality in their own government under democratic and republican institutions.

The most humane and advanced European colonial administrators and students of colonial science realized this development of public sentiment, and in order to lay a basis for the future establishment of these humane principles in law of nations, proposed the assembling of an international conference in Paris in 1900 in connection with the International Exposition, for the discussion of the duties of civilized States to aboriginal peoples under their sovereignty. The European Governments were agreeable to the plan, but evidently on account of the delicacy of the questions to be discussed the conference was given a wholly scientific character and was called an "international congress of colonial sociology." It was attended by delegates from the different nations, who were experts in colonial science or in colonial administration. It was under the patronage and direction of the French Government. Its conclusions were in the form of statements of opinion concerning what the principles of the law of nations ought to be, without attempting to determine what principles were actually accepted and applied, or to pass any judgment on existing principles or on the action of any nation. The action of the congress, therefore, is valuable only as suggestive of the development of the law of nations in the future and throws no light upon the actual principles recognized and applied. Considering the character of

this congress, however, it seems desirable to present its program and resolutions, as shown by the printed proceedings.

M. Leseur, the secretary general of the congress, in announcing the program to be followed by the congress, said (Proceedings, pp. 4–6, 12):

The object of the congress is the study of the moral and social questions growing out of colonization * * *. It is necessary not to forget that the congress * * * is an international congress; that it has for its purpose the bringing about of an exchange of views which shall, as it were, serve as a body of directions destined to guide, not one particular power, but rather all the powers which have seen fit to give to their development the form of colonial expansion. Certainly if there be one problem which can be said to be essentially international, it is that of the condition of aboriginal peoples. It is such not only by the circumstances under which it presents itself, but also by certain manifestations to which it has given occasion. It will suffice that I recall to your attention those somewhat peculiar statements of a document international in its nature, the Berlin African Act of 1885; the avowal of the preamble that the powers have concerned themselves in considering "the means of increasing the moral and material well-being of the aboriginal peoples;" and the engagement assumed by the powers in Article VI to watch over "the conservation of the aboriginal peoples and the amelioration of their moral and material conditions of existence." These are significant evidences, and in spite of the contradiction which certain established facts give to these avowals, they have nevertheless, from the point of view of the moral history of colonization, a considerable value. They amount to a condemnation of that policy of destruction and enslavement which for centuries has been the policy followed by the colonizing peoples as regards the natives of their colonies. They imply the avowal of the opinion that, though of a civilization more or less retarded, these aboriginal peoples are not on this account outside the domain of law, and that as for the colonizing powers, it is only by a just sentiment toward the inferior races and an exact observation of duties toward them that they can justify to themselves those facts of brutal conquest which are almost always the beginnings of colonial enterprises.

The general subject of the conference will be: The duties which colonial expansion imposes upon the colonizing powers, in colonies properly so called, as regards aboriginal peoples.

The program [will be] as follows:

I. The political condition of aborigines. To what extent and under what conditions is it desirable to maintain the aboriginal administrative organisms? How and by what means may an aboriginal population be put in a position to defend its rights and to secure redress of its grievances at the hands of the local authorities?

II. The juridical condition of aborigines. The conditions of aboriginal population from the point of view of civil and criminal legislation and the distribution of justice. Respect for the property of the aborigines and the means of harmonizing this respect with the needs of colonization.

III. The moral condition of aborigines. Means to which it is proper to have recourse to raise their intellectual and moral standards.

IV. The material condition of aborigines. Measures proper to be taken to assure the conservation of the race, to prevent its physical degeneration, and to ameliorate its conditions of existence.

The congress adopted resolutions upon all these points, which were as follows (Proceedings, pp. 442–452):

The political and juridical condition of aborigines.

I. To what extent and under what conditions is it desirable to maintain the aboriginal administrative organisms?

Opinions adopted by the congress:

The congress—

Considering that the well-being of aborigines, their physical, intellectual, and moral development ought to be the supreme end of all colonial policy;

Considering that the evolution of aboriginal societies can of necessity take place only gradually, being itself only the consequence of economic transformations which determine the degree of civilization of a people;

Convinced that the only rational method is that which consists in adapting, as much as possible, the colonial régime to the existing institutions, laws, and customs of the aboriginal races, ameliorating them so as to do away with their injustices and adapting them to new needs when such needs make themselves felt;

Announces as its opinion—

That colonial policy should tend, in principle, toward the maintenance of the aboriginal administrative organisms.

II. How and by what means may the aboriginal population be put in a position to defend its rights and to secure redress of its grievances at the hands of the local authorities?

Opinion adopted by the congress:

The congress—

Considering that good government of aborigines is impossible unless they have the means of making known their needs to the local authorities;

Considering, on the other hand, that it is important to the security of the colonies, and therefore to their prosperity, that the aboriginal populations should find in the peaceful operation of regular institutions the means of making known their grievances, whether arising from the local administrative measures or from legislative measures of the metropole by which they are affected;

Is of the opinion—

That the colonizing powers ought to give attention to the matter of providing their aboriginal subjects with the means of defending their rights and of securing redress of their grievances at the hands of the local authorities;

Among these means, which ought to be appropriate to the degree of civilization of the aboriginal population, the congress recommends the free exercise of the right of petition; this right being subjected to the minimum of formalities and expenses, in order that the ignorant and the very poor may be able to profit by it without difficulty.

While recognizing that the grant of representative institutions may be considered as the surest means of putting aboriginal populations in a position to defend their rights, and to obtain redress of their grievances at the hands of the local authorities, the congress considers that the régime of representative institutions is one which presupposes the concurrence of moral, intellectual, and political conditions which can be conceived of as realizable by aboriginal peoples only in a future more or less distant; and that, in view of the actual condition of the greater part of the aboriginal populations, the solution is to be sought according to circumstances, either in admitting the chief men of the aborigines as members adjunct of the councils connected with the local gov-

ernments (the executive council, the council of administration, the privy council), or, preferably in the creation of aboriginal assembles invested with purely consultative powers. The composition and powers of these assemblies should vary with the local conditions. It is, however, desirable, if the local circumstances permit, that these assemblies should be composed, in part at least, of elected members, the suffrage being restricted or of several grades.

In the colonies where the local conditions do not lend themselves to the establishment of such assemblies, it is to be desired that a person delegated by the governor should be constituted the protector of the aborigines, and should be charged with the duty of receiving their complaints.

III. Condition of aborigines from the point of view of civil and criminal legislation and the distribution of justice.

Opinions adopted by the congress:

A. CIVIL LAW.

1. Inasmuch as a knowledge of the juridical institutions of the aborigines is a matter of very considerable interest, both from the political and the scientific standpoint, it is to be desired that the governments should initiate and encourage the study of these institutions by competent men.

2. As respects the organization of their family life, and the use of their property, it is desirable to leave to the aborigines the benefit of their own customs, so far as these customs are not incompatible with the respect due to human life and liberty.

3. It is desirable to maintain the aboriginal tribunals for the purpose of exercising jurisdiction over the civil affairs between aborigines; a surveillance, more or less strict according to circumstances, being exercised over those tribunals and a right of appeal being given before a tribunal of metropolitan origin.

Whenever it becomes necessary to organize new tribunals it is essential to give representation to the aboriginal element of the population on these tribunals.

4. It is not desirable to encourage the aborigines to solicit individually the benefit of European juridical institutions.

5. It is desirable to codify the civil institutions of the aborigines, but only on the condition of attributing to these codes, at least provisionally, only a value purely doctrinal. These codes ought to translate the customary law of the aborigines without altering it.

6. By way of exception to the above, as respects the law of contracts and the commercial law, it is, on the contrary, desirable to enact for the aborigines a code resembling, as nearly as possible, the European legislation on this subject, with some reservations of which the principal are as follows:

(*a*) The contract of labor ought to be made the object of a special and detailed regulation guaranteeing the liberty of the aboriginal workers and assuring them equitable treatment.

(*b*) The system of evidence ought to be placed in harmony with the social status and the degree of instruction of the aboriginal population.

(*c*) It may be necessary to enact particular rules to assure the execution of obligations undertaken by the aborigines, and especially to authorize, as regards them, execution by bodily constraint.

7. Cases arising between individuals of different races ought to be adjudicated, not by the European tribunals, but by mixed tribunals in which the European element should in all cases be represented.

8. When the authority of the Europeans has been once established, it is desirable to commence to constitute the civil status of the aborigines by compelling them to declare the births and deaths which occur among them; it being understood that this declaration shall not modify their personal status.

B. CRIMINAL LAW.

9. The enactment of a penal code for the use of the aborigines is a duty which exists from the instant that the colony is founded. This code ought to be translated as soon as possible into the language of the aborigines.

10. This penal code for the aborigines ought not to be merely a copy, more or less modified, of the European penal code, though it ought to be based upon the same juridical principles. It is necessary to define anew each infraction of the law, and to determine its relative gravity.

An act forbidden to Europeans may be permitted to aborigines, and *vice versa*. The gravity of an infraction of the law may vary according to the race of the author or of that of the victim.

11. The duty of imposing penalties upon aborigines in criminal cases ought to be confided to the authorities of the colonizing power, even when the exercise of the right of jurisdiction is delegated to the aboriginal authorities.

12. It is desirable to establish, in order to impose penalties upon aborigines in criminal cases, a judiciary authority distinct from the administrative authority.

13. It is permissible, however, to confer upon an administrative officer jurisdiction to repress minor crimes conformably to the law.

14. It is desirable that a code of criminal procedure should be made for the use of the aborigines. While giving to the accused the necessary guaranties, the procedure ought to be established with sufficient conditions to insure rapid action, so that the punishment may follow as quickly as possible upon the commission of the crime. The practice of subjecting accused persons to incessant questioning and torture [*la question et les epreuves*] ought to be and to remain rigorously prohibited.

15. A prison régime different from that applied to Europeans ought to be established for the use of aborigines.

THE MATERIAL CONDITION OF ABORIGINES.

I. Measures necessary to assure the conservation of the race, to prevent its physical degeneration, and to ameliorate its conditions of existence.

Opinions adopted by the congress:

1. It being evident that the prosperity of tropical colonies is dependent upon the maintenance and development of the aboriginal population;

2. The congress expresses the opinion that the measures taken in the acts of Brussels of 1890 and 1899 to restrain the traffic in spirituous liquors within a zone of the African Continent, ought to be generalized, and that it is desirable that a diplomatic accord should be made for the purpose of extending these provisions to all colonies where there is an aboriginal population.

2. As respects those colonies which have local representative powers, the congress expresses the hope that the metropolitan governments will bring to the attention of the local governments the dangers arising from the consumption of alcohol, and will exercise upon them a moral pressure so as to induce them to take all possible measures having for their object the reduction of the local consumption of alcohol.

3. It is desirable that measures should be taken to prevent or restrict the consumption of opium.

4. It is desirable that the colonizing powers, each as regards that which concerns itself and in the respective spheres of their interests, should take measures to supervise and train all aboriginal labor, and should regulate it in such a way that the work done shall not be in excess of the physical forces of the laborers, whether the labor be on public works or private enterprises.

5. It is desirable that the colonizing powers take measures with a view to preventing the dangers which result from penury or famine among the aboriginal populations, and which are for them, periodically, a cause of epidemic diseases and abnormal mortality.

6. It is desirable that the powers, each in its own sphere and to the extent it may deem possible, should organize the care of abandoned infants and children. It is to be hoped that in the accomplishment of this work the colonizing powers will receive and even invite private assistance.

7. The organization of the public hygiene being one of the most efficacious means to maintain the aboriginal populations and preserve them from degeneration—

Considering, on the other hand, that the Europeans have the effective control, in moral and material matters, of the aboriginal peoples who are subjected to their authority, and that there is thus imposed upon all the colonizing powers the obligation of giving to the aborigines all the security which it is in their power to procure for them;

The congress expresses the opinion that the measures of public hygiene ought not to be limited to the European personnel only. It recommends as particularly urgent the adoption of the following measures:

(*a*) In the localities where leprosy exists, there should be created asylums, to which should be admitted as patients all lepers who, by reason of the characteristic condition of the lesions, are likely to be a source of contagion for the people of the neighborhood. These asylums should be distant from the inhabited centers. They should be established on rural lands of large extent, so as to permit the lepers to enjoy a certain liberty, under the usual restrictions of non-communication with the healthy localities. The hygienic care suitable to their condition and the necessary attention should be furnished by the administration.

The competent authorities ought to give advice of the departure of each leper leaving the colony to the Government of the country of his destination.

(*b*) It is necessary to instruct the aboriginal populations regarding the grave dangers which syphilis, under all its forms, presents, for the individual, the family, the community, and the race.

It is desirable to institute in the localities where they do not exist and to multiply in those in which they exist, dispensaries, hospitals, and consultation rooms where the malady may receive gratuitous treatment; hospital treatment not being made obligatory.

In those colonies where supervised prostitution shall be introduced it will be desirable that the best arrangements and regulations in use in the metropole should be applied.

(*c*) Against smallpox it is necessary to organize in tropical colonies a service of public vaccination.

(*d*) It is desirable that the colonial governments should give their attention to the creation of aboriginal schools of medicine and institutions for the instruction of a sufficient number of aboriginal women as midwives.

(*e*) The streets and ways of the European settlements, and of the aboriginal villages, *tatas*, camps, or other cantonments should be the object of a sanitary police.

(*f*) Against the persistent diseases of animals which render difficult the conditions of existence and labor of the aborigines, by depriving them of their beasts of labor, it is necessary to establish a local veterinary service, to eradicate the diseases of animals and prevent their recurrence.

(*g*) The service of colonial hygiene, in so far as it is a matter of public administration, should be directed by officials having technical training and knowledge. Each colony ought to have at its capital a council of hygiene.

(*h*) It is desirable that the colonizing powers should publish each year a schedule or general report indicating, from the social and demographic point of view, the progress made as respects public hygiene (the birth, sickness, and death statistics) and as respects private or public assistance for the benefit of the aborigines.

It is also desirable that the governments of colonies should take care to advise, as promptly as possible, the governments of neighboring colonies and that of the metropole in regard to matters occurring which may affect the public health.

II. Is it not necessary, in the interest of the material condition of the aborigines, to suppress that form of forced labor called the corvée?

Opinion adopted by the congress:

The congress—

Considering that the use of the corvée produces nothing but inconvenience; that it is a cause of diminution of the aboriginal population and at the same time a danger to the public tranquility by reason of the discontent which it excites;

Considering, on the other hand, that it is demonstrated by experience that the measures taken to prevent the abuses which arise from the use of the corvée are always ineffective and illusory;

Considering, finally, that it is only free and remunerated labor which gives beneficial results, and that there is no colony in which the necessary labor can not be obtained, provided the remuneration offered is sufficient;

Announces the opinion—

That the colonizing powers should suppress the corvée, and that they should force themselves to replace it by free and remunerated labor.

III. How to develop among the aborigines the habits of foresight and saving.

The congress—

Considering that it is important to develop among the aboriginal populations habits of foresight and saving, and that, as soon as these populations shall have adopted these habits, many of the difficulties arising out of colonization will solve themselves;

Considering, on the other hand, that the excellent results shown in Algeria by the aboriginal savings, mutual-aid, and cooperative societies organized under the law of April 14, 1893, have demonstrated the advantages which may be derived from these institutions; that not only are they an excellent agency of economic education for the aborigines, but that they are susceptible of furnishing to the metropole the means for remedying the dangers which usury offers to the holding of property by the aborigines, and of preventing, or at least mitigating, the consequences which flow from extreme poverty as respects the conservation of aboriginal races;

Is of the opinion that wherever the local conditions permit, the colonizing powers ought to give their attention to bringing about the formation of savings, mutual-aid, and cooperative societies among the aborigines.

THE MORAL CONDITION OF THE ABORIGINES.

Means to which it is proper to have recourse in order to raise the intellectual and moral standards of the aborigines.

Opinions adopted by the congress:

1. The development of the producing forces, which is the basis upon which human life evolves itself under all its manifestations, being a powerful factor in civilization and one of the best means for raising the moral standards of aboriginal populations;

The congress announces the opinion—

That colonial policy should tend to the continual improvement of the means of existence of the aborigines and the organization of the labor performed by them.

2. The congress—

Considering that the colonizing powers, by extending their domination over countries inhabited by populations of a civilization more or less retarded, have contracted the duty not only of ameliorating their material conditions of existence, but also of raising their intellectual and moral standards;

Is of the opinion—

That the colonizing powers ought to exercise a very particular solicitude over the instruction of the aborigines. They ought not to forget that this instruction ought to be of a character appropriate to their circumstances; that is to say, that the methods used and the courses given ought to be adapted to the mental conditions of the aborigines to whom they are applied. The instruction ought, moreover, to be essentially educative, that is to say, it ought not to have for its object merely to give a certain amount of professional knowledge to the aborigines, but it ought to have, as an object of its constant attention, their moral improvement.

3. The congress—

Considering that the colonizing peoples have a duty of education to perform as regards the aboriginal populations, and that the prosperity of the colonies is dependent upon the cooperation and the progressive culture of these races;

Announces the opinion—

That, by means of schools and other appropriate institutions, by means of encouragement given to free private establishments, and by means of an unhampered protection assured to all civilizing enterprises, this end ought to be pursued without intermission, particular care being taken to select out of the various means of action those which are adapted to the particular country, the particular race, the particular time, and the particular circumstances.

4. The congress—

As regards the moral and intellectual improvement of the women of the Mohammedan and Hindoo peoples;

Announces the opinion—

That the governments should encourage the creation or the development of professional schools of aboriginal industries appropriate to the condition and the traditions of women, in which there shall be given a moral education, and instruction in the language of the colonizing power, as incidental to instruction of a technical kind by means of which these women may be enabled to improve their material condition.

Since 1900 the nations generally have recognized this duty of tutorship. The leading colonizing States have given increasing attention to education, to training in civilized arts, and to sanitation. The International Colonial Institute of Brussels has published voluminous surveys of the condition of education in the colonies of civilized States and collections of acts and documents concerning land and labor legislation. Its sessions, as well as those of the various national and international colonial congresses held in the capitals of Europe, have been largely devoted to problems of the tutorship of native races. The publications of the various scientific societies in the European States devoted to the study of colonization, disclose that this tutorship has been extensively practiced by the European States, and that the experiments have been almost uniformly successful.

The United States has, in the Philippines particularly, fulfilled this duty of tutorship with a conscientiousness and zeal entitling it to take the lead in any future development of the law of nations in this respect.

CHAPTER IX.

THE LEGAL EFFECT OF AGREEMENTS BETWEEN CIVILIZED STATES OR THEIR CITIZENS AND ABORIGINAL TRIBES.

Taking it to be established as a fundamental principle of the law of nations that aboriginal tribes are the wards of civilized States, the question of the validity of agreements made between civilized States and aboriginal tribes is to be determined by the principles which would apply in the case of an agreement between guardian and ward. Such agreements are necessarily of a peculiar character. The guardian can not divest himself of his duty to protect and train his ward. On the other hand, if for any reason he finds it necessary or expedient to enter into an agreement with his ward, he can not honorably repudiate it and resume his power of guardianship and tutorship without making some arrangement with his ward which is just under all the circumstances.

Inasmuch as a State usually finds it necessary to support and champion its citizens and corporations in case they enter into agreements with aboriginal tribes, the principles applicable to such agreements are substantially the same as those applicable to agreements between civilized States and such tribes.

In the report of the Committee of the United States House of Representatives on Indian Affairs of 1830, above quoted, it is said:

> In the primitive condition of these tribes, they would have been independent in fact, if they had inhabited within the jurisdiction of the most powerful European State; and it would have been necessary to the safety and order of the established society either to exterminate them or to find out some other mode of making their existence compatible with those objects.
>
> To govern turbulent and warlike bands of Indians by regular law, administered in the ordinary form, was impossible. To impose such restraints as were in the power of the Government to execute was all that a practical people would attempt; and therefore what ordinary legislation and the regular administration of justice could not effect, the colonists sought to supply by gratuities, and appealing to whatever sense of the obligation of promises the habits of the Indians permitted, for the observance of such rules of intercourse between them and the white population, as were agreed upon in friendly conference and treaties. These treaties were, therefore, but a mode of government, and a substitute for ordinary legislation, which were from time to time dispensed with, in regard to those tribes which continued in any of the colonies or States until they had become inclosed by the white population. This transition from the practice of conciliating by treaty to that of controlling by regular laws has taken place, it is believed, with all the tribes in the old States, except Georgia; and in some of the new, as in Maine. It is true, that the legislation in most of the

States has been simple and intended rather for the protection than the restraint of the Indians. The tribes thus brought within the ordinary jurisdiction of the States are indulged in the enjoyment of their ancient usages so far as such a license is found compatible with the peace and good order of society, and whatever restraints have been imposed for any purpose seem, in general, to have been adapted to their condition with a humane discrimination. * * *

More than its due effect is often given to the circumstance of the actual independence which all the Indian tribes once enjoyed, and which many yet enjoy, within the territorial jurisdiction of the United States, in forming an opinion of the right of the appropriate sovereignty, where it finds it expedient, to bring them under the dominion of its laws. The distinction is not always adverted to between privileges and immunities indulged, and such as are enjoyed as matter of right, between such as are acknowledged by law and those which are merely tolerated, either because the State having the right can not or does not care to interfere. * * * A State is not obliged to exercise all its rights of sovereignty at once, nor is it a new case, or one of uncommon occurrence, that a State finds itself deficient in physical resources necessary to the exercise of its rights of sovereignty. Humanity has often pleaded successfully against the exercise of rights which belonged to a State as essential attributes of sovereignty. * * *

If the States which have exercised jurisdiction over the Indians had done so only upon a surrender of the separate political rights as a people, as such an act would imply one of the most affecting and solemn ceremonies which the intercourse between communities and nations can give rise to; the forms pursued upon such imposing occasions would have found a place among the historical records of the country. To attempt to give any such solemn effect to the submission of the sachem of an Indian village, who had not the power to resist, or to the more formal promises of obedience made by powerful tribes, and which were regarded in general as meaning nothing more than a promise to live in peace with the white population, seems to be supported by too little reason to deserve a serious notice. These stipulations were as often disregarded as any others into which the Indians entered; and it is not pretended that a formal surrender of political rights preceded the exercise of jurisdiction in all cases. The policy of the country has always been to avoid provoking the Indians, and even if it could be shown that the exercise of jurisdiction in any case was avoided because the Indians objected, still the right could not be affected. * * *

The character of the whole legislation of the States in regard to the Indian tribes shows most conclusively that their consent to a surrender, either of their lands or liberties, when the substance is looked at, instead of the forms of things, will be found to furnish no real foundation of authority or right to accept either of the one or the other. One of the first acts of most of the States after assuming jurisdiction over the Indians has been to declare unequivocally their utter incompetency to make a contract upon equal terms with the whites, or which should, in equity and good conscience, be enforced against them. Their lands and persons are both taken into wardship, and the members of ancient and independent communities appear no sooner to have yielded up their political privileges than they have been declared in a state of pupilage and incapable of managing their own private affairs. Most of the tribes in the old State have guardians, under some denomination or other, appointed by law to take charge of their property.

At the beginning of the report the committee summarized the general principles of civilized obligations applicable to agreements of this peculiar kind, as follows:

> The committee suppose they will not be required to show, by any illustration or reference to authorities, that the faith of a Government should in all cases be inviolably observed, and that, in attending to that indispensable duty, all its obligations should be considered; that all just and reasonable expectations, besides what may be expressly stipulated in a compact, should be allowed; and that the obligation is equal whether a treaty or compact be made with a foreign State, with independent or subject communities, or with individuals, citizens, or aliens. To these may be added, as applicable to the present inquiry, the following maxims and principles, which are equally sustained by reason and authority; first, antecedent engagements or compacts are entitled to precedence in the observance of them; second, stipulations impossible to be complied with, either for want of power or because they involve a violation of the rights of third persons or States, if not voluntarily waived, are to be compensated; third, the first duty of every Government is to protect the rights and promote the prosperity of its own members; yet the rights and interests of others, of whatever character or condition, are not to be wantonly restricted, nor in any case wholly disregarded.

The practice of regulating by treaty the relations between a civilized State exercising sovereignty over a region and the aboriginal tribes inhabiting the region, though permissible when these relations can not be regulated by the legislative, executive, and judicial action of the State, is recognized as undesirable.

In the report of the British Parliamentary Committee of 1837 on Aboriginal Tribes, it was said:

> As a general rule, * * * it is inexpedient that treaties should be frequently entered into between the local governments and the tribes in their vicinity. Compacts between parties negotiating on terms of such entire disparity are rather the preparatives and the apology for disputes than securities for peace; as often as the resentment or cupidity of the more powerful body may be excited, a ready pretext for complaint will be found in the ambiguity of the language in which their agreements must be drawn up, and in the superior sagacity which the European will exercise in framing, in interpreting, and in evading them.

The wisdom of this suggestion was manifested to the British Government by the terrible consequences growing out of an agreement made with the Maori Tribes of the northern part of New Zealand in 1840, which was so unfortunately worded as to give ground for the claim that Great Britain had recognized the tribes as an independent State, having the title in fee to all the land of that part of New Zealand. Incessant trouble arose between the home government and the colonial government on the one side, and the Maori Tribes and the Europeans claiming under them on the other. Twice the matter was considered by parliamentary committees—in 1840 and 1844—both of which insisted that Great Britain had not intended to make any such admission, upholding its full sovereignty and

recommending a compromise adjustment. Finally, in the sixties, the matter was settled by a war with the Maoris, in which the tribes were defeated and almost destroyed. This treaty, known as the treaty of Waitangi, provided as follows:

> The chiefs of the Confederation of the United Tribes of New Zealand, and the separate and independent chiefs who have not become members of the confederation, cede to Her Majesty the Queen of England, absolutely and without reservation, all the rights and powers of sovereignty which the said confederation or individual chiefs respectively exercise or possess, or may be supposed to exercise or possess, over their territories as the sole sovereigns thereof.
>
> Her Majesty the Queen confirms and guarantees to the chief and tribes of New Zealand, and the respective families and individuals thereof, the full, exclusive, and undisputed possession of their lands and estates, forests, fisheries, and other properties which they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession; but the chiefs of the United Tribes and the individual chiefs yield to Her Majesty the exclusive right of preemption over such lands as the proprietors thereof may be disposed to alienate, at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf.

The British Government regarded this treaty as acknowledging only a personal right of occupancy in the aboriginal tribes as respects all land not reduced by the tribes to agricultural use, and endeavored to extinguish this right by purchase; but the tribes, urged on by the colonists who had acquired title from them, and by those who expected future profits from trading in aboriginal titles to lands, insisted that the treaty acknowledged the fee to be in the tribes, and that they could sell the fee to any person; and that in case the British Government wished to buy, it must pay the value of the fee simple.

A committee of Parliament on the affairs of New Zealand in 1840, while affairs were in this condition, assuming that the British Government would succeed in its claim of right to extinguish the aboriginal occupancy by purchase, spoke thus in their report concerning the law applicable to the case, and the policy which had been pursued by Great Britain and which it ought to have pursued:

> The acknowledgment of the independent nationality of the natives has given a sanction to the acquirement of lands by individual purchasers, because when the right of the natives to sell to all the world was admitted by the British Government, it followed that all persons, whether British subjects or others, had a right to buy without its sanction. Hence the Crown, which, by pursuing a different line of policy from the time of the discovery, might have prevented the acquirement of land by private purchasers at all, appears to be now precluded from applying the proper remedy to the evil without legislative aid.
>
> That remedy would, in the opinion of your committee, have been now uncalled for if the British Government had, from the year 1769 downward, never lost sight of the principle which was formerly acted upon by this country, and by all other European powers, with regard to their North American possessions, and had refused to recognize any titles to land founded on purchases made by

private persons from savages. This principle has been adopted by the United States and it has constantly guided their Government in its dealings with the various Indian tribes inhabiting the North American Continent, and it has been solemnly declared by the Supreme Court of Judicature in the United States to be a principle of international law. According to this principle the nation by whose subjects a new country is discovered acquires thereby a title to its possession as against all foreign powers. That title, when completed by occupation, gives to the discovering nation the sole right to purchase the soil from the natives, to establish settlements within its territory, and to regulate its relations with foreign powers. Upon this principle the Governments of Europe, as well as that of the United States, have asserted their right—a right qualified only by the moral obligation of acting with justice to the aborigines—to grant lands to individuals in territories so acquired by them; and upon it the British Government has recently set aside purchases made by individual settlers from the natives in the neighborhood of Port Philip.

The wisdom of this principle can not be more clearly shown than by referring to the state of New Zealand, where it has not been acted on. Large tracts of land have been acquired by settlers for nominal considerations—a blanket, a hatchet, or a gun. Disputes about the boundaries of land purchased have arisen, and conflicting claims to the same property have been set up. No surveys of this country have been made; and no law to regulate the possession of property, its descent, or its alienation is in force. To these evils must be added the more serious ones which have been caused by the profligate and reckless conduct of some of the whites, who have sown among the aborigines the seeds of vice and misery. Such have been the results of unrestricted colonization in New Zealand.

Under such a system it was hardly to be expected that any portion of the land purchased would be reserved for the use of the natives. It will accordingly be found that some tribes have been induced to alienate in one sale the whole of their lands; a proceeding by which the difficulty of civilizing and preserving that interesting race is materially increased.

Whilst private persons may acquire land in the manner described, and dispose of it on whatever terms they please, the most approved method of colonization, viz., that of disposing of the whole of the waste lands by sale at a uniform and sufficient price, can not be carried into effect. The Government, it is clear, can not maintain such a price, and thus introduce labor into the colony in quantities proportioned to the extent of land held by private owners, if those owners can undersell the Government without loss to themselves.

Your committee, after much consideration, have arrived at the conclusion, that irreparable evils will ensue unless the Crown shall become the sole proprietor of the whole of the soil of New Zealand; and they are of opinion that a good system of colonization can not be carried into execution by any other means.

Your committee, therefore, entirely concur in the principle asserted in the recent proclamation of the officers of the Crown, "that Her Majesty does not deem it expedient to recognize as valid any titles to land in New Zealand which are not derived from, or confirmed by Her Majesty," as well as in the propriety of the appointment of a commission of inquiry into claims to land, notified in the said proclamations.

In the year 1844, the situation in New Zealand having steadily become worse, the affairs of the colony were again investigated by a parliamentary committee, which went into the whole subject of the

law of nations and the bearing of the treaty of Waitangi upon the rights of Great Britain as the sovereign State over the aboriginal tribes. The report showed the dangers and difficulties incident to the attempt to deal with aboriginal tribes by treaty. The following are extracts from this report:

It appears to your committee that the difficulties now experienced in New Zealand are mainly to be attributed to the fact that in the measures which have been taken for establishing a British colony in these islands those rules as to the mode in which colonization ought to be conducted, which have been drawn from reason and from experience, have not been sufficiently attended to. When it was first proposed to establish New Zealand as a British colony dependent upon New South Wales, Sir George Gipps, the governor of the latter, in a very able address, laid down the following principles as those on which he had framed the bill, which it was his duty to submit to his legislative council for the regulation of the infant colony of New Zealand: "The bill is founded," he said, "upon two or three general principles, which, until I heard them here controverted, I thought were fully admitted, and indeed received as political axioms. The first is that the uncivilized inhabitants of any country have but a qualified dominion over it, or a right of occupancy only; and that, until they establish among themselves a settled form of government, and subjugate the ground to their own uses by the cultivation of it, they can not grant to individuals not of their own tribe any portion of it, for the simple reason that they have not themselves any individual property in it. Secondly, that if a settlement be made in any such country by a civilized power, the right of preemption of the soil, or, in other words, the right of extinguishing the native title, is exclusively in the Government of that power, and can not be enjoyed by individuals without the consent of their Government. The third principle is that neither individuals nor bodies of men belonging to any nation can form colonies, except with the consent and under the direction and control of their own Government; and that from any settlement which they may form without the consent of their Government they may be ousted. This is simply to say, as far as Englishmen are concerned, that colonies can not be formed without the consent of the Crown."

There is no room to doubt that it would have been far better if British dominion over these islands had been asserted as early as 1832, or even 1825; but a different policy having been at that time pursued it was considered, in the year 1839, when Capt. Hobson was sent out, that the difficulties which had thus been created could only be got rid of by obtaining from the natives their assent to the extension of the authority of the British Crown over New Zealand. Acting under the instructions he had received, Capt. Hobson, therefore, immediately on his arrival in New Zealand, at the beginning of the year 1840, concluded, with a large number of the chiefs of the northern island, a treaty known by the name of the treaty of Waitangi, by which, in return for their acknowledgment of British sovereignty, they were promised protection and guaranteed in the possession of all lands held by them individually or collectively. The evidence laid before your committee has led them to the conclusion that the step thus taken, though a natural consequence of previous errors of policy, was a wrong one. It would have been much better if no formal treaty whatever had been made, since it is clear that the natives were incapable of comprehending the real force and meaning of such a transaction; and it therefore amounted to little more than a legal fiction, though it has already in practice proved to be a very inconvenient one, and is likely to be still more so hereafter. The sovereignty

over the northern island might have been at once assumed, without this mere nominal treaty, on the ground of prior discovery, and on that of the absolute necessity of establishing the authority of the British Crown for the protection of the natives themselves, when so large a number of British subjects had irregularly settled themselves in these islands as to make it indispensable to provide some means of maintaining good order amongst them. This was the course actually pursued with respect to the middle and southern islands, to which the treaty of Waitangi does not even nominally extend; and there is every reason to presume that, owing to the strong desire the natives are admitted to have entertained for the security to be derived from the protection of the British Government, and for the advantages of a safe and well-regulated intercourse with a civilized people, there would have been no greater difficulty in obtaining their acquiescence in the assumption of sovereignty than in gaining their consent to the conclusion of the treaty; while the treaty has been attended with the double disadvantage, first, that its terms are ambiguous and, in the sense in which they have been understood, highly inconvenient; and next, that it has created a doubt which could not otherwise have existed, and which, though not in the opinion of your committee well founded, has been felt and has practically been attended with very injurious results, whether those tribes which were not parties to it are even now subject to the authority of the Crown.

Your committee have observed that the terms of the treaty are ambiguous and, in the sense in which they have been understood, have been highly inconvenient; in this we refer principally to the stipulations it contains with respect to the right of property in land. The information which has been laid before us shows that these stipulations, and the subsequent proceedings of the governor founded upon them, have firmly established in the minds of the natives notions which they had then but very recently been taught to entertain, of their having a proprietary title of great value to land not actually occupied; and there is every reason to believe that if a decided course had at that time been adopted it would not have been difficult to have made the natives understand that, while they were to be secured in the undisturbed enjoyment of the land they actually occupied, and of whatever further quantity they might really want for their own use, all the unoccupied territory of the islands was to vest in the Crown by virtue of the sovereignty that had been assumed.

The error in policy which your committee have pointed out as having in our opinion been fallen into by the officers who have held the government of New Zealand in not asserting the right of the Crown to all the unoccupied soil of these islands, is very closely connected with another, to which we also feel it necessary to advert. It appears to us that there has been a want of vigor and decision in the general tone of the proceedings adopted toward the natives; measures have not been taken, as we think they ought, for making the original inhabitants understand that they are now to be considered as British subjects and must therefore abstain from all conduct inconsistent with that character. The local authorities may have been guided by a desire to treat the natives of the soil with the most scrupulous justice and with the greatest consideration; but we are not the less persuaded that, not only in what has been done with regard to the ownership of land, but also in showing too much respect for native customs, they have been led to pursue a line of policy which in its consequences must be injurious to the true interests of those out of consideration to whom it has been adopted. We agree in the opinion expressed by one of the witnesses we have examined * * * that the rude inhabitants of New Zealand ought to be treated in many respects like children, and that in dealing with them firmness is no less necessary than kindness. In the first instance there was on the

part of the natives a disposition to defer with almost superstitious reverence to the authority of the Government; and had this authority been firmly and judiciously exercised to suppress intestine war and all savage and barbarous customs, and to enforce between different tribes and between individuals the great principles of justice and respect for property, no serious resistance would probably ever have been attempted. But from an oversensitive fear of infringing upon native rights, the authority which, had it been decidedly assumed, would, there is every reason to believe, have been willingly submitted to, has been lost, and the consequence has been, that murder and cannibalism have been allowed to be committed unpunished, and that very serious hostilities have broken out between different tribes, while the right of the British Government to interfere has been repudiated by the more powerful party, and the want of the promised protection loudly complained of by the weakest. Your committee are persuaded that an enlightened humanity and a regard for the real welfare of the native tribes require that British power and authority should be resolutely exerted to put a stop to such a state of things, to maintain internal peace, and to prevent native customs and usages from being acted upon in a manner inconsistent with good order and morality and with the progress of civilization.

Your committee can not offer these recommendations, tending to what may be thought a more severe enforcement of authority over the natives, without at the same time expressing their strong sense of the duty incumbent upon the Government of adopting the most effective measures for their welfare and improvement. With this view we conceive that every effort should be made to amalgamate the two races; more particularly, the utmost attention should be paid to the education and training of the rising generation of the aborigines. Whenever their improvement in intelligence will admit of it, the natives should be placed in every respect on a footing of perfect equality with their white fellow subjects, and as soon as possible they should be employed in the civil service of the Government in any situations in which they can make themselves useful. We also attach much importance to the adoption of a good system of making reserves of land for their benefit.

In 1840, at almost the same time that the affairs of New Zealand were thus being plunged into confusion by the treaty of Waitangi, Capt. (later Sir) George Grey, as a commissioner of the British Government to report upon the best means of promoting the civilization of the aboriginal inhabitants of Australia, made a report to Lord John Russell, then prime minister of Great Britain, in which he advocated and gave the reasons for governing aborigines directly by special laws and regulations adapted to their state of wardship and pupilage. This report was regarded as so sound by Lord Russell that he sent copies of it to the local governors in Australia and New Zealand to be considered and put into effect with such modifications as the local situation might demand. The report was in part as follows (British Parl. Papers, 1844, vol. 34, Papers relating to the Aborigines, Australian Colonies, pp. 95–102):

1. The aborigines of Australia having hitherto resisted all efforts which have been made for their civilization, it would appear that if they are capable of being civilized it can be shown that all the systems on which these efforts have been founded contained some common error or that each of them involved some

erroneous principle; the former supposition appears to be the true one, for they all contained one element, they all started with one recognized principle, the presence of which in the scheme must necessarily have entailed its failure.

2. This principle was that, although the natives should, as far as European property and European subjects were concerned, be made amenable to British laws, yet, so long as they only exercised their own customs upon themselves and not too immediately in the presence of Europeans, they should be allowed to do so with impunity.

3. This principle originated in philanthropic motives and a total ignorance of the peculiar traditional laws of this people, which laws, differing from those of any other known race, have necessarily imparted to the people subject to them a character different from all other races, and hence arises the anomalous state in which they have been found.

4. They are as apt and intelligent as any other race of men I am acquainted with; they are subject to the same affections, appetites, and passions as other men, yet in many points of character they are totally dissimilar to them; and from the peculiar code of laws of this people it would appear not only impossible that any nation subject to them could ever emerge from a savage state, but even that no race, however highly endowed, however civilized, could in other respects remain long in a state of civilization if they were submitted to the operation of such barbarous customs.

5. The plea generally set up in defense of this principle is that the natives of this country are a conquered people, and that it is an act of generosity to allow them the full power of exercising their own laws upon themselves; but this plea would appear to be inadmissible, for, in the first place, savage and traditional customs should not be confounded with a regular code of laws; and, secondly, when Great Britain insures to a conquered country the privilege of preserving its own laws, all persons resident in this territory become amenable to the same laws, and proper persons are selected by the Government to watch over their due and equitable administration. Nothing of this kind either exists or can exist with regard to the customs of the natives of Australia; between these two cases, then, there is no apparent analogy.

6. I would submit, therefore, that it is necessary from the moment the aborigines of this country are declared British subjects they should, as far as possible, be taught that the British laws are to supersede their own, so that any native who is suffering under their own customs may have the power of an appeal to those of Great Britain; or, to put this in its true light, that all authorized persons should in all instances be required to protect a native from the violence of his fellows, even though they be in the execution of their own laws.

In the first report of the United States Board of Indian Commissioners, established by Congress during the term of President Grant in 1869 and under the influence of his avowed purpose to establish an enlightened and humane régime for the Indians (whom, he declared in his first annual message, with emphasis, to be "wards of the Nation"), it was said:

The treaty system should be abandoned, and as soon as any just method can be devised to accomplish it existing treaties should be abrogated. The legal status of the uncivilized Indians should be that of wards of the Government; the duty of the latter being to protect them, to educate them in industry, the arts of civilization, and the principles of Christianity; to elevate them to the rights

of citizenship and to sustain and clothe them until they can support themselves. * * * The honest and prompt performance of all the treaty obligations to the reservation Indians is absolutely necessary to success in the benevolent designs of the administration.

By the act of Congress of March 3, 1871, future treaties with Indian tribes were forbidden. This act was as follows:

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby validated or impaired.

Since this act was passed agreements with Indian tribes are made, but such agreements are subject to the approval of Congress.

By the treaty of March 30, 1867, between Russia and the United States, by which Alaska was ceded to the United States, the subjection of the aboriginal tribes to the full sovereignty of the United States by the cession was recognized; the treaty declaring that "the uncivilized tribes will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of [the ceded] country."

By the modern practice of nations, treaties with aboriginal tribes, instead of attempting to regulate the relations between the State exercising sovereignty and the tribe, as if it were independent, are made for the purpose of arranging the terms of the guardianship to be exercised over the tribe. Thus in the treaty between the British Government and the King of Uganda, after the conquest of Uganda by Great Britain in 1894, the King, in pursuance of the "protection" granted to him by the British Government and maintained through a local "representative" of that Government, agreed to the following terms: To make no treaties or agreements of any kind with any European without the consent and approval of the British representative; to exercise no jurisdiction over Europeans and persons not born in Uganda, and to leave the exclusive jurisdiction in such cases to the British representative; to allow the court of the British representative to exercise such jurisdiction in cases in which the aborigines were concerned as it might deem proper; to assist in the execution of the judgments of the British representative; to recognize all international acts by which Great Britain was bound as binding on the government of the dependency to such extent as might be prescribed by the British Government; to undertake no war or serious act of state without the consent of the British representative; to place the assessment and collection of the internal taxes and the external duties and the disposal of the revenue in the control and revision of the British Government; to allow the property of the

British Government in the dependency to be free from taxation; to allow all the foreign relations of the dependency to be in the hands of the British representative; and to abolish slave trading and slave raiding and to assist in the complete ultimate abolition of slavery in the dependency.

(British Parl. Papers 1895, vol. 71 (Cd. 7708), Africa, No. 7, 1895, pp. 118, 119.)

In the case of Choctaw Nation *v.* The United States (119 U. S., 1, decided in 1886), the Supreme Court, in an action under a treaty between the Choctaw Nation and the United States, making a money settlement of claims, laid down the rules of interpretation of Indian treaties as follows:

> The United States is a sovereign Nation, not suable in any court except by its own consent, and upon such terms and conditions as may accompany that consent, and is not subject to any municipal law. Its Government is limited only by its own Constitution, and the Nation is subject to no law but the law of nations. On the other hand the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent State or sovereign nation, but of an Indian tribe. As such it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the Government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the act of March 3, 1871, embodied in 2079 of the Revised Statutes, to exert its legislative power. * * *

The court quoted the following from the case of Worcester *v.* State of Georgia, 6 Peters, 515, 582:

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

The court then proceeded:

> The recognized relation of the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws.
>
> The rules to be applied in the present case are those which govern public treaties, which, even in controversies between nations equally independent,

are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations. And it is the treaties made between the United States and the Choctaw Nation, holding such a relation, the assumptions of fact and of right which they presuppose, the acts and conduct of the parties under them, which constitute the material for settling the controversies which have arisen under them. The rule of interpretation already stated, as arising out of the nature and relation of the parties, is sanctioned and adopted by the express terms of the treaties themselves. In the eleventh article of the treaty of 1855, the Government of the United States expresses itself as being desirous that the rights and claims of the Choctaw people against the United States "shall receive a just, fair, and liberal consideration."

It is thus evident that the term "treaty," as applied to an agreement between a civilized State and an aboriginal tribe is misleading, and that such an agreement is, according to the law of nations, a legislative act on the part of the civilized State, made on conditions which it is bound to fulfil since it insists that the aboriginal tribe shall be bound on its part. When the executive of a civilized State enters into a "treaty" with an aboriginal tribe, it seems clear that he exercises, according to the law of nations, a legislative power over the tribe in subordination to the legislature of the State, and that the legislature is honorably bound by his act and obligated to fulfil the conditions, unless it repudiates the agreement before rights under it have become vested.

The modern practice, whereby each agreement with an aboriginal tribe is given the form of an organic act or charter determining the manner of administration of the tribe as a dependent community, or the form of an act of legislation assented to by the tribe, seems to be consistent with the law of nations and with the honor of civilized States.

CHAPTER X.

THE FOUNDING OF THE INDEPENDENT STATE OF THE CONGO, AND ITS EFFECT ON THE LAW AND PRACTICE OF NATIONS REGARDING ABORIGINES.

In the spring of 1884 there existed two private associations of an international character, one subordinate to the other, which were making claim for recognition as a State having sovereignty of the basin of the River Congo. One of these associations—the parent association—was known as the International African Association; the other—the offshoot association—as the International Congo Association. Their claim was based partly on rights of discovery made by Henry M. Stanley, an American citizen, who had accepted membership and office in the associations, and partly on treaties made with aboriginal tribes largely through his influence. As Stanley had first discovered and explored the Congo basin, the United States claimed to have a special interest in the disposition and regulation of the region, though disclaiming sovereignty for itself in pursuance of its traditional policy of avoiding entangling alliances and intervention in European politics. This special interest it proposed to utilize for the benefit of the aborigines of Africa and the citizens of all the civilized States.

In a letter from Secretary of State Frelinghuysen to Mr. Tisdel, containing instructions to the latter as consular agent in the Congo region, dated September 8, 1884, it was said:

> An American citizen first traced the Congo to the sea, and were we to admit the validity of a claim of sovereignty over the region based on discovery, the United States might well assert certain rights which they have not set up. The policy of this country has been consistent in avoiding entangling alliances and in refraining from interference in the affairs of other nations. From that policy there is no intention of departing; at the same time the rights, commercial and political, of our citizens must be protected, and in the valley of the upper Congo we claim those rights to be equal to those of any other nation. (Report of the Secretary of State on the Independent State of the Congo, June 30, 1886, Ex. Doc. Sen. No. 196, 49th Cong., 1st sess., p. 347.)

In the letter of instructions from Secretary of State Frelinghuysen to Mr. Kasson, United States Minister to Germany, as delegate plenipotentiary to the Berlin African conference, dated October 17, 1884, it was said:

> The attitude of the United States in this question [of freedom of navigation of international rivers and of access to the riparian territory] has for many

years been clear, and in the particular case of the Congo this Government was among the first to proclaim the policy of unrestricted freedom of trade in that vast and productive region. This Government could, consequently, not be expected to countenance, either by assent during the progress of the discussions or by acceptance of its conclusions, any result falling short of the broad principle it has enunciated.

Having thus stated the minimum upon which the United States would insist by reason of its special interests in the Congo region by reason of Stanley's discoveries, Secretary Frelinghuysen then stated the maximum of the hopes of the United States, toward the attainment of which Mr. Kasson was to direct his efforts. This part of the letter was as follows:

So far as the government of the Congo valley is concerned, this government has shown its preference for a neutral control, such as is promised by the Free States of the Congo, the nucleus of which has already been created through the organized efforts of the International Association. Whether the approaching conference can give further shape and scope to the project of creating a great State in the heart of western Africa, whose organization and administration shall afford a guarantee that it is held for all time, as it were, in trust for all peoples, remains to be seen. At any rate, the opportunity which the conference affords for examination and discussion of these questions by all the parties directly or indirectly in interest should be productive of broad and beneficial results. (*Ib.* p. 14.)

At the opening of the Berlin African conference on November 15, 1884, a program and draft of declaration concerning the establishment of an "open-door" policy in the Congo Basin, similar to that applied by the civilized States in the case of China and Japan, was presented by the German Government. This program had evidently been agreed upon in advance by the leading powers. Prince Bismarck, who was elected the permanent chairman, declared that the policy outlined in the proposed declaration was based on "the régime which has been observed for a number of years in the relations of the western powers with the countries of eastern Asia," which had been "thus far attended with the most favorable results, in that it had restricted commercial rivalry to legitimate competition." (*Ib.*, p. 25.)

Mr. Kasson, according to his instructions, in a declaration of the policy of the United States read to the conference at its second session on November 19, 1884, accepted this plan for subjecting the Congo region to the open-door policy applied in China and Japan, as a minimum on which the United States would insist, and stated its maximum of hopes and desires. This part of the United States' statement was as follows:

While declaring the general concurrence of the Government of the United States with the views expressed in the opening address of his highness, the president of this international conference, it may be useful to state briefly the relation of my Government to pending African questions.

Until the year 1874 a large section of the heart of Africa, comprising a great part of its salubrious uplands, was wholly unknown both to the geographers and to the statesmen of Europe and America.

An American citizen, who was qualified by courage, perseverance, and intelligence, and by a remarkable intrepidity and aptitude in exploration, resolved, with the support of English and American friends, to expose, if possible, to the light of civilization this obscure region. With the peaceful flag of his country over his tent, and at the head of his retainers, he disappeared from the knowledge of his countrymen; and after 39 very long and very dangerous months of exploration and travel, he reappeared with the results of his discoveries, which were communicated to the world.

It is to be observed that from the time he left the eastern coast of Africa opposite Zanzibar, during his travels to and beyond the upper waters of the Nile, as far as the watershed of the Congo, and along the course of that great river, while slowly descending toward the sea, and until he saw an ocean steamer lying in the lower Congo, he found nowhere the presence of civilized authority, no jurisdiction claimed by any representative of white men save his own over his retainers, no dominant flag or fortress of a civilized power, and no sovereignty exercised or claimed except that of the indigenous tribes.

His discoveries aroused the attention of all nations. It was evident that very soon that country would be exposed to the dangerous rivalries of conflicting nationalities. There was even danger of its being so appropriated as to exclude it from free intercourse with a large part of the civilized world.

It was the earnest desire of the Government of the United States that these discoveries should be utilized for the civilization of the native races and for the abolition of the slave trade, and that early action should be taken to avoid international conflicts likely to arise from national rivalry in the acquisition of special privileges in the vast region so suddenly exposed to commercial enterprises. If that country could be neutralized against aggression, with equal privileges for all, such an arrangement ought, in the opinion of my Government, to secure general satisfaction. (*Ib.*, p. 34.)

The maximum of the hopes and desires of the United States for the utilization of its special interests in middle Africa in the general interests might, it would seem, be summarized as follows: First, that all nations should unite in founding "a great State in the heart of western Africa whose organization and administration [should] afford a guarantee that it is to be held for all time, as is were, in trust for the benefit of all peoples"; second, that the obligations of this international trusteeship should be "the civilization of the native races" and the assurance of "equal privileges for all" as respects "commercial enterprises"; third, that the proposed trustee State, in order to fulfill its international trusteeship, should be "neutralized against aggression."

The Monroe doctrine, having for its object the interests of all civilized States and of humanity at large, not only did not prevent such a policy respecting middle Africa on the part of the United States, but logically made it necessary.

The United States, therefore, was willing to use these international associations as an agent or trustee of civilization in carrying out its

humane purposes. It only required to be satisfied that they were so organized, so administered, and so committed to international trusteeship that they were likely to effect this purpose. Upon being so satisfied its position logically compelled it to take the lead in recognizing the associations, or one of them, as having at once sovereignty and trusteeship, since only through the exercise of sovereign power under an international trusteeship was it possible for the humane purposes of the United States to be fulfilled.

In the latter part of 1883 and the early part of 1884, when the modern colonizing movement of the European States began, due to inventions which caused a sudden expansion of trade, manufacture, and transportation, middle Africa, from its proximity to Europe, became the field of European colonizing operations. The parts of the coast not effectively under the sovereignty of a European power were claimed by other European States, either by mere occupation or by occupation under "treaties" made with the aboriginal tribes, by which these tribes acknowledged the sovereignty of the occupying State and submitted to its protection. An occupancy of the coast, according to recognized principles of international law, might be made the basis of an occupancy extending throughout the basins of the rivers emptying into the sea on the part of the coast occupied. Thus the movement to occupy effectively the coasts of middle Africa, unless checked by an effective civilized sovereignty in the interior of Africa, acting under international responsibility in the common interest, would necessarily result in the partition of middle Africa among the European powers, and the United States would gain nothing for the aborigines of Africa or for the world at large, from its special interests under Stanley's discoveries.

In February, 1884, Great Britain and Portugal made a treaty whereby Portugal's claim to the coast at the mouth of the Congo was recognized by Great Britain, thus paving the way for a claim of sovereignty by Portugal, and indirectly and ultimately by Great Britain as patron of Portugal, over the whole basin of the Congo. France sought to prevent this by sending explorers and agents into the region north of Portugal's claim, to lay the basis of a sovereignty on its part, extending from the Atlantic north of the mouth of the Congo through the Congo Basin to the river. Thus the Portuguese claim to the whole basin of the Congo would be blocked, but at the same time the territorial claims of the International Associations to the Congo Basin would be reduced. If Portugal and Great Britain were allowed to locate at the mouth of the Congo, and France on the river above its mouth for a considerable distance, they were in a position to close the upper basin of the Congo to the outside world and make it impossible for the United States to realize its philanthropic

plan to utilize its special interests under Stanley's discoveries for the good of the aborigines of Africa and of all civilized peoples.

The questions presented to the United States in the spring of 1884 were: First, could it, according to the law of nations, recognize as a State a private association of civilized persons actually exercising a persuasive sovereignty over aboriginal tribes in Africa; and, second, could it, in its recognition, so far impress an international character upon the territory under the actual persuasive sovereignty of the association, that, in case it could secure the cooperation and consent of the powers, the territory would permanently have an international character, assuring its administration for the benefit of the aborigines and the world at large, regardless of whether there should ever be a cession of the sovereignty or not? Unless the maintenance of the international character could be made a covenant running with the land the philanthropic purpose of the United States plainly could not be fulfilled.

The publicists agreed generally that a private association actually exercising sovereignty could, by the law of nations, be recognized as a State. The question was concerning the objects and administration of the associations and the manner of impressing an international character upon the territory claimed by them.

The International African Association was the result of an international conference of geographical societies held at Brussels in 1876, which had been suggested in various quarters, but which was actually called by King Leopold II of Belgium. Belgium was under a neutrality guaranteed by Great Britain, France, and Germany, and was not a colonizing power. It was doubtless felt that an international agency to civilize Africa would be more likely to appeal to the public as truly international if it had its foundation in Belgium, than if it were founded in one of the colonizing States. Leopold II, having interested himself in geography and exploration, naturally was elected to the presidency.

The plan of an international association to civilize Africa was not a new one. The various African negro colonization societies in the United States, National and State, had suggested the idea. In 1840 Thomas Fowell Buxton, in his book on "The African Slave Trade and Its Remedy," had presented a plan for an international association for middle Africa at considerable length and with great ability, outlining the objects and presenting a scheme of organization. His plan was substantially followed by the Brussels Geographical Conference of 1876. The conference constituted itself into the International African Association, the object being to form a series of scientific stations in middle Africa as foci for the efforts of the civilized States to civilize the aborigines and open up the country to the commerce of the world.

The plan proposed by Buxton, in 1840, was in advance of his times. By 1876, however, the developments in science and religion which led to the founding of the Red Cross Association at about the same time, made Buxton's plan possible. M. Gustave Moynier, one of the founders of the Red Cross, was also one of the founders of the International African Association, and the two associations at the outset evolved on parallel lines; the one combatting suffering, the other ignorance. The Geographical Congress made a declaration on the subject of stations, in which it was said:

In order to attain the object of the International Conference of Brussels, that is to say, to explore scientifically the unknown parts of Africa, to facilitate the opening of roads which may cause civilization to penetrate into the interior of the African continent, and to discover means for suppressing the negro slave trade in Africa, it is necessary:

First, to organize on a common international plan the exploration of the unknown parts of Africa, on the understanding that the region to be explored is to have for its boundaries, eastward and westward, the two seas; southward, the basin of the Zambesi; and northward, the frontiers of the new Egyptian territory and independent Soudan. The means best adapted for this exploration will be the employment of a sufficient number of separate travelers starting from different bases of operation; second, to establish as the bases of these operations a certain number of scientific and relief stations, both on the coasts of Africa and in the interior of the continent. Of these stations, some will be established, in very limited numbers, on the eastern and western coasts of Africa, at points where European civilization is already represented, as, for example, at Bagamayo and Loanda. The stations should have the character of depots provided with the means of supplying travelers with the necessaries of existence. They might be established at small expense, for they would be intrusted to the charge of Europeans residing at these points.

The other stations could be established at points in the interior best adapted to serve as immediate bases for explorations. The establishment of these latter stations could be commenced at the points which at the present time recommend themselves as most favorable for the proposed purpose. * * * The explorers would be able afterwards to point out other positions where it would be convenient to set up similar stations.

Leaving to the future the care of establishing safe communications between the stations, the conference expresses the desire that a line of communication as nearly continuous as possible should be established from one ocean to the other, following approximately the route of Commander Cameron. The conference also expresses the hope that lines of operation will be subsequently established running from north to south.

The above declaration is taken from the book published in 1877 by Emile Banning, one of the Belgian members of the conference, entitled "*L'Afrique et la Conférence Géographique de Bruxelles*," and translated into English by R. H. Major. In this book the constitution of the International African Association formed at the conference is given in full. This association was in this constitution called the "International Commission of Exploration and Civilization of Central Africa." Mr. Banning, describing the membership

of the conference, says that the delegates were "selected in such a manner that they should faithfully represent, whether they were one or many, the opinions of their different nations on the subject of African questions," and that "science, philanthropy, and general policy * * * had their representatives." An examination of the list of distinguished publicists and scholars who served as delegates shows that this statement is entirely correct. Describing the nature of the organization, Mr. Banning said:

From the nature of the constituent elements of the conference, there naturally resulted the principles of the organism which was to give to its work motion and life. This organism comprised three fundamental agencies, an international commission, an executive committee, and national committees. * * *

The international commission is the parliament of the association. It is composed, according to the terms of the resolutions adopted by the conference, of the presidents of the principal geographical societies represented at Brussels, or adhering to its program, and of two members delegated by each national committee.

The executive committee * * * is composed of the president of the international commission, who sits as such in the committee; of three or four members designated in the first instance by the conference and subsequently by the commission, and of a secretary-general named by the president. * * *

The national committees are * * * the popular bases of the work, the instrument of propaganda, and the foundation of the pecuniary resources of the association. * * * Each country will determine as it sees fit the method of organization [of its national committee]; but everywhere they will have the same mission to fulfil. This mission * * * will be to popularize in every way the knowledge concerning Africa, to make known the physical and ethnic conditions, the needs and the resources, the splendors and the horrors. It will be necessary to interest in the labors and the heroic enterprises of travelers, numbers of persons whose apathy is only due to their ignorance, to attract public sympathy toward the millions of human beings who remain excluded from the benefits of civilization, or who know of it only by the wrongs which the most unworthy of its representatives have inflicted upon them.

Mr. Banning considered that one of the results of the action of the association would be the abolition of the slave trade, and that only by efforts such as it proposed could the trade be prevented. After referring to the declaration of the congress of Vienna and Verona against the trade and the international agreements and action of the maritime powers for stopping the trade by capture of slave-trading vessels, he said:

It is a universal conviction that the most active cruisers are powerless, and that the slave trade can be destroyed only upon the very soil which is the scene of its ravages. Such is precisely one of the essential objects which the international association pursues. In opening up Africa to science, to Christianity, to commerce, in civilizing its peoples, it adopts the true, the only, system which, by the agreement of all the African travelers, can possibly result in the complete and final abolition of the slave trade. It is, then, the program of Europe which the association has taken upon itself to execute, and what can be more just, then, than to expect all the governments to lend it a sympathetic

aid. * * * Perhaps, if powerfully aided at the same time by private beneficence, it might be able to enter upon the execution of its program in several respects at the same time.

The executive committee named by the conference was: King Leopold, of Belgium, as president; Sir Bartle Frere, of Great Britain; Dr. Nachtigal, of Germany; and M. de Quatrefages, of France.

The association, in order to distinguish its stations in Africa and to give them all a common bond and symbol, adopted a flag—blue, with a golden star in the center.

The executive committee conducted its operations in Africa for a considerable time under the name of the *Comité d'Études du Haut Congo*—the Committee for the Study of the Upper Congo—thus avoiding giving offense to the European States, especially Portugal and Great Britain, who had claims on the lower Congo. Stanley himself became a member of the committee and its chief representative in middle Africa.

None of the States saw fit to pay money from their treasuries to this private association, and private subscriptions were small; so that the expenses, which were large, had to be borne by the executive committee, and principally by Leopold II. The object could evidently be attained only by the exercise of governmental power, including that of local taxation. The executive committee and other persons, almost exclusively Belgians, then organized themselves into the International Congo Association, as the political agent of the International African Association, which was still assumed to be in existence by reason of the existence of the national committees, though it never met as an association. The International Congo Association, as the political agent of the other association, adopted its flag as its own, and sent out agents to explore the country and thus to complete the claim of discovery based on the discoveries of Stanley. Stanley and the other agents of the International Congo Association, under the flag of the original association, made treaties with the aboriginal tribes, by which the tribes were by the association recognized as "free States," and the tribal chieftains, on their part, recognized the association as their common agency to manage the interests of the tribes.

M. Georges Blanchard, in his book entitled *Formation et Constitution Politique de l'État Independant du Congo*, published in 1899, speaking of the difficulties of the International Congo Association in attempting to organize politically the Congo Basin, has said (pp. 28, 29):

On the one hand, it was necessary to employ a protectorate compatible with the spirit of independence of the numerous small independent native sovereign-

ties included within the domain of the association. On the other hand, it was necessary to have over them an authority which would actually be able to induce them to renounce their inhuman practices, such as cannibalism. * * *

As long ago as 1879 Col. Strauch, the president of the association, had written: "Our enterprise has in view the establishment of a powerful negro state." But Stanley refused to agree to this. The association then proposed to him to take for its object the founding of a "Republican confederation of free negroes," of which King Leopold should be the president, residing in Europe. But Stanley would not at first accept this idea, considering the negroes as too jealous of their independence to lend themselves to such a combination. But, nevertheless, after his first refusal he changed his mind and himself drew up a kind of constitution, which, on April 8, 1883, he caused to be adopted at Leopoldville by the chiefs and principal men of 58 districts. By this document they declared that they grouped themselves into a confederation and deputed to the white superintendent at Leopoldville their collective armed force, but they maintained formally their independence. This treaty served thenceforward as the model for all those which the association entered into with the negroes whose countries it occupied, and accustomed them gradually to the idea of a unitary state.

Out of this political arrangement came the name "The Free States of the Congo," popularly adopted in 1883 and 1884 to designate the aboriginal tribes inhabiting the Congo region, as unified in some sense through the International Congo Association under the flag of the International African Association.

As respects the question of how an international trusteeship could be impressed upon the association if it should be recognized as a State, so that the trusteeship should be a covenant running with the land, the use of the term "free States" perhaps throws light. The situation was analogous to that which existed in the United States from 1783 to 1787 as respects the Northwest Territory. The States having special interests in that territory were willing to renounce these special interests only in case they were assured, by a covenant running with the land of the Northwest Territory, that it would be laid out into "free States," which should ultimately be admitted into the Union; that within the territory the aborigines should be justly and humanely treated; that all other persons should enjoy the equal opportunity and privileges which they enjoyed within the Union; and that the territory should be "neutralized against aggression" by being placed under the plenary sovereignty and the protection of the United States. These matters were made the subject of a fundamental compact in the ordinance of 1787 for the Government of the Northwest Territory adopted by the Congress of the Confederation. By the Constitution the United States assumed the obligation of this fundamental compact and has ever since insisted on its fulfillment by all the "free States," which were afterwards organized in the territory, as a covenant running with the land.

The article of this fundamental compact relative to aborigines, which, as will be noticed, combined the subject of education with that of aborigines, was as follows:

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made for preventing wrongs being done to them and for preserving peace and friendship with them.

The method of a "fundamental compact" which the United States had used in the ordinance for the government of the Northwest Territory was, however, not capable of application in the case of the dealings between the United States and the International Congo Association. The "fundamental compact" in the former case was a purely domestic arrangement, operating only as a limitation upon the powers of the United States and the States in favor of their own citizens. A treaty or agreement made by the United States with the International Congo Association, imposing a covenant running with the land of the Congo region for the benefit of the inhabitants and the world in general, might entangle the United States with European States as a party to the compact and a guarantor of the association. In order to avoid all possibility of the United States assuming responsibility for the dealings of the association with the aborigines, and with the citizens of civilized States, and at the same time to place the association under an international trusteeship in this respect which the United States might or might not in its discretion cause to be observed, the proper course to pursue evidently was for the association to make a declaration of international trusteeship, and for the United States to make a response approving on grounds of humanity the declaration of international trusteeship made by the association, and recognizing its flag as the flag of a friendly government. This was accordingly done.

The declaration of the International Congo Association was as follows:

The International Association of the Congo hereby declares that by treaties concluded with the legitimate sovereigns in the basins of the Congo and of the Niadi-Kialun and in the adjacent territories upon the Atlantic, there has been ceded to it territory for the use and benefit of the free States, established and being established under the care and supervision (*sous la protection et la surveillance*) of the said association in the said basins and adjacent territories, to which cession the said free States of right succeed;

That the said International Association has adopted for itself and for the said free States the flag of the International African Association, being a blue flag with a golden star in the center;

That the said association and the said States have resolved to levy no custom-house duties upon goods or articles of merchandise imported into their territories or brought by the route which has been constructed around the Congo cataracts; this they have done with a view of enabling commerce to penetrate into equatorial Africa;

That they guarantee to foreigners settling on their territories the right to purchase, sell, or lease lands and buildings situated therein, to establish commercial houses, and to there carry on trade upon the sole condition that they shall obey the laws. They pledge themselves, moreover, never to grant to the citizens of one nation any advantages without immediately extending the same to the citizens of all other nations, and to do all in their power to prevent the slave trade.

To this declaration the United States, by the Secretary of State (Mr. Frelinghuysen), acting in the name of the President and "pursuant to the advice and consent of the Senate heretofore given," responded, acknowledging receipt of the declaration, and on its part declared:

That in harmony with the traditional policy of the United States, which enjoins a proper regard for the commercial interests of their citizens while at the same time avoiding interference with controversies between other powers as well as alliances with foreign nations, the Government of the United States announces its sympathy with and approval of the humane and benevolent purposes of the International Association of the Congo, administering, as it does, the interests of the free States there established, and will order the officers of the United States, both on land and sea, to recognize the flag of the International African Association as the flag of a friendly Government.

(Report of the Secretary of State on the Independent State of the Congo, 1886, p. 260.)

The news that France was preparing to claim a part of the Congo Basin was published in the morning newspapers of April 22, 1884. The Senate immediately met in executive session and released for publication its action of a few days previously approving the plan of the President to recognize the International Congo Association. That afternoon the recognition of the United States occurred as above stated. On the next day—April 23—the association made an arrangement with France giving it the right of preemption in case it should ever sell its rights, and receiving in return the virtual recognition by France of the association as a State, subject to a future settlement of the French claims in the Congo Basin. In making this arrangement the association declared as follows in a letter addressed by its President to the French minister of foreign affairs:

The International Association of the Congo, in the name of the stations and territories which it has founded on the Congo and in the valley of the Niadi-Quillon, declares formally that it will not cede them to any other power, under reserve of particular treaties which may be concluded between France and the association for the purpose of fixing the limits and conditions of their respective actions. Nevertheless the association, desiring to give a new proof of its friendly sentiments toward France, binds itself to give it the right of prefer-

ence if, through unforeseen circumstances, the association should be inclined at any time hereafter to realize upon its possessions.

The French minister of foreign affairs (M. Ferry) in reply, on April 24, 1884, said:

I have the honor of acknowledging receipt of the letter, dated the 23d instant, by which, in your capacity as president of the International Association of the Congo, you transmit to me assurances and guarantees destined to consolidate our relations of cordiality and of good neighborhood in the region of the Congo. I take note of these declarations with great satisfaction, and, in return, I have the honor of informing you that the French Government engages itself to respect the stations and free territories of the association and to place no obstacle in the way of the exercise of its rights.

(*Formation et Constitution Politique de l'État Independant du Congo*, by Georges Blanchard, Paris, 1899, pp. 366, 367, French Yellow Book on the affairs of the Congo, 1884.)

This arrangement was notified to the powers by circular of May 31, 1884.

The Berlin African Conference assembled November 15, 1884. The European powers seem to have rejected unanimously the claim of the International Congo Association to be a federalizing agency for the "free States," which were, in fact, aboriginal tribes. Possibly the unfortunate results which had flowed from the attempted "confederation" of the Maori Tribes in New Zealand under the influence of the British reformers of 1840, may have had its effect.

It appears, however, that so late as November 23, 1884, the idea of a confederation of free States of the Congo was still talked of in some quarters, but that the "States" then referred to were not the aboriginal tribes, but administrative districts, to be instituted in the Congo region as Provinces. In a letter from Mr. Tisdel to Secretary of State Frelinghuysen, of November 23, 1884, when the Berlin African Conference was in session (Report of the Secretary of State on the Independent State of the Congo, 1886, p. 352), it is said:

It is the purpose of the association to establish a political government and administration under the name of the "Free States of the Congo," the constitution of which I have reason to know has been prepared with the help of eminent jurists, and will, in all probability, be laid before the conference in Berlin before the sittings will have ended. This constitution appears to be based mainly upon the British colonial system, dividing the country into three States or Provinces under a governor general, himself dependent upon the executive.

In the same letter, however, Mr. Tisdel inclosed a "Manifesto of the International Association" (*Ib.* p. 356) in which the association assumed that by international recognition it had become a "new State." There is only one reference to the relation of "States" to the association. It is said:

With regard to the question how it is proposed to govern the Congo States, the legislation of the Congo territory, subject to the supervision and control of

the association, shall be based upon the principles of law recognized by civilized nations and upon the philanthropic principles set forth in the well-known plan of the association, whose aim is to civilize Africa by encouragement given to legitimate trade.

It would, therefore, appear evident that already in November, 1884, and doubtless before the opening of the conference on the 15th of that month, the plan for regarding the aboriginal tribes as "free States" and the association as a kind of federalizing and directing bond between these aboriginal free States had been concluded to be contrary to "the principles of law recognized by civilized nations," and not essential to the carrying out of "philanthropic principles."

In this respect the European nations doubtless acted according to the principles of the law of nations, as evolved by their own practice and also by the practice of the United States with respect to the Indian tribes.

On November 8, 1884, a week before the Berlin African Conference assembled, Germany made a treaty with the International Congo Association recognizing it as a unitary State, and on December 16, while the conference was in session, Great Britain made a declaration of recognition and also entered into a commercial treaty with the association. The form of recognition given by Great Britain was externally the same as had been followed by the United States—a declaration by the association of the character of its organization, its humane objects, and the obligations of international trusteeship assumed by it, and a declaration of approval and recognition of Great Britain. The statement of the form of organization of the association in its two declarations, however, differed materially. In the declaration made to the United States it was said:

> The International Association of the Congo declares that by treaties with the legitimate sovereigns in the basin of the Congo, and that of the Niadi-Kialun, and in the adjacent territories upon the Atlantic, there has been ceded to it territory for the use and benefit of free States established and being established under the care and supervision of the said association in said basins and adjacent territories, to which cession the said free States of right succeed.

In the declaration made to Great Britain it was said:

> The International Association of the Congo, founded by His Majesty the King of the Belgians for the purpose of promoting the civilization and commerce of Africa, and for other humane and benevolent purposes, hereby declares as follows:
>
> 1. That by the treaties with the legitimate sovereigns in the basin of the Congo, and that of the Niadi-Kialun, and in adjacent territories upon the Atlantic, there has been ceded to it territory for the use and benefit of free States established and being established in the said basins and adjacent territories.
>
> 2. That by virtue of said treaties the management of the interests of the said free States is vested in the association.

(Report of the Secretary of State on the Independent State of the Congo, 1886, p. 261.)

The declaration to the United States, asserting that the free States "of right succeed" to the rights of the association, was a claim of temporary trusteeship for the free States. The declaration to Great Britain, asserting that the free States had by treaties "vested" in the association "the management of the interests of the said free States" was a claim of sovereignty, and was broad enough to be interpreted as a claim that the association was the sole sovereign, the "free States," being under its guardianship as aboriginal tribes.

All the other European States, in the treaties of recognition and commerce concluded with the association while the conference was in session (collected in the report of the Secretary of State on the Independent State of the Congo of 1886, pp. 260–275), dealt directly with the association as the sovereign of the Congo territory as a unitary State.

The International Association of the Congo made its first communication to the conference on February 23, 1885, the day upon which the conference agreed to the terms of the final act and three days before the conference closed its labors. On that day the presiding officer of the conference read a letter addressed by the president of the association to Prince Bismarck as the president of the conference, notifying the conference that all the powers participating in it, except Turkey, had by separate and individual treaties recognized the flag of the association as that of "a State or a friendly government." The letter expressed the hope that the conference "would consider the advent of a power which takes upon itself the exclusive mission of introducing civilization and commerce into the center of Africa as a further assurance of the benefits which its important labors are destined to produce."

Referring to this letter, Baron de Courcel, the representative of France, spoke of the association as *l'État du Congo*—the Congo State. Sir Edward Malet, the representative of Great Britain, spoke of it as *ce nouvel État*—this new State. The representatives of Portugal, Italy, Spain, Denmark, and Sweden and Norway also spoke of it as "the Congo State" or the "new State."

The association did not, however, adopt the name of the Independent State of the Congo but, with the assent of the conference, adhered to the final act on the last day, February 26, 1885, by the name of the International Association of the Congo. Prince Bismarck, responding to the letter from the president of the association, which was then read to the conference, announcing its adherence to the final act, said:

> I believe I express the views of the conference when I acknowledge, with satisfaction the step taken by the International Association of the Congo and acknowledge their adherence to our decisions. The new Congo State is called upon to become one of the chief protectors of the work which we have in view.

I trust it may have a prosperous development and that the noble aspirations of its illustrious founder may be fulfilled. (*Ib.*, p. 296.)

The Berlin African conference, therefore, had nothing to do with the institution of the Independent State of the Congo except, as one may say, to register in the most formal way the fact of its "advent" into the society of nations; the existence of the State being due it its own acts in acquiring sovereignty in middle Africa and to the separate acts of recognition of the civilized States which were the members of the conference.

In the summer of 1885 King Leopold, who had been the president of the International Congo Association, became president of the new State, which took the name of the Independent State of the Congo; its relationship with Belgium being declared to be a personal one, both States having the same monarch but having no other relationship.

President Cleveland on September 11, 1885, wrote to King Leopold as follows:

I have had much pleasure in receiving your Majesty's letter of the 1st of August last, announcing that the possessions of the International Association of the Congo will henceforth form the Independent State of the Congo and that your Majesty, under the authorization of the Belgian Legislative Chambers and in accord with the association, has assumed the title of Sovereign of the Independent State of the Congo. I observe your Majesty's further statement that the convention between Belgium and the new State is exclusively personal. This Government at the outset testified its lively interest in the well-being and future progress of the vast region now committed to your Majesty's wise care by being first among the powers to recognize the flag of the International Association of the Congo as that of a friendly State; and now that the progress of events has brought with it the general recognition of the jurisdiction of the association and opened the way for its incorporation as an independent and sovereign State, I have great satisfaction in congratulating your Majesty on being called to the chief magistracy of the newly formed Government. The Government of the United States, whose only concern lies in watching with benevolent expectation the growth of prosperity and peace among the communities to whom they are joined by ties of friendship, can not doubt that under your Majesty's good government the peoples of the Congo Basin will advance in the paths of civilization and deserve the good will of all those States and peoples who may be brought into contact with them.

(Report of the Secretary of State on the Independent State of the Congo, 1886, p. 331.)

On the same day Secretary of State Bayard wrote to M. van Eetvelde, administrator general of the Independent State of the Kongo, declining to take action on the note of the Congo State announcing its assumption of a status of permanent neutrality under the provisions of the final act of the Berlin African Conference, on the ground that the United States had not ratified the signature of its plenipotentiary to that conference. Secretary Bayard's letter concluded thus:

The relationship of cordial recognition and earnest good will heretofore initiated by the Government of the United States toward the International

Association of the Congo, and now confirmed and, I trust, perpetuated in respect of the new independent State, is, however, complete in itself and apart from any conventional relationship flowing from or defined by the general act of the Conference of Berlin; and the obligation to respect the precepts of neutrality and friendly intercourse is held by the Government of the United States to be as perfect toward the Sovereign and Independent State of the Congo as toward any and all sovereignties with which the United States maintain friendship and intercourse.

The Independent State of the Congo, on July 1, 1885, forbade to the civilized inhabitants the making of contracts with the aborigines for the purchase of lands without the consent of a duly authorized officer of the State and declared all "vacant lands" to be the property of the State; applying the established principles of the law of nations as the guardian of the aborigines. (*Ib.*, p. 402.) In all its subsequent administration of its territory in Africa, it assumed to act on the same principles as other European States; recognizing itself as bound by the final act of the Berlin African conference, in the same manner as the other States having possessions in the conventional basin of the Congo.

The institution of the International African Association and of the International Congo Association undoubtedly stimulated public interest in the relations of civilized States to aboriginal peoples and made possible the remarkable development in the law of nations on this subject which occurred through the work of the Berlin African Conference. The covenants running with the land which the United States desired, and which it endeavored to initiate through agreements of recognition, were, in fact, made real by the action of that conference and by the adherence of the International Congo Association to the final act. The effect of the declaration of international trusteeship made by the International Congo Association to the United States, preliminary to the recognition of its sovereignty by the United States, as a declaration running with the land and binding Belgium, the present successor of the association, is doubtful. The obligations of international trusteeship and of guardianship of aborigines established by the final act of the Berlin African Conference are, however, of course, in effect as respects all the signatory and adherent powers and their successors; and the adhesion of the association to that act binds Belgium as its successor.

CHAPTER XI.

THE INSTITUTION BY THE BERLIN AFRICAN CONFERENCE OF A MIDDLE-AFRICAN ZONE OF INTERNATIONAL JURISDICTION AND THE EFFECT OF THIS ACTION ON THE LAW OF NATIONS REGARDING ABORIGINES.

The project to "create a great State in the heart of western Africa, whose organization and administration shall afford a guarantee that it is to be held, for all time, as it were in trust for all peoples," which the United States had supported and which it had hoped would be realized by the Berlin African Conference was, in substance, realized by the action of the conference.

The conference did not "create a great State in the heart of western Africa," although during the time that its sessions were going on such a State—the Independent State of the Congo—came into existence by the separate acts of recognition of twelve of the European States, in addition to the acts of recognition of the United States and Germany, which occurred before the conference opened.

But the conference, though it did not create a State, created a political and territorial institution affecting territory greater in extent than that described as "the heart of western Africa," and having in some respects the character or, at least, the possibilities of a "great State" administering a "trust for all peoples."

The first step taken by the conference in this respect was the establishment of a "conventional basin of the Congo," which was in fact all middle Africa from ocean to ocean, including substantially all the country between the Sahara Desert on the north and the rivers forming the northern boundary of what has since become South Africa.

Over this middle African zone the conference assumed what came very near to being an international over-sovereignty, supreme over the sovereignties exercised by the States having colonies in the zone. It decreed a régime in the nature of a supreme law of the land for the region, which the States having colonies in the region obligated themselves to follow, but which none of the States participating in the conference obligated itself to enforce. The zone established seems fairly to be described as one of international jurisdiction, since the congress was participated in by powers having no colonies in the region as well as by those having colonies there, and was open to the adhesion of all other powers.

As a result of the régime thus established as the supreme law of the land for this vast region by the assembled powers in the exercise of an international jurisdiction, the principles on which the United States insisted—of guardianship of aborigines and the open door to the commerce and intercourse of civilized persons—were assured.

Fourteen States were represented in the Berlin African Conference, namely, Germany, Great Britain, France, the United States, Russia, Spain, Austria-Hungary, Italy, Holland, Portugal, Belgium, Denmark, Sweden and Norway, and Turkey.

The program of the conference, as determined in advance, was limited to the establishment of an international agreement on three subjects:

1. Freedom of commerce in the basin and mouths of the Congo.
2. Application to the Congo and the Niger of the principles adopted by the Vienna Congress with a view to sanctioning free navigation on several international rivers, which principles were afterwards applied to the Danube.
3. Definition of the formalities to be observed in order that new occupations on the coast of Africa may be considered effective. (Report of the Secretary of State on the Independent State of the Congo, 1886, p. 1.)

In the discussion of the first two points, involving the question of "the open door" for middle Africa, the question arose concerning the nature and extent of territory to which it was possible to apply such an international political and economic régime. It was evident, as soon as the question was examined, that such a régime could be effectively applied only to a territory which constituted a political, economic, and ethnic unit. The geographical basin of the Congo, when examined by the conference, after hearing the explanations of Stanley, was found to be a region of irregular and complicated boundaries, having neither a political, an economic, or an ethnic unity. The commercial approach to the Congo Basin at that time was from the Indian Ocean, to which the geographical basin of the Congo did not extend. The negro race was aboriginal throughout a territory far more extensive than the geographical basin. The claims of the civilized States were certain to include the whole region inhabited by the negroes, and the territorial boundaries of their respective jurisdictions would doubtless take no heed of the geographical boundaries of the Congo Basin.

In order to find the necessary geographical, political, economic, and ethnic unit to place under the proposed international régime, it was necessary to take in other territory than the geographical basin of the Congo. As the conference was called to discuss the freedom of commerce in the basin of the Congo, it fulfilled its mandate by agreeing upon a "conventional basin of the Congo" to which the international régime should apply.

Mr. Stanley proposed a plan for joining to the geographical basin of the Congo the territory on the Atlantic coast north and south of the Congo for a distance of about 300 miles, and also all the territory between the geographical basin of the Congo and the Indian Ocean, taking in the great lakes on the north and extending south as far as the Zambesi River; that is, from the French and English spheres of sovereignty and influence on the north to the English and Portuguese spheres of sovereignty and influence on the south.

This region was accepted by the conference as the region to be subjected to the international régime determined by the conference, in so far as it should be or come under the sovereignty of any of the States signatory of or adhering to the final act of the conference. This region, though already to some extent parceled out among the civilized States and the International African Association and its successors, and certain to be completely parceled out in the near future, was nevertheless to have an international character as a kind of international reservation in which the aborigines should be treated justly and all civilized States should enjoy equality of opportunity.

The program of the conference made no special reference to a consideration of the law of nations regarding the relations between civilized States and aboriginal tribes; but the conference was evidently unanimous in agreeing that the first topic of the conference, "freedom of commerce in the basin and mouths of the Congo," involved the whole question of the relations of the colonizing States to the aborigines. Evidently there can be no "freedom of commerce" in a country inhabited by aboriginal tribes unless these tribes are given their proper and just relationship to the civilized governments and their citizens, and peace and order prevails. The question of the relations with the aborigines was therefore considered in the course of the deliberations of the conference on the freedom of commerce.

Provisions insuring equality of opportunity in the reservation to all civilized States and their citizens were agreed upon, as follows:

Article II. All flags, without distinction of nationality, shall have free access to the whole of the coast line of the territories above enumerated, to the rivers there running into the sea, to all the waters of the Congo and its affluents, including the lakes, and to all the ports situated on the banks of these waters, as well as to canals that may in future be constructed with intent to unite the water courses or lakes within the entire area of the territories described in Article I. Those trading under such flags may engage in all sorts of transportation and carry on the coasting trade by sea and river, as well as boat traffic, on the same footing as if they were subjects.

Article III. Goods, of whatever origin, imported into these regions, under whatsoever flag, by sea or river or overland, shall be subject to no other taxes than such as may be levied as fair compensation for expenditures in the interest of trade, which, for this reason, must be equally borne by subjects and by

foreigners of all nationalities. All discriminating duties on vessels, as well as on merchandise, are forbidden.

Article IV. Merchandise imported into those regions shall be exempt from import and transit duties. The powers reserve to themselves to determine, after a lapse of 20 years, whether this exemption shall be maintained or not.

Article V. No power that exercises or that shall hereafter exercise sovereign rights in the above-mentioned regions shall be allowed to grant therein a monopoly or favor of any kind in matters of trade. Foreigners, without distinction, shall enjoy the same usage and rights as subjects as regards the protection of their persons and possessions, the purchase and sale of property, personal and real, and the exercise of their vocations. * * *

Article VII. The Convention of the Universal Postal Union, as revised at Paris, June 1, 1878, shall be extended in its operation to the Conventional Basin of the Congo. The powers which therein do or shall exercise rights of sovereignty or protectorate engage, as soon as circumstances permit, to take the measures necessary for carrying out the preceding provision. (Ib., pp. 208, 209.)

In the opening address of Prince Bismarck at the first session the first words were as follows:

In extending its invitations to this conference the Imperial Government was guided by the conviction that all the Governments shared the desire to promote the civilization of the natives of Africa by opening the interior of that continent to commerce, by furnishing the means of instruction to its inhabitants, by encouraging missions and enterprises calculated to diffuse useful knowledge, and by preparing the way to the abolition of slavery, and especially of the slave trade, the gradual abolition of which was proclaimed by the Congress of 1815 as a sacred duty of all the powers.

The interest taken by all civilized nations in the material development of Africa assures us of their cooperation in the task of regulating commercial relations with that part of the world.

The régime which has been observed for a number of years in the relations of the western powers with the countries of eastern Asia having been thus far attended with the most favorable results, in that it has restricted commercial rivalry to legitimate competition, the Government of His Majesty the Emperor of Germany has thought that it might recommend to the powers to introduce into Africa, in a form suitable to that continent, the same régime, which is founded upon the equality of the rights and upon the solidarity of the interests of all commercial nations. (Report of the Secretary of State on the Independent State of the Congo, 1886, p. 25.)

In the draft of declaration on freedom of commerce submitted to the conference by the German Government at the first session one of the closing articles was as follows:

All powers exercising sovereign rights or any influence in the said territories shall assume the obligation to take part in the abolition of slavery, and especially in that of the slave trade, to favor and assist the labors of missionaries and to encourage all institutions calculated to educate the natives and to teach them to understand and appreciate the benefits of civilization. (*Ib.*, p. 31.)

At the session of November 27 this paragraph was approved by the conference with an addition proposed by Sir Edward Malet (the plenipotentiary for Great Britain) whereby the powers also agreed

to favor and aid "the exercise of all religions without distinction of creed." A proposal was made by M. de Serpa, a delegate of Portugal, seconding a suggestion of Count de Launay, plenipotentiary for Italy, to add to the article a declaration against the importation of spirituous liquors and gunpowder into the Congo territory, and also against "the importation of pillories, lashes, and all instruments of torture," but these proposals were not considered.

The matter of the relations with the aborigines was then referred to a committee on editing, of which Baron de Courcel, plenipotentiary for France, was the chairman and Baron Lambermont, plenipotentiary for Belgium, the reporter. This committee formulated the declaration concerning the relations with the aborigines substantially as it now appears in the final act, which is as follows (Arts. 6 and 9):

All the powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in abolishing slavery and especially the slave trade. They shall, without distinction of creed or nation, protect and favor all religious, scientific, or charitable institutions and enterprises created and organized for the above ends, or designed to instruct the natives and to bring home to them the blessings of civilization.

Christian missionaries, scientists, and explorers, with their escorts, property, and collections, shall likewise receive special protection.

Freedom of conscience and religious toleration are expressly guaranteed to the natives, as well as [to] subjects and foreigners. The free and public exercise of all forms of divine worship, and the right to build edifices for religious purposes, and to organize religious missions belonging to all creeds, shall not be limited or fettered in any way whatsoever. * * *

Seeing that the slave trade is forbidden according to the principles of international law as recognized by the signatory powers, and seeing also that the operations which, by sea or land, furnish slaves to the trade, are likewise to be regarded as forbidden, the powers which do or shall exercise sovereign rights or influence in the territories forming the conventional basin of the Congo declare that those territories shall not serve as a market or means of transit for the trade in slaves, of whatever race they may be. Each of the powers binds itself to employ all the means at its disposal for putting an end to this trade and for punishing those who engage in it. (*Ib.*, pp. 290, 300.)

The committee, in reporting these provisions, thus commented upon them:

According to the text, as according to the observations to which it has given rise in the commission, three elements are distinguishable. The first concerns protection so far as the development, material and moral, of the indigenous populations [is concerned]. In regard to these populations, which for the most part should, without doubt, be considered as finding themselves without the community of the law of nations, but who, in the present state of affairs, are scarcely qualified to defend their own interests, the conference has thought proper to assume the rôle of official guardian. The necessity of securing the preservation of the aborigines, the duty to aid them to attain a higher political

and social status, the obligation to instruct and initiate them into the advantages of civilization are unanimously recognized.

It is the future of Africa which is here at issue. No dissent manifested itself, nor could manifest itself, in this respect in the commission.

Two heavy scourges weigh on the actual condition of the African people and paralyze their development—slavery and the slave trade. Everyone knows—and the witness of Mr. Stanley has but confirmed in this respect an accepted notion—what deep roots slavery has in the constitution of the African societies. Certainly, this malevolent institution should disappear; it is the condition even of all progress, economic and political; but superintendence [and] changes [in social and economic conditions] will be indispensable. It is enough to indicate the objects; the local governments will seek the means and adapt them to the time and [circumstances]. The trade has another character; it is the [very] negation of all law, of all social order. The hunting of men is a crime of treason against humanity. It should be repressed wherever it [may] be possible to extinguish it, on land as on sea. Under this condition the commission has * * * prescribed a rigorous obligation. The events of which the Egyptian Soudan is at this moment the theater, the scenes of which Mr. Stanley has recently been witness on the banks of the upper Congo, the abominable expeditions which, according to Dr. Nachtigal, are frequently organized in the central Soudan, and which penetrate to the basin of the Congo, demand an intervention which the local powers will be compelled to face as a pressing duty, a moral mission. But the sphere of action of these powers will be for a long time yet limited. It is for this reason that the commission asks them to second these generous and civilizing beginnings.

Religion, philanthropy, science may send missionaries, who will receive every protection and guaranty. The declaration as formulated makes no exception of creed or nationality; it opens the field to all devotions and covers them indiscriminately with its protection and patronage. * * *

[The] last paragraph concerns religious liberty of conscience and religious toleration for the aborigines, [for the citizens of the colonizing States and for] foreigners. No restriction shall be placed on the free and public exercise of worship or on the right to erect religious edifices or organize missions belonging to all creeds. * * *

[Thus] in another land the moral and material conditions of the existence of the indigenous populations, the suppression of slavery, and above all the slave trade, [the encouragement of] scientific or charitable institutions, missionaries, scholars [and] explorers, liberty of conscience, and religious toleration are the objects of guaranties which correspond to the most elevated design of your labors.

(Report of the Secretary of State on the Independent State of the Congo, 1886, pp. 76, 77.)

The statement that "the conference has thought proper to assume the rôle of official guardian" of the aboriginal tribes, as primitive societies "without the community of nations" and "scarcely qualified to defend their own interests," doubtless meant that the conference recognized the civilized States collectively as a "community" holding to the aboriginal tribes a relationship of overguardianship or chancellorship; the aboriginal tribes, as "without the community of the law of nations" being subject to that community as wards are subject to the chancellor,—the direct guardianship being exercised

by the States exercising sovereignty over the region inhabited by the tribes.

The extent of the duties of guardianship of aborigines recognized by the signatory powers was by the language used in the final act left somewhat indefinite. By Article VI, above quoted, the powers exercising sovereignty or influence in the conventional basin of the Congo bound themselves "to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being." This, however, was made somewhat more definite by the words of the preamble, which declared that the powers participating in the conference were "desirous to secure the means of furthering the moral and material well-being of the native population." The language of the committee in the report above quoted, however, placed upon these words a meaning which clearly imposed upon the powers exercising sovereignty or influence in the conventional basin of the Congo the duty of training the aborigines for civilization by the direct action of the state. This language was as follows:

> The necessity of securing the preservation of the aborigines, the duty to aid them to attain a higher political and social status, the obligation to instruct and initiate them into the advantages of civilization, are unanimously recognized. It is the future of Africa which is here at issue. No dissent manifested itself, nor could manifest itself, in this respect in the commisson. (*Ib.*, p. 76.)

The action of the conference concerning the relation of civilized States to aboriginal tribes above considered was all that directly bore on this question. From the omission of the conference, however, to refer to treaties with aboriginal tribes in the articles of the final act relating to the formalities to be observed in order to make new occupations effective, and from the discussions in the conference regarding these articles, the opinion of the conference on the effect of such treaties under the law of nations may inferentially be ascertained.

Articles 34 and 35 of the final act were as follows:

> Any power that may hereafter take possession of any territory on the coasts of the African continent outside of its present possessions, or that, having had none up to that time, shall acquire any, and likewise any power that may assume a protectorate there, shall accompany the respective act with a notification thereof, addressed to the other signatory powers of the present act, in order to enable them, if need be, to make good any claims of their own.
>
> The signatory powers of the present act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent sufficient to protect existing rights, and, the case arising, freedom of trade and of transit on the conditions that may have been agreed upon.

There being no reference in these paragraphs to treaties made by the colonizing States or their citizens with aboriginal tribes, the inference is necessary that the conference considered that such treaties

had no effect in determining the right of a State to exercise sovereignty over the region inhabited by the tribes. As between two or more civilized States disputing the sovereignty over a given territory, possibly treaties with the aboriginal tribes might be used in evidence by one or the other to prove the fact of prior occupation, but it was settled that no civilized State could base its title to sovereignty on such treaties, or insist, against another State, on its producing such treaties, as the source of its right to sovereignty.

The "acquired rights," which it was made the duty of the occupying State to respect, were not intended to cover the rights of the aborigines. The question was raised at the session of the conference on January 31, 1885, when the declaration was being considered. Mr. Kasson, the plenipotentiary for the United States, inquired what was meant by "acquired rights," and it was answered by the presiding officer of the conference and agreed by the delegates that the expression 'acquired rights' comprised "all the acquired rights in existence at the time of a new occupation, whether these rights belonged to private individuals or to Governments." (*Ib.*, p. 211.)

Mr. Kasson, on behalf of the United States, stated that his Government approved the declaration regarding new occupations "as a first step, well directed, though short," and made the following "observation," which the conference ordered to be recorded as a part of the proceedings:

> Modern international law follows closely a line which leads to the recognition of the rights of native tribes to dispose freely of themselves and of their hereditary territory. In conformity with this principle, my Government would gladly adhere to a more extended rule to be based on a principle which should aim at the voluntary consent of the natives whose country is taken possession of in all cases where they have not provoked the aggression.

He also added to the "observation" a statement of his understanding that the conference agreed that the acts prescribed in the declaration were "the minimum of the conditions which must necessarily be fulfilled in order that the recognition of an occupation may be demanded."

(Report of the Secretary of State on the Independent State of the Congo, 1886, p. 211.)

The Berlin African act consisted of four "declarations," two "acts of navigation," one relating to the River Congo and the other to the River Niger, and a section containing the "general dispositions" relating to signature and ratification. By articles 13 and 26, the principle of equality of treatment in the navigation of each of these rivers, for all nations, without any exclusive privilege to any, was "recognized by the signatory powers as forming hereafter a part of the public international law." The declaration relative to liberty of commerce in the conventional basin of the Congo (in which was

included the declaration regarding the guardianship of aborigines), was regarded by the conference as establishing an international covenant of a permanent nature, running with the land, and binding for all time the powers exercising sovereignty in the conventional basin. Doubtless the same is true of the other declarations, but in regard to this one the conference placed itself on record.

At the session of January 31, 1885, it was stated by Sir Edward Malet, in behalf of Great Britain, that the question had been raised whether the provision in this declaration that the signatory powers reserved the right to decide, at the end of a period of twenty years, whether the exemption from import duties should be maintained, implied that after that date the principle of equality of treatment and freedom of commerce on the rivers and in the conventional basin of the Congo might be abolished. He therefore asked that the conference set this doubt at rest. The unanimous decision of the conference, voiced by Baron de Courcel, as chairman of the committee, was that these principles were intended to be perpetual. He said:

> The prohibition of discriminating duties, of monopolies or privileges, and of all inequality of treatment to the prejudice of persons belonging to a foreign nationality, is affected by no limitation of time. The good which results therefrom should be considered as a definitive acquisition. The conference, by inaugurating such a state of things, will have accomplished a work which in point of liberality we can pronounce, with a feeling of satisfaction, to have been hitherto unprecedented. (*Ib.*, p. 213.)

Mr. Kasson, in a letter to Secretary of State Bayard, dated March 16, 1885, in which he mentioned the various and complicated questions considered by the conference, said that those questions had been "settled for all time, for the principles go with the soil." (*Ib.*, p. 189.) And Sir Edward Malet, in his report to Earl Granville, dated December 23, 1884, said, referring to the declaration concerning freedom of commerce in the conventional basin of the Congo:

> The declaration, as formulated, practically binds the territory itself to which those engagements relate. No power can occupy any part of it in future except under those engagements. Any power, therefore, not represented in the conference, if it acquires possession in the territory, would have to respect the engagements entered into. (*Ib.*, p. 307.)

And on February 21, 1885, writing again to Earl Granville, and referring to the proceedings at the session of January 31 above quoted, Sir Edward Malet said:

> The assurances given, in which the French Ambassador emphatically joined, that equality of treatment in the free zone is for all time, can not fail to set this question at rest. (*Ib.*, pp. 308–309.)

The action of the Berlin African Conference, therefore, was in the nature of a supreme federal constitution or a supreme law of the land, affecting all the States then or thereafter exercising sovereignty in

the conventional zone established by the conference. The final act was not "legislation" in the ordinary sense, since none of the signatory States bound itself to enforce it. But neither was it a mere "intervention," since the powers exercising sovereignty in the region participated with powers exercising no sovereignty there, and for the same reason it was not a mere "cooperative agreement" of parties engaged in a common work. The final act seems to be most correctly described as an act of supreme international jurisdiction, the signatory and adhering powers being or representing the society of the civilized States. If this is the case, the conference established a political entity in middle Africa in the nature of a new "State," federalistic in character, whose "organization and administration" were so prescribed that middle Africa "is to be held for all time, as it were, in trust for all peoples," and especially for the aborigines, under the terms prescribed by the conference as a covenant running with the land, which no State obligated itself to enforce, but which any State or group of States was at liberty and under moral obligation to enforce. This great and novel political entity may perhaps be properly described as the "middle African zone of international jurisdiction."

CHAPTER XII.

THE FAILURE OF THE PROPOSALS, IN THE BERLIN AFRICAN CONFERENCE, FOR NEUTRALIZATION AND SURVEILLANCE OF THE MIDDLE AFRICAN ZONE OF INTERNATIONAL JURISDICTION, AS AFFECTING THE DEVELOPMENT OF THE LAW OF NATIONS REGARDING ABORIGINES.

A. NEUTRALIZATION.

It was evident, when the conference had reached the point of agreeing upon the conventional basin of the Congo, that they were really establishing and legislating for a territorial institution analogous to an international reservation.

The question immediately arose whether or not any one or more civilized States should have the right to make war in the international reservation, and thus be able to set at naught the provisions which all the civilized States had made for the welfare of all concerned within the reservation. As the international reservation was to be parceled out among several civilized States, there was danger not only that those exercising such sovereignty might war with each other, but that States not exercising such sovereignty might war with those exercising it. Hence there was danger not only of wars arising within the reservation, but of the transfer to the reservation of wars arising outside of it.

On November 18, 1884, at the second session of the conference, Mr. Kasson read the statement setting forth the general policy of the United States referred to above.

Speaking of Stanley's explorations, it was said:

> His discoveries aroused the attention of all nations. It was evident that very soon that country would be exposed to the dangerous rivalries of conflicting nationalities. There was even danger of it being so appropriated as to exclude it from free intercourse with a large part of the civilized world. It was the earnest desire of the Government of the United States that these discoveries should be utilized for the civilization of the native races, and for the abolition of the slave trade, and that early action should be taken to avoid international conflicts likely to arise from national rivalry in the acquisition of special privileges in the vast region so suddenly exposed to commercial enterprises. If that country could be neutralized against aggression, with equal privileges for all, such an arrangement ought, in the opinion of my Government, to secure general satisfaction.

Speaking of the recognition by the United States of the flag of the International Congo Association, the statement asserted:

> The President of the United States * * * believes that in thus recognizing the only dominant flag found in that country he acted in the common interest

of civilized nations. He regards this local government, or any successor, resting on the same bases and principles, as an assurance that the dangers of international violence will be averted; that the enormity of the slave traffic will be suppressed; that the blacks will learn from it that the civilization and dominion of the white man means for them peace and freedom and the development of useful commerce, free to all the world.

He therefore desires to see in the delimitation of the region which shall be subjected to this benevolent rule the widest expansion consistent with the just territorial rights of the Governments. In so far as this neutral and peaceful zone shall be expanded, so far he foresees the strengthening of the guaranties of peace, of African civilization, and of profitable commerce with the whole family of nations.

(Report of the Secretary of State on the Independent State of the Congo, 1886, p. 34.)

There was general agreement for a neutralization of the rivers Congo and Niger, which should be an agreement of self-abnegation on the part of the signatory States and without any guaranty binding them to intervene in case the neutrality of the rivers was violated.

The proposition of the United States that the enormous extent of the Congo Basin—increased largely by the agreement of the conference fixing the "conventional" basin of the Congo—be neutralized raised a great number of difficult questions. Should the agreement for neutralization be one of individual self-abnegation only, or should it include a guaranty that in case one or more violated the neutrality the others would forcibly intervene? Should the territory be attempted to be kept free from wars arising in Africa itself or should it only be kept from being made a theater of war as an incident to wars waged between civilized States, the main theater of which was outside of Africa? These questions were in fact considered, as the proceedings show. Other questions necessarily arose and must have been discussed privately, though obviously too delicate for public discussion and record. Should the renunciation extend to preventing the colonizing powers from organizing colonial armies and navies of any kind in the international zone, or colonial armies and navies, the personnel of which should be recruited from the aborigines? Or should it prevent them from establishing munition plants, arsenals, and naval bases in international zone? Should the inhibition or renunciation of war be required only from the States having colonies in the international zone, or from all States? Should the inhibition extend to requiring the States having colonial possessions in the international zone to punish their citizens who should attempt to bring about war with another such State by exciting aboriginal border tribes to revolution or to the commission of atrocities? In view of the opportunities which aboriginal tribes have always offered and must always offer to adventurers or politicians as a means of

stirring up international war between civilized States, the question of keeping international war out of the international zone, or out of any other colonized region inhabited by aboriginal tribes, was a peculiarly difficult one.

The original proposition submitted by Mr. Kasson was as follows (*Ib.*, p. 63):

> To assure in time of war the continuance of the liberty of commerce and of navigation before stipulated, should war unhappily exist between any two or more powers adhering to this declaration, each of the signatory powers engages itself to treat all the free commercial territories defined in the first declaration of this conference, together with all its water routes, as the territory of a neutral in which no act of war shall be committed by either belligerent against the other and no articles contraband of war shall be supplied therein to either belligerent; and each of the signatory powers reserves the right to cause this stipulation to be respected.

This proposition came up on December 10 before the general committee of the conference, during the discussion in regard to the article neutralizing the Congo River and the works connected with its navigation. The report of the committee referring to the proposition was as follows (*Ib.*, pp. 103, 104):

> According to that plan, it is not only the river, the assimilated watercourses, and the roads that are to be declared neutral in time of war; all the territories forming part of the conventional basin of the Congo, as marked out in Article I of the declaration as to the freedom of commerce, are to be placed under the same regimen. Any act of hostility in those localities on the part of the belligerents is to be prohibited, and no article classed as contraband of war is to be furnished to them. Finally, the signatory powers are to have the right to cause this neutrality to be respected.
>
> In a statement which he read to the commission, Mr. Kasson explained and justified his proposition. He did not propose, he said, absolutely to exclude the hypothesis of a war between powers situated on the banks of the Congo; he wished, however, to prevent any European or American powers, whether they had or had not any possessions in the basin of the Congo, from making that the theater of hostilities in case of any such hostilities breaking out. Colonial wars considerably hampered and for a long time paralyzed the prosperity of the American colonies. The same experience should not be repeated in Africa. The efforts that shall be made and the establishments that may be created at great expense ought not to be threatened or destroyed by rivalries and contests in which these States themselves have no interest. In order to prevent any misunderstanding of his idea, Mr. Kasson translated it in terms conformable to the explanations contained in his *mémoire justicatif.*
>
> At the request of Mr. von Kusserow [a delegate of Germany], the jurists present at the session were requested to make their views known. Prof. Asser, delegate of the Netherlands, supported the motion made by Mr. Kasson, for the reason that the freedom of rivers in time of war is not included in that of territories. He made a distinction between the liberty of continuing commerce and neutrality, and he rendered homage to diplomacy aiding the progress of the science of international law.
>
> Mr. Travers Twiss, British delegate, thought that it would be difficult to maintain neutrality in Africa in case of a war between the powers owning col-

onies there. If, however, it was proposed not to forbid war but to circumscribe its theater, the proposition was a practical one.

Mr. Engelhardt, French delegate, stated that they were agreed as to the maintenance of navigation in time of war. Neutrality applied to watercourses only did not seem liable to objection.

After these explanations the commission took up the real subject of the debate.

The ambassador of England declared that his Government was ready to subscribe to the engagement proposed by the plenipotentiary of the United States and that it accepted it in the widest sense that it might be desired to give to it.

Count Hatzfeldt [German delegate] expressed himself in the same terms on behalf of Germany, which, he said, was disposed to extend, as far as possible, the immunity which had been proposed.

The plenipotentiary for Italy [Count de Launay] shared this view. He hesitated to suggest an arbitration, which did not seem likely to receive the unanimous vote of the conference; he thought, however, that the mediation clause inserted in the twenty-third clause of the Paris conference might be taken up again, and that, for this special case, greater efficacy might be given to it. He placed this opinion under the patronage of the Chevalier Mancini, whose competence is likewise recognized in the science of international law.

Mr. de Serpa Pimental, the plenipotentiary of Portugal, thought that Mr. Kasson's plan threatened the sovereignty of the Congo States [and] of the powers having colonies there. The effect of its application might be to subject the territory of the same State or colony to two different international régimes if it was traversed by the line of demarkation of the Congo basin. For these reasons he could not concur in said plan.

Mr. von Kusserow [German delegate] expressed himself in a different sense. He thought that the American proposition was inspired by the same thought that presided at the convocation of the conference. It accorded with the common interest. All that was necessary was to assume the engagement to limit the field of future hostilities, to renounce the pursuit, in the basin of the Congo, of a conflict having its origin elsewhere. The States and colonies of the Congo would not be involved in wars that did not concern them. The plenipotentiary of Germany [Prince Bismarck] would support any combination made in this spirit.

Baron Lambermont [Belgian plenipotentiary] said that if any State should be friendly to the principle of neutrality that State was certainly Belgium, which is indebted to it for a long period of peace and prosperity. He remarked, nevertheless, that if, according to Mr. Kasson's proposition, all that was wanted was a pledge not to make war in the basin of the Congo, Belgium would merely act on its character of a neutral in subscribing to such a pledge.

The ambassador of France [Baron de Courcel] objected to the proposition presented by the United States minister. Neutrality, said he, can exist in but two forms; it is either voluntary and free or it is compulsory and guaranteed. The latter is not under discussion and the former is not decreed. Hence the proposed measure would be without practical value. No belligerent Government having possessions in the basin of the Congo could submit to it. It can not be asked that a belligerent State shall deprive itself of a part of its means of action. Baron de Courcel added that such an engagement could not be kept. When a State is at war, it wages war by all the means in its power. The compromise proposition concerning navigable water-courses and roads realizes all that is practicable in Mr. Kasson's plan. This proposition, he said, is a great step in advance, since it consecrates the principle of the in-

violability of private property both of belligerents and neutrals on the said waters and roads.

The ambassador of Italy [Count de Launay] said that the point in question was not so much to render the basin of the Congo neutral as it was to assume an engagement in virtue of which the signatory powers should renounce carrying on wars in that basin.

It is only the safety and the expansion of the great market that is to be opened on the banks of the Congo, added Mr. von Kusserow, that it is desirable to secure.

At the conclusion of this exchange of views the plenipotentiary of the United States defended his plan. He declared that it did not contemplate wars in Africa, but foreign wars transferred to Africa. It only sought to prevent the basin of the Congo from becoming the scene of conflicts that did not concern it and to prevent belligerents from rousing the native tribes, which are already but too much given to fighting and plunder. Our proposition, said he, is not only humanitarian, but it has a very practical sense.

As a result of the discussion it was agreed to disconnect the provisions for freedom of commerce of the rivers from those relating to the renunciation of hostilities in the international zone, and that the latter question should be taken up later.

The committee on editing on December 15 proposed as a substitute an agreement of mutual self-renunciation, mediation, and arbitration, as follows (*ib.*, pp. 88, 89):

In order to secure the maintenance of the freedom of commerce and navigation, even in time of war, in all the districts comprised within the conventional basin of the Congo, and place [them under] the régime of commerce and liberty according to article 1 of the declaration of this conference, and to the reservations therein stipulated, the signatory powers of the present declaration, or subsequently adhering thereto, adopt the following:

I. In case of war between the powers signing the present declaration or subsequently adhering thereto, and having no possession in the conventional basin of the Congo, the belligerent powers renounce the extension of hostilities [to the territories] comprised in the said basin.

II. In case of war between powers exercising rights of sovereignty [or] protectorate in the said basin, each of the belligerents shall likewise renounce the extension of hostilities to [the territories comprised in] the said basin.

III. In case of war between powers, one of which exercises and the other does not exercise rights of sovereignty [or] protectorate in the said basin, they shall likewise renounce the extension of hostilities to the territories comprising [comprised ?] in that basin, and the colonial possessions of the first power shall be considered on both sides as the territory of a non-belligerent State.

IV. In case difficulties should arise between any of the powers signing the present declaration or subsequently adhering thereto who possess colonies in the said basin and States which may be established there, or shall establish themselves there, the parties renounce any recourse to hostilities and pledge themselves to abide by the mediation [or] arbitration of one or more friendly powers.

On December 28 the general committee presented another draft of a resolution, which met with the approval of Germany, the United

States, Great Britain, and Italy, in the following words (*ib.*, 155, 156):

> In order to insure the freedom of commerce and navigation, even in time of war, in all the countries mentioned in paragraphs 1 and 2 of Article I of the present declaration and placed under the régime of commercial freedom, the signatory powers of the present declaration adopt the following principles:
>
> The whole of the basin, including the territories which are there found subject to the sovereignty or the protectorate of one of the belligerent powers, shall be considered as the territory of a non-belligerent State.
>
> Consequently, in the case of war between the signatory powers of the present declaration, these engage to renounce the extending of hostilities into the territories included in this basin or the making of them serve as the base of operations of war.
>
> The vessels of the belligerents shall be forbidden to remain in the territorial waters of this basin, except in case of storms or for necessary repairs.
>
> In such cases the belligerent vessel shall quit these waters so soon as the storm shall have ceased or the damages shall have been repaired. It shall not coal there except in such quantity as may enable it to reach the nearest national port situated outside the basin.
>
> In case difficulties should arise between the signatory powers of the present declaration which may exercise sovereign or protectorate rights in the said basin, the parties renounce the recourse to hostilities in the said basin and engage to appeal to the mediation or refer to the arbitration of one or more friendly powers. These engagements shall likewise include the independent States established on the littoral of the oriental zone mentioned in paragraph 3 of Article I of the present declaration under condition of their consent.

Great Britain proposed to add a provision prohibiting belligerent vessels, after coaling in the harbors of the lower Congo, from taking coal again there until after an interval of three months.

France, by Baron de Courcel, declined to consent to this formula, for the reasons given by him in opposition to the original proposition of the United States, but intimated that he would propose a formula, and the matter went over until February 23, 1885, the third day before the close of the conference.

On December 28, 1884, at the time the committee offered this proposal of neutralization, the United States, Germany, Great Britain, and Italy had recognized the International Congo Association as a State apparently by boundaries which included the territories claimed by France and Portugal. Austria made a commercial treaty with the association on December 24, and Holland on December 28, without mention of territorial limits. Spain made a similar treaty on January 7, 1885. On February 5, 1885, France came to an agreement with the International Congo Association by which it recognized the association, and the association yielded its claim to most of the region claimed by France north of the lower Congo, subsequently known as the French Congo, and on February 14, 1885, the Portuguese claims were adjusted so that Portugal controlled only the south side of the

mouth of the Congo and the association the north side for a considerable distance (*ib.*, pp. 230-240).

It was made a provision in the treaties of the association with France and Portugal that these two States should use their influence in the conference to obtain the neutralization of the territories of the association (*ib.*, pp. 240, 243).

On February 23, 1885, after the association had been admitted to the conference as one of the parties, Baron de Courcel, as chairman of the general committee, presented a proposition approved by the committee relating to the neutralization of the Congo Basin. This proposition was adopted and forms a part of the final act (Art. X, XI, and XII). These articles are as follows (*ib.*, p. 300):

ARTICLE X. In order to furnish a new guarantee of security to trade and industry and to encourage, by the maintenance of peace, the development of civilization in the countries mentioned in Article I, and placed under the system of commercial freedom, the high signatory parties to the present act, and those who shall hereafter adopt it, bind themselves to respect the neutrality of the territories or portions of territories belonging to the said countries, including the territorial waters, so long as the powers which exercise or shall exercise the rights of sovereignty or protectorate over those territories, using their option of proclaiming themselves neutral, shall fulfill the duties which neutrality requires.

ARTICLE XI. In case a power exercising rights of sovereignty or protectorate in the countries mentioned in Article I. and placed under the free-trade system, shall be involved in a war the high signatory parties to the present act, and those who shall hereafter adopt it, bind themselves to lend their good offices in order that the territory belonging to this power and comprised in the conventional zone of commercial freedom, may, by the common consent of this power and of the other belligerent or belligerents be placed during the war under the régime of neutrality and be considered as belonging to a non-belligerent State, the belligerents thenceforth abstaining from extending hostilities to the territories thus neutralized, and from using them as a base for warlike operations.

ART. XII. In case a serious disagreement originating on the subject of or within the limits of the territories of Article I and placed under the system of commercial freedom shall arise between any signatory powers of the present act, or the powers which may become parties to it, these powers bind themselves, before appealing to arms, to have recourse to the mediation of one or more friendly powers. In a similar case the same powers reserve to themselves the option of having recourse to arbitration.

Baron de Courcel, in behalf of the committee, made an explanatory statement, as follows (*ib.*, pp. 276, 277):

It is not the first time that this idea [of neutralization] has appeared in your deliberations. In the course of the examination of the declaration on the freedom of commerce, as also in the discussion on the acts of navigation of the Congo and of the Niger, the idea of neutralizing the whole or a part of the territories of the conventional basin was first expressed. It was even partially applied in the position assigned to these two rivers in time of war (arts. 25 and 33). The minister of the United States had submitted to you an

extended proposal which would have fixed, on the whole territories, provisions analogous to those which had obtained your consent in dealing with the river region. This proposal, as it stood, at once met the approval of several of the plenipotentiaries; nevertheless, certain doubts as to the practical range of the terms neutrality and neutralization as applied to territories, the care of or the respect for the sovereignty of States, the uncertainties even which then existed as to the future division of the countries in the basin of the Congo, prevented an agreement from being reached on a formula that would be satisfactory in every emergency.

These difficulties diminished notably afterwards. At the time when the conference was drawing to the end of its task, circumstances appeared to allow the solution of a problem which it had not abandoned without regret. Inspired with this thought, and combining divers elements that had been produced in the course of the former discussions, the ambassador of France took the initiative in a proposal of an essentially compromissorial character. Your commission had not received instructions to deal with this point, but it thought that by agreeing to it, it would meet your views and facilitate the progress of your work.

On examination, the proposal of the French plenipotentiary did not raise serious dissent. The ambassador of England agreed to it. Some plenipotentiaries, whose views were expressed by Count de Launay and Mr. Kasson, would have preferred a fuller and wider solution, but this did not prevent them agreeing to the proposal which finally united all the votes. It only remains for me briefly to describe its sense and scope.

The first of the three articles submitted to you provides that the powers exercising the right of sovereignty, or of protectorate, within the conventional basin of the Congo, may, by proclaiming themselves neutral, secure to their possessions the benefit of neutrality. In this case, and this is the essential meaning of the clause, the signatory powers engage beforehand to respect this neutrality, under the sole reserve of the correlative fulfillment of the duties which it imposes. This engagement is not only contracted toward the power which issues the declaration of neutrality but toward all the other signatory powers which thus acquire the right to demand that it shall be respected.

No limit is imposed upon the declaration of neutrality, which may be temporary or perpetual. It has been explicitly understood that this provision applied especially to the State which the International Association of the Congo is about to found and which it appears to have the intention of placing under the system of permanent neutrality. This wish, therefore, obtains the assent and sanction of the powers in advance. Nevertheless, other States have, or will have, possessions in the basin of the Congo and may wish to claim the same privilege. There are at present two which possess colonies hitherto held under the same system, situated partly in the conventional basin, partly outside of it. It was impossible either to exclude these territories from the neutrality clause or to include them wholly, because the neutralization, placed under the optional guaranty of the signatory powers to the general act, could not in any way be extended beyond the limits of the conventional basin. To guard against this difficulty the article contemplates not only the territories but "the parts of territory dependent upon the said countries." In addition, the following article contemplates more especially the situation of the powers that are in this position. Let us add, as the ambassador of England has remarked, that the power of declaring themselves neutral would belong to those powers exercising a sovereignty or protectorate in the territories of the conventional basin of the Congo which may adhere to the act in the same manner as to the signa-

tory powers. Such would be the case, for example, with the Sultan of Zanzibar if he should adhere to the general act and place his States under the system defined by this act.

The second article has for its object to withdraw as much as possible from the evils of war the regions included in the basin of the Congo, without, nevertheless, interfering with the sovereignty of the governments. It provides for the case in which a power possessing a colony might be involved in a war of which the cause or the origin might be foreign to its African possessions. The signatory or adhering powers bind themselves, therefore, to tender their good offices to bring the two belligerent parties to consent, the one not to extend hostilities to the countries situated in the basin of the Congo and the other not to make them a base for military operations. If this reciprocal consent is obtained the territories to which it refers will in fact be rendered neutral during the continuance of the war.

The third article contains an engagement to have recourse to a preliminary mediation if a conflict shall arise in Africa itself, between powers exercising rights of sovereignty in the basin of the Congo. * * * Mediation does not exclude the possibility of war; it may fail to prevent it. It is less than arbitration, which respect for the independence of States prevents *a priori* from being imposed, but it is more than a simple recourse to good offices. In reality, mediation will generally be efficacious and will very often lead to the smoothing away of international difficulties. To the State—the growing Congo State—which all the powers wish to surround with pacific guarantees, this provision is of real value, because it obliges the States that may have a disagreement with it to have recourse to the mediation of the friendly powers.'

B. SURVEILLANCE.

The question of placing the zone under an international commission of surveillance was considered in the conference.

In the original draft of declaration laid before the conference by Prince Bismarck at the first session, the final paragraph was as follows:

With the reserve of ulterior arrangements between the Governments signing this declaration, and those powers which shall exercise rights of sovereignty in the territories in question, the international commission for the navigation of the Congo, appointed in virtue of the act signed at Berlin on the ————, in the name of the same Governments, shall be charged with the [surveillance] of the application of the principles proclaimed and adopted by this declaration. (Report of the Secretary of State on the Independent State of the Congo, 1886, p. 33.)

At the session of the conference on November 27, 1884, this proposition was taken up for discussion. The proceedings were as follows (*ib.*, pp. 58–59):

Mr. de Serpa, [delegate of Portugal], thinks that the supervision attributed by this paragraph to the international commission of the Congo would impede the liberty of action and the legitimate initiative of the territorial governments, and would create perpetual occasions of conflict. The local authorities would have responsibility for their acts, and should preserve their full liberty of administration. To take this from them would be to compromise the development of colonies.

Baron de Courcel, plenipotentiary for France, suggested that the discussion be postponed "until the constitution of the commission should have been decided and regulated."

Mr. Kusserow, [delegate of Germany], said:

> The German Government had not the least intention to encroach upon the sovereign rights of Governments recognized or to be recognized. But, meanwhile, it seemed to him necessary not to leave without control the liberty of commerce in the basin of the Congo. * * * The international commission of the navigation of the Congo appeared to him to be a competent organ to be personally charged with that control. For the rest, the plenipotentiaries of Germany indorse the opinion of the French ambassador, inclining to adjourn the discussion of this paragraph till the erection of the international commission in question.

About December 15, 1884, the general committee presented a draft of articles concerning the navigation of the Congo, containing provisions for the establishment of an international commission of navigation, accompanied with a report of the proceedings of the committee during its consideration of this subject (*ib.*, pp. 89–102). The committee stated that it had based its action upon the principles derived from a study of the conventional régimes adopted by international agreement in the case of the Rhine, the Scheldt, the Paraná and Uruguay, and the Danube (*ib.*, p. 94). The European commission of the Danube, established by the treaty of Paris of 1856, was adopted as the model on which the international commission of navigation of the Congo was to be formed (*ib.*, pp. 97–99). In the report it was said (*ib.*, p. 97):

> We have already stated in the introduction to this report that the Paris congress was induced in 1856 to charge a European commission with the measures to be adopted for the improvement of the navigation of the Danube, and that that commission had justified, by the services rendered by it, the expectations of the Governments and of commercial men.
>
> The desire that such a commission might be appointed on the Congo has recently been expressed in various quarters, and has found practical expression in the draft of a navigation instrument prepared by the German Government.
>
> Your commission has adopted this idea without discussion. If debates have arisen, they have had special reference, as you will see hereafter, to the character of the task to be intrusted to the international commission and to the nature and limits of its powers.

In the project of declaration regarding the navigation of the Congo, presented by the general committee and accompanying this report, it was provided as follows (*ib.*, p. 81):

> ARTICLE VII. An international commission is instituted, empowered to secure the execution of the provisions of the present act.

The report of the committee shows that the delegates of Belgium proposed that the international commission should be independent of the territorial authority, and that its officials should have the bene-

fit of extraterritoriality, as in the case of the Danube commission; but that this proposition met with objections from several powers, notably France and Portugal (*ib.*, p. 98).

The report also shows that a proposal was made that the loans contracted by the international commission should be held to be guaranteed by the States signing the final act or adhering thereto, and that this proposal was opposed by the United States and the Netherlands (*ib.*, pp. 100, 101).

By the final act of the conference the navigation of the Congo, its affluents, and the roads, railways, or lateral canals "constructed with the special object of obviating the innavigability or correcting the imperfection of the river route on certain sections of the course of the Congo" were made "free for the merchant ships of all nations equally, whether carrying cargo or ballast, for the transportation of both merchandise and passengers." Only taxes or duties of a nondiscriminating character and "having the character of an equivalent for services rendered to navigation" were permitted to be levied by the international commission, and the kinds of taxes and duties were specified (arts. 13–16 of the final act, *ib.*, pp. 300, 301).

The provisions of the final act concerning the constitution and powers of the international commission of navigation, strictly as such, are contained in articles 17 to 21, and are as follows (*ib.*, pp. 301–303):

ART. 17. An international commission shall be created which shall be charged with the execution of the present act of navigation. The signatory powers of this act, as well as those who may subsequently adhere to it, may always be represented on the said commission each by one delegate. But no delegate shall have more than one vote, even in the case of his representing several governments. This delegate will be directly paid by his government. As for the various agents and employees of the international commission, their compensation shall be deducted from the amount of dues collected, according to paragraphs 2 and 3 of article 14. The amount of the said compensation, as well as the number, grade, and powers of the agents and employees, shall be entered in the returns to be sent yearly to the Governments represented in the international commission.

ART. 18. The members of the international commission, as well as its appointed agents, are invested with the privilege of inviolability in the exercise of their functions. The same guarantee shall apply to the offices and archives of the commission.

ART. 19. The international commission for the navigation of the Congo shall be constituted as soon as five of the signatory powers of the present general act shall have appointed their delegates. Pending the constitution of the commission, the appointment of these delegates shall be notified to the Imperial Government of Germany, which shall see to it that the necessary steps are taken to summon the meeting of the commission. The commission shall at once draw up navigation, river police, pilot, and quarantine rules. These rules, as well as the tariffs to be framed by the commission, shall, before coming into force, be submitted for approval to the powers represented in the commission. The powers interested shall communicate their views with as little delay as possible. Any infringements of these rules shall be checked by the agents of the

international commission wherever it exercises direct authority, and elsewhere by the riparian power. In the case of an abuse of power, or of an act of injustice, on the part of any agent or employee of the international commission, the individual who considers himself to be aggrieved in his person or rights may apply to the consular officer of his country. The latter shall examine his complaint, and if he finds it prima facie reasonable, he will be entitled to bring it before the commission. At his instance, then, the commission, represented by at least three of its members, shall, in conjunction with him, inquire into the conduct of its agent or employee. Should the consular officer look upon the decision of the commission as raising questions of law, he will report on the subject to his Government, which may then have recourse to the powers represented on the commission, and request them to agree as to the instructions to be given to the commission.

ART. 20. The international commission of the Congo, charged, according to article 17 with the execution of the present act of navigation, shall, in particular, have power—

1. To decide what works are necessary to secure the navigability of the Congo in accordance with the needs of international trade. On those sections of the river, where no power exercises sovereign rights, the international commission shall itself take the measures necessary to secure the navigability of the river. On those sections of the river held by a sovereign power the international commission shall concert its action with the riparian authorities.

2. To fix the pilotage tariff and that of the general navigation dues as provided for by paragraphs 2 and 3 of article 14. The tariffs mentioned in the first paragraph of article 14 shall be framed by the territorial authorities within the limits prescribed in the said article. The levying of the various dues shall be under the charge of the international or territorial authorities on whose behalf they are established.

3. To administer the revenue arising from the enforcement of the provisions contained in the preceding paragraph (2).

4. To superintend the quarantine establishment created in virtue of article 24.

5. To appoint officials for the general service of navigation, and also its own proper employees. It shall be for the territorial authorities to appoint subinspectors on sections of the river occupied by a power, and for the international commission to do so on the other sections. The riparian power shall notify to the internationl commission the appointment of subinspectors, and this power shall take care that their salaries be paid. In the exercise of its functions, as above defined and limited, the international commission shall be independent of the territorial authorities.

ART. 21. In the accomplishment of its task, the international commission may, if need be, have recourse to the war vessels of the signatory powers of this act, and of those who may in future accede to it, under the reserve, however, of such instructions as may be given to the commanders of these vessels by their respective Governments.

ART. 22. The war vessels of the signatory powers of this act that may enter the Congo are exempt from payment of the navigation dues provided for in paragraph 3 of article 14; but, unless their intervention has been asked for by the international commission or its agents, according to the preceding article, they shall pay all pilot or harbor dues.

ART. 23. With the view of providing for the technical and administrative expenses which it may incur, the international commission created by article 17 may, in its own name, negotiate loans to be exclusively guaranteed by the revenues assigned to the said commission. The decisions of the commission

authorizing the conclusion of a loan must be reached by a majority of two-thirds. It is understood that the Governments represented in the commission shall not in any case be held as assuming any guaranty, or as contracting any engagement or joint liability with respect to the said loans, unless under special conventions concluded by them to this effect. The revenue yielded by the dues specified in paragraph 3 of article 14 shall be appropriated by way of priority to the payment of the interest and sinking fund of the said loans, according to the agreements made with the lenders.

ART. 24. At the mouth of the Congo there shall be established, either at the initiative of the riparian powers, or through the intervention of the international commission, a quarantine establishment for the control of vessels passing out of as well as into the river. The powers shall subsequently decide whether sanitary control shall be exercised over vessels engaged in the navigation of the river itself; and if so, in what manner.

ART. 25. The provisions of the present act of navigation shall remain in force in time of war. Consequently all nations, whether neutral or belligerent, shall be always free, for purposes of trade, to navigate the Congo, its branches, affluents, and mouths, as well as the territorial waters fronting the mouths of the river. Traffic shall similarly remain free, despite a state of war, on the roads, railways, lakes, and canals mentioned in articles 15 and 16. There shall be no exception to this principle, except so far as concerns the transportation of articles intended for a belligerent and considered, in virtue of the law of nations, as contraband of war. All the works and establishments created in pursuance of the present act, especially the tax offices and their treasuries, as well as the permanent service staff of these establishments, shall enjoy the benefit of neutrality, and shall, therefore, be respected and protected by belligerents.

At the session of the conference on December 18, 1884, consideration was again given to the proposal of the German Government that there should be conferred on the international commission a general power of surveillance of all action under the provisions of the final act. It would appear that the proposal had been acted upon unfavorably and privately by the conference, but that the idea had received such support that it was felt to be necessary that some reference to such a general surveillance should be made in the final act. This was effected by the German Government itself offering a new proposal, in which the substance of the original proposal was given up, but which nevertheless kept the principle of general surveillance in the final act. The record is as follows (*ib.*, pp. 126, 127):

The president recalls that the study of the final paragraph of the first project of declaration submitted to the conference by the Government of Germany * * * had been referred to a later epoch, and that the time has come to proceed to it.

Mr. Busch, [delegate of Germany], read, from a newly proposed text a revision of this paragraph, as follows:

In all parts of the territory covered by the present declaration [where no] power shall exercise rights of sovereignty, the international commission for the navigation of the Congo instituted in virtue of the act signed at Berlin the ————, shall be charged with superintending [*chargée d'surveiller*], the

application of the principles proclaimed and established by this declaration. In all cases where difficulties relative to the application of the principles established by the present act shall arise, the interested Governments shall [be at liberty to] agree to appeal to the good offices of the international commission by [authorizing it to make] an examination [into] the facts which [shall] have been the occasion of these difficulties.

Baron de Courcel states that they found in the beginning some obscurities in the sense of this paragraph. Since then it has been clearly established that the authority attributed to the international commission in regard to superintending the application of the principles of commercial liberty could only be exercised in the territories where no regularly established sovereign authority existed.

The plenipotentiary of France remarked on the other hand that the new revision contained a paragraph which did not exist in the primitive text, and which had for its object to forsee the eventuality of arbitration, simply voluntary and optional, in view of which the Governments would appeal to the good offices of the international commission. Baron de Courcel adheres to this arrangement, which he thinks may be fruitful.

Sir Edward Malet is of the same opinion as the ambassador of France.

Baron Lambermont, [plenipotentiary of Belgium], observes that the first paragraph of the text under discussion affirms, on behalf of the international commission, a right of supervision relative to the application of certain principles in the regions where no constituted authority exists. He asks upon whom falls this application which the international commission should supervise.

Mr. Busch, [delegate of Germany], replies that the question is of the application of the régime of commercial liberty by the aboriginal chiefs.

Mr. de Kusserow, [delegate of Germany], thought it proper to insert in the first paragraph the words "or protectorate" between the words "sovereignty" and the words "the international commission."

The conference adheres to this modification.

The whole of the final paragraph was then adopted.

The article agreed upon appears in the final act, as one of the articles of the declaration concerning freedom of commerce, and is as follows:

Article VIII. In all parts of the territory had in view by this present declaration, where no power shall exercise rights of sovereignty or protectorate, the International Navigation Commission of the Congo, instituted in virtue of Article 17, shall be charged with the supervision (*chargée de surveiller*) the application of the principles proclaimed and perpetuated by this declaration. In all cases of difference relative to the application of the principles established by the present declaration, the Governments concerned may agree to appeal to the good offices of the international commission by requesting it to examine the matters that may have occasioned such difficulties.

As it was not likely that there would long remain in the international zone any place which would not be under the sovereignty or protectorate of a civilized State, and as the whole zone was soon effectively placed under civilized sovereignty, the right of surveillance delegated to the International Commission of Navigation was of no effect. Its action in adjusting disputes between the States

exercising sovereignty was dependent upon the willingness of both or all disputants to appeal to its good offices.

As to the meaning which the Conference attached to the word surveillance, which the English text translates as "supervision," reference may be made to the report of the commission regarding the article which now appears as article 20 of the final act. Speaking of the provision which authorizes the commission to superintend the quarantine establishment, etc. (which in the original French version reads *la surveillance de l'établissement quarantenaire*, etc.), the committee said (*ib.*, p. 99):

> For the quarantine, for whose establishment at the mouth of the river provision is made, the term "control" has been replaced by that of "surveillance," which implies a less extended intervention.

An agreement for surveillance apparently would not have authorized any action beyond that of ascertaining the facts concerning the administration of the law, offering suggestions in the nature of conciliatory advice, and making reports to all the civilized States.

The attempt to establish a surveillance of the international zone for the purpose of rendering the cooperative action of the States exercising sovereignty within its borders harmonious and effective, thus resulted only in a virtual failure, as did the attempt to neutralize the region. The compromise measures adopted on both these subjects, however, have kept the question alive. That neutralization of an international zone, and international surveillance over it, are necessary to secure the effective carrying out of the international cooperative agreements of the States exercising sovereignty within the zone, is evident. The compromise measures adopted by the conference in this respect will no doubt serve in some future African conference as bases for developing this middle African zone of international jurisdiction into an effective political organization for assuring the proper guardianship of the aborigines and for maintaining the "open door" to the civilizing activities of the people of all civilized States.

CHAPTER XIII.

INTERNATIONAL ACTION SINCE THE BERLIN AFRICAN CONFERENCE, AFFECTING THE LAW OF NATIONS REGARDING ABORIGINES.

On January 5, 1885, while the Berlin African Conference was in session, the House of Representatives adopted a resolution requesting the President to furnish it with information concerning the conference. In response, the President, on January 30, 1885, sent to the House a message inclosing a report to the Secretary of State containing a statement of the circumstances leading up to the conference and the action taken up to that time. (See 48th Cong., 2d sess., H. R., Ex. Doc. No. 156, Jan. 30, 1885.)

On February 5, 1885, the House adopted a resolution requesting to be furnished with copies of all communications received concerning the conference and of the instructions given to the United States delegates. In response, the President, by message of February 19, 1885, transmitted a report of the Secretary of State containing the copies desired, which contained the proceedings of the conference to January 7, 1885, and communications up to February 17, 1885. (See 48th Cong., 2d sess., H. R., Ex. Doc. No. 247, Feb. 19, 1885.)

On the last day of the Forty-eighth Congress, March 3, 1885, eight days after the final adjournment of the conference, the House Committee on Foreign Affairs presented a report as follows:

> Your committee has given to the messages of the President relative to the participation of representatives of the Government of the United States in the so-called Congo conference the grave consideration to which the subject is entitled. While not unmindful of the conspicuous part American enterprise, energy, and skill has taken in the development of Africa, your committee is of the opinion that if such action is acquiesced in, without protest on the part of the legislative branch of the Government, it might become the beginning of a new departure in the foreign policy of the United States and might engraft upon the peaceful precedents of our diplomacy a precedent liable to become pregnant with foreign discord and domestic unrest.
>
> From the information on the subject which has been communicated to this committee, it is impossible to precisely ascertain the purposes of the conference and the conclusions it has reached. Your committee has given serious consideration to the subject, with a due regard to the gravity of a new departure from the history and traditions of this Government, and to the uniform absence of any representation of our Government in the deliberation of European conflicts and interests, and especially all conferences of European nations which might lead to disturbances in foreign nations and affecting the settlement of questions in which this Government has no interest.

Your committee, in the light of all the knowledge in its possession, can only express the opinion that they can find no sufficient reason for the participation of the Government of the United States in the Congo conference, and for a departure from the established political doctrines and policy of this Government from its formation, and therefore confine themselves to declaring that they can not approve of the fact that our Government was at all represented at the Congo conference, and recommend the House to adopt the following resolution:

"*Resolved*, That no prospect of commercial advantage warrants a departure from the traditional policy of this Government which forbids all entangling alliances with the nations of the Old World; and that the participation of the delegates of the United States in the so-called Congo conference, while carefully guarded—as your committee is informed—in the purpose to confine their powers to the consideration of commercial interests exclusively, is unfortunate in so far as it is a departure from the policy which forbids the Government of the United States to participate in any political combination or movement outside of the American continent." (48th Cong., 2d sess., H. R. Rept. No. 2655, Feb. 28, 1885.)

This report was referred to the House Calendar and ordered to be printed. (Cong. Rec., 48th Cong., 2d sess., p. 2571, Mar. 3, 1885.)

In the message of President Cleveland to Congress of December 8, 1885, it was said:

A conference of delegates of the principal commercial nations was held at Berlin last winter to discuss methods whereby the Congo Basin might be kept open to the world's trade. Delegates attended on behalf of the United States on the understanding that their part should be merely deliberative, without imparting to the results any binding character as far as the United States were concerned. This reserve was due to the indisposition of this Government to share in any disposal by an international congress of jurisdictional questions in remote foreign territories. The results of the conference were embodied in a formal act of the nature of an international convention, which laid down certain obligations purporting to be binding on the signatories, subject to ratification within one year. Notwithstanding the reservation under which the delegates of the United States attended, their signatures were attached to the general act in the same manner as those of the plenipotentiaries of other Governments, thus making the United States appear, without reserve or qualification, as signatories to a joint international engagement imposing on the signers the conservation of the territorial integrity of distant regions where we have no established interests or control.

This Government does not, however, regard its reservation of liberty of action in the premises as at all impaired; and holding that an engagement to share in the obligation of enforcing neutrality in the remote valley of the Congo would be an alliance whose responsibilities we are not in a position to assume, I abstain from asking the sanction of the Senate to that general act. (Cong. Rec., 49th Cong., 1st sess., p. 110.)

On January 14, 1886, in the Senate, Senator Morgan offered a resolution, to which was attached a copy of the Berlin African act, apparently in the French original, and by the terms of which the act was to be referred to the Committee on Foreign Relations, and to be translated under the direction of the committee and printed; the part of the President's message relating to the subject to be also

referred to the committee. The resolution was at once adopted. (Cong. Rec., 49th Cong., 1st sess., p. 643.)

In speaking on his resolution Senator Morgan stated that, in his belief, there had been "a misapprehension or misinterpretation of this act on the part of the United States," and described the final act of the conference as "a great and general act, the benefits of which no doubt will be felt by generations of men through years to come."

He asserted the entire freedom of the United States as respects ratification, saying:

> Notwithstanding the very great advantages which would inure [from the Berlin African act] to the people of any commercial nation who should visit that country for the purposes of trade, neither the preceding administration nor the minister of the United States who was at Berlin considered that the Government of the United States had given its consent in any way at all to become a party to the agreement as an engagement. A mere declaration has been submitted to the judgment of the enlightened world by this great conference upon this very important topic and in regard to this very important country; and the question whether we shall accede to that agreement is one that is entirely a matter of option on our part.

Concerning the manner of ratification, Senator Morgan, in the same speech, expressed the following opinion:

> It [the accession of the United States to the final act of the Congo conference] is something that need not be transacted even through the diplomatic channels of the Government. An act of Congress originated by any Member of this body, or of the other House, which should declare that the Government of the United States adheres to or accedes to that agreement would make us a party to it precisely as it does to postal conventions and various other conventions of that kind which have been agreed upon by other nations and to which we have the right to accede if we choose or to withhold our concession if we please. (*Ib.*, p. 644.)

On the same day (Jan. 14, 1886) the Senate referred to the Committee on Foreign Relations all those parts of the President's message relating to foreign affairs. The year allowed for ratification expired on February 26, 1886, without any action having been taken by the United States as respects the ratification of the final act of the conference. (*Ib.*, p. 644.)

Although the Berlin African act made no express provision for the adherence or ratification of any State, which, after signing the act, should fail to ratify within the year, this matter had been informally considered at the session of the conference on January 31. At the meeting of the signatory powers other than the United States, to exchange ratifications, held at Berlin on April 19, 1886, it was agreed that the United States might adhere to the act at any time, "in the manner and with the effect provided in article 37." This article authorized the adhesion of non-signatory powers and provided that adhesion should "involve full acceptance of all the obligations as

well as admission to all the advantages stipulated for by the present general act." It would appear to have been the understanding that, by such adhesion, the United States, as a signatory power, would be in the same position as if it had ratified the convention within the time allowed. (*Ib.*, pp. 251, 252, 303, 323.)

On April 28, 1886, evidently for the purpose of placing in print for possible future action the material in the hands of the Government relating to the conference, the Senate Committee on Foreign Affairs reported a resolution requesting the President to give full information concerning the conference, which was at once adopted. The President, in response to this request, sent a message to the Senate on June 30, 1886, inclosing a report from the Secretary of State containing the proceedings of the conference and all accompanying documents. The report was referred to the Committee on Appropriations and ordered to be printed. (*Ib.*, p. 6316.)

It appears that no further action has ever been taken by the United States with reference to the ratification of or adherence to the Berlin African act.

During 1884 and 1885 the British Government opened negotiations with all the powers interested in the western Pacific islands for a conference to concert regulations and measures relating to the importation of firearms and intoxicants into the islands so as to prevent abuses of them by the natives. On April 11, 1885, Secretary of State Bayard wrote to the British ambassador, Mr. Sackville West, as follows:

> I have had the honor to receive your note of the 6th instant, in which you refer to the correspondence heretofore exchanged on the subject of the supply of arms and ammunition to the natives of the western Pacific islands, and inform me that all the powers interested have now given a general assent to the suggestion for an international agreement for the settlement of this question, with the exception of the United States, in view of which Lord Granville has instructed you to press for an early communication of the views of this Government in the premises.
>
> Whilst recognizing and highly approving the moral force and general propriety of the proposed regulations and the responsibility of conducting such traffic under proper and careful restrictions, the Government of the United States does not feel entirely prepared to join in the international understanding proposed, and will, therefore, for the present, restrain its action in the direction outlined by the suggested arrangement of a sound discretion in permitting traffic between its own citizens in the articles referred to and the natives of the western Pacific islands.

This action was taken by the United States a few weeks after the close of the Berlin African Conference, and at the time when strong objections were being made in Congress to the ratification of the Berlin act. A renewal of this proposition made by Great Britain to the United States in 1887 was declined by the United States. (Brit. Parl. Papers, 1887, vol. 58, Cd. 5240. Western Pacific; correspondence relating to proposals for an international agreement, etc.)

The Institute of International Law, at its session held at Lausanne, in 1888, considered the question of the conditions with regard to occupation which ought to be fulfilled by a civilized State in order to enable it to obtain a good title in international law to the sovereignty over the region occupied by it. Incidentally consideration was also given to the question of the relations which the occupying State ought to hold, under the law of nations, both at the time of occupation and afterwards, toward the aboriginal tribes inhabiting the region. The deliberations of the Institute (*Annuaire*, vol. 10 (1888–89), pp. 173–201) resulted in the adoption of the following declaration of the views held by it:

ARTICLE I. The occupation of a territory under title of sovereignty can be recognized as effective only in case it fulfills the following conditions:

1. The taking of possession of a territory comprised within certain limits, the act being done in the name of the Government;

2. The official notification of the taking of possession. The taking of possession is to be effected by the establishment of a local responsible government provided with means sufficient for maintaining order and assuring the regular exercise of its authority within the limits of the occupied territory. These means may be borrowed from the institutions existing in the occupied country. The notification of the taking of possession is made either by publication in the form used by each State for notification of its official acts, or through diplomatic channels. It will contain an approximate determination of the limits of the territory occupied.

ART. II. The rules stated in the above article are applicable to the case where a power, without assuming the entire sovereignty of a territory, and maintaining with or without restrictions the administrative autonomy of the aboriginal tribes, shall place the territory under its "protectorate."

ART. III. If the taking of possession shall give rise to claims founded on anterior titles, and if the ordinary diplomatic procedure shall not lead to an agreement between the parties interested, they will appeal to the good offices, the mediation, or the arbitration of one or several third powers.

ART. IV. All wars of extermination of aboriginal tribes, all useless severities, and all tortures are forbidden, even by way of reprisals.

ART. V. In the territories had in view by the present declaration, the local authority will respect or will cause to be respected all rights, especially of private property, as well of the aborigines as of foreigners, and including both individual and collective rights.

ART. VI. The local authority has the duty of watching over the conservation of the aboriginal populations, their education, and the amelioration of their moral and material condition. It will favor and protect, without distinction of nationality, all the private institutions and enterprises created and organized for this purpose, under the reserve that the political interests of the occupying or protecting State shall not be compromised or menaced by the actions or tendencies of these institutions and enterprises.

ART. VII. Liberty of conscience is guaranteed to the aborigines, as well as to the nationals of the colonizing State, and to foreigners. The exercise of all the forms of religious faith shall not be subjected to any restriction or hindrance; provided, however, that practices contrary to the laws of morality and of humanity shall be prohibited.

ART. VIII. The local authority shall make preparations for the abolition of slavery. The sale or the employment of slaves for domestic service, by others than aborigines, shall be immediately forbidden.

ART. IX. The slave trade shall be forbidden in the whole extent of the territories had in view by the present declaration. These territories shall not be used as markets, nor ways of transit, for the sale of slaves; and the most rigorous measures shall be taken against those who engage in the traffic or are interested in it. The introduction and the internal commerce in *cangues* and other instruments of torture for use by proprietors of slaves shall be prevented.

ART. X. The sale of intoxicating liquors shall be regulated so as to preserve the aboriginal populations from the evils resulting from their abuse.

(*Cf.* Resolutions of the Institute of International Law dealing with the Law of Nations, edited by James Brown Scott, pp. 84–86.)

The following propositions were brought before the Institute, but failed to receive its approval (*Annuaire*, vol. 10, pp. 171–201):

That aboriginal tribes and the territory inhabited by them are outside "the community of the law of nations" (pp. 171–181).

That occupation by a civilized State of territory in Africa not occupied by any other civilized State ought to have as its basis arrangements with the chiefs of the aboriginal tribes (pp. 181, 182).

That "sovereignty" over aboriginal tribes is a relationship differing from "protectorate" in character and not merely in form (pp. 184, 185, 189, 190).

That the aborigines as well as the European colonists should be prohibited from holding aborigines in domestic slavery (p. 195).

That countries inhabited by aboriginal tribes under the sovereignty of a civilized State should be submitted to the régime of the Universal Postal Union (p. 198).

That in all such countries there should be equality of rights of trade and intercourse for all nations on the land and of navigation on navigable rivers (p. 199).

That the countries under the sovereignty of civilized States whose title has been obtained by occupation should have the faculty of being declared neutral by the State exercising the sovereignty—the neutrality to be permanent or temporary—in which case all the States should be bound to respect the neutrality; that in case war should arise outside these countries and a State which had so declared neutrality for its colonies should be involved, all the other States should exercise their good offices to have the neutrality maintained; and that, in case of disputes occurring between States concerning or originating in colonies, the parties should submit to mediation or arbitration before entering upon hostilities (pp. 200, 201).

On June 14, 1889, shortly before the Brussels African Conference met, the United States, Germany, and Great Britain, after conferences at Washington and Berlin, concluded a convention for a joint

control over the interests of these powers in the Samoan Islands. By this convention it was declared:

> That the islands of Samoa are neutral territory in which the citizens of the three signatory powers have equal rights of residence, trade, and personal protection. The three powers recognize the independence of the Samoan Government and the free right of the nations to elect their chief or king and choose their form of government according to their own laws and customs. Neither of the powers shall exercise any separate control over the islands or the government thereof.

The convention provided that the joint control was to be exercised by a chief justice of Samoa "named by the signatory powers in common accord," to whom was delegated "jurisdiction of all questions arising under this general act." By the convention the future alienation of land without the consent of the chief justice was forbidden, with certain exceptions, and a land commission to settle previous claims was constituted. The chief executive magistrate of Apia, appointed by agreement of the powers, and the consuls of the signatory powers in Apia were given control of European interests of a private character. The importation of arms and ammunition was forbidden, subject to the right of the Samoan Government to import arms for maintaining order. A provision of the convention prohibited the sale, gift, or offer of intoxicants to any native Samoan or any South Sea Islander resident in Samoa. Samoa was to assent to the convention, and the convention was to be amendable by request of either power after three years.

The plenipotentiaries of the three powers which entered into the Samoan convention were the same who had represented them at the Berlin African Conference—Mr. Kasson, for the United States; Sir Edward Malet, for Great Britain; and Prince Bismarck, for Germany. The States represented by these three distinguished diplomats and statesmen, on their advice, entered into this arrangement, converting the Samoan Islands into an international reservation under an international control participated in equally by the three powers. The experiment proved the impracticability of such an arrangement. The colonists would not submit to the tripartite sovereignty, and the civil wars of the Samoan aborigines growing out of their disagreements over the election of their chief further complicated the situation. The arrangement was abolished in 1900. Great Britain withdrew from the islands, receiving compensation elsewhere, and Germany and the United States partitioned the islands into regions under their separate sovereignty; the United States receiving Tutuila in the partition. The application of the principle of joint international control of contiguous or adjacent colonies inhabited by aboriginal tribes, instead of the principle of separate national control

under joint international surveillance, has by some been regarded as the cause of the failure of this experiment.

The Brussels African conference was convened, as stated in the preamble of the final act, at the invitation of the Belgian Government, in agreement with the British Government. The following 17 states participated in the conference: Great Britain, France, Germany, Italy, Spain, Belgium, Holland, Portugal, the United States, Russia, Austria-Hungary, Denmark, Sweden and Norway, Turkey, Persia, the Independent State of the Congo, and Zanzibar. The sessions of the conference began on November 18, 1889, and were continued, with various intermissions, until July 2, 1890, when the final act was signed.

The conference was convened in response to a world-wide demand for international protection of the African aborigines, based on revelations of the inhumanities practiced in the aboriginal regions of Africa in the prosecution of the slave trade, of the degeneration of the aborigines through the use of intoxicating liquors, and of the anarchy and destruction caused by their ownership of firearms. Slave trading, though almost ended on the sea, still continued in the Indian Ocean, and further measures for the prevention of the traffic within this maritime area were necessary. The trade carried on within Africa, it was evident, could be stopped only by the unanimous cooperation in repressive measures of all the powers exercising sovereignty or influence in the regions inhabited by aboriginal tribes. The supply of alcoholic liquors and firearms to the aborigines could be prevented only by the unanimous cooperation of all the civilized States trading with Africa in restricting importation of these instruments of degeneration and destruction, coupled with the unanimous cooperation of all the States exercising sovereignty or influence over the aboriginal tribes within the territory of Africa and of the States and self-governing colonies of European settlement bordering upon these territories, in restricting or prohibiting the manufacture and distribution of these articles. Thus the questions under consideration involved, to some extent, international jurisdiction and surveillance of the whole continent of Africa. The problems which had been insoluble to the Berlin African conference, which was confined to a consideration and application of the principles of common international use to the Rivers Congo and Niger, of common international commerce to the basin of the Congo, and of acquisition of sovereignty by civilized States by occupation of territory inhabited by aboriginal tribes on the west coast of Africa, were to be solved by a conference dealing with Africa as a whole, considered as a region to some extent under international jurisdiction.

In the preamble of the Brussels African act the motives and objects of the contracting powers were thus stated:

Being equally actuated by the firm intention of putting an end to the crimes and devastation engendered by the traffic in African slaves, of efficiently protecting the aboriginal population of Africa, and of securing for that vast continent the benefits of peace and civilization;

Wishing to give fresh sanction to the decisions already adopted in the same sense and at different times by the powers, to complete the results secured by them, and to draw up a body of measures guaranteeing the accomplishment of the work which is the object of their common solicitude, have resolved * * * to convene for this purpose a conference at Brussels, etc.

In the body of the act, the following general principles were declared as those which the powers were to adopt and cause to be adopted:

ARTICLE I. The powers declare that the most effective means of counteracting the slave trade in the interior of Africa are the following:

1. Progressive organization of the administrative, judicial, religious, and military services in the African territories placed under the sovereignty or protectorate of civilized nations.

2. The gradual establishment in the interior, by the powers to which the territories are subject, of strongly occupied stations, in such a way as to make their protective or repressive action effectively felt in the territories devastated by slave hunting.

3. The construction of roads, and in particular of railways, connecting the advanced stations with the coast, and permitting easy access to the inland waters, and to such of the upper courses of the rivers and streams as are broken by rapids and cataracts, with a view to substituting economical and rapid means of transportation for the present system of carriage by men.

4. Establishment of steamboats on the inland navigable waters and on the lakes, supported by fortified posts established on the banks.

5. Establishment of telegraphic lines, insuring the communication of the posts and stations with the coast and with the administrative centers.

6. Organization of expeditions and flying columns, to keep up the communication of the stations with each other and with the coast to support repressive action, and to insure the security of high roads.

7. Restriction of the importation of firearms, at least those of modern pattern, and of ammunition, throughout the entire extent of the territory in which the slave trade is carried on.

ART. II. The stations, the inland cruisers organized by each power in its waters, and the posts which serve as ports of register for them all, shall independently of their principal task, which is to prevent the capture of slaves and intercept the routes of the slave trade, having the following subsidiary duties:

1. To support and, if necessary, to serve as a refuge for the native population, whether placed under the sovereignty or the protectorate of the State to which the station is subject, or independent, and temporarily for all other natives, in case of imminent danger; to place the population of the first of these categories in a position to cooperate for their own defense; to diminish intestine wars between tribes by means of arbitration; to initiate them in agricultural labor and the industrial arts so as to increase their welfare; to raise them to civilization and bring about the extinction of barbarous customs, such as cannibalism and human sacrifices.

2. To give aid and protection to commercial enterprises; to watch over their legality * * * especially [by] controlling contracts for service with natives; and to prepare the way for the foundation of permanent centers of cultivation and of commercial settlements.

3. To protect, without distinction of creed, the missions which are already or that may hereafter be established.

4. To provide for the sanitary service and to extend hospitality and help to explorers and to all who take part in Africa in the work of repressing the slave trade.

By articles 3 and 4 the powers "exercising a sovereignty or a protectorate in Africa" confirmed their previous obligations, individually and collectively, to abolish the slave trade and agreed to hold themselves responsible in this respect for companies chartered by them, and to aid and protect private associations and enterprises organized for repression of the slave trade.

The next article was as follows:

ART. V. The contracting powers pledge themselves, unless this has already been provided for by laws in accordance with the spirit of the present article, to enact or propose to their respective legislative bodies, in the course of one year at the latest from the date of the signing of the present general act, a law rendering applicable, on the one hand, the provisions of their penal laws concerning grave offences against the person, to the organizers and abettors of slave hunting, and to those guilty of mutilating male adults and children, and to all persons taking part in the capture of slaves by violence; and, on the other hand, the provisions relating to offences against individual liberty, to carriers and transporters of, and to dealers in, slaves.

The accessories and accomplices of the different categories of slave captors and dealers above specified shall be punished with penalties proportionate to those incurred by the principals.

Guilty persons who may have escaped from the jurisdiction of the authorities of the country where the crimes or offences have been committed shall be arrested either on communication of the incriminating evidence by the authorities who have ascertained the violation of the law, or on production of other proof of guilt by the power in whose territory they may have been discovered, and shall be kept, without other formality, at the disposal of the tribunals competent to try them.

The powers shall communicate to one another, with the least possible delay, the laws or decrees existing or promulgated in execution of the present article.

By articles 8 to 14 the importation of firearms was prohibited, within a specified zone, for a period of 12 years, subject to renewal. It was recited that "the experience of all nations" had "clearly proved that the preservation of the African population, whose existence it is the express wish of the powers to protect, is a radical impossibility if measures restricting the trade in firearms and ammunition are not adopted." The zone within which these restrictions were to be applied was thus described in article 8:

The territories comprised between the twentieth parallel of north latitude and the twenty-second parallel of south latitude, and extending westward to the Atlantic Ocean and eastward to the Indian Ocean and its dependencies, including the islands adjacent to the coast within 100 nautical miles from the shore.

This zone thus included a Middle Africa, according to the widest interpretation of the term, extending from the Moorish and Arabic settlements in the north, under the sovereignty or protectorate of the civilized powers, to the South African States and British colonies.

By articles 90 to 95 the prohibition or regulation of the importation of and traffic in intoxicating liquors within this same zone was agreed to by the signatory powers; the prohibition to be put in force wherever the use of distilled liquors should not have been developed, or where the religion of the natives enjoined disuse, and a uniform import and excise duty being established as respects the regions where liquors were used by the natives; the arrangement regarding duties and excises being subject to revision at specified periods.

It was realized in the conference that the effectiveness of the final act would largely depend upon the provisions made for surveillance of its operation and execution, and the general recognition of this necessity led to the insertion in the final act of provisions for a qualified surveillance, which were as follows:

CHAPTER V. INSTITUTIONS INTENDED TO INSURE THE EXECUTION OF THE GENERAL ACT.

SECTION I.—OF THE INTERNATIONAL MARITIME OFFICE.

ART. LXXIV. In accordance with the provisions of Article XXVII, an international office shall be instituted at Zanzibar, in which each of the signatory powers may be represented by a delegate.

ART. LXXV. The office shall be constituted as soon as three powers have appointed their representatives. It shall draw up regulations fixing the manner of exercising its functions. These regulations shall immediately be submitted to the approval of such signatory powers as shall have signified their intention of being represented in this office. They shall decide in this respect within the shortest possible time.

ART. LXXVI. The expenses of this institution shall be divided in equal parts among the signatory powers mentioned in the preceding article.

ART. LXXVII. The object of the office at Zanzibar shall be to centralize all documents and information of a nature to facilitate the repression of the slave trade in the maritime zone. For this purpose the signatory powers engage to forward within the shortest time possible:

1. The documents specified in Article XLI;

2. Summaries of the reports and copies of the minutes referred to in Article XLVIII;

3. The list of the territorial or consular authorities and special delegates competent to take action as regards vessels seized according to the terms of Article XLIX;

4. Copies of judgments and condemnations in accordance with Article LVIII;

5. All information that may lead to the discovery of persons engaged in the slave trade in the above-mentioned zone.

ART. LXXVIII. The archives of the office shall always be open to the naval officers of the signatory powers authorized to act within the limits of the zone defined by Article XXI, as well as to the territorial or judicial authorities, and to consuls specially designated by their Governments.

The office shall supply to foreign officers and agents authorized to consult its archives translations into a European language of documents written in an Oriental language.

It shall make the communications provided for in Article XLVIII.

ART. LXXIX. Auxiliary offices in communication with the office at Zanzibar may be established in certain parts of the zone, in pursuance of a previous agreement between the interested powers.

They shall be composed of delegates of these powers, and established in accordance with Articles LXXV, LXXVI, and LXXVIII.

The documents and information specified in Article LXXVII, so far as they may relate to a part of the zone specially concerned, shall be sent to them directly by the territorial and consular authorities of the region in question, but this shall not exempt the latter from the duty of communicating the same to the office at Zanzibar, as provided by the same article.

ART. LXXX. The office at Zanzibar shall prepare in the first two months of every year a report of its own operations and of those of the auxiliary offices during the past 12 months.

SECTION II. OF THE EXCHANGE BETWEEN THE GOVERNMENTS OF DOCUMENTS AND INFORMATION RELATING TO THE SLAVE TRADE.

ART. LXXXI. The powers shall communicate to one another, to the fullest extent and with the least delay that they shall consider possible:

1. The text of the laws and administrative regulations, existing or enacted by application of the clauses of the present general act;

2. Statistical information concerning the slave trade, slaves arrested and liberated, and the traffic in firearms, ammunition, and alcoholic liquors.

ART. LXXXII. The exchange of these documents and information shall be centralized in a special office attached to the foreign office at Brussels.

ART. LXXXIII. The office at Zanzibar shall forward to it every year the report mentioned in Article LXXX, concerning its operations during the past year, and concerning those of the auxiliary offices that may have been established in accordance with Article LXXIX.

ART. LXXXIV. The documents and information shall be collected and published periodically, and addressed to all the signatory powers. This publication shall be accompanied every year by an analytical table of the legislative, administrative, and statistical documents mentioned in Articles LXXXI and LXXXIII.

ART. LXXXV. The office expenses as well as those incurred in correspondence, translation, and printing, shall be shared by all the signatory powers, and shall be collected through the agency of the department of the foreign office at Brussels.

When the question of surveillance was pending before the conference, a project for surveillance of a more specific kind was introduced by the British Government. The British proposition was regarded by the French Government as unsuitable for immediate adoption, but possibly suitable to be adopted at a later period in the development of Africa. It was thereupon agreed that though the committee on editing should recommend to the conference the plan of qualified surveillance which appears in the final act, it should carefully revise the British project so as to give it a form acceptable to the con-

ference as a project for future adoption, and that the project should be spread upon the record of the proceedings accompanied by a resolution expressing approval of it by the conference and declaring its opinion that at a future time, when the situation should permit, the plan of surveillance should be put in force by international accord. The opposition to the more extended plan of surveillance having been voiced by France, M. Bourée, the French plenipotentiary, also voiced the sentiment of the conference in favor of agreeing upon a plan for a more specific surveillance and recommending it for future adoption. In speaking upon the subject on behalf of the French Government he said that he considered that it would be best not to establish immediately such a surveillance as the project proposed, but rather "to make this project the object of a favorable opinion (*voeu*) inserted in the proceedings of the conference, reserving for the subsequent determination of the powers the choice of the moment for putting the plan into execution." "When that moment should arrive," he said, "the Governments would find at hand a system already prepared, which would reflect faithfully the views of the conference on this subject." (French Yellow Book, Proceedings of the Brussels African Conference, 1890, pp. 262, 278, 279.)

At the session of the conference on May 22, 1890, the president, Baron Lambermont of Belgium, called attention to the arrangement made in the committee, and accordingly the project was read and inserted in the proceedings.

The project thus perpetuated by being spread upon the records of the conference was as follows:

1. There shall be established at Brussels an international bureau which shall have as its function the centralizing of the exchange between the powers of the documents and informative matter mentioned hereinafter, and the use of this material as a means of exercising surveillance over the execution of the clauses of the present treaty and of the measures of amelioration which the treaty contemplates.

2. The representatives at Brussels of the signatory powers who shall have expressed the desire to participate shall constitute, with a representative of Belgium, the council of administration of the international bureau. They shall hold meetings at least twice each year, in the months of * * * upon the call of the representative of [the King of Belgium], for the purpose of receiving and considering the analytical statement provided for hereinafter, and the report concerning the operations of the bureau, and for the purpose of approving them in tenor. The organic regulations concerning the mode of nomination and the salaries of the employees of the central bureau, their functions and their liability as respects expenses and receipts, as well as concerning the measures of execution of article 7, shall be made the object of a separate protocol.

3. The council of administration of the bureau at Brussels shall exercise a right of control over the administrative and financial operations of the international bureau at Zanzibar, as well as over the auxiliary agencies. It shall approve the organic regulations of the bureau and its budget.

4. The powers will communicate to the bureau to the greatest extent and with the least delay possible—

(*a*) The text of the laws and administrative regulations which now exist or which may be enacted in pursuance of the provisions of the present act.

(*b*) Information relating to the slave trade, to slaves taken from their captors and liberated, and to traffic in arms, munitions of war, and alcoholic liquors.

5. The international bureau established at Zanzibar shall cause to be furnished each year the report mentioned in the general act regarding its operations during the preceding year and those of the auxiliary bureaus which shall be established conformably to the act, as well as the statistical tables covering the last previous statistical period.

6. The documents and information shall be collected and published in periodical and pamphlet form, and sent to all the signatory or adherent powers. This publication will be accompanied each year by an analytical exposition of the legislative, administrative, and statistical documents mentioned above.

7. The expenses of the central bureau at Brussels shall be supported in equal parts by all the powers which shall have manifested a desire to be represented in the Council of Administration. The expenses shall not exceed — francs per year. (*Ib.*, pp. 278, 279.)

The following resolution on the subject was then introduced by the president and adopted:

The conference, having taken cognizance of the project which the commission has prepared, upon the initiative of the plenipotentiaries of Great Britain, for the establishment of an international bureau to be created at Brussels, with functions more extended than those delegated by chapter 5, paragraph 2, of the general act, in order to permit the powers to exercise surveillance over the execution of the treaty and to make, when needful, the necessary amendments, expresses the wish that this institution may be called into existence to replace the bureau provided for in the act at a time in the future when, by common accord, the powers shall have recognized that circumstances render possible the adoption of this measure.

The plenipotentiary of Great Britain (Lord Vivian) thereupon made the following declaration:

The [British] Government regrets that the [French] Government has not found itself able, at the present time, to consent to the insertion in the general act of the proposition submitted to the commission by the British plenipotentiary, according to which more extended functions would be delegated to the central bureau at Brussels. In consenting that this proposition shall be spread upon the records of the proceedings of the conference the [British] Government can only hope that the moment is not far distant when it will be adopted.

Mr. Bourée stated that he was "the more appreciative of the acquiescence given by the British plenipotentiaries to the wish expressed by the conference, inasmuch as the statements previously made by Lord Vivian had evidenced the importance which the British Government attached to the project, which it had caused to be introduced." (*Ib.*, pp. 247–249.)

The final act, as will have been noticed, made no adequate provision for the financial support of the institutions of surveillance. By article 86, the expenses of the bureau at Zanzibar were to be "divided

in equal parts among the signatory powers mentioned in the preceding article"—that is, by the three or more powers which should elect to send representatives to participate in the Zanzibar bureau. The "office expenses" of the "special office attached to the foreign office at Brussels," "as well as those incurred in correspondence, translation, and printing," were to be "shared by all the signatory powers," and were to be "collected through the agency of the department of the foreign office at Brussels."

A discussion was had at the session of the conference of June 16, 1890, as to how these expenses were to be "shared," but no conclusion was reached. (*Ib.*, pp. 357, 358.) The conference ended without further action in this respect.

It appears that the special office to be attached to the foreign office at Brussels was never instituted, or, at least, that it has never exercised the functions intended by the final act.

The Brussels African act was ratified by the United States with the following proviso, which was inserted by the Senate by making it a part of its resolution advising and consenting to the ratification:

> The United States, having neither possessions nor protectorates in Africa, hereby disclaims any intention, in ratifying this treaty, to indicate any interest whatsoever in the possessions or protectorates established or claimed on that continent by the other powers, or any approval of the wisdom, expediency, or lawfulness thereof, and does not join in any expressions in the said general act which might be construed as such a declaration or acknowledgment.

(For the Brussels African act, see Treaties and Conventions of the United States, vol. 2, pp. 1964–1992.)

While the provisions of the Brussels African act relating to the suppression of the slave trade and the restriction of the traffic in alcoholic liquors and firearms have since been made the subject of international conventions and accords, the provisions of the act by which the signatory and adherent powers recognized the duty of guardianship over aborigines have not been made the subject of further international consideration. Inasmuch, however, as these provisions were expressly based upon those on the same subject in the Berlin African act, and were in furtherance of those provisions; and inasmuch as the United States, though it has not ratified the Berlin act, did ratify the Brussels act, the Brussels act has served to enable the United States to cooperate in all movements for the amelioration of the aborigines in Africa, and to base itself upon the provisions on this subject contained in the Berlin act as well as on those contained in the Brussels act.

At the time when the matter of the cession to Belgium of the Independent State of the Congo was pending, in the years 1907 and 1908, the United States, on account of reports concerning unjust treatment

of aborigines in the Congo State, took action intended to insure the international guardianship of the aborigines, basing its action on articles 2 and 5 of the Brussels African act. The Department of State regarded these articles as a repetition and enforcement of the provisions of the Berlin African act relating to the guardianship of aborigines, so as to make the United States, morally though not legally, an adherent of the Berlin African act so far as it concerns the guardianship of aborigines. On January 15, 1907, Secretary of State Root, in a dispatch to Mr. Wilson, United States minister to Belgium, said:

> Our attitude toward Congo question reflects deep interest of all classes of American people in the amelioration of conditions. The President's interest in watching the trend toward reform is coupled with earnest desire to see full performance of the obligations of articles 2 and 5 of the slave-trade act, to which we are a party. We will cheerfully accord all moral support toward these ends, especially as to all that affects involuntary servitude of the natives. (Foreign Relations of the United States, 1907, pt. 2, p. 799.)

On December 16, 1907, in a dispatch to Minister Wilson, Secretary of State Root said:

> Our attitude and purpose rest on the broad general purpose to elevate and benefit the native Africans as declared in the Berlin act, to which we are, however, not a party, and emphatically reaffirmed in the Brussels act of 1890, applicable to all dominion and control of civilized nations in central Africa, to which we are a party. Our voice and sympathy are in favor of the full accomplishment of those declared purposes, and, while we are not directly interested in the administrative and financial details of the government of any one of the several districts of central Africa embraced in the compact of 1890, we are free, and, indeed, morally constrained, to express our trust and hope that every successive step taken by the active signatories will inure to the well-being of the native races and execute the transcendent obligations of the Brussels act, in all its humanitarian prescription, especially as to article 2. In these respects the interests of all the signatories are identical. (*Ib.*, p. 829.)

In a letter from Secretary of State Root to the Belgian minister at Washington, dated January 11, 1909, the United States stated that it held itself bound by article 2 of the Brussels African act to assure a proper guardianship of the aborigines by the States exercising sovereignty within the zone covered by that act and requested an acknowledgment by Belgium of its obligation under this act and of its intention to fulfil the obligation. (Foreign Relations of the United States, 1909, p. 400.)

On June 12, 1909, a memorandum of the Belgian Government was handed by the Belgian minister to the Secretary of State, stating that Belgium had never questioned this obligation. (*Ib.*, pp. 409, 410.)

During the progress of the negotiations in 1907 and 1908 whereby Belgium took over the Congo State as a colony, as well as during the progress of the negotiations of 1909 concerning the methods to be

adopted by Belgium for carrying out its obligations toward the natives, the United States insisted upon this interpretation of its rights and duties under the Brussels act, and the interpretation was acquiesced in by Belgium and Great Britain and was apparently not questioned by other powers. (*Cf.* Foreign Relations of the United States, 1907, pt. 2, pp. 791, 829; *ib.*, 1908, pp. 536–593; *ib.*, 1909, pp. 400–414; also Sen. Doc. No. 143, 61st Cong., 1st sess., Affairs of the Congo, pp. 16, 46, 182, 202.)

The international opium conference, convoked by the United States, which met at The Hague in 1911 and 1912, adopted, on January 23, 1912, an international opium convention, regulating international commerce in opium and its preparations, as well for the civilized States "as for their possessions, colonies, protectorates, and leased territories;" thus protecting the aboriginal populations, as well as other persons.

CHAPTER XIV.

THE DOCTRINE OF "INTERVENTION FOR HUMANITY" AND ITS EFFECT ON THE DEVELOPMENT OF THE LAW OF NATIONS REGARDING ABORIGINES.

The growing practice of "intervention" by civilized States, individually and collectively, in the internal and external affairs of the so-called "minor" or "semicivilized" States, the absence of any recognized rules of the law of nations and the general conviction that some interventions were necessary to hold together human society and hence must be rightful under the law of nations, led to a consideration by scholars, during the latter part of the last century, of the standards and principles which ought to be applied in any given case of "intervention" to determine whether the act was rightful or wrongful under the law of nations.

In the year 1876, Egide R. N. Arntz, a German publicist resident in Belgium (quoted by Gustave Rolin-Jacquemyns, a Belgian publicist, in an article by the latter in the *Révue de Droit International et de Législation Comparée*, vol. 7, p. 673) made the following statement of doctrine:

> When a Government, though acting within the limits of its rights of sovereignty, violates the rights of humanity, either by measures contrary to the interests of other States or by excesses of injustice and cruelty which deeply injure our morality and our civilization, the right of intervention is lawful. For, however much to be respected may be the rights of sovereignty, there is something yet more to be respected, namely, the right of humanity or the right of the human society, which ought not to be outraged. Just as in the State the liberty of the individual ought to be restricted and is restricted by the law and customs of society, so the individual liberty of States ought to be restricted by the laws of the human society.

The proposition thus formulated by Arntz was but the summing up of the conclusions reached by the liberal publicists of the period, among the most brilliant of whom were Bluntschli in Germany and Lorimer in Great Britain, who were themselves inspired by the humanitarian aspect impressed upon the Civil War in the United States by the genius of Lincoln.

This doctrine of the right of intervention for humanity necessarily divided all kinds of interventions into two kinds—interventions for humanity, which were rightful under the law of nations when effected under conditions and circumstances guaranteeing their humanitarian character and effect, and all other interventions, which were wrongful under the law of nations. To give the doctrine a

practical form, so that it might become a working basis for the social relations of the States and countries constituting the whole society of nations, it was necessary for the States forming the society of civilized States to recognize the existence of this supreme "law of human society," to determine its fundamental principles by applying analogies drawn from the private law concerning the social relations of individuals, and from the public law concerning the social relations of States already recognized and in force, and to derive from these fundamental principles the necessary subsidiary principles to facilitate and assure the practical observance of the fundamental principles.

In an essay written in 1910, when the question was raised whether France and Spain could legally intervene in the State of Morocco and convert it into an international or colonial protectorate of one or both of them, under a "law of humanity" superior in obligation to the international act of Algeciras, a study was made of this doctrine by a French publicist, Antoine Rougier. In this essay (*La Théorie de l'Intervention d'Humanité*, in the *Révue Générale de Droit International Public*, vol. 17, pp. 468–526) he said (p. 472):

> The theory of the intervention for humanity is properly that which recognizes as a right the exercise of an international control by a State over acts of internal sovereignty of another State as being "contrary to the laws of humanity," and which justifies this control as a means of organizing in a juridical manner the functions of the State so controlled. According to this doctrine, whenever the "human rights" of a people are persistently ignored by those who govern it, a State or a group of States may intervene in the name of the society of nations, either to require the annulment of the acts of public power which are the subject of criticism or to prevent in the future a renewal of such acts, or in case the government is inert, to substitute temporarily its or their sovereignty in place of the sovereignty of the State controlled and take such measures of conservation as are urgently needful.

This supreme law, which by some publicists had been called "the law of human solidarity" or "the law of humanity," but which Rougier preferred to call "the human law" (*le droit humain*), he described as follows (pp. 491, 494):

> The peoples live * * * a triple social life, corresponding to a triple form of collective organization. The national society corresponds to the juridical intercourse of individuals grouped politically upon a unitary territory. The international society corresponds to the juridical intercourse of political groups of States with one another. The human society corresponds to the juridical intercourse of all men, of each with each and of each with all, without distinction arising out of political classifications. And as no society can exist without a responsibility which conditions its activity—that is, without a law of its own—there must necessarily be a national law, an international law, and a human law.
>
> If one compares these forms of law, it is evident that the human law is supreme over all, because it corresponds to the primordial form of society, to the deepest and most permanent needs of human nature, while the two other

forms correspond to needs more diverse, more contingent, more variable. The human law must, perforce, dominate and penetrate the national law and the international law, because the ends of all human society are of a double character; because, before it can satisfy the contingent interests of its political groups, it must satisfy the human rights of its members. It has a human mission to fulfill before it fulfills its national and international missions which are of a less universal character.

The human law * * * comprises all the rules which have as their characteristic to express or develop the human solidarity. * * * The human solidarity requires that all the activities of man, whether as a physical, a moral, or a social being, should be protected—his life, his physical and moral liberty, his aptitude for social intercourse. The human law must guarantee to individuals the respect for life, the respect for material and moral liberty, and, finally, the recognition of a legal order, which is the *sine qua non* of life in society. I say "a legal order," without defining the term exactly. Each particular society is free to determine the legal order which it thinks proper to establish upon its territory, conformably to the principles of the human solidarity. The rights which are derived from the legal order established by a particular society are the political, public, and civil rights of the individuals composing it. The only thing which the human solidarity requires is that there shall exist in each nation a legal order of some kind regulating the relations of the governors and the governed, that the individual shall not be subjected to a régime of a purely arbitrary character, and that the established legal order shall not be arbitrarily violated. It is thus that the determination of crimes punishable by death belongs to the legislature of each nation, but that the execution of a citizen without judgment, or for an act which no law has declared a crime, constitutes a violation of the human law. The human law is summed up in the triple formula—the law of life, the law of liberty, the law of legality. These three terms correspond closely to those used in the Declaration of the Rights of Man and of the Citizen, of 1789—liberty, resistance to oppression, which corresponds to the right of legality, and security—which implies respect for life. The text of 1789 adds the right of property.

It is thus evident that Rougier identifies "the law of humanity" with the fundamental rights of man recognized in the preamble of the American Declaration of Independence of 1776, when it asserts as a "self-evident truth" that "governments are instituted among men to secure certain unalienable rights" of all men, with which they are "endowed by their Creator," and as respects which "all men are created equal," the rights thus existing under this supreme "law of humanity" being, among others, the rights of "life, liberty, and the pursuit of happiness" through legal order.

As respects the rule for determining which of the States, in a particular case, have the right to intervene for humanity, Rougier, in common with all other publicists, holds that a State in order to have this right of intervention must, first of all, be a full member of the society of the civilized States. Those States which recognize themselves as obligated to fulfill the functions which are necessary to the existence of all organized society, by maintaining order and justice under a regular government and securing the human rights of their inhabitants "form a community or society, anciently called

the community of the Christian States, now the community of the civilized States" (p. 495). Those States or countries which do not fulfill these fundamental obligations of every State—obligations which "bind it in common with all other members of the community of the civilized States, and in the performance of which the whole international community is interested," place themselves in a situation of an exceptional character, which is thus described (pp. 495, 496):

> A Government which fails in its function by ignoring the human interests of the governed commits what may be called a perversion of its sovereignty; its right of self-determination no longer imposes itself in a sovereign manner upon third States. * * * The other members have an interest in intervening to control its action, and they have a right to intervene by reason of its violation of the human law. In place of the sovereignty of the culpable Government there is substituted a foreign sovereignty, either to annul the act to which the fault attaches or to prevent similar defaults from occurring in the future. * * *
>
> As respects the manner and extent of the control, there is this distinction to be made: * * * Between two States equally developed belonging to a group of civilized powers the control will be temporary and occasional. It is to be presumed that these powers will perform as fully as possible their essential functions, and that the fault of any one of them is an accidental one, which it is only necessary to point out in order to prevent its repetition. * * *
>
> When the violations of the law of human solidarity occur in the case of a barbarous or half-civilized State, in which the disorders have a durable and permanent character, the civilized powers must of necessity have recourse to a more energetic method of control—a control adapted to prevent the wrongdoing rather than to repress it or to cause reparation to be made. Instead of the right of ordinary intervention there then arises the right of permanent intervention.

The views of publicists differ greatly on the scope and character of the right of "intervention for humanity." Most of them assert that it applies only against civilized or half-civilized States. On the other hand, De Martens holds that it is a right solely against barbarous tribes (*Traité de Droit International*, § 76). Pillet, in his article on *Les Droits Fundamentaux des États*, in the *Révue Générale de Droit International Public* (vol. 6, 1899, p. 256), regards the subjects of "intervention for humanity," and "the mission which the civilized nations have as respects savages," as falling outside the limits of his study of "the fundamental rights of States," because in these activities of a State its own interests are not at stake, it being "a participant in the common work of all nations." (*Cf.* Rougier, article above cited, p. 482, note; p. 497, note.)

Rougier remarks (page 468) that perhaps the slowly developing recognition of the right of "intervention for humanity" is "the sign of an evolution in doctrine toward a new conception of international society, according to which the nations, while remaining strictly solidary and dependent one on the other, will be grouped under a

jurisdictional authority, or, at least, under a hierarchical power, charged with the duty of assuring to all of them respect for justice."

Until recently, it has been only the part of the world under French influence which has recognized the term "intervention for humanity" as a term of jural significance. In the part of the world under British influence, intervention is generally considered as a political fact, incapable of being given a jural character. In the part of the world under German influence the existence of an actual organized society of nations is assumed by scholars, and each civilized state is regarded as having a right under the law of nations to extend its sovereignty to the extent that may be needful and proper under the circumstances, "for the protection of the common interests of the society of the civilized states." This doctrine is very precisely stated by von Liszt, the leading writer on international law in Germany. (*Das Völkerrecht systematisch dargestellt*, by Franz von Liszt, 10th ed., 1915, pp. 175–281.)

In the United States, the tendency has been to avoid the use of the word intervention altogether as implying an act considered as having a nonjural character, and to speak of such acts as extensions of sovereignty or influence made in pursuance of the law of nations, which the United States has always recognized as a part of its own law. The principles which the United States has recognized and acted upon as principles of the law of nations for determining the rightfulness or wrongfulness of extensions of national sovereignty are those universal principles declared in the preamble of the Declaration of Independence, and implied or expressed in the Constitution of 1787. In deriving subsidiary principles from these fundamental and universal principles, the United States has followed analogies drawn from the private law relating to the formation and management of associations and partnerships, and to the rights and duties attaching to the relationship of partner and copartner, tenant in common and cotenant, patron and apprentice, and guardian and ward. Thus by treating intervention of strong states in the affairs of weak states as one of a large class of cases in which a civilized state extends its sovereignty over other states and countries, the United States is beginning to substitute in place of the idea of "intervention for humanity," under a "law of humanity" or a "law of human society," the idea of extension of sovereignty over states and countries in various ways and with various effects according to recognized principles of the law of nations; the division of the law of nations thus placed in process of formulation so as to be susceptible of international recognition being perhaps properly designated as the part concerning social relations, and corresponding to that part of the private law which is classified as the law of personal

relations or the law of social and domestic relations. The law of all these relationships is based upon the assumption of their having a fiduciary character. Using trusteeship in its largest sense as a generic word to express all fiduciary relationships, including those essentially of a personal character, the basic principle of this part of the law is that in all these relationships one person is trustee for another.

The American substitute for the doctrine of "intervention for humanity" thus has the effect to convert all acts of force of a civilized State extending its sovereignty or influence to another State or country, by consent of the other civilized States or without their opposition, into acts institutive of an international trusteeship, the terms of which are determined by that part of the law of nations which concerns the social and domestic relations of States and countries. The civilized States which consent to the extension of sovereignty or intentionally refrain from opposition to it, resemble the family council which under some systems of jurisprudence is provided for as precedent to the application of a court of equity for the appointment of a guardian for a minor individual, or the meeting of relatives and creditors which generally precedes an application to a court of equity for the appointment of a conservator of a person incompetent to manage his own affairs. In the society of nations the court of equity being nonexistent, the appointment is made by the meeting of the civilized States related to the incompetent major or minor State, or to the incompetent community, as neighbors or creditors or as professional trustees for profit.

That a State is an artificial personality having such a corporate character in the law of nations that it is capable of trusteeship under the law of nations, is well settled. The Supreme Court of the United States has held that the United States itself, as a legal personality, may be a trustee under the law of nations; and that it has, in fact, executed trusts of a most important kind, going even to the extent of holding sovereignty in trust for other States and conferring it upon these States according to the agreed terms and conditions of the trust. In the case of Shively *v.* Bowlby, decided in 1894 (152 U. S., 1, 26, 27), the court thus described the terms of one very important trust undertaken by the United States:

> The act of 1783 and the deed of 1784 by which the State of Virginia, before the adoption of the Constitution, ceded "unto the United States in Congress assembled, for the benefit of the [new States to be formed in the Northwest Territory], all right, title, and claim, as well of soil as jurisdiction" to the Northwest Territory, and the similar cession by the State of Georgia to the United States in 1802 of territory including great part of Alabama and of Mississippi, each provided that the territory so ceded should be formed into States, to be admitted, on attaining a certain population, into the Union (in the words of the Virginia cession) "having the same rights of sovereignty as the other States," or (in the words of the Ordinance of Congress of July 13,

1787, for the government of the Northwest Territory, adopted in the Georgia cession) "on an equal footing with the original States in all respects whatever, * * *."

The court then quoted and approved its decision made in the case of Pollard *v.* Hagan, 3 Howard, 212, 221, 222, decided in 1844, as follows:

> We think that a proper examination of the subject will show that the United States never held any municipal sovereignty, jurisdiction, or right of soil, in and to the territory of which * * * any of the new States were formed, except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia Legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French Republic of the 30th of April, 1803, ceding Louisiana. * * * When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new States, and to invest them with it to the same extent in all respects, that it was held by the States ceding the territories.

This trust was fulfilled by the United States in letter and in spirit.

It has been objected by some writers that the doctrine of the "right of intervention for humanity" can never be a practical doctrine, because intervention for humanity implies disinterestedness, and disinterestedness of States is nonexistent. This objection would seem to be valid. If, however, "intervention" be regarded, according to the views held by the United States, as an extension of national sovereignty or influence, the rightfulness or wrongfulness of each extension of sovereignty or influence is determined, according to the principles of trusteeship, by the part of the law of nations concerning the social relations of States and countries, and disinterestedness is not essential. Most of the social relations of men and States are determined by the interestedness of the parties. The family council in cases of guardianship, the meeting of relatives and creditors in case of conservatorship, are meetings of the parties interested; and if they agree on the person to be appointed guardian or conservator, the court of equity having jurisdiction generally confirms the selection. Nor does it as a general rule make any difference that the person selected is interested, even against the minor or incompetent. The court considers the capacity and character of the candidate for the office, and unless there is active competition or conflict between their business operations, so as to place the candidate under severe temptation, does not allow such considerations to weigh against an established reputation for high character and probity.

The United States has for a century recognized itself as guardian of the aboriginal tribes under its sovereignty under the law of na-

tions. The question of disinterestedness or interestedness has never been raised.

By some writers it is held that an intervention can never be rightful under the law of nations unless made by a group of States or by one State acting by permission or request of a group. This doctrine is based on the ground that the participation of the larger number assures the "disinterestedness" which is essential to an "intervention for humanity." The fallacy of this doctrine lies in assuming that such an assembly is a court of equity, and as such must be disinterested. Such a gathering, however, is not a court. It does not proceed by the judicial method, hearing evidence and argument and making decision according to the principles of law. The society of nations has not yet established a court of equity to impose conservatorship upon incompetent States or guardianship upon aboriginal tribes. The group of powers is always an interested group, and properly so; for each State is interested in the social relations of all and each, and the question is not of absence of interest, but of degree of interest due to physical or spiritual proximity. An international conference preceding an extension of sovereignty over another State or country is, it would seem, in contemplation of the law of nations under present conditions, rather to be regarded as a family meeting or family council, or a meeting of relatives and creditors. The State which is appointed by the meeting, whether by its free and deliberate action or after contest between two or more members as professional conservators or guardians for profit, is, it would seem, in contemplation of the law of nations, the agent of the meeting. If so, the principles of the private law of agency applicable in such cases between individuals are undoubtedly to be applied.

The State selected to perform this highly honorable and difficult agency and trusteeship is thus obligated, according to the law of nations, to observe in letter and in spirit, the principles agreed upon by the meeting, and, except so far as the agreement confers discretionary powers, to carry out, precisely, the measures agreed upon in execution of the principle. If the State thus, as agent of the meeting, occupying the position of conservator or guardian, at any time deems unjust the principles agreed upon, or considers improper the measures in execution of the principles agreed upon, or regards the agreement itself as having become obsolete, it is its duty to take the initiative in having the agreement amended or abrogated by a new agreement of the meeting; and on failure of its project of amendment or abrogation in whole or in part, to resign the agency, or continue to exercise it according to the terms agreed upon by the meeting.

Each of the States other than the one appointed as agent has, in this view of the law of nations, the right and duty, at any time during the continuance of the conservatorship when it may come to regard the agreement as based on principles which are unjust, or the measures agreed upon in execution as improper, or may have reason to think that State appointed as agent of the meeting is acting *ultra vires*, or is failing to act according to obligation, or may deem the arrangement obsolete or the conservatorship no longer necessary, to take the initiative in having the agreement amended, or having it abrogated and a new agreement substituted, or in having it abrogated altogether so as to end the conservatorship; or in having the State which is agent called to account for malfeasance or nonfeasance in executing the agency.

The objection to the doctrine of intervention for humanity that it is based upon a hypothesis of disinterestedness which in fact can never exist has therefore no significance as respects the doctrine of extension of national sovereignty on principles of trusteeship, since the latter doctrine is based on the hypothesis of the interestedness of all the parties concerned, which corresponds with the actual fact.

It has been said that the doctrine of "intervention for humanity," in spite of the humanitarian purpose of those who formulated it, is, in the practice of nations, used fraudulently and as a means of covering conquest and exploitation with a veil of legality. Thus Rougier, at the conclusion of the article above quoted (pp. 525, 526) wrote in 1910:

> The conclusion which it seems necessary to reach from this study is, that it is practically impossible to separate the human motives from the political motives and to assure the absolute disinterestedness of the intervening States. * * * From the instant that the intervening powers judge their action to be opportune, they regard this opportunity from the subjective point of view of their interests for the moment. * * * Whenever a power intervenes, in the name of humanity, in the sphere of competence of another power, it does nothing else than oppose its conception of justice and social welfare to that of the latter, and it supports its conception by force. Its action has a tendency, as a matter of fact, to involve the State which is the object of the intervention in the moral and social sphere of influence of the intervening State, and to result in involving the former in the political sphere of influence of the latter. The intervening State controls the country in order to prepare to dominate it. Thus the intervention for humanity appears as an ingenious juridical means of taking away, little by little, the independence of a State, and of keeping it on a downward incline toward semi-sovereignty.

If the doctrine of "intervention for humanity" has in practice this alleged effect of demoting sovereign States to the status of half-sovereign States (and, by necessary implication, of demoting half-sovereign States to the status of aboriginal tribes), it would seem reasonable to conclude that this effect is due to the inadequacy of the

doctrine itself. No well-founded legal doctrine readily becomes an "ingenious juridical means" by which an act recognized to be morally wrong becomes legally rightful. Considering interventions of civilized States in the affairs of semicivilized States as an extension of national sovereignty and regarding all extensions of national sovereignty as regulated by that part of the law of nations which is concerned with the social relations of States and countries, which part of the law is based upon the fundamental principle of trusteeship, there would seem to be no possibility of civilized States legally engaging in the work of demoting any community from the status which it has acquired by general recognition. The trusteeship is for conservation and elevation of status. A conservator or guardian can find in the private law no warrant for altering for the worse the social status of the incompetent person or the ward. His duty is to alter it, if possible, for the better.

When the United States extended its sovereignty over Cuba, the Philippines, and Porto Rico, as the result of the Spanish War, the public sentiment was strongly against "imperialism" and in favor of the doctrine that "the Constitution follows the flag." In developing a conception of the law of nations which should take account of this public sentiment the American Government based itself upon the conception of a trusteeship implied in sovereignty. By recognizing this trusteeship under the law of nations, through acts of the Government declaratory of the trust, the relationship between the United States and the countries to which its sovereignty was extended was established as being social and not imperial, and the spirit of the Constitution was made to follow the flag and to permeate the spirit of the peoples within whose territories the flag had been raised by the power of the United States in conformity with the existing law of nations.

The first act based on this fundamental principle of trusteeship occurred in the case of Cuba. On April 20, 1898, the day before the war began, Congress made a declaration of trust in favor of the people of the island. In the preamble it was asserted that "the abhorrent conditions which have existed for more than three years in the island of Cuba, so near our own borders, have shocked the moral sense of the people of the United States [and] have been a disgrace to civilization." It was thereupon declared "that the people of the island of Cuba are, and of right ought to be, free and independent." Having thus recognized Cuba as having a personality by and under the law of nations, the resolution then proceeded to demand that Spain "relinquish its authority and government in the island of Cuba" and to authorize the President to use all needful military and naval force to bring about this relinquishment.

It concluded by declaring a trusteeship on the part of the United States toward the people of Cuba, thus determining its social relationship to Cuba as a State, in the following words:

> The United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people. (U. S. St. L., vol. 30, pp. 738, 739.)

The Supreme Court of the United States in the case of Neely *v.* Henkel, 180 U. S., 109, decided in January, 1901, in construing the declaration that "the people of Cuba are and of right ought to be free and independent," held that it meant "that the Cubans were entitled to enjoy * * * that measure of self-control which is the inalienable right of man, protected in their right to reap the exhaustless treasure of their country," and that "as between the United States and Cuba that island is territory held in trust for the inhabitants of Cuba to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action."

The United States has faithfully performed its trust.

By the treaty with Spain, the United States assured itself the right to determine the relationship between it and each of the acquired countries according to its own views of the principles of the law of nations and its own judgment concerning the social attainment of each of them. The treaty provided that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress." In the case of Downes *v.* Bidwell, 182 U. S., 244, decided in May, 1901, Justice (now Chief Justice) White, in the concurring opinion of himself and Justices Shiras and McKenna, said (p. 340):

> I can not doubt that the express purpose of the treaty was not only to leave the status of the territory to be determined by Congress, but to prevent the treaty from operating to the contrary.

In the case of the Philippines the American Government, as soon as its sovereignty of the archipelago was assured by the treaty of peace, made a declaration of trust recognizing the duties under the law of nations, arising by virtue of the personal relationship thus brought about between it and the Philippine Islands. In the proclamation to the people of the Philippine Islands of April 4, 1899, issued by the first (Schurman) Philippine Commission by order of the President, it was declared that treaty with Spain for the cession to the United States of the sovereignty which Spain formerly possessed and exercised in the islands had, "in accordance with the law of nations, received a complete and indefeasible consummation," and that "in order that the high responsibilities and obligations with

which the United States has thus become definitely charged may be fulfilled in a way calculated to promote the best interests of the inhabitants of the islands," the President had appointed the commission.

The proclamation then proceeded as follows:

The aim and object of the American Government, apart from the fulfillment of the solemn obligations it has assumed toward the family of nations by the acceptance of the sovereignty over the Philippine Islands, is the well-being, the prosperity, and the happiness of the Philippine people, and their elevation and advancement to a position among the most civilized peoples of the world.

[The President] believes that this felicity and perfection of the Philippine people is to be brought about by the assurance of peace and order; by the guaranty of civil and religious liberty; by the establishment of justice; by the cultivation of letters, science, and the liberal and practical arts; by the enlargement of intercourse with foreign nations; by the expansion of industrial pursuits, trade, and commerce; by the multiplication and improvement of the means of internal communications; by the development, with the aid of modern mechanical inventions, of the great natural resources of the Archipelago; and in a word, by the uninterrupted devotion of the people to the pursuit of those useful objects and the realization of those noble ideals which constitute the higher civilization of mankind. * * *

The commission emphatically asserts that the United States is not only willing, but anxious, to establish in the Philippine Islands an enlightened system of government under which the Philippine people may enjoy the largest measure of home rule and the amplest liberty consonant with the supreme ends of government, and compatible with those obligations which the United States has assumed toward the civilized nations of the world.

The United States striving earnestly for the welfare and advancement of the inhabitants of the Philippine Islands, there can be no real conflict between American sovereignty and the rights and liberties of the Philippine people. For, just as the United States stands ready to furnish armies, navies, and all the infinite resources of a great and powerful nation to maintain and support its rightful supremacy over the Philippine Islands, so it is even more solicitous to spread peace and happiness among the Philippine people; to guarantee them a rightful freedom; to protect them in their just privileges and immunities; to accustom them to free self-government in an ever-increasing measure; and to encourage them in those democratic aspirations, sentiments, and ideals which are the promise and potency of a fruiful national development.

It is the expectation of the commission to visit the Philippine people in their respective Provinces, both for the purpose of cultivating a more intimate acquaintance and also with a view to ascertaining from enlightened native opinion what form or forms of government seem best adapted to the Philippine peoples, most apt to conduce to their highest welfare, and most conformable to their customs, traditions, sentiments, and cherished ideals. Both in the establishment and maintenance of government in the Philippine Islands it will be the policy of the United States to consult the views and wishes, and to secure the advice, cooperation, and aid of the Philippine people themselves.

In the meantime the attention of the Philippine people is invited to certain regulative principles by which the United States will be governed in its relations with them. The following are deemed of cardinal importance:

1. The supremacy of the United States must and will be enforced throughout every part of the archipelago, and those who resist it can accomplish no other end than their own ruin.

2. The most ample liberty of self-government will be granted to the Philippine people which is reconcilable with the maintenance of a wise, just, stable, effective, and economical administration of public affairs, and compatible with the sovereign and international rights and obligations of the United States.

3. The civil rights of the Philippine people will be guaranteed and protected to the fullest extent; religious freedom assured; and all persons shall have an equal standing before the law.

4. Honor, justice, and friendship forbid the use of the Philippine people or islands as an object or means of exploitation. The purpose of the American Government is the welfare and advancement of the Philippine people.

5. There shall be guaranteed to the Philippine people an honest and effective civil service, in which to the fullest extent practicable, natives shall be employed.

6. The collection and application of taxes and revenues will be put upon a sound, honest, and economical basis. Public funds, raised justly and collected honestly, will be applied only in defraying the regular and proper expenses incurred by and for the establishment and maintenance of the Philippine Government, and for such general improvements as public interests may demand. Local funds, collected for local purposes, shall not be diverted to other ends. With such a prudent and honest fiscal administration, it is believed that the needs of government will in a short time become compatible with a considerable reduction in taxation.

7. A pure, speedy, and effective administration of justice will be established, whereby the evils of delay, corruption, and exploitation will be effectually eradicated.

8. The construction of roads, railroads, and other means of communication and transportation, as well as other public works of manifest advantage to the Philippine people, will be promoted.

9. Domestic and foreign trade and commerce, agriculture and other industrial pursuits, and general development of the country in the interests of its inhabitants will be the constant objects of solicitude and fostering care.

10. Effective provision will be made for the establishment of elementary schools in which the children of the people shall be educated. Appropriate facilities will also be provided for higher education.

11. Reforms in all departments of the Government, in all branches of the public service, and in all corporations closely touching the common life of the people must be undertaken without delay and effected, conformably to right and justice, in a way that will satisfy the well-founded demands and the highest sentiments and aspirations of the Philippine people.

Such is the spirit in which the United States comes to the people of the Philippine Islands. [The President] has instructed the commission to make it publicly known. (S. Doc., vol. 44, 56th Cong., 1st sess., pp. 3–5.)

This proclamation was evidently intended to stand as a permanent fundamental constitution and compact, establishing the terms of the trusteeship which the United States recognized itself as assuming under the law of nations, as respects all peoples and territories over which it in any manner extends its sovereignty. The acts agreed to be done were recognized as incumbent upon it because they were all needful in execution of those principles of social relationship which have a universal character, and which are expressed or implied in the preamble of the Declaration of Independence and in the Constitution; these principles, by reason of their universality, being recognized as principles of the law of nations.

The proclamation was, however, almost wholly an affirmative statement. It contained no bill of rights imposing legal limitations by way of express prohibition upon all government in the Philippine Islands similar to those imposed upon all governments in the United States by the bills of rights contained in the Federal Constitutions and in the State constitutions. Such a bill of rights, made by combining all the provisions of the Federal and State bills of rights which have a universal character and are capable of universal application, was accordingly inserted in the instructions of April 7, 1900, to the commission appointed to take over the civil government of the Philippines from the military authorities, commonly called the first (Taft) commission. This bill of rights has been quoted previously in this study (pp. 40, 41). Its provisions were incorporated almost literally in the organic act of the Philippine Islands of July 1, 1902. They are also incorporated in the new organic act of August 29, 1916, by which an autonomous government for the Philippines is established in preparation for the ultimate independence of the Islands, which the act promises and assures.

Elihu Root, who was the Secretary of War from 1899 until 1904, and thus in principal charge of the relations with these countries during the period when the American Government was thus formulating and applying its conception of the true principles of the law of nations governing such relations, has recently described this evolutionary action of the United States. Speaking particularly with reference to the Philippine Islands, he has said:

> We acquired the rights and undertook the duties of sovereignty. We declared a trust for the benefit of the people of the islands. * * * We can not relieve ourselves from [the obligations thus assumed] except in one way, and that is by carrying our performance to such a point that our *cestuis que trustent* will be competent to take care of themselves. * * * We took the same view of rights and duties when we became sovereign and the Filipinos colonists that we did in the time of the American Revolution when we were colonists and Great Britain was sovereign. We undertook to go a little farther than other countries had gone, and to make the first consideration in our government of the islands the training of the inhabitants in the difficult art of self-government, so that they would as soon as possible become competent to govern themselves instead of being governed by us. Accordingly, one of the first things that we did was to send over teachers by the shipload—thousands of them—and to establish schools all over the islands. And then we provided a form of government under which the Philippines should receive what may be called clinical instruction in administration and in the application of the principles which we consider vital to free self-government and we provided that, step by step, just as rapidly as they became familiar with the institutions of free government and capable of continuing them, the powers of government should be placed in their hands. I am sure that this view of suitable treatment of the Philippines, so long as we are to be in the islands at all, commends itself to the best intelligence and practical idealism of the American people. (The Philippines, to the End of the Military Régime, by Charles B. Elliott, 1917, prefatory note by Elihu Root.)

The doctrine of "the intervention for humanity" would thus appear to have been a first step toward the development of a law of nations, dealing with the social relationships of States and countries. The supreme "law of humanity" on which it was based was found to be so indefinite as to be dangerous. Any State, basing itself on this "higher law," could hold itself exempt from all its conventional obligations, even those of the most solemn kind which a State assumes by participating in the final act of an international conference. To avoid this danger, publicists sought to limit this "higher law" by defining it as the "law of human solidarity"; thus applying the principles of the French law of partnership and association, whereby the partners or associates are regarded as mutual trustees and agents—each for each, each for all, all for each, and all for all—and whereby the unit thus formed is characterized as *solidaire* and the partners or associates are considered to exist, for the purposes of the partnership or association, in a relationship of *solidarité*. This definition of the supreme "law of humanity" as the supreme "law of human solidarity," imported into the law of nations notions which were partly social and partly economic, but which were essentially those of commercial agency. The notion of reciprocal trusteeship of a personal as well as an economic character, however, is a part of the conception of the relationship of solidarity. By the application of this notion of reciprocal trusteeship of a personal character, and by applying analogies drawn from the private law concerning the social and domestic relations of individuals, a part of the law of nations under the condition of peace seems already to have been evolved, which may perhaps be called the social law of nations.

Though the doctrine of "intervention for humanity" has doubtless been abused by civilized States, in the same way that the doctrine of the freedom of the individual to act under "the higher law" has been abused by individuals, it has probably served, on the whole, to promote the well-being of the weaker States, communities, and individuals. Transformed into the doctrine of "extension of national sovereignty according to the social law of nations," the doctrine exists in a practical and effective form, and the possibility of its abuse is avoided.

CHAPTER XV.

THE ESTABLISHMENT OF THE "TRIPLE PRINCIPLE" BY THE ACTION OF INTERNATIONAL CONFERENCES IN THE CASE OF MOROCCO, AND THE EFFECT OF THIS ACTION ON THE DEVELOPMENT OF THE LAW OF NATIONS REGARDING ABORIGINES.

The international action which has occurred since 1880 with reference to Morocco has involved the international consideration of the relationship of the leading civilized States to Morocco as a minor State. The questions to the solution of which this international action has been directed have thus been questions arising under what has been called above the social law of nations, which also governs the relations of civilized States to aboriginal tribes. The principles recognized and acted upon in the international action concerning Morocco are therefore to be examined and an estimate formed concerning the relationship of these principles to the principles above laid down as governing the relations between civilized States and aboriginal tribes. If, as claimed by some publicists and as might perhaps be inferred from the existing situation of fact, Morocco has by international action been demoted from the status of an independent and sovereign, though minor, State, to that of a territory partitioned into three districts, two of which are colonies of two of the major or civilized States, and the third a district under international administration as a kind of federal reservation of the society of nations, the case of Morocco, as a case of demotion or reduction of international status by international action, would be of great interest in a study of the law of nations concerning aborigines. To all members of the society of nations, a case of reduction of international status by international action is of vital interest. The principles applied in demoting a minor State would, if recognized as just and proper, be equally applicable in demoting a major State. As aboriginal tribes have the lowest possible international status, a legal process of demotion, as applied to them, whether by international action or otherwise, would seem necessarily to be a legal process of extinction.

Therefore, in view of these claims of publicists, supported as it may be claimed by existing political facts, that Morocco has been demoted and partitioned into districts whch are colonies of civilized States, it seems necessary to consider in this study the international action concerning Morocco in its legal aspects.

The preliminary question is to determine whether consideration should be given in such a study to all the various acts of civilized States which have occurred with reference to Morocco, especially those which have occurred since the spring of 1904 and which for 10 years preceding the present war produced a condition of continuous political tension in Europe and twice threatened to produce a European war. These various acts are of three different classes: Acts done separately by one civilized State as acts of force or of military rule or of civil administration; acts having the form of treaties, some public and some secret, entered into by two or three States with each other; and acts having the form of general acts entered into by a large number of civilized States assembled formally or informally in international conference. It seems clear that in a study of the relationship of the civilized States to Morocco, only the international acts of a general character can be considered. The general and unanimous act of an international conference, whether taken at a formal assembly of the conference or by unanimous accord through treaty or convention entered into after formal conference and as amendatory of the final act of the formal conference, seems clearly to be and is recognized by all civilized States as being an act of the highest dignity and majesty short of the unanimous act of all the States of the world assembled. Such an act has the character of a supreme and fundamental compact, or an act of supreme legislation, adjudication, or administration, as compared with any act having the character of legislation, adjudication, or administration done or of war waged, by any one of the civilized States which are members of the conference, or of agreement made by any number of them less than all.

If the above classification of the acts of the civilized States with reference to Morocco be correct, as it would seem clearly to be, and if it be the case, as it undoubtedly is, that all civilized States recognize the acts of public international conferences as having this supreme character as compared with the action of individual States or small groups of States, the study of the question of the present legal social status of Morocco, and of the principles applied by the civilized States in agreement with Morocco as establishing this legal status, is much simplified. There are, in this view, only three documents having this supreme character—the final act of the conference of Madrid of 1880; the final act of the conference of Algeciras of 1906; and the Franco-German convention of 1911, which was open to the adhesion of the powers signatory of the Madrid act and the Algeciras act, and was adhered to by these powers. The various treaties relating to Morocco, made by two or three of the powers signatory of the Madrid and Algeciras act with each other, are acts

of inferior dignity and majesty to the acts of the international conference, and can no more operate to change or in any way affect these acts than an act of two or three States of the Union can change or in any way affect the Constitution of the United States.

In determining the legal status of Morocco and the principles applied by the action of international conferences in establishing this status, the three acts above mentioned—the Madrid act, the Algeciras act, and the amendatory accord of 1911 evidenced by the Franco-German convention of that year—are to be construed according to the established legal rules, recognized in all civilized systems of jurisprudence, for the construction of legal instruments. These are, undoubtedly, that the circumstances surrounding the execution of the instrument to be construed are to be considered, for the purpose of establishing its general purport and the general intention of the party or parties in making it; that the words used are to be construed in their ordinary and usual meaning, technical terms having their technical meaning when evidently intended to be used in their technical sense, the intention being determined by the general tenor and purport of the instrument and the circumstances surrounding its execution; and that ambiguities of meaning inherent in the words used, as so construed, are to be resolved by construing them according to the probable intention of the party or parties to the instrument as determined by its general tenor and purport and in the light of the circumstances surrounding its execution.

The circumstances which led to the adoption of the Madrid act of 1880 by the international conference of Madrid, were as follows:

Morocco, ever since the time, at least a century before 1880, when it had come into definite relationship with the civilized States, had been recognized by them as a State. On account of its ineptitude for civilized social relations, however, its statehood was recognized as being of the minor form, in comparison with that of the civilized States, all of which had statehood of the major form. As a consequence of this minority of Morocco the civilized States had demanded and Morocco had conceded to each of 12 of the leading civilized States, by treaty, the right of jurisdiction over their own citizens in Morocco. This jurisdiction was exercised in behalf of each State by its respective consul in a manner determined by the law of nations concerning consular jurisdiction in minor States. By these treaties, each of these 12 civilized States had certain rights to select certain native Moroccans as protégés for life, and to extend to them its consular jurisdiction. The persons so selected as protégés were assumed to be agents or employees of the citizens of the States exercising consular jurisdiction, though the matter was left uncertain by the treaties. Any of these States was therefore able, without clearly subjecting itself to a

charge of having broken its treaty, to convert a large number of native Moroccans into its subjects. The natives who were not protégés came into conflict with the protégés. The States concerned became involved. It was evident that if the practice of creating protégés were carried sufficiently far, the civilized States, or some or one of them, might, through its citizens and protégés dominate Morocco and convert it into a colony or partition it into colonies. Moreover, one State, by a combined process of commercial penetration, the employment of native Moroccans, and the conversion of them into its protégés, could obtain the dominating commercial influence in Morocco, and by gradually extending its commercial influence could attain political influence, by gradually extending its political influence could attain political control, and by gradually extending its political control could attain sovereignty. The provisions of the treaties of Morocco with the respective civilized States, with reference to this right of converting native Moroccans into protégés, were not only obscure, but they varied one from the other. The situation could be remedied only by the civilized States being placed upon a uniform basis as respects their right to create protégés. In order to insure the observation of this principle of uniformity it was also necessary to prevent any of the civilized States having relations with Morocco from making a more favorable commercial treaty with Morocco than the others had. Unless this were prevented, it would be possible for a State having a preferential commercial treaty, especially by taking advantage of the obscurity of the treaties as respects the right to create protégés, to attain in Morocco, without obstruction, a commercial predominance, and, by the gradual pushing process above described, ultimately to reduce its status from that of a minor State to that of a colony.

There were special and permanent considerations in the case of Morocco which induced the civilized States having relations with that State to accept its invitation to confer with it concerning the maintenance of its status as a minor State. These considerations were based on its geographical location as related to the international processes of social intercourse, trade, and war. The territory of Morocco includes the south shore of the narrow Strait of Gibraltar, which separates western Europe from western Africa. Through this channel, not more than 10 miles wide at its narrowest point, passes the great middle route for the sea-borne traffic of the world. In the near future, the great trunk line of railroad connecting western Europe and western Africa, after passing through the continent of Europe, collecting there vast burdens of commodities through an intricate network of ramifying and converging lines, will convey these riches through the projected tunnel under the Strait of Gibraltar, and in return will bring to Europe loads of commodities collected from all parts of Africa. The district lying between the shore of the

harbor of Tangier and the Morocco end of the European-African Railroad tunnel will in the future be the point at which the main sea trade-route of the world will intersect one of the greatest of the world's trunk lines of railroads. It must therefore become a great commercial center. The possession of this district and its hinterland—that is, of Morocco—by any one of the civilized States, would give that State a predominance likely to cause international jealousy and lead to a general war. It was already the settled policy in 1880 that in interests of international order and peace, the sovereignty of a district of such international importance should be vested in a minor State, and that the sovereignty of that State, its freedom from partition, and uniformity of treatment for all other States, should be assured by formal or informal international agreement. While there was a tendency to regard this policy as a "principle," and as applicable to the relations of all civilized States to all minor States, the "policy" had not yet become a "principle" of the law of nations. The policy—sometimes spoken of as the "triple policy," by reason of the necessity of there being a combination of all the three elements to accomplish the international result intended—was particularly applicable to Turkey and Morocco—to Turkey as the holder of Constantinople, the junction-point of the middle sea route of the world with the then projected and now established Eastern European-Asian-African trunk line of railroad which will probably soon pass under the Strait of the Dardanelles; and to Morocco, as the holder of Tangier, the junction point of the middle sea route with the main land route, destined to be a railroad route, connecting western Europe with western Africa by a tunnel under the Strait of Gibraltar.

The final act, of July 3, 1880, adopted by the Madrid conference, recognized and applied this "triple policy." The situation in which this policy then was, evidently made it impossible for the conference to formulate and declare it as a "principle" of the law for nations. This would have raised the question whether the principle was applicable generally to the relationship which the civilized States, as major States, bear individually and collectively, to minor States, or whether it was applicable only in special cases such as arose out of the situation of Turkey and Morocco.

The Madrid act was participated in by Morocco, on the one part, as the initiator of the conference, with whom the powers there assembled were collectively agreeing, and 12 major States collectively on the other part. These States were Great Britain, France, Germany, Russia, Spain, Italy, Austria-Hungary, Holland, Portugal, Denmark, Norway, and Sweden, and the United States. All, including Morocco, united in a declaration of the motives of the conference,

which was made a part of the preamble of the final act. It was declared that they all "recognized the necessity of establishing, on fixed and uniform bases, the exercise of the right of protection in Morocco, and of settling certain questions connected therewith." The policy of "uniformity" of rights in Morocco of all other States and their citizens was thus, according to the preamble, the "basis" on which it was declared the deliberations of the conference had proceeded; though it was also declared that the object of the conference was to apply this basic policy of uniformity of rights only as respects "the exercise of the right of protection in Morocco" and the rights of the civilized States in Morocco "connected therewith."

The first 16 articles of the Madrid act were concerned with the right of protection. The seventeenth (which was the last with the exception of one relating to ratification), was concerned with the right of trade; this right being evidently regarded as a right "connected with" the right of protection, which was essentially a right of a social nature. The policy of uniformity was here again applied as the "basis" of the common action. Article 17 was as follows:

> The right to the treatment of the most favored nation is recognized by Morocco as belonging to all the powers represented at the Madrid conference.

The cautious statement that this uniform right exists in all "the powers represented at the Madrid conference," and that the recognition of this uniform right is made "by Morocco" does not alter the fact that they all "recognized" the right of the States assembled, other than Morocco, to the treatment of the most favored nation in Morocco as respects trade. It seems clear that they intended to recognize that the right was not a right granted by Morocco, but a right existing under the law of nations in favor of all the civilized States against Morocco as a minor State for the sake of the general welfare, and in favor of Morocco for its protection against extinction, partition, or exploitation.

The Algeciras conference was held in pursuance of a program agreed to in advance by Morocco and all the powers which had participated in the conference of Madrid. This agreed program and the circumstances surrounding its execution may properly be considered in construing the final act of Algeciras as one of the facts surrounding the execution of that act, for the purpose of ascertaining its general meaning and purport. This program was formulated on July 8, 1905, by exchange of notes between France and Germany, and was to be presented to Morocco and the 12 powers signatory of the Madrid act and accepted by them in advance. It was so presented, and all of them accepted the program.

The program was necessary to relieve a situation of extreme tension in Europe over Morocco. In 1904, Great Britain, France, and

Spain had asserted special interests in Morocco by conventions and declarations duly published. As a part of these transactions, they also entered into conventions which were not published, but whose contents were the subject of public surmise and conjecture, and which were, as then understood and as later shown, susceptible of being interpreted as intending the partition of Morocco into districts, one of which would be a colony of France, one of Spain, and one an international district commanded by the British fortress of Gibraltar. Germany assumed the position of next friend of Morocco, relying upon the principles implied or declared in the Madrid act, and in behalf of Morocco and of itself asserted that the action proposed by Great Britain, France, and Spain could be legally taken under the law of nations, if at all, only by authority of the final act of an international conference at least equal in dignity and majesty with the Madrid conference. France at first asserted the rights of the three nations under the law of nations to act without authority of an international conference. The matter was finally adjusted by France accepting Germany's position and agreeing that the conference should be bound in advance to the principles of the Madrid act, and by Germany accepting, subject to the permanent observance of these principles, the position of France that it had a "special interest" in Morocco. The note of the French Government of July 8, 1905, was as follows:

> The Government of the [French] Republic is convinced, by the conversations which have taken place at Paris and Berlin, that the imperial [German] Government will not pursue in the conference proposed by the Sultan of Morocco, any object which will compromise the legitimate interests of France in that country, or which may be contrary to the rights of France resulting from its treaties or arrangements and in harmony with the following principles:
>
> Sovereignty and independence of the Sultan;
>
> Integrity of his Empire;
>
> Economic liberty, without any inequality;
>
> Utility of reforms of police and financial reforms, the introduction of which should be regulated, for a short period, by way of international accord;
>
> Recognition of the actual situation of France with respect to Morocco, due to the contiguity, along a vast extent of Algeria and [Morocco], and to the particular relations which result between two countries which border on each other, as well as by the special interest which ensues to France that order should reign in [Morocco].
>
> In consequence, the Government of the Republic withdraws its previous objections against the conference and agrees to its being convoked. (French Yellow Book, Affairs of Morocco, 1901–1905, pp. 251, 252.)

The German Government immediately replied by note confirming the programme and understanding as stated in the French note.

The conference of Algeciras convened on January 16, 1906, and after careful deliberation adopted a final act on April 7, 1906. Like

the Madrid conference, it was called by Morocco. The same twelve major states participated in the conference with Morocco. More than a quarter of a century had passed since the Madrid conference, and the "triple policy" had proved itself to be a practicable working principle of relationship between the civilized States, individually and collectively, and the minor States. The process of demotion of the minor States and the conversion of them into colonies, either directly or under the fiction of "colonial protectorate," was going on or had been completed in the cases of Tunis, Algeria, Egypt, Korea, and other less conspicuous cases. The action of the United States in declaring the people of Cuba independent, and the establishment by international recognition of Cuba as a minor State, had brought into public consideration the question whether civilized States ought any longer to indulge in the process of demotion of minor States, and whether the civilized States did not have the duty, by reason of their major status, their civilization and their strength, to conserve and raise the status of minor States and uncivilized tribes, and to recognize the statehood of peoples entitled by their situation and attainments to have this social status in the society of nations.

The conference of Algeciras, having accepted by its program the "triple principle" as the basis of its deliberations, and no doubt recognizing that there was a strong and growing public sentiment in favor of this chivalrous and Christian conception of the duties of the strong to the weak, and itself approving this conception, made its final act the means of converting the traditional "triple policy"—which, though proved to be satisfactory and workable, was not strong enough to restrain acquisitive States—into a "triple principle" of the law of nations. The conference, with proper caution, asserted and applied the principle only as respects Morocco, thus leaving for future decision whether the principle governs the relations of all civilized States individually and collectively, to all and each of the minor or half-civilized States, or is applicable only to minor States whose territory is valuable for trade or war. This whole result was accomplished by a declaration of principle, included in the declaration of the motives of the conference made in the preamble of the final act. The declaration of motives was as follows:

> [The 12 powers and Morocco], inspired by the interest attaching itself to the reign of order, peace, and prosperity in Morocco, and recognizing that the attainment thereof can only be effected by means of the introduction of the triple principle of the sovereignty and independence of His Majesty the Sultan, the integrity of his domains, and economic liberty without any inequality, have resolved, upon the invitation of his Shereefian Majesty, to call together a conference at Algeciras for the purpose of arriving at an understanding upon the said reforms, as well as examining the means for obtaining the resources

necessary for their application, and have appointed as their delegates plenipotentiary, etc.

The body of the final act was concerned with the "reforms" which by the application of the "triple principle," and to assure its observance, were deemed needful. The provisions concerning the reforms were classified under three heads. Those concerning reforms which were essentially matters of internal administration—organization of a Moroccan state police, improvements in methods of assessment and collection of taxes, imposition of new taxes, improvement of the management of the public service, and construction of public works through contracts assigned after competition and adjudication of merit—were called "declarations," as manifesting the intention of the 12 powers to have the internal administration continue to be in the name of the Moroccan Government. The provisions which in law constituted a 40-year charter of an international banking corporation, operating under French law as the Moroccan State Bank for the purpose of financing the public operations of the State, were called collectively a "concession." The provisions concerning reforms which were essentially matters of external administration—changes in the customs laws and tariffs, the suppression of customs frauds and smuggling, and repression of contraband of arms—were called "regulations," as showing that the 12 powers regarded themselves as having a joint control of the external administration with the Moroccan Government.

The expression "the sovereignty and independence of his Majesty the Sultan," was the formal method, imported into the public law of Europe from the feudal law, of acknowledging the independence of the people of Morocco as a State; the monarch under the feudal system, being regarded as holding the sovereignty over the people and over the land (to use the words of the Supreme Court of the United States in Shively *v.* Bowlby, 152 U. S., 1, 14), "as the representative of and in trust for the nation."

The general intention of the Algeciras conference seems to have been to make, by the joint action of the 12 powers and Morocco, a general declaration of trust, which should have the effect of a fundamental compact assuring the independence of the people of Morocco as a minor State, subject to an international easement or covenant running with the land, protecting Morocco against itself and against each of the major States, and protecting each of the major States against each and all of the others.

The only provisions of the final act which recognized France and Spain as having special interests in Morocco were those relating to the organization of the Moroccan State police. This police was to be a body of Moroccans, created and regulated by the Moroccan Government. Provision was made for the Moroccan Government em-

ploying French and Spanish officers as instructors for this police force; the commissioned officers serving as such instructors not to exceed 20, and the noncommissioned officers not to exceed 40. A Swiss officer was to be inspector general of police, reporting to the dean of the diplomatic body at Tangier. Article 12 of the final act provided as follows:

> The staff of instructors of the Shereefian police (officers and noncommissioned officers) shall be Spanish at Tetuan, mixed at Tangier, Spanish at Larache, French at Rabat, mixed at Casablanca, and French in the other three ports.

This article, by locating French instructors at the military posts in the French zone of influence and Spanish in the Spanish zone, and by requiring both French and Spanish officers to be located in the military posts within the international zone of influence at Tangier and at Casablanca where there was no predominating influence, recognized the French and Spanish zones of influence, and gave these two States a legal right in Morocco of a preferential character. During the discussion in the conference on the organization of the police, Germany proposed that the conference should provide an international surveillance of a definite and efficient kind, and in this connection, on March 8, 1906, caused a declaration to be made by its chief delegate on this subject. A translation of this declaration is as follows:

> We concur in the opinions expressed at the last session of the committee, showing the necessity of organizing in Morocco a police force placed under the sovereign authority of [the Sultan of Morocco]. We appreciate the reasons in favor of having recourse to officers chosen in France and in Spain and giving them an effective participation in this organization. But we can not admit that this cooperation should be limited to these two nations, without control by others and without any guaranty of international surveillance.
>
> It is evident that in a country at such a stage of civilization as Morocco the exercise of the only real force capable of maintaining order and guaranteeing the public security would give to the two powers which should have this exclusive privilege an exceptional position, which would make itself felt within the sphere of national interests and would endanger the principle of economic liberty for all. It is to be expected, in fact, that Morocco would fall into a condition of dependency on these two States from which would result an inequality of situation unacceptable to the other nations.
>
> The interests of Europe in Morocco require that there should be the strongest guaranties. To protect and develop these common interests by a common action—such is the principle practiced with success in other international circumstances. It suffices to call to mind the results obtained in Macedonia and in China by the collective efforts of the powers.
>
> We ask, then, that in the organization of the Moroccan police there should be such a cooperation of the powers foreign to Morocco as shall assure to all nations equality of economic treatment and the policy of the open door.
>
> We shall examine every proposition looking toward this end, with the most earnest desire to see the conference reach an agreement on this important matter. (French Yellow Book, Proceedings of the Conference of Algeciras, 1906, p. 185.)

The German Government, during the consideration in the conference of the provisions relating to the institution of the Moroccan State Bank, proposed to have the administration placed in the hands of a council of surveillance (*Conseil de Surveillance*), a council of administration (*Conseil d' Administration*), and a board of directors (*Directoire*). The council of surveillance was to be composed of the diplomatic representatives of the signatory powers at Tangier and a delegate appointed by the Sultan of Morocco. It was to have the general superintending power. The council of administration was to consist of two delegates " from each of the States, banks, or groups of banks " concerned. (French Yellow Book, Proceedings of the Conference of Algeciras, p. 185.)

The provisions of the final act on this subject (arts. 47 to 58) vested the ultimate power of surveillance and control in four of the major States, the plan of surveillance adopted being as follows: The bank was located at Tangier, the headquarters of the diplomatic body, so that they would be in a position to have a knowledge of its operations. The Moroccan Government was given the right and duty of surveillance by a high commissioner appointed after agreement with the board of directors, and the directors were controlled by meetings of the shareholders. Each of the twelve States had the option to become an equal shareholder with the rest, and each State electing to participate had an equal portion of the stock. Over all was placed a body of four censors; the four most interested powers—France, Germany, Great Britain, and Spain—each appointing one censor on the nomination of its State bank. Thus four powers were made the agents of the conference to protect the interests of all concerned as respects the financing of Morocco.

(For the Algeciras act, see Treaties and Conventions of the United States, vol. 2, pp. 2157–2183.)

The United States ratified the Algeciras act, with a reservation made by resolution of the Senate which was as follows:

Resolved, That the Senate, as a part of this act of ratification, understands that the participation of the United States in the Algeciras conference and in the formation and adoption of the general act and protocol which resulted therefrom, was with the sole purpose of preserving and increasing its commerce in Morocco, the protection as to life, liberty, and property of its citizens residing or traveling therein, and of aiding, by its friendly offices and efforts, in removing friction and controversy which seemed to menace the peace between powers signatory with the United States to the treaty of 1880, all of which are on terms of amity with this Government; and without purpose to depart from the traditional American foreign policy which forbids participation of the United States in the settlement of political questions which are entirely European in their scope.

On February 9, 1909, the French and German Governments united in the following declaration concerning Morocco (*Nouveau Recueil Général de Traités*, 3d ser., vol. 2, p. 30):

The German Imperial Government and the Government of the French Republic, animated by an equal desire to facilitate the execution of the act of Algeciras, are agreed in defining the meaning which they attach to its provisions, with a view of avoiding all cause of misunderstanding between them in the future.

In consequence, the Government of the French Republic, entirely attached to the maintenance of the integrity and the independence of the Shereefian Empire and resolved to safeguard economic equality in Morocco, and therefore to interpose no obstruction to the German commercial and industrial interests there;

And the German Imperial Government, pursuing only economic interests in Morocco, recognizing, on the other part, that the special political interests of France in Morocco are closely allied to the consolidation of the internal order and peace, and having the fixed intention not to obstruct these interests;

Hereby declare that they will not pursue or encourage any measure of a nature to create in their favor, or in favor of any power whatever, any economic privilege, and that they will endeavor to associate their nationals in the business projects for which they [their nationals, *ceux-ci*] shall be able to obtain the concession or contract [*l'enterprise*].

The provisions of the Algeciras act regarding the organization of the Moroccan police were by the terms of the act to continue for only five years after its ratification. The arrangement thus expired on December 31, 1911. In 1908, on account of internal troubles in Morocco and on the ground of protecting French interests, France had sent an army into Morocco. Later, Spain sent an army for the same purpose into the Spanish zone of influence, and the situation was in fact that of a joint military occupation and a partition of the State into districts under military rule. Germany, as next friend of Morocco and as a member of the Algeciras conference, objected to the situation, claiming it to be, as a military occupation and a *de facto* partition, a contravention of the Algeciras act. This legal objection it finally supported by sending a small vessel of war to the harbor of Agadir on the ground of protecting German interests. Another period of political tension occurred, which was brought to an end by an accord between France and Germany of November 4, 1911, which was open to the adhesion of the 12 powers signatory of the Algeciras act. This accord contained in the preamble a declaration of motives, of which the following is a translation:

The Government of his Majesty the Emperor of Germany and the Government of the French Republic, in consequence of the troubles which have arisen in Morocco and which have demonstrated the necessity of following out in the general interest the work of pacification and of progress provided for by the act of Algeciras, etc.

The first three articles, relating to the status of Morocco, were as follows:

The Imperial German Government declares, that, pursuing in Morocco only economic interests, it will not obstruct the action of France in lending its as-

sistance to the Moroccan Government for the introduction of all the reforms—administrative, judicial, economic, financial, and military—which may be needful for the good government of the Empire; as well as for [establishing] new regulations, and modifications in existing regulations, incidental to such reforms. In consequence, it gives its adhesion to such measures of reorganization, of control, and of financial guaranty as, after accord with the Moroccan Government, the French Government shall deem it its duty to take to this end, under the reserve that the action of France shall safeguard in Morocco economic equality between the nations.

In case France shall find itself under the necessity (Fr. *serait amenée;* Ger. *sich veranlasst sehen sollte*) of defining and extending its control and protection (Fr. *à préciser et à étendre son contrôle et sa protection;* Ger. *seine Kontrolle und seinen Schutz schärfer zum Ausdruck zu bringen und auszudehnen*), the Imperial German Government, recognizing full liberty of action to France (Fr. *reconnaisant pleine liberté d' action à la France;* Ger. *in Anerkennung der vollen Aktiensfreiheit Frankreichs*), and under the reserve that the commercial liberty provided for by previous treaties shall be maintained, will interpose no obstacle.

The terms used—"lending of assistance" to the Moroccan Government, "control," and "protection"—are all terms of the law of conservatorship and guardianship. They necessarily imply the continued independence and sovereignty of Morocco. The expression "full liberty of action" as respects "control and protection" is most nearly translated by the words "plenary power," which, as above shown, is an expression of the law of agency and trusteeship.

The accord made a number of modifications and changes in the act of Algeciras. There was no reference to the first two principles of the "triple principle"—the "independence and sovereignty of Morocco" and "the integrity of its domains." By contrast, in article 4 the third principle of "economic liberty without any inequality" was expressly affirmed in the following language:

> The French Government declares that, being firmly attached to the principle of commercial liberty in Morocco without any inequality, it will not lend itself to any inequality, either in the establishment of customs, imposts, or other taxes, or in the establishment of tariffs or transportation by rail, river, or other method, and especially in all the questions of transit. The French Government will use its influence also with the Moroccan Government for the purpose of preventing all differential treatment between the nationals of the different powers.

By article 6, the subsidiary principle of letting public contracts by competition and adjudication was preserved by the following provisions:

> The Government of the Republic obligates itself to take care (Fr. *s' engage à veiller;* Ger. *verpflichtet sich zu sorgen*) that the works and supplies necessitated by the eventual construction of roads, railroads, harbors, telegraphs, etc., shall be let on contract by the Moroccan Government by the method of adjudication. It binds itself also to take care that the conditions imposed on adjudications do not place the nationals of any power in a situation of inferiority.

Article 14, relating to the adhesion of the other powers, was as follows:

The present accord shall be communicated to the other powers signatory of the act of Algeciras, with whom the two Governments bind themselves to lend mutually their aid for the purpose of obtaining their adhesion.

(For the Franco-German accord of Nov. 4, 1911, see *Nouveau Recueil Général de Traités*, 3d ser., vol. 5, pp. 643–650; also Brit. Parl. Papers, 1912–13, vol. 122; (Morocco No. 4, 1911) Cd. 6010).

If there could be any question concerning the legal effect of these words as recognizing the sovereignty and independence of the people of Morocco and providing for that State a temporary conservatorship which should be executed by a continuous and gradual reduction in the intensity of the control, as Morocco should improve under the conservatorship, and by an ultimate withdrawal of France from Morocco, this question would seem to be set at rest by the letter of October 17, 1911, addressed by M. de Selves, French Minister of Foreign Affairs, to the Sultan of Morocco, in which it was said:

The troubled situation of the Shereefian Empire during the last months, and the political events consequent upon it, have led the French and German Governments to examine the conditions under which the work of pacification and progress contemplated by the act of Algeciras, and which interests not only the Moroccan Government but the other States having relations with it, ought to be carried on. The two Governments have come to an agreement on this subject, which is set forth in detail in the arrangement, the text of which I have the honor to send Your Majesty herewith and which will later on be communicated to the powers signatory of the convention of Algeciras. It has been recognized by this accord that the collaboration of France requested by Morocco, and which has already been assured to Morocco under the recent and decisive conditions, responds to the necessities of the internal and external situation of Morocco; that it can not endanger foreign interests; and that it is of a nature favorable to the development of the Shereefian administration and the economic progress of the Empire.

All difficulty on this point being thus cleared away, the French Government will hereafter be in a position to lend its entire cooperation to the Moroccan Government, and thus to put into effect completely the previous accords concluded between them several years since. It will bring to this work those dispositions toward Morocco which are known to Your Majesty and which have never ceased to inspire the French policy. It continues to be concerned, first of all, to strengthen the authority of the Moroccan Government (*l'autorité Makhzénienne*), to furnish it the resources of which it has need, to facilitate by its counsels and by its agents the putting in force of the reforms already decided upon by Your Majesty. It will regard it as its duty, as respects matters with which it is concerned, to respect scrupulously the customs, the traditions, and the religion of the Mohammedan people. Your Majesty, then, has no cause to doubt the fixed purpose which the French Government has formed, to cooperate with the Moroccan Government according to the sentiments of reciprocal loyalty and confidence already manifested by significant acts, and which will equally determine its conduct toward the successor whom Your Majesty shall designate. (*Nouveau Recueil Général de Traités*, 3d ser., vol. 7, pp. 108, 109.)

The adhesion of the United States to the Franco-German accord of 1911 was made by written communication from the Secretary of State (Mr. Knox) to the French ambassador at Washington (Mr. Jusserand), of December 15, 1911. The following is a translation of the material part of this letter:

I have the honor to inform your excellency that, in conformity with the traditional foreign policy of the United States, which forbids the participation of the Federal Government in the regulation of political questions of a purely European order, this Government is bound to abstain from expressing any opinion for or against any of the provisions of the Franco-German accord relative to Morocco which may be regarded as having a political character.

As regards the desire of the Government of the French Republic to have the United States adhere to the articles of this accord relative to commercial rights and the administration of justice, I take the liberty of calling the attention of your excellency to the fact that the adhesion of the United States as respects these articles will involve a modification of our present rights as these are established by our treaties now existing with Morocco; which, under our Constitution, can be done only by and with the advice and consent of the Senate of the United States.

I have, however, the pleasure of informing your excellency that, in conformity with the desire expressed by the French Republic, the Department of State will be disposed, at any time when it may be convenient, to engage in negotiations with a view to concluding such new conventional arrangements as shall seem proper, for the purpose of modifying our rights of exterritoriality and the rights of American protegés in Morocco according to the ideas indicated in the Franco-German accord; and, in a general way, to adhere to the other principles of the accord, provided that the commercial and other advantages which are assured to us by existing treaties are maintained. (*Nouveau Recueil Général de Traités*, 3d ser., vol. 7, pp. 131, 132.)

The treaty between France and Morocco of July 20, 1912, "for the organization of the French protectorate" in Morocco, as a treaty, necessarily implied the independence and sovereignty of Morocco. (For this treaty and the act of the French Parliament of July 20, 1912, ratifying it and authorizing its execution, see *Journal du Palais*, *Lois Annotées*, new ser., vol. 3 (1911–1915), p. 543.)

The treaty between France and Spain of November 27, 1912, made "for the purpose of defining the situation of France and Spain, respectively, with regard to the Shereefian Empire," made provision for Spain taking over the control and protection of the so-called Spanish zone, and recognized Tangier and the adjacent region as an international district. (*Journal du Palais*, *Lois Annotées*, new ser., vol. 3 (1911–1915), pp. 544–547.) (For English translation, see Supplement of American Journal of International Law, vol. 7 (1913), pp. 81–93.)

The same legal terms were used in this treaty as in the Franco-German treaty—"lending of assistance" to the Moroccan Government, "control," "protection," "obligation to care for," etc. This

treaty did not purport to be intended as amendatory of the Algeciras act. It made no provision for the adhesion of all the powers signatory of that act. Article 29 provided that "the present convention shall be notified to the Governments signatory of the general act of Algeciras." The assumption of the parties evidently was that France had the right, as agent of the international conference, by the terms of the Franco-German accord of 1911 adhered to by the signatory powers, and as conservator of Morocco, to grant to Spain the right to act as agent of the conference and to exercise the office of conservator of Morocco in a certain district, provided no one of the signatory powers objected to the delegation and appointment or to the territorial partition thus made. It would seem that the personal character of such an agency and such an office would render doubtful the validity of such action.

The "triple principle," of "the sovereignty and independence" of each State once recognized as a State, "the integrity of its domains," and "economic liberty" for all States in their dealings with the State, without any inequality," would seem to be a universal principle of the social law of nations. It conserves the statehood of States having statehood; it makes for the recognition as States of peoples who are universally recognized as entitled to statehood; it prevents partition of existing States without the consent of the State partitioned and of all other States; it prevents the commercial exploitation of small States and enables strong States to cooperate for the common good, instead of being exposed to be ruined commercially by unfair competition practiced against them or to be ruined morally by engaging in unfair competition.

If this "triple principle" is of a universal character, it is especially important as applied to the relations of civilized States to aboriginal tribes. According to this principle, the only legal purpose which a civilized State can have in acquiring sovereignty over territory inhabited by aboriginal tribes is to act as conservator for them and to aid them in raising their status as rapidly as possible and to the highest degree possible for them. The aborigines have thus, under the law of nations, a right of protection and aid in raising their own status. They are assured the rights and privileges of those of higher grade when they merit elevation to this grade. These rights of aborigines all States are bound to observe. Civilized States can no longer partition at will the territory acquired by them by occupation and inhabited by aboriginal tribes, and no partition can legally be made without the consent of the States concerned and the common consent. Exploitation of any kind attempted against aborigines is met and halted by the principle of "economic liberty without any inequality"; and a legal basis is established for preventing or penalizing unfair competition.

Viewing the international action taken by the twelve powers and Morocco in its purely legal aspect, therefore, it would seem clear that this action was intended to have the effect, and did have the legal effect, not to destroy the statehood of the people of Morocco, or to demote that State to an inferior status, but to place the people of Morocco, as a State, under a temporary and conditional conservatorship for the purpose of reforming the constitution, laws, and administration as might be needful according to the joint opinion, and enabling the people to exercise the rights and fulfill the duties of an independent State. From the legal standpoint, therefore, there would seem to be nothing in this joint international action capable of being used as a precedent unfavorable to the conservation and development of aboriginal tribes. The action of the Algeciras conference in formulating and declaring "the triple principle" will no doubt prove to be of great importance in the development of the law of nations, as giving a concrete and practical interpretation of the rights and duties implied in mutual and reciprocal trusteeship.

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