WORLD RULE OF LAW

I

In "the world to which we have come," to use a phrase prominent in a well-known recent opinion of the United States Court of Appeals, [1] the law of nations has undergone an evolution so considerable as to entitle it to a new name significant of a new place in human civilization. In the same opinion occurs the assertion that nineteenth-century international law may not be applicable to twentieth-century adjudication. Widespread appreciation of the emergence of something that is distinguishably new in jurisprudence and in public affairs has led to the increasing use of the phrase "world law" and to organized effort, on an unprecedented scale, to promote world rule of law. Unprecedented effort does no more than face the fact of unprecedented need: "the world to which we have come" has become untenable — nay, is in clear and present deadly peril — without effective legal order. As in all lesser communities, where the problem has been met and measurably overcome, the world community must be one of legal order as the alternative to what may most appropriately be called human suigenocide.

That explains the "why" of such efforts as the World Rule of Law Center, set up last year in the School of Law of Duke University in the United States. This article is offered in the hope and faith that its words may prove to be not without persuasiveness to the readers of the *University of Malaya Law Review*, upon the inauguration of which those who belong to the Center tender their heartiest congratulations and very best wishes.

The Center is devoted to research and teaching in the field of world law. Its director, Arthur Larson, whose career in education and public service is climaxed in his capacity as a personal consultant to President Eisenhower, opened the 1959 spring seminar in World Law with a brief address in which he identified "world law" with the vast new array of legislation in the form of internationally enacted treaties, customs based upon the immense multiplication of the international activities of nations, and the constitutional instruments that have been created to institutionalize procedures for the effectuation, interpretation, and growth of law in its world-wide application. Clearly, these developments have created something to be accounted unprecedented. They challenge humanity to make the second half of the twentieth century surpass the first half in the confirmation and growth of world legal order in degree as progressive as this century has already surpassed any previous one.

In the field of research, the World Rule of Law Center has posited an agenda of projects. Basic among them will be progressive addition

1. *State of the Netherlands* v. *Federal Reserve Bank of New York* (1953) 201 F. 2d, 455,

to available knowledge of all of the principal systems of law or legality that have been evolved by the peoples of the world, in the hope of encouraging the development of their rules and principles into a jurisprudence suitable for and acceptable to the world community. To say that all members and groups of members of the world community should make contributions to its evolving law, and so to law that may in the fullness of reality be a rule for the world, is to say what is no less true than it is obvious.

II

Whatever this world law may be at any stage of its ever-continuing evolution, its capacity as an instrument whereby humanity may safeguard itself against the obliteration which lawlessness spells in these days, will depend upon its acknowledged precedence with respect to national law in the event of any divergence by the latter from it. The law of the world community must be upheld, for its subordination to the laws of the component parts — the states members — is, by all community experience, chaos. Accordingly, the first inquiry in any program for world rule of law is how to win acceptance for this conditio sine qua non of legal order in that community, composed as it is of the peoples of eighty to ninety largely autonomous nation-states.

Such inquiry in a single one of them, the United States, is the effort of the present writing — an effort to concentrate upon a project that a single people may put into effect, on their own motion alone, without weakening but actually strengthening their position in the world and creating for their nation an exemplary status inviting universal emulation. While dealing only with the problem as it presents itself to the people of the United States, the considerations set forth are believed to be illustrative of and applicable to that with which all members of the world community are confronted.

Several of these members, among which the Netherlands, the Federal Republic of Germany, and France are outstanding, have already very cannily adopted national constitutional provisions effecting far-reaching reform in the direction of conforming their national law to world law. They are thereby making their national law perform its proper function of supporting world law — hence safeguarding their national independence, which is essentially tied to the prevalence of law in the world. Formal constitutional amendment has resulted, among other things, in assuring that treaty law and obligation will not be negatived by act of the national legislature: it is to this latter aspect of the larger problem that the present writing will exclusively relate.

Amendment of the federal Constitution is, of course, a legitimate means to this end in the United States. In the United States, however, it is notably true that the present national law on the subject may

confidently be said to rest on judicial interpretation, rather than upon any necessary imperative of the words of that Constitution. Accordingly, the more appropriate procedure in the United States would be for the judiciary to re-examine the judicial doctrines that have from time to time been ascendent in the decisions of the federal courts with a view to ascertaining their validity in "the world to which we have come." Just as the President, in his State of the Union message at the convening of the 86th Congress, January 1959, promised a "re-examination" of the United States' "relation to the International Court of Justice," so might well the Supreme Court of the United States, when the next pertinent litigation comes before it, devote searching reconsideration to the question whether, in the event of conflict between them, a later congressional enactment or a treaty of earlier date shall furnish the rule of law by which the case will be decided. One of its most distinguished twentieth-century judges, writing one of its most important twentieth-century opinions, remarked, "We must consider what this country has become" in deciding what a provision of the Constitution means.

Of several relevant constitutional provisions, the second paragraph of article VI merits first priority:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The history of the times and the records of the constitutional convention of 1787 which drafted this fundamental law seem to leave little room for doubt that (1) the prime purpose of this clause of the Constitution was to enable the new federal government to put a stop to violation by the several state governments of treaties that its predecessor governments of the Union had entered into, particularly the definitive treaty of peace with Great Britain (1783); (2) that, since the national government had not violated any treaty, the possibility of such infraction on its part, or by Congress, its legislative department, was not envisaged, or at least not deemed to merit express constitutional treatment; (3) that the statesmen of the time, under the influence of the philosophy of Vattel, accepted the supremacy of the law of nations in relation to national law; and (4) that the intense desire of the people of the United States for recognition as members of the international community, their "decent Respect to the Opinions of Mankind," their weakness and consequent need for the protection of the community law, all tended to the submergence of any idea that there would ever be any need for specified constitutional restraint in the matter so far as the federal government was concerned. The anxiety of the constitution-makers with respect to the states was based on bitter experience that demanded positive language. No such reason existed so far as the federal agencies were concerned.

The three outstanding relevant opinions of the federal courts in the early decades of supreme law as laid down by the Constitution seem persuasively to confirm these assumptions.

In *Ware v. Hylton*,[2] the Supreme Court found that the words "any Thing in the...Laws of any State..." operated retroactively to obliterate the effect of an act of the Virginia state legislature (1778), which it adjudged to be in conflict with a provision of a treaty of 1783. In so doing, it established a rule of national supremacy that has never since been seriously questioned, namely that "all Treaties made...under the Authority of the United States" are exempt from interference by action of its federated parts.

In *United States* v. *Robbins*,[3] a lower federal court held that an extradition provision of a treaty of 1794 was direct authority for the court to refuse habeas corpus and authorize delivery of the accused (who claimed to be a citizen of the United States) to the authorities of the other party to the treaty. In the face of insistence that the court could act only after congressional action to give effect to the treaty, this was a vital holding. The treaty was law by its own authority under the Constitution and needed no validation or implementation by the national legislature.

In *United States* v. *Schooner "Peggy"*,[4] the Supreme Court, in one of the earliest opinions delivered by Chief Justice Marshall, reversed a lower federal court on the ground that, subsequent to the decision below, a treaty had become operative altering the law applicable to the case. The result was to disallow claims to the schooner, which had been captured by a privateer licensed by the President under an act of Congress. The treaty was supreme law under the Constitution. The court was legally bound to give it effect.

During the first half of the nineteenth century, federal and state courts, in a succession of cases involving land titles arising under the treaty with Spain (1819) ceding Florida, and that with Great Britain (1842) providing for the rectification of a portion of the United States-Canadian boundary line, held themselves competent to confirm title without any implementing or authorizing national legislative act, thus following, with respect to other kinds of personal rights dealt with in treaties, the precedent of the *Robbins* case.

In one of the Florida land cases, *Foster and Elam* v. *Neilson*,[5] however, the Supreme Court took the position that, in view of the words of the treaty, congressional implementing action was prerequisite before it could act under the provision applicable to the case before it — that is,

2. (1796) 3 U.S. 199.
3. (1799) 27 F.C. 825.
4. (1801) 5 U.S. 103.
5. (1829) 27 U.S. 253.

confirm title under the grant of the king of Spain. In a slightly later case, *United States* v. *Percheman*,[6] the court, having before it the clearer Spanish text, held that its previous interpretation had been in error and proceeded to give effect to the treaty. The *Foster* case is nevertheless a landmark in the judicial history of the statute-treaty relationship, because the rationalization the court used could serve as an authoritative foundation for the formulation of a doctrine of necessary congressional intervention between the treaty and its application by the courts. The practical effect was to make what the Constitution declared to be supreme law not law, so far as the court was concerned, till made law by Congress.

III

What was adumbrated by the *Foster* case may, in perspective, be thought of as an about-face in the judicial attitude toward treaty law that became general after the middle of the nineteenth century, especially after the Civil War (1861-1865). The nation had become powerful, and with power came less acute need for the protection of the law of nations as well as ability to brush aside its restraints. The legacy of violence which war leaves is seldom favorable to respect for law and, moreover, the increasing isolationism, outgrowth of preponderant attention to pursuits attached to the far-flung interior of the realm, together with advantages anticipated from shutting out goods from Europe and human beings from Asia, characterized the popular attitude of the period. The practice of states and the philosophy of writers on customary international law seemed less favorable to its prestige than in the era of the founding of the republic. In such climate, the courts were less sensitive than in the early days to the international responsibilities of the United States.

Accordingly, new judicial doctrines found a fertile field for development, the courts seeking precedent where, as in the rationalization set forth in the *Foster* case, they might find it. Among the theories that were devised, not all clear-cut or consistent with each other, the following should be emphasized : (1) that, at least with respect to treaty provisions relating to subject-matter upon which Congress is authorized by the constitution to legislate, the courts would not enforce treaty law until confirmed by statute; (2) that Congress is under no legal duty to enact such a statute; (3) that Congress may by statute overrule a treaty; and, (4) that, as between treaties with respect to which congressional confirmation may not be required, and statutes, the later in date prevails over the earlier. There was developed, in addition, a doctrine by which the courts, on pronouncing litigation brought before them to involve a political rather than a legal question, divested themselves of jurisdiction to pass upon its merits.

The political-question doctrine has played an important part in the matter of judicial enforcement of treaties, but seems, on the whole, not directly relevant to the relationship between treaties and congressional

6. (1833) 32 U.S. 51.

enactments. As for the other four above-stated rules, it may well be said of them, as was said by the Supreme Court of the basis of an earlier decision dealing with internal commerce, which it was in no uncertain terms overruling, they were "novel when made and unsupported by any provision of the Constitution" *(United States* v. *Darby*[7]).

The provision of the Constitution quoted above, as a rereading will instantly confirm, simply says the treaties made (i.e., entered into) under authority of the United States are the supreme law of the land. It makes no mention of any authority of the United States being vouchsafed in the legislative department to stand between them and their enforcement by the executive and judicial departments of the government. What is already law does not need to be made law; it only needs appropriate administration. Congress does have a role to play, however. Though its legislative powers are specifically limited to those granted in the Constitution (article I, section 1), among them (article I, section 8, final paragraph) is the power "To make all Laws which shall be necessary and proper for carrying into Execution...all...Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." As the Constitution provides that the President and Senate shall have power (article II, section 2) to enter into treaties, the legislative power of Congress may be validly used to enforce treaties. It cannot be validly used to interfere with their enforcement. A fortiori, it cannot be used to alter or abrogate them. The constitution places no limitation upon the treaty-making power. The subject-matter of treaties and the purposes for which they may be entered into are for the President and Senate, which constitute the treaty-making power, not for the Congress, to determine. Among the earliest of the great congressional debates on the Constitution was one concerned with this question; the result was the establishment of a precedent to the effect that the House of Representatives was not a part of the treaty-making power. One of the most respected of early commentators on United States constitutional law is the author of the vigorous statement: "If a treaty be the law of the land, it is as much obligatory upon Congress as upon any other branch of the government, or upon the people at large...The House of Representatives are not above the law."

The possibility of refuting the logic and the law thus set forth is not apparent. Certainly, there is no such refutation in any reasoning in the late nineteenth-century decisions of the Supreme Court. These decisions seem expressions of policy — of policy based on power. They do not appear to be based upon anything accurately to be denominated judicial interpretation of the Constitution. The Court had much to say about political questions. Could it have subconsciously transformed itself into an instrumentality of policy rather than of law? How far is it legitimate for a court to be swayed by the political climate of the times?

7. (1941) 312 U.S. 100, overruling *Hammer* v. *Dagenhart* (1918) 247 U.S. 261.

IV

Just as the climate of United States affairs in the first few decades of its national existence was such as to favor international legal responsibility, and that climate in the decades following the violence of the civil-war period (which bore so much evil fruit) was replete with irresponsibility, the events of the twentieth century brought the people of the United States back to earth in the matter of their relationship to the community of nations.

At the turn of the century, they had followed their earlier thoroughly casual acquisition of nonadjacent territory by taking possession of non-continental areas in the Atlantic and stretching to the far-western reaches of the Pacific — acquisitions which have now eventuated in a new nation in the world community and two new states in the national community. The old isolationism that had so profoundly affected almost every phase of their thought and policy would hardly continue much longer to dominate their action or their law.

Since the Napoleonic wars, they had steered clear of European quarrels. But they had begun to take part in conferences of the nations in which they helped to enact great code-like instruments of law. Such international legislation did not so well fit in with the idea of the national legislative supremacy of a single one of the many enacting nations as did the simpler instruments which Chief Justice Marshall had had in mind when he said in 1829 that "a treaty is in its nature a contract between two nations." They undertook to make peace between nations warring in eastern Asia but were soon themselves deeply involved in world war centering in Europe. World-wide economic crisis brought unprecedented depression to their national economy, and the world-wide devastation of their own mistaken economic policies helped them to realize that they could no longer, even in the limited sense of the nineteenth century, live unto themselves alone. Tardily conscious of the economic implications of becoming a creditor nation and of being an immense producer of goods everywhere in demand, and of the reactionary political implications of their non-participation in the League of Nations, they reformed their international economic policy, though too late to have made it a possible preventive of world depression, and their international political policy, though too late to have made it a possible preventive of World War II — the unspeakable horrors of which along with their full-scale participation in it may be said to have administered the final coup de grace to their nineteenth century isolationism. In the climate of the twentieth century, the trend of judicial decisions began to undergo a change and to pave the way for orderly evolution of the law in the direction of legal order in the world community.

Of the judicial doctrines of the nineteenth-century Supreme Court, the one which places statutes and treaties in the same level of the law,

just as though both were statutes, and so concludes that the later in date prevails over the earlier in case of conflict, has apparently been most persistent in its hold upon the judicial mind — truly astounding in that it completely disregards legal deductions from the fact that there is another nation or there are other nations without whose participation there would have been no treaty for the Constitution to declare to be supreme law. Equally surprising is the total disregard of the formal language of article VI. "Acts of Congress," said the Supreme Court in 1920, "are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States." It followed that "the validity of the test" of what the legislative power could do under the Constitution was different from that with respect to the treaty-making power, which must, accordingly, "be ascertained in a different way." Without over-emphasizing the formal difference in the words of the Constitution, the tenability of the ancient idea of lawfully treating statutes and treaties precisely alike becomes, in the light of this decision *(Missouri* v. *Holland* [8]), constitutionally even more suspect than theretofore. In any event, the doctrine posteriores priores promptly underwent a notable development.

V

Symbolic of nineteenth-century unawareness of the significance (hence of the obligations) of membership in the world community was the continuance, until late in that era, of the custom of treating contracts made with the dwindling groups, or tribes, of human beings, descendants of the inhabitants of the national area before the Europeans came, as though these arrangements were international acts. In the case of the *Cherokee Tobacco*,[9] the Supreme Court applied the posteriores priores doctrine to one of them in relation to a later act of Congress, with resulting breach of the faith of the people of the United States toward these helpless dependents of the nation. This was too much for the sensibilities of two of the justices, who, in a prophetic dissenting opinion, refused to attribute to the Congress, in the absence of specific affirmance, intention to override the "treaty" with the Cherokees by a general legislative act: "Had it been the intent of Congress to include" their territory, "it would have been very easy to say so." Not having specifically said so, the dissenters insisted, "the presumption is that Congress did not intend to include it." Some sixty years later, the rule of clear indication of congressional intent to overrule as prerequisite to its infraction of an international act by a national legislative act became the basis of the Supreme Court's opinion in a case involving a treaty, joint enactment of the United States and the United Kingdom.

8. (1920) 252 U.S. 416.

9. (1871) 78 U.S. 616.

The opinion in *Cook* v. *United States*[10] dealt with a recurring statutory provision included in the Tariff Act of 1922 which undertook to authorize the Coast Guard to search and seize vessels within twelve miles of the shore if suspected to design to smuggle merchandise into the country. In 1924 the treaty became operative: the United Kingdom, in deference to United States laws prohibiting the importation of alcoholic beverages, consented to the search of British vessels within the distance from the shore that could "be traversed in one hour by the vessel suspected of endeavoring to commit the offense." Such a vessel, capable of a speed of ten miles per hour, was taken into custody eleven and a half miles out. Prior to this event the Tariff Act of 1930 had entered into force, superseding the 1922 enactment and containing identically the same provision as its predecessor with reference to suspicious vessels hovering along the coast. "A treaty," said the Supreme Court, "will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." The same rule was laid down, under circumstances that made it not only follow the Supreme Court's holding, but strengthen it from the point of view of maintaining the integrity of treaties, by the Court of Customs and Patent Appeals in the case of *Bill* v. *United States*.[11] These two decisions are more noteworthy than is evident at first glance: whereas in all of the nineteenth-century cases decided under posteriores priores, the treaty in question had been held to be overruled by a later statute, in these two cases the doctrine was so applied as to preserve the integrity of the international legal obligation.

More important than this significant fact is the attitude of the courts, obviously one of international awareness — which is especially manifest in the *Bill* case — an attitude in striking contrast to that of the nineteenth-century judges, who eagerly ranged far from the requirements of the cases before them in order to assert the supremacy of national legislation. Would it be a longer step from the *Bill* case to the abandonment of posteriores priores and the holding of international obligations inviolable by congressional enactment than was the step from the characteristic nineteenth-century holdings to the *Cook* case rule? In the light of the certainly strained, and herein indicated to be impermissible, interpretation of the Constitution in the earlier decisions, it is urged that such step is not only not too difficult to take, but too difficult to avoid taking.

The inconsistency of posteriores priores as a rule governing the relationship of treaties and statutes is further indicated, quite apart from the argument above relied on, by the opinion in *Missouri* v. *Holland*.[12]

10. (1933) 288 U.S. 102.
11. (1939) 104 F.2d. 67; 26 C.C.P.A. (United States Court of Customs and Patent Appeals) 27.
12. (1920) 252 U.S. 416.

That case dealt with the authority of Congress, under the specific constitutional provision, to take necessary and proper action to carry into execution an act of the treaty-making power. A practical effect of the recognition of this congressional power by the court is to extend the functioning of Congress into subject matter that might, but for the "necessary and proper" clause, be unauthorized or be prohibited by the tenth amendment of the Constitution, reserving powers to the states or to the people. In a sense, it results in a partnership of the treaty-making power and Congress for increasingly effective contribution by the people of the United States to the development of world law. Few principles of law could be more utterly incongruous than for the Constitution, on the one hand, to authorize such a role for Congress and, on the other hand, to permit Congress to destroy the effectiveness of the treaty law which the Constitution has confirmed and the Congress has helped to execute.

Authorization to make laws necessary and proper for carrying into execution the power of the President and Senate to enter into international acts is not authorization for the Congress to violate the supranational law thus enacted.

A high-ranking nineteenth-century judge found it impossible to believe that the Constitution could authorize a binding treaty (i.e., one that Congress could not revoke), for that would infringe upon the independence of the United States *(Taylor* v. *Morton)*.[13] A twentieth-century judge might find it at least equally impossible to believe that the Constitution (even apart from its great emphasis upon the law-quality of treaties) could tolerate congressional violation of the faith of the people of the United States or the obligations of the law of the world community.

VI

In world law there can be no question as to the primacy of an international treaty over a national legislative act — an assertion which appropriately marks the transition of the present discussion from national constitutional law to the supranational phases of the law. A long and apparently unbroken line of decisions by international arbitral and judicial tribunals so holds unequivocally. An equally impressive line of United States and other national governmental pronouncements regarding other nations' legal duties, and by inference each one's own, emphatically accepts these holdings. Thus the veritable cornerstone of world legal order — the prevalence of world law over the law of the component parts of the world community — is fully established in the authoritative interpretation as well as in the inherent nature of world law itself. Any act of a member state of the world community in contravention of that fundamental rule of world law that treaties must be fulfilled (pacta sunt servanda) is an act of arbitrary power, not of law. It is an act in defiance of law, a world-law delict of first-rank gravity.

13. (1855) 23 F.C. 784.

With a few (presumably temporary) exceptions, all nations have joined together in the United Nations to create, through its apparatus for the institutionalization of world legal order, a less imperfect world community. In participating in the United Nations, after formally engaging its faith in the Charter, the constitutional treaty that binds its members together under stated rules declared to prevail over all their other treaty obligations, the United States of the mid-twentieth century has reaffirmed and added to the legally-binding quality of the duty which it accepted when it declared its separate membership in the community of nations a century and three-quarters ago. The explicit rules and the implicit principles of the United Nations Charter have become supreme law in the United States not only by mandate of article VI of its own National Constitution, but in fulfilment of unquestionably binding rules of world law.

"This nation," a United States Supreme Court judge recently said in a concurring opinion (*Oyama* v. *California*[14]), "has...pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. The [California] Alien Land Law stands as a barrier to the fulfilment of that national pledge. Its inconsistency with the Charter...is...one more reason why the statute must be condemned." Among the principles of the Charter, none is more basic than "respect for the obligations arising from treaties" and fulfilment "in good faith" of "the obligations assumed" by members of the United Nations. The inconsistency with the Charter of unilateral abrogation of treaty stipulations is the climactic reason why the latter's underwriting by United States courts must be condemned — and over-ruled.

The yearning for national existence and the instinct of national self-preservation — "in the world to which we have come" — asserted themselves no less intelligently in the San Francisco act of 1945 than in the Philadelphia declaration of 1776.

VII

Without undertaking a refutation of the foregoing reasoning, some present-day lawyers and jurists, nevertheless, urge that United States national courts should concern themselves exclusively with so-called national aspects of the inter-relationships of treaties and statutes. The actual cases before the courts have, naturally enough, usually been controversies between individuals and have involved individuals' claim of right. As often as not, both plaintiff and defendant have been United States citizens, one perhaps a United States administrative official. A joint enactor of a treaty, another member of the international community, has not, so far as the opinions indicate, undertaken to become a party

14. (1948) 332 U.S. 633.

to the lawsuit in order to make its plea in favor of the integrity of the treaty. Nineteenth-century courts took the position that they could leave questions of treaty violation to the branches of the government that handled international relations and approach treaties just as though they were national acts.

To do so, however, involved more than merely to ignore the essential joint-enactment characteristic of treaties and their status in world law. It had also to deny them their national status of constitutionally declared supreme law, for that status depended upon and was inseparably bound up with the fact that treaties were international legal acts. They were "the supreme Law of the Land" because they were treaties, and, by definition, they were treaties because they were supranational law. To ignore their obligation as higher law was essentially to ignore their existence. If the courts ignored the existence of treaties which everyone knew existed, what should be said of the judicial duty of safeguarding the legal rights of litigants, including litigating citizens?

Actually, from the beginning, the federal courts, to which the Constitution specifically extends jurisdiction in "all Cases...arising under...Treaties" (article III, section 2), have heard and adjudicated controversies that involved the interpretation of treaty law; have, under constitutional authorization, interpreted and applied rules of world-community customary law, and have, without specific constitutional permission, but with logic almost invariably deemed irrefutable, assumed for themselves the authority for final determination of the question whether any act of Congress is in pursuance of the Constitution or void as an unconstitutional assertion of the legislative power *(Marbury* v. *Madison*[15]). It would seem that law and logic alike proclaim their authority to declare ultra vires an act of Congress that is found to be in violation of a joint act of the United States and another member or other members of the world community.

Three years after *Cook* v. *United States*,[16] the Supreme Court handed down an opinion in which no treaty was involved, but which rather notably shed light upon the powers of the United States in the matter of world law. In the case of *United States* v. *Curtiss-Wright Export Corporation*,[17] the Supreme Court, after citing a number of its former decisions, asserted unequivocally that in each case, it had "found the warrant for its conclusions not in the provisions of the Constitution but in the law of nations." At the same time, it enumerated certain governmental powers, none of them "expressly affirmed by the Constitution," which "nevertheless exist as inherently inseparable from the conception of nationality."

15. (1803) 5 U.S. 137.
16. (1933) 288 U.S. 102.
17. (1936) 299 U.S. 304.

It follows that not only national duties and obligations, but national rights and powers emanate from world law. A court that is a part of the Government of the United States, and finds in world law a warrant for judicial conclusions, is beyond question a court which can look to world law for the legal norm in deciding whether by unilateral national legislative act a jointly enacted international treaty can be infringed.

As Chief Justice Marshall said in one of the Supreme Court's most renowned decisions, "If two laws conflict with each other the courts must decide on the operation of each."

VIII

If and when the courts of the United States decide that the operation of a treaty cannot be interfered with by an act of Congress, the people of the United States will have made, let it be emphatically repeated, a basic contribution that is sine qua non to effective world legal order. It is hardly to be denied that effective world legal order is sine qua non to a world in which human life is likely to continue.

It is said that if the courts undertake to decide the foregoing question they may reach decisions as to whether a treaty is in force, and what meaning is to be attached to its words, that differ from conclusions reached by the head of state of the United States or by the other joint-enactor or joint-enactors of the treaty. To this, it may be said in reply (1) that, under the governmental system of the United States, the judiciary has, and is properly expected to have, the final word as to what the law is; and (2) that nothing in a national legal order inclusive of such function of the national courts need stand in the way of a supravening international adjudication. Perhaps had the United Nations, with its International Court of Justice, existed in the nineteenth century, the nineteenth-century doctrines in this paper discussed would never have been uttered.

"The present climate of opinion," said the United States Supreme Court in the recent case of *National City Bank of New York* v. *Republic of China,*[18] "has brought governmental immunity from suit into disfavor." It is not unthinkable that this same climate has likewise brought into disfavor governmental infidelity to treaty obligations.

WALLACE MCCLURE. *

18. (1955) 348 U.S. 356.

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