THE OUTLOOK FOR INTERNATIONAL LAW

BY

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I

THE PRESENT SYSTEM

'Success in politics, as in every other art, obviously before all else implies both knowledge of the material with which we have to deal, and also such concession as is necessary to the qualities of the material Above all, in politics we have an art in which development depends upon small modifications That is the true side of the conservative theory To hurry on after logical perfection is to show oneself ignorant of the material of that social structure with which the politician has to deal To disdain anything short of an organic change in thought or institution is infatuation' (John Morley, *On Compromise*, ch v)

WHEN the international order is rebuilt after the present war, international law will be one of the instruments that the architects will use They will be bound to use it, if only because the settlement will involve the making of treaties, and treaties raise questions of drafting, of interpretation, of enforcement, and other questions, the answers to which belong to international law But the part that international law can play, or the conditions on which we can hope to make it one of the pillars of a more stable world, cannot be determined by reasoning in the void or by wishful thinking Too many people assume, generally without having given any serious thought to its character or its history, that international law is and always has been a sham Others seem to think that it is a force with inherent strength of its own, and that if only we had the sense to set the lawyers to work to draft a comprehensive code for the nations, we might live together in peace and all would be well with the world Whether the cynic or the sciolist is the less helpful is hard to say, but both of them make the same mistake. They both assume that international law is a subject on which anyone can form his opinions intuitively, without taking the trouble,

as one has to do with other subjects, to inquire into the relevant facts.

That is not to say that international law is a mystery about which only professed international lawyers have a right to express opinions On the contrary, one of the handicaps that it has always suffered from is the lack of general interest in its problems and of informed criticism of its defects [1] But no reasonable estimate either of its present value or its future prospects can be formed without a certain amount of serious thought, and there are three matters in particular to which it is necessary that this thought should be directed In the first place, we have to remember that we do not start with a clean slate but with an existing system, such as it is, and we need to make some examination of the part that that system is playing, as things are, in international relations Secondly, law is not, as some laymen seem to imagine, a sort of sociological maid of all work, but a highly specialized instrument, and it is essential to have before our minds not only the uses that it may serve but even more the limitations upon its usefulness as a means of controlling human conduct.

[1] In an article in the *Sunday Times* of 17 January 1943 Mr G M Young speaks of the very serious danger that is created by a public opinion which is deeply interested in, but very ill-informed about, foreign relations 'Interest', he says, 'in so illimitable a theme as that, if it is not limited and fixed and anchored to the things we really know and are conversant with, may be mischievous A vague and ardent curiosity about matters in general is the very field for the propagandist and the dogmatist, and when the curiosity about things as they are is coupled with an equally vague and ardent desire to see them bettered, then the charlatan and the quack may count on a merry harvest as well Between the wars we had experience enough of the harm that could be done by the inflation, so to speak, of a general interest till it rose and soared and broke the mooring ropes that ought to have kept it to the ground Never, I suppose, was there a time when people in general were more ardently, indeed passionately, concerned about foreign affairs, or more richly dieted on wind ' And this, he says, will happen again, unless we can rear 'a body of opinion trained to test all projects against the things it really understands'

Thirdly, we are concerned with the problems of a system of law in which the subjects are not individual men and women, as they are in the law with which we are all brought into contact in our daily lives, but independent states, and we have perpetually to be asking ourselves how far, and on what conditions, independent states can be expected to be amenable to the special kind of control that it is in the nature of law to provide All this is but to say that our best laid schemes will be likely to go agley unless we have taken account of the data which are given us, the instrument we have to use, and the subject-matter we hope to mould

The present system of international law is about four hundred years old Some of its rules are much older than this, but it was only in the sixteenth century that men began to study the rules that states followed in their relations with one another systematically and as a separate branch of learning, and to treat them as rules of law rather than of ethics The rise of international law was in fact one of the consequences of that great political change which marks the dividing line between the mediæval and the modern eras, it is one of the results on the secular side of the Reformation movement It assumes the abandonment of the mediæval ideal of the unity of Christendom, and the substitution for it of the modern system of sovereign states, each independent of the others in its system of government and law, and each acknowledging no authority outside itself But that this modern conception of the sovereignty or independence of states is not inconsistent with their subordination to law was and is its fundamental postulate.

There are of course versions of the doctrine of sovereignty which deny this, and assert that it is of the very essence of sovereignty to be absolute and illimitable. If

states were indeed sovereign in that sense, it would follow that they cannot be limited in their behaviour by law or anything else but superior force, and international law would be impossible in the nature of things, at most the term might describe certain practices which states do normally follow, not because they have any obligation to follow them, but because they find it convenient to do so The defect of all such theories, however, is that they are reached by *a priori* reasoning, by arguing that a state as such *must* have certain attributes, and therefore we ought to conclude without more ado that actual states do have them But that is a thoroughly unscientific method of approach to any object of study. States are facts in the world in which we live, and there is no way of understanding their nature except by observing them as they are and as they behave If we do that, we see at once that one of the conditions under which every actual state exists, and from which it can never escape, is the coexistence with itself in the same world of other states with which it is brought into constant relations To neglect this condition of state existence and to profess to explain what a state is and what its attributes are without reference to it, as political philosophers have too often done, is like trying to explain human nature by studying the behaviour of Robinson Crusoe before the arrival on the scene of Man Friday.

The existence of some kind of international law is simply one of the inevitable consequences of this coexistence in the world of a plurality of states necessarily brought into relations one with another It is one illustration of a truth with which all students of law are familiar and to which there are no exceptions, that when there is a society there is necessarily law, and when there is law there we can be sure a society will exist. The reason that law and society

are linked together in this way is quite simple, it is that men who are living together cannot avoid making claims on one another, they must demand that their neighbour should act or refrain from acting towards them in some particular way; and they learn by experience that these claims will not be recognized, that is to say, they will not be treated as rights, except on terms of reciprocity, unless each for his part recognizes a correlative duty to do towards others as he would be done to by them Even a hermit state, such as Tibet used to be, must at least claim as its right that other states should leave it alone, and must admit its own corresponding duty not to interfere with them It is not a bad definition of international law to say that it is the sum of the rights that a state may claim for itself and its nationals from other states, and of the duties which in consequence it must observe towards them

The best evidence for the existence of international law is that every actual state recognizes that it does exist and that it is itself under obligation to observe it States may often violate international law, just as individuals often violate municipal law,[1] but no more than individuals do states defend their violations by claiming that they are above the law. It is only the philosopher in his study who sometimes makes that claim on their behalf States may defend their conduct in all sorts of other ways, by denying that the rule they are alleged to have broken is a rule of law, by appealing to a supposed right of self-preservation superior to the ordinary law, and by other excuses more or less sincerely believed in as the case may be, but they do not use the explanation which would obviously be the natural one if there were any doubt that international law has a real existence and that they are bound by it.

[1] This is the term that lawyers commonly use to denote the law of a state when they are contrasting this with international law

The rules of international law have never been embodied in any formal code, they still derive their authority from unwritten custom Customary law is typical of an early stage in the development of any legal system, for it is only in a fairly mature system of law, such as we have within a modern state, that most legal rules come to be expressed either in formal legislation or in judicial decisions, and international law has not yet reached that stage But to say that it is essentially a system of customary law does not mean that all the rights and duties of states are derived directly from customary rules On the contrary, the greater number of any state's rights and duties to-day come from treaties into which it has entered with another state or states But indirectly even these treaty rights and duties depend on custom, for what makes a treaty binding is a customary rule that when it has been duly entered into its terms shall bind the states that make it This rule is the most fundamental of the whole system For owing to the defective condition of international law on the institutional side treaties have to fulfil functions which are much wider than those of the contracts which are their most obvious counterpart in a municipal system, and in particular they provide the most effective of the means whereby international law develops A purely customary law can only grow in a slow and haphazard way, it has no regular procedure by which it can be adapted to new situations, however urgently these may require to be regulated by law But treaties, especially those to which large numbers of states are parties, 'multilateral' treaties, as they are called, provide a substitute, though not a completely satisfactory one, for the legislative processes of municipal law, and thus supply international law with a principle of growth which is necessary for the health of any legal system

The function that international law tries to fulfil in the world of states is not always clearly understood It is a more limited and specialized function than is sometimes supposed We hear so much to-day of the ever-growing interdependence of the different countries of the world, and of those manifold contacts in trade and finance and social and cultural relations of all kinds, which are always taking place across national frontiers, that it is perhaps natural that people should expect that international law would be a system having for its function, or at least for its ideal aim, the co-ordination and regulation of this great volume of intercourse A recent writer[1] has criticized international lawyers for sometimes raising expectations of this kind in their writings when in fact the system does not fulfil them He points out that the contents of the ordinary standard treatise of international law do not correspond to what the student, unfamiliar with its history, but realizing how the life of mankind in general and international relations in particular have been revolutionized in the last hundred years by the consequences of the Industrial Revolution, might expect to find Here and there, he says, we come across a few pages devoted to the forms of commercial treaties, or to telegraphs, wireless, aerial navigation, copyright, and the like. But the space devoted to these practical subjects is infinitesimal compared with that taken up by such apparently academic matters as the qualifications of states for membership of the family of nations, or the usages surrounding the head of a state or a diplomatic envoy, and our surprise, he says, is increased when we find that nearly half the total space is devoted to one particular form of intercourse between states, the oldest and the least civilized of all, namely, war

[1] Sir A Zimmern, in a paper on 'International Law and Social Consciousness', in vol xx of *Transactions of the Grotius Society*

Now this is not altogether an unfair picture of the contents of a treatise on international law, and it contains a challenge that international lawyers ought to be willing to take up It is to be noted, however, that the kind of textbook that Sir A Zimmern evidently has in mind is one dealing with the fundamental principles of the system, and that if we want to know how international law has dealt with any of the 'practical' subjects that he mentions we must go to the special books in which they are treated in detail, the general treatise could not possibly find room for them, and if it could the reader would only be bored. But certainly if international law did profess to regulate the innumerable contacts to which intercourse across national frontiers gives rise in a way at all comparable to the way in which municipal law regulates the life of society within a modern state, it would be almost a complete sham. That, however, is not the function, or at any rate it is as yet only a subordinate and little developed function, of international law. It is true, as Sir Alfred Zimmern mentions, that it does contain regulations for some few of the contacts that take place across frontiers, it does so because states have made arrangements among themselves on these matters by means of multilateral treaties This is a very important movement, but it is quite a recent one, less than a hundred years old, and it covers as yet only a small part of international intercourse. Most of that intercourse is not between states but between individuals, and with this international law has as a rule nothing to do If, for instance, legal questions arise out of a contract which business men in different countries have made with one another, these will be decided by the municipal law of one or other of these countries, and not by international law It is true that the court which decides such questions may take the principle which will

determine the case from a branch of law which is sometimes called 'private international law', but this kind of law is quite distinct from the 'public international law' with which we are concerned here. Private international law is not international, but municipal, law, in spite of its name, it denotes the rules that the municipal law of each state directs its courts to apply when the case before them has some foreign element in it, but these rules are 'international' only in the sense that there is, as it is obviously desirable that there should be, a large measure of uniformity in the rules that different systems of municipal law provide for such cases [1]

There need be no mystery about the primary function at least of international law Stated quite simply, what it tries to do is to define or delimit the respective spheres within which each of the sixty-odd states into which the world is divided for political purposes is entitled to exercise its authority Each of these states is independent of the others, and each has its own governmental and legal system, if there is not to be a clash between their respective competences there must clearly be some principles to determine where the competence of one state ends and that of another begins These principles are given by international law, and once that is understood, most of those topics that wear an appearance of formalism and remoteness from the real life of the world in the text-books fall into their place Thus inasmuch as we are concerned with

[1] The objects of private international law, or 'conflict of laws', as it is alternatively called, have been described as follows (i) to prescribe the conditions under which the court is competent to entertain such a suit, (ii) to determine for each class of case the particular territorial system of law by reference to which the rights of the parties must be determined, (iii) to specify the circumstances in which (*a*) a foreign judgment can be recognized as decisive of the question in dispute, and (*b*) the right vested in the creditor by a foreign judgment can be enforced by action in England (Cheshire, *Private International Law*, p 1)

the respective competences of states, a primary question is to determine the conditions that entitle an organized association of human beings to rank as a state for international purposes, and that is not a simple question, it will be answered in the text-books under such headings as 'the subjects of international law' or 'international persons'. When we know what a state is, we must know how in a legal sense it 'acts', for it is only individual human beings that can ever act in any literal sense, and there must therefore be rules to determine the circumstances in which the act of an individual is to be regarded in law as the act of his state, and these rules will be found under such headings as the 'responsibility of states', 'diplomatic agents', and others When we know what acts are to be regarded in law as the acts of a state, there must be rules to demarcate the scope of their validity, both by reference to the territory, by land, sea, and air, over which a state may extend its authority to the exclusion of that of other states, and by reference to the persons who may be subjected to that authority Rules of this kind will occupy many chapters in any exposition of the contents of international law, they will comprise, to name only a few of the usual chapter headings, discussions of the open sea, territorial waters, the air, the various modes of acquiring territory such as occupation, cession, or prescription, nationality, extradition, aliens, and many other topics Another big heading will relate to treaties, showing how they must be made if they are to be binding on the states that make them, the conditions in which they become void, and so on, and still another to the machinery for settling differences between states when they arise

This short catalogue of some of the main topics to which the rules of international law relate shows how far it is from being a system of law for the regulation of inter-

national life in general The fact is that international law is still very definitely in the *laisser-faire* stage of social development In most modern states men have ceased to believe that the function of law ought to be limited to the marking out of separate spheres within which each individual member of society is to be free to act as he pleases so long as his acts do not lead to collisions between the sphere of one man and that of his neighbour, and they have begun to see that in law a society has a valuable instrument for positive action aiming to promote the general social welfare This revolution in thought has gone farther in some countries than in others, but it is comparatively recent in all, and it is as yet only beginning to make headway in international relations There have, as has been already mentioned, been a few tentative efforts in this direction in modern times, but these would have to be developed on a far greater scale before it would be accurate to describe international law as a system of rules for the general regulation of the relations of states with one another, and not even the most far-reaching development on these lines would convert it into a system for the regulation of international life as a whole

The *laisser-faire* character of the system can be seen too in another tendency No legal system can eliminate every case of what an English lawyer calls *damnum sine injuria*, that is to say, loss or damage caused by conduct which does not constitute a legal wrong and therefore gives no claim for redress to the injured party against the party whose act has caused the injury, there will always remain cases in which it is on the whole right that one party should be allowed to do what he wishes to do even though his action prejudices some interest of another But in international law these cases are not exceptional as they are in municipal law, for the restraints that the law puts on the

freedom of states to choose their own line of action are slight Of course a state may limit its own liberty by entering into treaties with other states, and the effect of the treaty will be to remove the matter with which it deals out of what international lawyers commonly call the domain of its 'domestic jurisdiction' and to make it one of international concern But in the absence of a treaty every state's domestic jurisdiction, as the law stands at present, includes *inter alia* practically the whole field of its economic policy; it is free, whatever the injury that it may thereby be inflicting on other states, to follow a purely self-regarding policy on such matters as tariffs, bounties, preferences, access to its markets or raw materials, immigration Obviously a state's action in any of these matters may have the most serious effects on the interests of other states, none the less in law those effects are irrelevant

There is probably to-day a growing realization that the sphere that international law has hitherto left to domestic jurisdiction is too wide, and that even the most powerful and the most nearly self-sufficing of states have more to gain than to lose by agreeing to a greater measure of co-ordination of their policies with those of other states But progress in this direction will not alter the role of international law It will not become the instrument of a world government, for government in all likelihood will continue to be the function of the several states. Its function will still be, both by its customary rules and by treaties, to mark out the sphere within which each state may exercise its governmental powers without trespassing on the sphere of other states, and thus to make it possible for a plurality of independent states to coexist in the same world without colliding one with another.

It may seem almost an idle question in the midst of a great war to ask whether that function is being effectively

fulfilled by the present system On that an opinion that is doubtless widely held has been thus described by a recent writer. 'English lawyers', he says, and he need not have limited his statement to lawyers, 'believe that international law consists of a relatively small body of principles contained within the compass of the small standard treatise of, say, 500 pages, that it is nearly all abstract stuff, that publicists develop their theories, and quote and contradict each other, and governments go their own way doing what seems best for political reasons, and not bothering what the books say '[1] More picturesquely Sir Alfred Zimmern has called it 'an attorney's mantle artfully displayed on the shoulders of arbitrary power', and 'a decorous name for a convenience of the chancelleries' [2] But though the system has serious defects, these particular criticisms do not take account of all the relevant facts We shall only discover the true position if we realize that international law is not simply a subject about which books are written, but a system that is practised, and to judge the measure in which it is effective it is necessary to watch it in action Unfortunately the practice of international law is a matter of which the layman sees little, it only rarely makes front-page news in the newspapers But in fact it proceeds on much the same lines as the practice of municipal law When, for instance, a difference arises as to what the rule of law is, or how it applies to some particular state of facts, the matter is referred by foreign offices to their legal advisers, much in the same way as a client goes to his solicitor, probably the point will then be argued by correspondence between the foreign offices of the states concerned, and if this does not lead to a settlement 'out of court', it may be brought before an international court of

[1] W E Beckett, in *Law Quarterly Review*, 1939, p 257
[2] *The League of Nations and the Rule of Law*, ch ix

justice or of arbitration, and in that case a judgment or award will eventually be given after a hearing like that which would take place before a municipal court It is true that there is at present no certain way of ensuring that a dispute will be brought before a court, though cases are so brought much oftener than most laymen realize It is true, too, that most of this work is not at all sensational, but then only a tiny fraction of legal work of any kind is of general interest to those who are not directly concerned It is part of the routine day-to-day business of governments, and the matters to which it relates for the most part are only on the fringe of international politics They are often, however, very important to the individuals or to the classes whose interests they affect, and the volume of the business that they entail is considerable. But the most significant fact about the work is that it rests on certain assumptions about the way in which states normally behave to one another, it would have no meaning if it could not be assumed that states do generally keep the treaties into which they have entered, that they do not habitually break acknowledged rules of law, and that they will carry out the decisions of courts even when these have gone against them. Experience shows that these assumptions are generally justified Of course it would be wrong to exaggerate the smoothness with which the system works; arguments about the law or the facts may often be unconscionably protracted, the submission of differences to impartial adjudication may be unreasonably obstructed, in fact states have nothing to learn from the individual litigant about the seamy side of law, and they have wider facilities than he has for evasion. But one might suppose from some of the disparaging things that are said about international law that it is the regular practice of every state that is strong enough to bludgeon its way through

opposition That is not the case, to anyone who has ever seen a foreign office file about a legal matter it is a grotesque misrepresentation of the facts Normally states do use the processes of law for the settlement of their differences, and the difficulties that their lawyers have to meet are much the same in character as those of other lawyers

One of the difficulties that is often supposed to be a particularly formidable obstacle to the use of international law as a practical instrument is the alleged vagueness and uncertainty of its principles There is some substance in this objection, but not very much The customary part of the law does consist of rules which are often vague or disputed, and, unlike the rules of the English Common Law, which in origin were also customary rules, they have not had the advantage of being worked out by many generations of judges into a rich store of detailed and very practical principles That is a defect which one may hope will be gradually reduced in importance by the development of international adjudication. But it is also true—and this is more serious—that some of the uncertainties of the customary law are not historical accidents, they are the reflection in the law of divergencies, not always avowed or superficially apparent, between the interests of different nations, and this is a defect which is only likely to be cured by a closer integration of the society of states, which at the best will be a slow process But these difficulties do not apply to the bulk of international legal business, which does not arise out of the customary law but out of treaties, and in respect of clearness treaties are very like Acts of Parliament, that is to say, if they are not always conspicuously clear, they can at least be made to yield up a meaning to a properly equipped court But when international law, or for that matter any other kind of law, is

criticized on the score of uncertainty, the criticism often springs from a misunderstanding Certainty is an ideal that law must never cease to aim at, but it is also one that it can never realize at all completely, for the main cause of uncertainty in any kind of law is the uncertainty of the facts to which it has to be applied Law has necessarily to be stated in the form of general principles, but facts are never general, they are always particular, they are often obscure or disputed, and they were very likely not foreseen, and therefore not expressly provided for, at the time when the rule of law received its formulation It is this intractability of facts that prevents the practice of law from ever becoming a science, it is and always will be an art

For various reasons this credit side of the balance-sheet of international law is not sufficiently recognized. The facts which show the smooth working of the system are not as a rule made public, partly because foreign offices are temperamentally secretive, but partly too because the public would not be interested in them What it is interested in, and what it does hear about, are the breaches of international law, and it naturally concludes that breaches are the rule and observance the exception This one-sided presentation of the facts also has the effect of making it difficult to compare international and municipal law in point of effectiveness For the failures of the former of which the public hears are failures to control great political issues, and we do not always ask ourselves whether it is law that controls such issues when they arise within the state. We tend therefore to compare two dissimilar things, the political failures of international law with the successes of municipal law in regulating the private affairs of individuals. The contrast would certainly be reduced if we could compare the operation of the two kinds of law, on the one hand, in matters which are not politically

important, for there we should find the standard of observance is fairly high in both, and, on the other hand, their capacity to influence issues in which a political element is prominent, which we should find in both cases to be slight

It is right therefore that we should be reminded that international law, even as things are, is performing a useful function in the relations between states, it is a means for enabling the day-to-day business of states to be conducted in normal times along orderly and predictable lines, and that is no small service But the debit side of the balance-sheet is a serious one It is that hitherto states have only allowed law to control their relations in matters which, though they are not unimportant in themselves, are of secondary importance, and therefore present them with no very strong temptation to defy it [1] When issues of high politics arise between them they do not yet allow law to have the final word in the determination of their policies A generation ago this used to be expressed quite frankly in arbitration treaties by a clause which excluded from the obligation to arbitrate those differences which affected the 'vital interests' of either party, and it was left to each party to say when a case arose whether it fell within this description or not The result, as one of the delegates to the Hague Conference of 1907 pointed out, was that, though

[1] Dr Schwarzenburger (*Power Politics*, p 150) makes an interesting comparison between the present state of international law and the law of a totalitarian state Hitler's Germany has a system of law which normally regulates the everyday life of Germans, but when a matter is 'political' this system is not allowed to function, and, just as the interest of a state is 'vital' when the state concerned declares that it so regards it, so 'politics' in Germany is whatever the political authorities choose to define as 'political' Thus the Supreme Court of Bavaria has held that it may include the granting of a licence to drive a taxi-cab, and the Reichsgericht itself has held that the issuance of a birth certificate to a Jew may be political and therefore a matter outside the purview of the court (See also Fraenkel, *The Dual State*, p 42)

the treaties began with the imperative 'thou shalt', they ended with the reassuring words 'if thou wilt' [1] To-day this 'vital interests' clause has gone out of fashion, no doubt it was almost indecently candid But there has been no fundamental change in the attitude of states towards the law that it expressed, normally they find it a useful lubricant for their relations and they use it accordingly, but in the last resort they regard its observance as optional rather than, as the nature of true law requires, as compulsory and unconditional This attitude has its extreme but logical development in the traditional attitude of states to war.

[1] Quoted in Cory, *Compulsory Arbitration*, p 72

II

WAR AND THE LAW

'In this eternal conflict of separate states lies the beauty of history, the wish to do away with this rivalry is simply unintelligent' (*The Political Thought of Heinrich von Treitschke*, H W C Davis's translation, p 130)

'When a state realises that existing treaties no longer express the actual relations between the Powers, then, if it cannot bring the other contracting state to acquiescence by friendly negotiations, there is nothing for it but the international lawsuit—War The justice of war depends simply on the consciousness of a moral necessity Since there cannot be, and ought not to be, any arbitrary power above the great personalities which we call nations, and since history must be in an eternal flux, war is justified War must be conceived as an institution ordained of God' (Ibid, p 178)

THOUGH modern international lawyers may not believe with Treitschke in the beauty and divine origin of war, most of them would not differ greatly from his view of its relation to the law But the earlier writers taught a different view, and the tale of the transition from the original to the modern doctrine is interesting because it helps us to see the nature of the problems that the persistence of war in the world creates for international law

The classical writers regarded it as almost self-evident, as indeed it is, that law should set limits to the liberty of states to resort to war They had inherited from the theologians and canon lawyers of the Middle Ages the doctrine that war was *justum*, that is to say, regular and lawful, only on certain conditions, and they tried to establish this doctrine as a legal, and not merely, as it had on the whole been previously regarded, as an ethical principle One of the conditions essential to the lawfulness of a war was, they held, that it must have originated in a 'just cause', in some motive for making war which the law recognized as sufficient, and the just causes that most

of them enumerated were self-defence, the recovery of property, and the punishment of wrongful acts committed by the state against which war was made. The common element in all these just causes was that some wrong had been done, and war was therefore an instrument for upholding the law, a 'sanction' as we might say, and could only be lawfully used for that purpose.

But there were great and obvious difficulties in making such a doctrine as this prevail Grotius summed them up under two main heads [1] One was that it might often be difficult to know which of the parties to a war had right on his side, the other was that if other states were to presume to judge of the rights and wrongs of a war, they themselves might be in danger of getting involved in it Now these are real difficulties, and in fact they are just the difficulties that we still have to overcome The first is the difficulty of determining, as we now say, which state is the 'aggressor', the second is that of organizing security in such a way that the force which the society of states ought collectively to provide in support of the law may be overwhelming, and at the same time the states which join in providing it may be protected from the aggressor's vengeance. Grotius, however, and the writers who followed him in the seventeenth and eighteenth centuries, could see no way of overcoming these difficulties, and they concluded rather lamely that the only practical course was to leave the question of the lawfulness or otherwise of a war to be decided by the conscience of the belligerents themselves, and not to ask third states to judge between them As Vattel, whose work, *Le Droit des Gens*, first published in 1758, was one of the most influential works on international law of the eighteenth century, put the matter, every war must be accounted 'just' on both sides, 'any other

[1] *De Jure Belli ac Pacis*, III 4 4

rule', he said, 'would be impracticable as between nation and nation, since they recognise no common judge' [1]

It has to be admitted therefore that the attempt to establish in international law a distinction between legal and illegal war always contained a large element of unreality These writers knew, as well as we do, that the conscience of belligerents is but a frail support for a rule of law professing to regulate their right to resort to war But we should note the difficult choice which, as things are, any theory which tries to found international law on a sound basis of juridical principle has to make One alternative is to assert, as writers continued to do for many generations, that the distinction between legal and illegal war is a truly legal one, but this is confronted with the only too obvious fact that states do not recognize it in their practice, and that hitherto it has not been practicable to compel them to do so, throughout its history they have treated war as an instrument of policy and not of law The other alternative is to bow before the facts, and drop the attempt to import the distinction into the law, but a system professing to be one of law, which yet is incapable of making the most elementary of all legal distinctions, that between the lawful and the unlawful use of physical force, is entitled to very little respect and hardly deserves to be described as legal at all To hold at one and the same time that states are legally bound to respect each other's independence and other rights, and yet are free to attack each other at will, is a logical impossibility. Yet that is what the accepted international legal theory to-day requires us to do, and it leaves us therefore with no real answer to attacks on the reality of international law such as are made by Treitschke and many other, especially German, writers. Every sovereign state, says Treitschke,

[1] l c III, ch 12

has the unquestionable right to declare war when it desires to do so, and if it does declare it one effect is to cancel the binding force of treaties into which it may have entered It follows that for a state really to hamper the exercise of its free will in the future by undertaking obligations towards other states is impossible, because nothing can prevent it throwing off any such obligations at will For their own convenience, he says, states will go on concluding agreements with one another and thus in a sense limiting their sovereignty, but that does not really alter the case, no treaty can be more than a voluntary self-limitation, and they are all made with the mental reservation that they may be thrown over when they have outlived their usefulness

In the dilemma in which the persistence of war has always placed international legal theory most modern writers, though not all, choose the more realistic alternative They pass lightly over the discredit that this involves for international law and the doubt that it throws on its genuinely legal character, they regard war simply as a fact or an event, neither legal nor illegal, that occurs from time to time in the relations of states, and that the law tolerates because it can do nothing else about it According to this, the prevailing doctrine, we must accept the freedom to make war for any cause or for none as one of the prerogatives of every sovereign state, and the only way in which law enters into the matter is that it tries to impose certain restraints on the manner in which states conduct a war when it has once broken out This is the function of that part of international law that is known as the laws of war, and the principle on which these rest is that, whatever the origin of a war may have been, both sides are in the same position in the eye of the law, they have the same rights and duties, and no third state has any right to judge between them

This then is shortly how the law has come to regard

states which have become involved in war with one another But the outbreak of a war necessarily affects also states which are not involved in it as belligerents, and if we are to see the problem of the future relation between war and the law as a whole, we need to have some understanding of the development of the law's attitude towards these, the neutral, states Neutrality in one sense is as old as war itself, for throughout history when wars have occurred there have always been some states which were not involved in them But mere non-involvement in a war has not always been regarded as conferring a special legal status on the neutral states, as it has come to be to-day. We know indeed that at least as early as the fourteenth century neutrals were considered to have certain rights and duties in matters of maritime commerce, but on the whole it is true to say that most of the ideas which we now associate with neutrality are modern They grew up in the eighteenth and nineteenth centuries, and the process was somewhat as follows.

Essentially the rules which were developed were the result of a compromise between the conflicting interests of belligerents and neutrals, and not of the working out of any definite view of neutrality as a legal status Experience taught states that when they were at war they could not simply prosecute their war without any regard to the interests of other states not involved in it, and conversely neutral states learnt that they could not insist on retaining their full peace-time freedom of action in total disregard of the interests of the belligerents Both therefore came to regard it as normal and inevitable that they should accept certain limitations on their freedom of action, and more or less insensibly some of these limitations came to be accepted as rules of law

We can see how vague the notion of neutrality as a legal

concept was in the seventeenth century from the way in which Grotius treats it His treatment is very short [1] He begins with a sort of apology for referring at all to those who are not involved in a war, since obviously, he says, war cannot give the belligerents any rights against them But in practice, he says, belligerents do commit injurious acts against them under the pretext of necessity, and he therefore gives them some advice. They ought, he says, to do nothing to strengthen the side which has an unjust cause in the war, or to impede the one that is waging a just war But if the question of justice is doubtful (and we have seen that he thought this was likely to be the case), he says they should act impartially towards both sides, and finally he recommends them, if they can, to make treaties with both sides in order that they may be allowed to stand aside from the war without losing the good will of either

One interesting point to note in what Grotius had to say about neutrality is that he evidently regarded it as a precarious status, he did not suppose that belligerents were likely to allow a state to be neutral, if that did not suit them, merely because it preferred to be so. In that he was merely being realistic For in the seventeenth century states at war fought, if they were strong enough, wherever they could get at one another, even if the territory concerned belonged to a neutral, their attitude on the matter was like that attributed to Gustavus Adolphus of Sweden when the Elector of Brandenburg had expressed a desire to be neutral in one of the King's wars 'Neutralitat', the King is reported to have said, 'was ist das fur ein Ding? Ich verstehe es nicht; es ist nichts damit' And the poor Elector's comment was 'Que faire? Ils ont des canons' [2]

[1] *De Jure Belli ac Pacis*, III 17

[2] The story is told in Butler and Maccoby, *Development of International Law*, p 231

We may note too Grotius's advice to would-be neutrals to try to secure their position by making treaties, for it was largely by treaties of this kind that the compromise between the interests of belligerents and neutrals was worked out into rules which in time crystallized into rules of law It was a common practice in the seventeenth and eighteenth centuries for would-be neutral states to make treaties with belligerents or prospective belligerents stipulating for their neutrality to be respected on terms agreed, and gradually it came to be generally admitted that even without a treaty a state which desired to be neutral ought under the general law to have its neutrality respected, provided that it was willing to stand aside from the war, to concede certain special rights to the belligerents, and to accept for itself certain special duties towards them

In the period between the later eighteenth century and the Hague Peace Conferences of 1899 and 1907 this conception of neutrality as a status which any state had a right to claim when other states went to war seemed, to outward appearance at least, to be going from strength to strength The prevailing view came to be that, since war could not be abolished, the best thing to do about it was to limit the area of its effects; build a fence round the belligerents, let them fight out their quarrel inside the fence, but let the rest of the world stand aside and be protected by all possible means from sharing in the miseries and inconveniences of the war To build up the law of neutrality was the key to this desirable state of things We may think that the ideal was not a very high one, and we shall see that the structure which was built was never as solid as it seemed. But it is important to ask why this development took place, and especially why it took place during this particular period. For in looking to the future we need to know whether the conditions which led to this florescence

of neutrality were fixed and permanent, or whether they have passed or are likely to pass away.

In fact there were a number of different causes which, as it happened, were combining to lead in the same direction One was the virtual disappearance of the old distinction between lawful and unlawful war, clearly so long as the law was seriously trying to establish that distinction, or even so long as it retained it in theory, it could not consistently be also building up rules based on the principle that when states were not involved in a war they should disinterest themselves in its rights or wrongs But when most people had accepted the view of Vattel that every war must be accounted just and lawful on both sides, this particular obstacle was removed Then, secondly, it was only gradually that all the implications of the modern theory of state sovereignty came to be admitted, neutrality could not be developed far as a legal status until the law had unequivocally proclaimed, and men had really come to believe, that states were truly independent, and that every one of them had an equal right to have its independence respected by other states Vattel's work was influential also in bringing about this change of mental attitude

But these were changes of theory, and changes of theory are more often the result than the cause of political changes, they would hardly of themselves have led to the development of neutrality that took place during this period What they did rather was to clear the ground and so to enable certain new political facts to be rationalized in a new and coherent legal doctrine. At least three political developments were operating (i) the policy and growing influence of the United States, (ii) the changes in the map of Europe which were a legacy of the Napoleonic wars, and (iii) the generally peaceful character of the era which opened in 1815 and lasted until 1914

(1) During the Napoleonic wars the United States practised a stricter view of the duties of a neutral state than had hitherto been usual in fact or even regarded as obligatory in theory She did so at first in the interests of her own defence, Americans were building up a new nation in a new world in the face of very serious difficulties at home, they were determined that this work should not be impeded by their involvement in the quarrels of the old world, and they felt that the surest way of avoiding this was to stand aside from the Old World's wars and treat both sides in them with strict impartiality This aloofness and impartiality were the price that they offered for the advantage of being left alone to work out their own destiny Later on, however, as the nineteenth century progressed and the United States' own position became more assured, she added a commercial motive to this original motive of defence, it was no longer enough to keep the quarrels of the Old World from involving the United States as a nation, it had also become important that they should not be allowed to interfere with the opportunities of profitable trading that these wars opened up to her citizens Hence the 'freedom of the seas' became one of the cardinal points in the American attitude towards any war in which the United States was not herself involved, with the result that the policy towards neutrality which she adopted for herself, and also on the whole successfully persuaded the other nations to accept, had two aspects; on the one hand neutral *states* were to be left alone by the belligerents, provided they stood absolutely outside the war, treated both sides alike, and helped neither of them, and on the other hand neutral *individuals* were to be interfered with by the belligerents as little as possible, and to have the largest measure of freedom to keep up their peacetime relations with both sides that it was possible to secure

for them.[1] These were the two lines on which the law developed in the course of the century, and the process was assisted by the growth of a curious notion that the interests of neutrals were somehow intrinsically more worthy to be protected by the law, were even in a sort of higher class morally, than those of a belligerent, and this without regard to the question whether any particular belligerent might be an aggressor or the aggressor's victim In a century when most states were inclined to regard themselves as more likely to be neutrals than belligerents if war should break out, even though this often meant forgetting their own experience,[2] it is easy to account for the popularity of this view But to-day we have ceased to regard the superiority of the neutral's case as a self-evident truth, though it is perhaps too early yet to be sure that two world wars in the lifetime of one generation will be found to have persuaded the nations, and the American nation in particular, that it is not a truth at all

(ii) When the Napoleonic wars began, central Europe had been a mosaic of small states so numerous and so mixed up together that if belligerents had held them-

[1] Whatever the future of neutrality in general may be, this particular distinction, which assumes the general acceptance by states even in time of war of the system of individualist capitalist economy, has already broken down and can hardly be restored Applied consistently to the conditions of modern war it would entail the practically complete cessation of trading between neutrals and belligerents, for to-day nearly all such trading is very strictly state-controlled, even when it is not actual trading between states and not between individuals at all In the present war no neutral state is interpreting its obligations in this strict sense

[2] The report of the American delegation to the Hague Conference of 1907 contained the curious statement that they (the delegation) had constantly borne in mind 'that the United States is and always has been a permanently neutral power, and has always endeavoured to secure the greatest enlargement of neutral privileges and immunities' This was written about midway in the period of only nineteen years which separated the Spanish-American War from the entry of the United States into the first World War

selves bound to respect the neutrality of a state just because that state preferred not to be involved in a war, they could hardly have carried on their wars at all But when those wars were over about 260 nominally independent states had disappeared from the map for ever Later in the century there were further consolidations and a consequent further reduction in the number of state boundaries, and one result of these changes was that the belligerents of the nineteenth century were not greatly tempted, as those of the eighteenth had been, to violate the neutrality of other states, with the instruments of war and in the conditions of mobility which were then available to them they could deploy their resources without having to do so.

In the nineteenth century therefore would-be neutral states did enjoy a fair degree of security against the risk of being drawn into war against their will and merely to suit the interests of a more powerful neighbour, and it was easy to attribute to the laws of neutrality a security which they really owed to contemporary, and as we can now see also temporary, conditions When the process of building up these laws had culminated in the Hague Conferences of 1899 and 1907, they doubtless looked to the casual observer a solid and imposing structure Yet for all its impressive façade the cracks in the edifice had begun to appear even before the turn of the century In the practice of nations at war neutrality had never been quite so strictly applied as the books said that it ought to be and were inclined to assume that it was, it was often not truly impartial, but 'qualified' or 'benevolent', much as it had been in the eighteenth century and as it is again to-day In the Boer War Portugal had allowed British troops to pass through Portuguese territory to get at their enemy from a more favourable quarter, and in the Russo-Japanese War France had allowed the Russian fleet to

make an inordinately long stay in the ports of Madagascar on its journey to the Far East But it is even more significant to note that the right of a state to be neutral in the wars of other states, if it so chose, had again become insecure The German General Staff is believed to have adopted the Schlieffen Plan in or about 1897, and by that plan German armies were to pass through Belgian territory in the event of a war with France, so that even while the lawyers were talking at The Hague it seems likely that the Chancelleries of Europe knew that in the next war Germany, if it suited her, would violate the neutrality of a little state which she had herself guaranteed But we shall not understand either the present position or the future prospects of the laws of neutrality unless we realize that, however morally dishonourable it may have been, militarily the Schlieffen Plan was perfectly sound So, too, have been the many attacks that Germany has made on would-be neutral states in this war For it was only a temporary balance between the political divisions of Europe and the means of warfare that had been available to belligerent states that had made respect for neutrality and the efficient prosecution of war consistent with one another, when that balance passed away, as it did with the increased size of armies, the greater range of modern weapons, and improved facilities of mobility, the map of Europe began again to bear much the same relation to modern warfare that it had done in the eighteenth century to the warfare of that era The neutrality of little states again became a possible disadvantage to the powerful belligerent, for unfortunately for them their neutrality seldom affects both sides equally, however scrupulously impartial they may try to be, geographical, economic, or other causes generally make their neutrality an advantage to one side and a disadvantage to the other When that happens, neither

law nor honour has prevented unscrupulous belligerents from sweeping away the obstacle

(iii) A third cause which helped to mask the real weakness of the laws of neutrality in the nineteenth century was its generally peaceful character if we compare it either with the eighteenth century or with the present so far as it has gone There were many wars, of course, but there were no world wars involving all the Great Powers of the day, and in wars from which some Great Powers stand aside neutrality has a better chance of being respected The wars, too, were wars with limited objectives, not the kind of wars which we now call totalitarian, in which each side can admit no ending as tolerable short of the complete and unconditional surrender of the other One, perhaps the main, cause of this peaceful character of the century was the unobtrusive influence of the British fleet, as recent American writers have begun generously to acknowledge

'The invisible, the unexamined and unrecognized premise of American isolation', writes Mr Walter Lippmann, 'has always been an international system in which naval power in British hands is predominant over all other military power Such an international system existed in the century between Waterloo and the Marne, and all our preconceptions about world politics implicitly assume the continuation of some such system '[1]

The bearing of this state of things on the development of international law and the place of neutrality within the system has been thus summed up by Professor Quincy Wright

'The inconsistency of neutrality with an effective international law was obscured during the nineteenth century because Great Britain had so firm a devotion to law and liberty that British control of the world, facilitated by the doctrine of neutrality,

[1] *Foreign Affairs*, July 1937

did not wholly destroy the rule of law Neutrality lasted because it facilitated the Pax Britannica Its influence in weakening the law of nations was not observed because the law of England was substituted '[1]

And he adds that 'the way in which British leadership was maintained during this period deserves careful study because it throws light on methods that might be employed by an international association' Thus in a sense it may be said that the task of the future is to put into international commission the function which Great Britain fulfilled for the world not unworthily in the nineteenth century, but which to-day she neither can nor ought to bear alone

[1] *American Journal of International Law*, 1940, p 410

III

VITAL INTERESTS

'Il est ridicule de prétendre décider des droits des royaumes par les mêmes maximes sur lesquelles on decide entre particuliers d'un droit pour une gouttière' (Montesquieu, *L'Esprit des Lois*, 26 16)

REFERENCE has been made above to the common practice in the early years of the present century of including in arbitration treaties a clause which allowed either of the parties to reserve from arbitration differences which affected its 'vital interests' The implications of such a clause were clear It meant that although states might be willing to accept the decision of a court on differences of secondary importance, they were not willing to do so if the matter at issue was one on which they regarded it as absolutely essential to have their own way Their attitude to the law was not one of unconditional acceptance, or at any rate they were not willing in all circumstances to allow an outside body to decide for them what the rule of law might be

After the first Great War, however, this particular formula fell into disfavour Popular interest in international affairs had been rudely awakened, and it was not easy to explain and justify the reluctance of states to accept the arbitral method of settling their differences more whole-heartedly It was easier to change the formula in the treaties for one which was not quite so outspoken, and this is what many states did Their draftsmen invented a terminology which was more discreet, but which gave practically the same result, and still left a loophole through which states could retain the last word for themselves when they thought it necessary.

The establishment of the Permanent Court of Inter-

national Justice in 1921 did not make any fundamental change in this position Submission of disputes to the Court was voluntary unless a state had accepted the so-called 'optional clause' of the Court's Statute If a state did accept this clause, it bound itself to recognize the jurisdiction of the Court as compulsory in all or any of four kinds of 'legal disputes', of which the most important were the interpretation of treaties and any question of international law Many states did accept this clause, but many of them, including Great Britain, added qualifications to their acceptances which greatly reduced the binding effect of the obligation they were undertaking, and even if the acceptances had been unqualified, there are some ambiguities in the clause itself, including the meaning of the term 'legal disputes', which make it not altogether easy to be sure how far the obligation would extend On the whole it still remains true to say that states have not yet shown that they are willing to have their conduct judged on the basis of rules of law unconditionally and in all circumstances They still have certain interests or policies which they consider so 'vital' that they intend to be free to assert them, if necessary, whatever the law, or at any rate, whatever a court professing to interpret the law, may say about them

The sentence of Montesquieu which stands at the head of this chapter fairly describes this prevailing attitude of states, and it is interesting to see that Montesquieu thought it was a reasonable attitude and even that any other would be absurd. We may or may not agree, but at least it does not seem right to dismiss such a view without examining what can be said in support of it We certainly cannot dispose of it merely by pointing out that inside a state it is a matter of course that individuals should be compelled to submit even their highest interests to the judgments of courts of law, and arguing from the supposed analogy that

there can be no good reason why states should not do the same In fact this analogy is, as we shall see later, not a true one, and, even if it were, all analogies drawn from the state and applied to international affairs need to be used with great caution. In any case, merely to condemn the present attitude of states as unreasonable and obstructive without asking whether there is any justification or explanation of it is not likely to be helpful

In his *Studies in Diplomatic History*[1] Sir James Headlam Morley has defended the concept of vital interests as being valid and just, and lawyers would do well to ponder the reasoning which led him to that conclusion He was writing as historical adviser to the Foreign Office, primarily therefore for statesmen and not for lawyers, but this is a matter on which it is not at all likely that lawyers will have the last word Sir James took most of his examples from the history of the United States, not because the United States is the only Power which has been consistently determined to secure certain interests of her own at all costs, but because she has informed the world more clearly than most other Powers what the interests were upon which she would insist He points out that the Colonies had no sooner won their independence than they began to entertain ambitions of vast territorial expansion which were certain to bring them into conflict with the established rights of other countries, and which did in fact lead to many occasions of acute friction and to one occasion of actual war On the whole circumstances favoured them, but

'no one can doubt', says Sir James, 'that had they met with more resolute opposition, no arbitral decision, no apprehension that technically they were acting as aggressors, would have diverted the United States from the pursuit of this purpose

[1] pp 42–50

They had in mind a great constructive policy, and, if necessary, would at any time have been ready to devote to it the whole of their strength and resources The real justification for their action is to be found not in the methods by which the country was acquired, but in the use they made of it The historian of the future will record that in these vast territories they built up an orderly and effective system of government, and thereby added to the prosperity of the world '

Sir James goes on to show how in the Monroe doctrine and in the corollaries which American policy has attached to that doctrine from time to time the United States has notified other nations that she will insist on certain other interests, wider than these because not confined to her own territories actual or prospective, and these nations have known that to stand in the way of her maintaining those interests would be to risk war with her These demands, too, which she has made on other nations have not been founded exclusively on her acknowledged legal rights, on the contrary she has required them to refrain from doing many things which the law certainly allowed them to do if they wished, for instance, she has forbidden them to acquire new territory on the American continents even with the consent of the people of any territory concerned, and she has forbidden the transfer of possessions in America from one European state to another In pursuing these extra-legal aims, however, the United States has been fortunate, because generally the objects she was determined to secure were more important to her than the denial of them would have been to other nations, and they therefore, when faced with the alternative, have not been willing to challenge her policy in war

Other countries, too, have interests comparable with these of the United States, which they regard as vital and are in no circumstances willing to surrender For Britain,

for example, there is the principle that the Low Countries or the Persian Gulf shall not fall under the dominion of a great military or naval Power, for France, that no Great Power shall establish itself in north-west Africa, for Russia, that no other Power shall take over the control of the Straits from Turkey Finally Sir James Headlam Morley suggests as his conclusion that if in the past the doctrine of compulsory arbitration in all international disputes had prevailed and been enforced, the whole political development of Europe would have been held up 'We could not now wish that Russia should still rule in Warsaw and in Helsingfors, that the Austrians should still be in Milan and in Venice, that Belgrade, Sofia, and Bucharest should still be under the government of the Sublime Porte, or that the unification of Germany and Italy should not have taken place, and that the Yugoslav nation should still be divided between the sovereignty of three other states'

Now to some parts of this argument it may be that lawyers can find an answer We may doubt, for instance, whether it is self-evident that the unification of Germany has been for the good of the world in general, and we may point out that even if it is true, as it may be, that the following by states of their vital interests without being subjected to the restraints of law has often resulted in adding to the welfare of the world, yet this result is only an accidental by-product of the system or lack of system which has existed There can be no sort of security that this will be the result so long as it has to be taken for granted that each state may define for itself without appeal the interests which it will require the others to respect The Monroe doctrine may, as Sir James thinks it has, have worked for the general good, but Germans have probably persuaded themselves that their *Grossraum* policy, which they regard as vital for themselves, would also be recognized as good

for the world if only others would appreciate the superiority of a Herrenvolk when it is so plain for all to see On what ground, other than our own preference, are we to distinguish between these cases? If one state may define and pursue its own vital interests, then others must be free to do the same, and if all states are to do it, we are thrown back on the law of the jungle Surely there must be some way of reconciling the legal and the diplomatic ways of approach to this problem of vital interests, but if lawyers shut their eyes to the element in the concept which is valid and just, they are likely to be defeated in their efforts to correct what is neither valid nor just in it For, as things are, these interests have power behind them, and facile denunciations of 'power politics' are neither a helpful nor a sensible way of meeting the difficulty Vital interests are a real problem, not just because it would be idle to lay plans for the future of international law as if they did not exist, but also because it would be wrong to disregard them even if we could

Yet the present state of things, in which each state defines its own interests for itself, and no means exist for distinguishing those that are reasonable from those that are not, is indefensible Somehow or other the legal system must find means, firstly, of satisfying the vital interests of states so far as they are reasonable or they will continue to endanger it from the outside as they do at present, and secondly, of securing, within the limits of what is possible, that those shall not be pressed which are spurious or unreasonable But this ideal may call for some revision of our ideas on the lines of development which we commonly take for granted that international law ought to follow

International law is sometimes described as a primitive or undeveloped system of law, and the description is true

as far as it goes But it may mislead us if it suggests that the only important difference between international and municipal law lies in the stage of development which they have respectively reached, and that when international law has arrived at maturity it will be much like municipal law except for the fact that it will be operating in a different social field There is no warrant for any such conclusion A society in which the units are independent states will always differ in fundamental respects from one in which they are individuals, and these differences will certainly be reflected in the form and structure and methods of the two kinds of law We may hope that international law is destined to become a strong form of law, but if so it will follow its own line of development, and legal arrangements that municipal law has found effective or even indispensable may not always be suitable for its imitation

There is one contrast[1] in particular between the problems of municipal and those of international law which has an important bearing on this matter of the vital interests of states When law is applied to the affairs of individual human beings, we rightly regard it as of its very essence that it should be impersonal and general; we demand that it should deal with persons and situations as

[1] This point has been elaborated in a valuable course of lectures published in the *Recueil* of The Hague Academy of International Law by Professor Schindler of Zurich, on *Les Facteurs sociologiques et psychologiques du Droit International* Cf also Professor E H Carr (*The Twenty Years Crisis*, p 228) 'The tiny number of states forming the international community creates the same special problem in law as in ethics The evolution of general rules equally applicable to all, which is the basis of the ethical element in law, becomes extremely difficult Rules, however general in form, will be constantly found to be aimed at a particular state or group of states, and for this reason, if for no other, the power element is more predominant and more obvious in international than in municipal law, whose subjects are a large body of anonymous individuals The same consideration makes international law more frankly political than other branches of law'

examples of types and not as individual cases to be treated each according to its special circumstances But even in municipal law this generality of the legal method is not an unmixed good It is valuable because, as the saying goes, we believe, and on the whole rightly, that law ought to be 'no respecter of persons', that justice should be 'even-handed', its results predictable and not arbitrary But for these advantages we pay a price, and the price is the 'hard cases' which cannot be eliminated from the law so long as its method is to ignore the eccentricities of the individual case and treat it as conforming to a type whether in fact it does so completely or not This is one of the reasons why law is never more than an approximation to justice But on the whole experience has shown that it is as near as we can get if we are to live under 'a government of laws and not of men', we know that if we were to try to eliminate all the 'hard cases' by departing from our general rules we should produce 'bad law', and that this loss would more than offset the social gain.

But the perpetuation of hard cases in the application of law can only be justified if they are the rare exceptions and not the rule, and this on the whole is true of law within the state Though individual men are never exactly alike, they are very much alike, and the respects in which they differ are for the law the less essential respects, their similarities are far more important than their differences Hence it is not unreasonable that the law should ignore the differences, since by doing so it can secure the manifold advantages of a uniform rule indifferently applied But a law which has to deal with states is in a very different case In contrast with a national society the two most prominent characteristics of the international society are the fewness of its members and their heterogeneity The individuals of a state are counted in millions, whereas there are only

about sixty states in the world, and these individuals by and large have the same basic interests, personal and proprietary, whereas the interests of states are almost infinitely diverse In a sense in which no individual is, every state is unique Its history and traditions, its geographical position in the world and the physical configuration of its territory, its economic development, its interests, political, strategic, cultural, and so on—all these things are particular to each individual state and are not the same for all. Of course the extent of the differences between states varies, clearly one state may have more in common with some states than with others, but the things which all of them have in common are really very few When one has said that all states possess territory, and that they all claim to exercise sovereignty over societies of persons attached to them by the legal bond of nationality, it is not easy to think of other features common to them all But this variety makes it extraordinarily difficult to compress their interests into types to which general rules can appropriately be applied The human mind, and perhaps especially the legal mind, is tempted to seek uniformity for its own sake, but uniformity is only a good thing when it means that we are treating in a like way persons or things that are alike, and not when its effect is to assimilate artificially cases which differ from one another in respects so material that justice requires that they should be differently treated

A few illustrations of this predominance of the particular over the general element in international legal situations may usefully be given In the law of territorial waters it would in many ways be convenient to have a general rule defining uniformly the area adjacent to their coasts over which states may claim to exercise their sovereignty No such rule, however, has yet proved practicable, and for

this there are good reasons One difficulty is strategic, some states believe that a narrow area favours the interests of their defence, and others take the contrary view Then again coastlines have a habit of being indented by bays, and no two bays are alike Whether it is reasonable that a particular bay should form part of the territory of the adjacent state or part of the open sea is a matter on which it is only fair to take into consideration a number of relevant circumstances, some of which were enumerated in the award in the Atlantic Fisheries Arbitration between Britain and the United States in 1910 The arbitrators mentioned, in particular, the relation that the width of the bay bears to its penetration inland, its importance for the defence of the coastal state, its value for the industry of the inhabitants of that state, and its distance from the highways of the open sea Bays again are not the only complication which impedes the acceptance of uniform rules in this matter of the territorial sea, as a conference which tried to produce an agreed code on the matter discovered in 1931 For instance, a coast like that of Norway may have a peculiar configuration which it seems right that the law should take into account, or the sea may contain sources of wealth, such as fisheries or sponges or oysters, which the inhabitants of the adjacent land may not unreasonably think they ought to be entitled to exploit to the exclusion of others

We may take another illustration from the question of rivers [1] There are many rivers, especially so-called 'international' rivers, which flow through or between the territories of more than one state, which it is desirable in the general interest that the law should regulate so that the maximum of advantage may be extracted from them But

[1] Professor H A Smith has treated this question at length in his book, *The Economic Uses of International Rivers*

this cannot be done by rules applying generally to all rivers The political factors which have to be taken into account differ, and so do the uses to which rivers may be put, navigation, electric power generation, irrigation, water supply to cities, are some instances Some rivers are more important for one purpose and some for another, so that they cannot all be dealt with in the same way, each requires a régime adapted to its own special circumstances Experience has shown that special river commissions, each with its powers and duties laid down in an appropriate convention, are a more suitable method of regulating the user of rivers than a general law of rivers could ever be. Some straits again, like the Dardanelles and the Bosporus, and some canals, like that of Suez, have an individual character which makes it impossible to leave them to be regulated by general rules applying indifferently to all straits or to all canals When a strait or a canal is of sufficient international importance, it is in practice as a matter of course provided with a special régime

Now in those interests of states which are really 'vital' this element of particularity is almost certain to be present, and to attempt to regulate them by rules of law which take no special account of this particularity, and treat them as if they were merely instances of types or categories of legal situations, is almost certain to be unsatisfactory and to meet with resistance That is not to say that all the interests which a state chooses to regard as vital are interests which the law should treat as unique, it is the vice of the present state of things that states are able to use the umbrella of vital interests to shelter interests which are not in truth vital at all, but merely interests which it desires to withhold from the domain of law But we shall not be able to correct this vice unless we recognize that there are interests which really are vital, that they constitute

a real problem, and that they neither can nor ought to be dismissed by demanding that states should submit them to a system of law which does not provide any guarantee that they will be safeguarded

The first step towards a solution of the problem of vital interests lies in realizing its intimate relation to those wider problems of international order which will be the subject of the chapters of this book which are to follow Many of the interests which law at present finds so intractable have their origin, and to a large extent their justification, in the insecurity in which states at present exist, for if a social system cannot, as the international system as yet cannot, give its members a reasonable assurance of order, it is inevitable that they should try individually to create such an order for themselves, they must make defence their first and constant preoccupation, giving it priority over everything else, including the respect which they owe to law In an unorganized world, too, states are bound to claim to decide, each for itself and to the limits of its own power, what the interests are on which they must insist Obviously that opens a wide door to every kind of abuse, if states are strong enough they are likely to designate as 'vital' interests which cannot be so regarded in any reasonable sense of that word. The irony of the situation is that the door neither can nor ought to be shut so long as the security of each depends upon itself alone Only when that state of things has been altered and states have been offered a security in which they can have reasonable confidence, can we hope to see the problem of vital interests transformed into one of devising the legal methods most appropriate for dealing with them The problem will not have been solved even then, the politics of power have nowhere been completely made subordinate to law in any human society But the sting will have been taken out of

it The fatal mistake is to suppose that vital interests can successfully be dealt with by any purely juridical approach

But even in an assured international order law, if it is to deal justly with the interests of states, will have to be adapted in its structure and methods to the particularity which characterizes so many of their relations. We must not look for much help from a prolific growth of rules of general application such as is aimed at by projects of developing the law by codification, for that would be to assume a uniformity among states and their interests which often does not exist It is more likely that the line of progress will be found to lie in the finding of particular solutions for particular problems, in the constitution, for example, of special régimes for special regions of the world which are of concern to more nations than one (as already in those of the Straits and the Suez Canal), or in the setting up of special functional organs with powers appropriate to the particular subject-matter which they are charged to regulate The legal purist may object that such an outlook means the continued presence of a strong political element in the international legal system, but the admixture is made inevitable by the nature of the entities with which the system has to deal

IV

WAR AND VITAL INTERESTS INSIDE THE STATE

'As for discontentments, they are in the body politic like to humours in the natural, which are apt to gather a preternatural heat, and to inflame, and let no prince measure the danger of them by this, whether they be just or unjust—for that were to imagine people to be too reasonable, who do often spurn at their own good neither let any prince or state be secure concerning discontentments, because they have been often, or have been long, and yet no peril hath ensued—for as it is true that every vapour or fume doth not turn into a storm, so it is nevertheless true that storms, though they blow over, divers times, yet may fall at last, and, as the Spanish proverb noteth well, "The cord breaketh at the last by the weakest pull" ' (Bacon, *Of Seditions and Troubles*)

IT is too often overlooked that neither the problem of war nor that of vital interests is a specifically international problem, for both of them occur inside, as well as between, states. But at least the more fortunate among states have advanced some way towards finding solutions for them, and it may be that their experience will suggest some clues that can be followed up in the field of international law.

Of course it must not be assumed that the procedures that states have found useful can be transplanted as they stand into the international system That is extremely unlikely. Moreover, municipal analogies always need to be used with great caution by the international lawyer, for the habit of personifying states may easily tempt him to see an analogy where none really exists Hobbes described a state as 'but an artificial man', and some modern writers have told us that we ought to look upon international law as only private law 'writ large' But these are only metaphors, which are more likely to confuse than to illuminate international problems For most purposes the

states with whose relations international law has to deal are utterly unlike the individual human beings who are the primary subjects of municipal law Nevertheless it does sometimes happen that municipal law confronts situations which are fundamentally similar to those that are normal in international law, it does so whenever it has to deal with the conduct of men acting, not singly as isolated individuals, but together in associations or groups formed for the pursuit of some purpose that the members have in common Union always gives strength, and when the membership of these associations is large, when they can command powerful resources, and when the generality of the members feel strongly that the interests that their association exists to protect are 'vital', they often develop a tendency to pursue their purposes extra-legally, and sometimes even illegally, without any punctilious regard to the legal nexus which nominally continues to bind them to the rest of the society of which they are only a part They behave in fact within the state in a way which is fundamentally similar to, though ordinarily it is less uncompromising than, the way in which sovereign states behave in the international society

Political philosophers have often pointed out how the task of government is complicated by this fact that the state is a society of societies and not only one of individuals But there is no simple way out of the difficulty, for the government of men is at the best a complicated business Rousseau[1] thought that the knot might be cut by forbidding any 'partial society' to be formed within the state. But that, even if it were practicable, which fortunately it is not, leads straight to totalitarianism, as modern dictators have not failed to see. 'For the Fascist', Mussolini has written, 'everything is in the state, and nothing human

[1] *Contrat Social*, l 2, ch 3.

or spiritual exists, much less has value, outside the state . Outside the state there can be neither individuals nor groups, political parties, associations, syndicates, classes '[1] Most of us think that that is too high a price to pay even if it is the easiest way to preserve the strength and unity of the state, and that somehow or other we must find more tolerable means of combating the fissiparous tendencies which are part of its nature Yet if we are resolved to hold on to the ideal of the liberal state, we shall have to accept its risks, and one of these is the risk of factions, determined to satisfy interests of their own which seem to them 'vital', even if that involves the flouting of rules of law which in their view do not take sufficient account of the special circumstances of their own case

Now if for factions we read states, there is here a real analogy with the international problem International law is inter-group law, and so too is municipal law in this aspect of it, and in inter-group law, whether it is international or national, the situations that arise often are in fact, and in any case they are often felt to be by those whom they most closely affect, unique situations, unsuitable for control by rules which have been framed for general application on the assumption that all probable situations can be classified into types From this springs the temptation to treat obedience to law as a matter of discretion rather than of obligation, to claim, for the state or for the group as the case may be, the right to be 'judge in its own cause', to refuse the submission of a case to 'third-party decision', in short, only to accept the law so long as it does not obstruct what the state or the group regards as its vital interest The 'sovereignty' that states claim for themselves is merely the culminating point of a

[1] The quotation is from the translation in Oakeshott, *Social and Political Doctrines of Contemporary Europe*, p 166

tendency that can be seen in the conduct of all powerful cohesive associations, and the task of subjecting sovereign states to law is essentially the same in kind as, though of course more difficult than, that which municipal law has to perform in establishing its control over the conduct of groups.

We think of our own country as a particularly law-respecting country, and so in the main it is But it is salutary that we should remember that only a generation ago the leaders of one of the great parties in the state were taking the salute at the march past of a private army pledged to take over the government of a part of the United Kingdom in the event of the law thwarting the policy on which its members were determined to insist A few years later there was actual civil war in Ireland During the present war trade unions have publicly discussed the pros and cons of action which would avowedly be a violation of the Trade Disputes and Trade Unions Act of 1927, and there has been an epidemic of illegal strikes in war industries which the law has been impotent to stop It is not to the point to ask whether in any of these cases the law which was challenged was a bad law, the point is that all were cases where factions within the state were resolved to defy the law because it stood in the way of some interest which they had decided was vital to themselves, and that in none of them was the law able to meet the challenge effectively In the world as a whole civil wars always have been and still are much commoner events than international wars, though they may impress our imaginations less, but that is only because their effects are localized, and generally, though not always, less destructive. But both kinds of war have the same social significance; in both the object is to make the united wills of those who have gone to war prevail over the wills of those

who are opposing them, in short, both are instruments of policy, either of a state or of an organized faction within a state Even commoner than actual civil wars are revolutions, the overthrow or the attempted overthrow of established orders by the use or threat of force, which differ from civil wars in social analysis only in the fact that they either attain their purpose, or are defeated, before they have reached the dimensions of war As Mr E H Carr[1] has pointed out, 'there are few European countries where, at some time during the past thirty years, potential revolution has not been an important factor in politics, and the international community has in this respect the closest analogy to those states where the possibility of revolution is most frequently and most conspicuously present' That statement is as true of other continents as it is of Europe

It is worth while therefore to examine the means whereby states protect themselves against this threat to their integrity which is involved in the reluctance of factions to have their vital interests submitted to the arbitrament of rules of law, and in the possibility in the last resort of civil war breaking out One measure that every state takes is so much a matter of course that its significance may be overlooked Every state makes it illegal for its members, singly or in association, to use physical force except in circumstances which the law defines Here at the outset is a striking contrast to the attitude of international law which, as we have seen, has come to regard the use of force by one state against another merely as an incident of international life which it is unable to eliminate, and which therefore it would be useless for it to forbid Yet although there are states in which revolutions and even civil wars are quite as endemic as is war in the society of states, none of them ever accepts the view that for the law

[1] *Twenty Years Crisis*, p 140

to go on forbidding them is so unrealistic that it might as well admit the legality of actions which experience has shown it is unlikely to be able to prevent The defeatist policy is accepted in international law alone

For international law to throw in its hand at the outset like this is to abandon all hope of becoming one of the instruments of a stable international order, and it is certain that any plan for strengthening its influence must start with a change in the rule on this matter Like factions within the state, so states in the society of states must be forbidden to use physical force against one another except in circumstances which are defined by law That would be a return to the original doctrine of international law

This was exactly what the Pact of Paris or, as it is more often called, the Kellogg Pact, attempted to do, and if the pact had been followed up, it might have been the starting-point of a great advance But those who made the pact, or at any rate those of its makers who took it seriously, made the same mistake as the early international lawyers, but without their excuse They acted as though it was enough to make war illegal and to leave it at that, as though war could be exorcized by trusting to the conscience of nations to obey the legal ban Three hundred years ago Grotius knew how little confidence could be placed on that, but then he had no other resource Today we ought at least to have learnt that order cannot be had without organization

No state leaves the problem of order where the Kellogg Pact left it for international society, every one of them tries to secure that the ban that its law sets on the use of physical force shall be effective We tend perhaps to think first of the criminal law with its machinery of police and courts and punishments as the means whereby states do

this But the criminal law is only the first line of a state's defence It is a means of maintaining order when the general conditions are peaceful, when all that has to be feared are breaches of the peace by individuals acting alone or at least without elaborate organization or powerful resources There is a famous, but too often misquoted, passage in Burke's *Speech on Conciliation with the Colonies* which explains why it is that the criminal law cannot be used as our defence in 'a great public contest' We can use it, he says, against 'the irregular conduct of scattered individuals or even of bands of men who disturb order within the state', but not in 'civil dissensions on great questions' [1] Of course it is true that those who take part in 'civil dissensions on great questions' may be breaking the criminal law, but the difficulty of dealing with them under that law is a practical one, there are probably too many of them, and in any case it is likely that it would be politically unwise

It is necessary to stress this limited function of criminal law because the notion that international war can be dealt with by measures in the nature of police action has been

[1] Burke was not denying, as he is often supposed to have done, the possibility or the justice of placing the responsibility for collective acts on a whole nation That would have been quite inconsistent with his whole philosophy of politics He was arguing against a specific proposal that the revolting colonists ought to be treated as criminals 'At this proposition', he says, 'I must pause a moment The thing seems a great deal too big for my ideas of jurisprudence It should seem, to my way of conceiving such matters, that there is a very wide difference in reason and policy between the mode of proceeding on the irregular conduct of scattered individuals, or even of bands of men, who disturb order within the state, and the civil dissensions which may, from time to time, on great questions, agitate the several communities which compose a great empire It looks to me narrow and pedantic, to apply the ordinary ideas of criminal justice to this great public contest I do not know the method of drawing an indictment against an whole people ' Burke was of course using the word 'indictment' in its strict legal meaning of a formal accusation presented to a criminal court (World's Classics edition, vol ii, p 198)

popular in recent discussions of the subject The analogy is a false one, taken from a too superficial examination of the machinery of order within the state To call the force that is necessary for preventing or suppressing war a 'police force' is a dangerous simplification of its function, which can no more be a 'police' function in the ordinary understanding of the word than was that of the federalist forces in the American Civil War. The maintenance of a police force is only one subordinate manifestation of a policy that every single state follows or tries to follow in order to be secure against civil war, the policy of concentrating in the hands of the government a monopoly of the use of physical force of every kind

'There is no pacifism within the state If members of the criminal minority resort to force, force will be used against them If larger groups threaten the peace by rioting, first the police and then the more heavily armed forces at the disposal of the government will be used against them The theory and practice of government is the theory and practice of mobilizing an overwhelming force against anyone or any group that will not keep the law in peace '[1]

It is this monopoly over the use of force, which every state tries to establish and maintain, that distinguishes a state from all other forms of human association It was by this that the modern state raised itself out of the semi-anarchy of feudalism, which had divided the control of force among numerous more or less independent holders of power, much as it is still divided in the society of states to-day [2]

[1] Durbin and Bowlby, *Personal Aggressiveness and War*, p 45

[2] There is a true parallel between international law to-day and law under feudalism, as Figgis, *From Gerson to Grotius*, p 16, has pointed out 'The world of politics is composed of certain communities entirely independent, territorially omnipotent, and to some extent morally responsible A set of rules founded upon an insecure basis of custom, convenience, humanity, or natural reason admittedly exists, to which under the name of international

This monopoly control of force is a complete defence against all disturbance of the peace of a state so long as it can be maintained intact, and although there is no state in the world that has a right to feel itself absolutely secure, yet the more fortunate among states have reached a position in which attacks on their integrity from within have become events of rare occurrence, the fear of which they do not have to keep perpetually before their minds But the analogy cannot be transported into the international sphere without far-reaching modifications, for that would mean the total or almost total disarmament of the existing states and the establishment of a world state with its own armed forces States, too, can ask more of their individual members—even that they should sacrifice their lives for the good of others—than the society of states can ever ask from individual nations But nothing can be more certain than that if international law is ever to provide mankind with a defence against war, some form of control over the armed forces of the separate states, which will do internationally what the governmental monopoly of force does within the state, some form of international organization which will ensure that an overwhelming preponderance of force shall be placed behind the law, will have to be devised Without this no reaffirmation of the ban on war proclaimed in the Kellogg Pact can be more than an empty formula

The state's monopoly over force, however, is never absolute, and it is never self-maintaining The mere survival of revolutions and civil wars shows that it is liable to break down unless it can be reinforced by further measures

law they pay a nominal, reluctant, and none too regular obedience—which is however more regular and less reluctant than was the obedience six centuries ago paid to the common law by any decently placed medieval feudatory '

As Burke said in another passage of the same speech,[1] 'The use of force alone is but temporary It may subdue for a moment, but it does not remove the necessity of subduing again, and a nation is not governed which is perpetually to be conquered ' Every wise government of a state therefore tries to create conditions in which it will not be too difficult to maintain its control over the use of force, it knows that if it fails to do this, the strain of holding the forces of disruption in check is likely to become too great. That has happened over and over again in our own day, in Ireland, for example, where concessions were withheld until it was too late, in Spain, where the party at the helm failed to remember that the power of an elected majority to ride roughshod over a strong and determined minority is always a limited power, in Weimar Germany, where weak governments without popular roots had neither the power nor the resolution to stand firm against the influences that were working to destroy them No state can endure unless it recognizes, with Bacon, that 'the surest way to prevent seditions (if the times do bear it), is to take away the matter of them, for if there be fuel prepared, it is hard to tell whence the spark shall come that shall set it on fire' [2]

There are many things that states do to 'take away the matter of seditions', and so to reduce the strain that would otherwise fall on those of their institutions which are directly concerned with the preservation of peace. Modern states have become largely institutions of public service, we have come to think that next to defence their most necessary function is to provide the conditions of the good life for all their members In so far as states can succeed in satisfying that demand, it is clear that they create an atmosphere which reduces the chance that factions within will develop either the power or the will to disturb the

[1] Ibid , p 184. [2] *Of Seditions and Troubles*

peace in the pursuit of their own private interests As their instruments for doing this states can command the whole complicated apparatus of their legislative, judicial, and administrative institutions They can use these instruments, and especially legislation, both to produce the general contentment of their people by measures designed to increase the welfare of the state society as a whole and also to remove particular grievances of sections of the people which might become dangerous if they were left unredressed This last kind of state action is particularly important for the light that it throws by way of contrast on one of the main defects of the international system as it exists at present It means that states have developed a procedure which enables them to treat situations which are in their essence particular situations as individual cases, and not, as ordinary judicial process always must, as mere examples of a general type of situation, they can and do deal with the vital interests of associations within the state, as the society of states cannot yet deal with the corresponding interests of states themselves, by measures which follow an orderly and regular procedure within the law and yet do not involve the submission of these interests to the rough-and-ready application of general rules of law which cannot take full account of the particularity of the special case

It may be useful to refer here to two well-known modern occasions on which we in this country have been forced to recognize that the interests of large and powerful associations within the state cannot always be treated by applying to them general rules of law, but that it may be necessary or just that the law should treat them on their merits as particular cases Both these occasions arose from decisions of the House of Lords In the first, the Taff Vale case, the House had decided in 1901 that a trade union might be

ordered to pay damages out of the funds of the society for torts committed by its agents This had come as a great shock to the trade-union world, which had thought that, since unions were not corporate bodies in law, their funds could not be made liable in this way for wrongful acts committed on their behalf The decision had been reached by applying a principle of law which did not affect trade unions only, though they were the kind of association that it was most likely to affect in practice; yet the principle was a general one to the effect that when bodies, even though not technically corporations, enjoy privileges and exercise powers which are analogous to those of corporations, they ought also to be subject to corresponding obligations Now as a general principle it is difficult to deny the justice of such a rule, for 'the distinction between corporate and unincorporate bodies is often a legal technicality of the most refined kind' [1] The unions, however, bitterly resented its application to themselves; they resented it because it endangered what to them was a vital interest on which they were determined to insist, the security of their funds They therefore pressed for the reversal of the decision by Act of Parliament, and they had their way in the Trade Disputes Act of 1906, which placed them in a privileged position outside the general rule of law We need not consider here whether this Act was the redressing of a legitimate grievance or an example in the domestic field of the policy which, when it is applied internationally, we now call 'appeasement' As Bacon points out in the essay which is quoted at the head of this chapter, states cannot always deal with 'discontentments' merely by asking 'whether they be just or unjust, for that were to imagine people to be too reasonable', they have to think also of the danger to their own stability if a discontentment, just or

[1] H A Smith, *Law of Associations*, p 70

unjust, is left to 'inflame' In that, too, lies a moral for the architects of a better international order.

The other occasion arose out of a schism in the Free Church of Scotland. The Assembly of that church had decided by a large majority to unite with another church, the United Presbyterian, but a small minority, who became known as the 'Wee Frees', objected to the union and claimed thereafter to be the only true Free Church and as such entitled to all its property This property was held by trustees on certain trusts which contained no express power of change, and when the case came before the House of Lords in 1904 it was held that the resolution of the majority had been *ultra vires* as being in violation of the trusts, and that the contention of the Wee Frees was therefore justified In so deciding the House applied a general principle of the law of trusts without any special regard to the particular nature of a Church as a spiritual body needing power to grow and develop its formularies, with the result, as F W Maitland said in a famous criticism of the decision,[1] that the dead hand of the law fell with a resounding slap upon the living body of the Church The result was grotesque, and subsequently by an Act of 1905 Parliament divided the property between the two parties in proportion to their adherents But here again what we are concerned to note is the limitation that the case revealed on the power of general rules of law to provide for a situation which was not general but unique, and the fact that the state had the means and used them to correct the defect of the law by dealing with the Church not as an ordinary beneficiary under a trust but as a beneficiary of a very special kind

Machiavelli has summed up almost the whole art of government in a single sentence, which is as true of inter-

[1] *Collected Papers*, vol iii, p 319

national government as of domestic 'The foundations of all states', he says, 'are good laws and good arms, but there cannot be good laws where there are not good arms '[1] No state has solved finally and completely the problem of how to reconcile to the satisfaction of all the conflicts of those interests which classes and parties and powerful associations within itself feel to be vital to themselves, and no state can feel absolutely secure that these conflicting interests may not in certain events lead to the outbreak of civil war But to the extent that states have succeeded in solving these problems, it is by following Machiavelli's maxim that they have done it, they have insisted first and last that the control of physical force must be centralized in their own hands, if there are factions demanding the satisfaction of interests which they regard as vital, they must not be allowed to satisfy them by resorting to force, they may seek satisfaction through the processes of law, or they may press for the law to be changed in their favour, but if these means fail they must submit to their grievance remaining unredressed In this sense 'good arms' always come first. But 'good laws' are almost as necessary, both for their own sake, and because they relieve the strain which the conflicts of interests would otherwise put upon the 'arms'. Good laws offer to factions within the state the prospect, not indeed of satisfying all their vital interests or even all their reasonable vital interests, but of so far satisfying them as to make fighting for them generally not worth while.

It is of course a much simpler task to establish 'good arms' and to underpin them by 'good laws' inside the state than it is internationally, but fundamentally the task is the same in either sphere. Inside the state, or perhaps we should say inside those states which fortune has favoured, there is a common stock of traditions and loyalties which

[1] *The Prince*, ch xii.

ordinarily disinclines both sides in a quarrel to proceed to extremes, which is but to say that a state is or ought to be a true community In this respect the society of states is at a disadvantage which is supremely important and also to all appearances permanent On the other hand, there are some considerations to be set against this One is that fortunately we probably do not need, as a basis for international peace, a sense of community anything like so intimate as that on which domestic peace depends, for even in the modern interdependent world contacts across national frontiers are relatively few, though they are often supremely important Another is that there is much that can be done to stimulate the growth of a closer international community feeling Every activity or event that reduces friction, either between the governments or the peoples of different countries, everything that helps to create a habit of mind that accustoms men to feel that fighting to get one's own way is a barbarous survival, and that toleration of differences is a natural and normal incident of civilized life, contributes something to this end Law itself is a powerful influence working in this way It is no guarantee of peace alone, but the mere existence of courts has a symbolic as well as a practical value, for courts stand for the rational and the orderly, and every time that states resort to them, even for the settlement of secondary issues, strengthens those elements in international life Cultural contacts across the frontiers, better standards of education, especially perhaps in the teaching of history, functional co-operation in various fields both governmental and unofficial, all these things help Progress along these lines will certainly not be swift or dramatic, but there is no reason why it should not be both real and continuous.

V

PROGRESS UNDER THE COVENANT

'We have great responsibilities for the part we played, all of us, and so have the Americans, in not making the League of Nations a reality, and not backing its principles with effective armed force' (Mr Churchill, House of Commons, 21 April 1944)

'This war could easily have been prevented if the League of Nations had been used with courage and loyalty by the associated nations Though the road has been one of tragedy and terror, the opportunity will surely be offered again to mankind to guard themselves at least for a few generations from such frightful experiences You may be sure that I shall act in accordance with the spirit and principles of the League, but clothing those principles with the necessary authority' (Mr Churchill, in a letter to Lord Cecil of Chelwood, *The Times*, 14 September 1944)

THE Covenant of the League of Nations was entered into, as its preamble states, 'in order to promote international co-operation and to achieve international peace and security' It is still too commonly believed, both by critics and by friends of the League, that the Covenant was a pacifist document, but that is the very reverse of the truth On the contrary, if it erred, it was in assuming that states would be willing to be more ruthless in putting forcible pressure on the breaker of the peace than in the event they proved to be It was a real attempt to provide the society of states with Machiavelli's two foundations, 'good laws and good arms'. But 'good arms', as he has told us, come first, and the League did not succeed in providing them. Both by way of warning, however, and of encouragement, the manner in which the Covenant tried to deal with the problem of international order deserves to be studied, for it is not unlikely that historians may yet have to record that it marked the biggest single step forward ever taken towards that goal.

There were two dominant ideas The first was that war is never a matter in which only the belligerents are concerned, whatever its origin and wherever it breaks out, it is so likely to affect the interests of other nations that they cannot be indifferent to it 'Any war or threat of war', says Article XI, 'is a matter of concern to the whole League' This principle was not new, it occurs in the Hague Convention for the Pacific Settlement of International Disputes, and it is a principle on which the Great Powers have always held themselves free to act But it is not easily reconciled with the theory of the proper relation between belligerents and neutrals which the law had come to adopt as its ideal in the nineteenth century, namely, to seal off the area of the war and to leave the belligerents to fight out their quarrel.

The first principle then of the Covenant is that war is always a matter of general concern But that does not mean, and the Covenant did not say, that all wars ought to be treated alike Article XI went on to say that in any war or threat of war the League was to take 'any action that may be deemed wise and effectual to safeguard the peace of nations' That is vague, but so are the circumstances in which action might have to be taken The theory was that it is not possible to say before the event in the case of *every* war what exactly other states ought to do about it, and that seems sound But the second dominant principle of the Covenant was that in *some* wars this is possible, and that when it is possible it is wise that it should be done That again is surely sound, and the merits of any scheme for dealing with war will largely depend on how this second principle is worked out, that is to say, on the way in which the wars as to which action is to be announced beforehand are marked off from the other wars as to which it is left vague,

and on the kind of action which the states participating in the security system are to be committed to take in the former.

The plan of the Covenant was to mark off from other wars those which seemed to be of a particularly inexcusable kind, in effect, wars in which a reasonable settlement would have been possible if the aggressor had been content to accept one These wars every State Member of the League covenanted not to enter upon itself, and also to take certain prescribed action, 'sanctions' as it is generally called, against any state breaking this covenant. The plan required that no state should resort to war unless, firstly, it had previously submitted the dispute to one of three alternative peaceful procedures in the hope of reaching a settlement, to arbitration, or to judicial settlement (which meant to the Permanent Court of International Justice at The Hague), or to inquiry by the Council of the League, secondly, it had waited for three months after the arbitrators had given their award, the Court its decision, or the Council its report, as the case might be, and thirdly, it did not make war on a state which complied with the award or the decision or the recommendations of the report, provided in the last case that the report was unanimous apart from the votes of the parties themselves. It will be seen that there were left certain 'gaps' as they came to be called, that is to say, cases in which it remained possible for a state to go to war without breaking any express obligation, for example, the other state might have refused to accept the award or decision or report, or the Council might have failed to reach unanimity.

There has been much discussion about the wisdom of leaving these gaps, but their importance has certainly been exaggerated It was theoretically possible that an

intending aggressor might first scrupulously observe all his obligations, and then take advantage of one of the gaps and enter on a war which he had not covenanted to refrain from; but such a course of events was always most improbable, and as a fact none of the wars that have occurred since the League was founded has begun in that way, all of them have either involved direct breaches of a state's obligations under the Covenant, or would have done so if the aggressor had been a member of the League It may be right, indeed it would probably be better, that in any future security system states should undertake not in any circumstances to resort to war, but if they do, it would not follow that they should at the same time do away with the distinction that the Covenant made between wars as to which states declare beforehand exactly what they will do and wars as to which they leave this vague It will be important to keep that distinction in any security system, because of the unfortunate but inescapable fact that promises are fragile things, and especially so when, even in the most favourable circumstances, to keep them may entail serious hardships and dangers, as all promises to take sanctions necessarily must Certainly, in so far as it is practicable, it is useful to know exactly what other states will do if war breaks out. But that is not always practicable, because they do not and cannot know themselves. If they promise to take specific action against any state that goes to war, whatever the circumstances, whatever the provocation, and however strongly the sympathies of their own people may favour its cause, then it is as certain as any political forecast can be that they will either break the promise outright or find some disingenuous way of evading it. The event showed that even in the Covenant, which tried to avoid this mistake, states had promised more than they were willing to fulfil when the

time came. At all costs they must not be encouraged to repeat that tragic mistake

It may help us to estimate the extent of the progress that the Covenant marks if we go back to those two difficulties that Grotius found so baffling and ask how far it overcame them. The first was the difficulty of knowing which of the parties to a war has the right on his side That difficulty is real, in fact it is insuperable, so long as states are asked to form their judgment on the *merits* of the dispute which has led or threatens to lead to war But when peace is broken inside the state we do not wait for the law to decide which of the parties has the better case before we do anything about the matter, we insist that the violence shall stop at once, and however good his case may be in other respects, the party that refuses to stop it puts himself in the wrong It is only afterwards, when the fighting has been prevented or stopped, that we allow inquiry to be made into the merits of the case in a court of law or by some other appropriate process. It is one of the great services that the Covenant has rendered to have shown that this principle can be applied equally to breaches of the international peace It is for historians, and not for statesmen who have to deal with current problems and to make up their minds quickly, to judge the merits of the two sides to a war, for the ultimate causes of most wars are complex, they have their roots deep in the past, and the relevant evidence is not always available to contemporaries. But under the scheme of the Covenant all this does not matter The state in the wrong is the state which has refused to accept a certain form of prescribed procedure, which has not been willing to submit the dispute to any of the three alternative forms of peaceful consideration, or has failed to wait for the so-called cooling-off period, or has made war on a state which has accepted the result of the third-party

procedure. The state in the wrong is simply that state which has 'resorted to war in disregard of its covenants', and that is a question that can be answered with certainty and answered at once Everything else in its conduct or in that of the other side is in the first instance and until the fighting has been stopped irrelevant

Observe, too, how this simple test for distinguishing between lawful and unlawful resort to war circumvents the difficulties of which we have heard so much in the last few years of devising a satisfactory definition of 'aggression' [1] Aggression is not a technical term, and it is rather curious that it should have given rise to so much argument, for the Covenant does not even use it in any of the articles which we have been considering As a popular label to denote the party which has made war in disregard of its covenants, it is quite a convenient term, but that is all it is, we need no further definition And fortunately so, for if we try to enumerate the kind of acts which are to be taken as proofs of aggression, we shall find that there is not one of them, not even the invasion of territory or a declaration of war, that might not in conceivable circumstances be legitimate acts of self-defence and not aggression at all

But the Covenant way round this first of Grotius's difficulties is only possible on one condition, and it is one that could not be satisfied in his day It is only possible if states are organized, if the agencies have been created for applying the test between legal and illegal war. Now that the Covenant has shown us the way, there can be no excuse for not learning this lesson at least It has been truly said, that 'to pray for peace without organizing the

[1] The Harvard Research in International Law in a draft convention on *The Rights and Duties of States in Case of Aggression* conveniently defines 'aggression' as 'a resort to armed force by a state when such resort has been duly determined, by a means which that state is bound to accept, to constitute a violation of an obligation'.

world is to do like the Christian Scientist who prays for healing without going to the doctor' [1]

Grotius's second difficulty was the danger that third states run if they venture to pronounce on the rights and wrongs of a war in which other states are involved This is a danger that no conceivable form of security system can wholly eliminate, for there will always be a price to be paid for the assurance of order But the price can be reduced The Covenant tried to reduce it by providing that states taking sanctions would mutually support one another in the financial and economic measures taken in order to minimize the resulting loss and inconvenience, and in resisting any special measures aimed at one of their number by the covenant-breaking state In 1921 the Assembly went beyond the Covenant in this matter and adopted certain 'rules of guidance' which empowered the Council to postpone the duty of applying sanctions, wholly or partially, by particular states so far as that might be desirable for reducing the losses that sanctions would entail on such states But these safeguards do not go very far, though it may be that not much more can be done if the obligation to take sanctions is to be uniform for all states, irrespective of the particular circumstances or the particular region of a war, as the Covenant assumed that it should be It seems to have been assumed also at the time the Covenant was made that the vast preponderance of force which its terms proposed to place behind the law would be so overwhelming that the question of protection for states helping to provide it would hardly arise If so, it may have been because the Covenant was drafted by statesmen and not by soldiers, who would have seen that power cannot be measured merely quantitatively, that its effectiveness depends on the extent to which it can be

[1] Van Vollenhoven, *Law of Peace*, p 253

brought to bear at the right place, and that this may vary enormously owing to conditions of geography, mobility, and so on [1] It is likely too that the tremendous effect of the economic blockade during the war which had just ended, which was very much present to the minds of the draftsmen of the Covenant, may have led them to underestimate the danger that the state against which economic sanctions were taken would react by military action against the weaker or the more accessible of the states applying them It cannot be said that the Covenant has solved this second of Grotius's two difficulties

Under the plan of the Covenant it was for each state to decide for itself whether a state had 'resorted to war in disregard of its covenants', and consequently whether its own obligation to take action 'to protect the covenants of the League' had arisen No organ of the League, and no majority of the members, had authority to make a decision on this question which would be binding on all the members. The rules of guidance just mentioned did indeed provide that the Council should meet to consider all breaches or threatened breaches, and that if it thought a breach had been committed it should notify the members and invite them to take action. They also contained other provisions which were intended to secure the co-ordination of the action of the several states which might decide to co-operate in the application of the sanctions But the last word remained with each state individually, and clearly there are weaknesses in such a system There would have been an obvious advantage in an arrangement which would have secured that there should always be a single decision, the decision of the League as a corporate body,

[1] 'World security, like national security, must be based on particular forces mustered in particular places to guard against particular dangers' (From an anonymous article in *Agenda*, vol II, p 226)

binding on all its members, and to draft an arrangement of this kind would be a simple matter But the real question is whether such a plan would have been practicable. It would certainly have involved a body very different in character from the League which was actually set up, a body working under a system of majority voting and more in the nature of a federation of states than a mere league It is difficult to think that in 1919 the members of the League could have been induced to give up the right of individual decision on a matter which might involve them in the most serious consequences, no less than the issue between peace and war, and it is no more likely that they would be willing to do so even to-day.[1] Moreover, experience has shown that this weakness, if a weakness it is, need not make the system unworkable It was only once put into operation, in 1935, when Italy made war on Ethiopia, and then it worked well Out of fifty-four states present in the Assembly, all except four, Italy herself, and Austria, Hungary, and Albania, none of whom was in a position to offend Italy, voted according to the evidence and decided that Italy had resorted to war in disregard of her covenants No doubt the case was so clear that only one opinion could honestly be held, but so far as it goes, the incident shows that a system of relying on separate state decisions, co-ordinated as far as is possible without taking the final decision out of their hands, can be made to work In the event of course the sanctions failed, but the failure had absolutely nothing to do with the fact that each state had the right to decide for itself whether a breach of

[1] 'Can it seriously be believed that either the United States or Soviet Russia or the members of the British Commonwealth are prepared to make formal surrender of their right of ultimate decision in unknown contingencies on the issue of war or peace? If not, the attempt to travel farther along this path will lead only to misunderstanding and frustration' (*The Times*, 22 May 1944)

the Covenant had been committed In any case we must remember that in the last resort all we have to rely on is the willingness of states to keep their promises, whatever the system by which the decision is arrived at, and the states which voted with Italy in 1935 would almost certainly have disregarded a decision of the Council, if the Council had been empowered under the Covenant to decide the question for them

A common criticism of the League scheme is that it did not provide for preventive action at an early stage of a dispute, but only for action to restore the peace after a state had actually 'resorted to war in disregard of its covenants' But if this criticism is directed against the terms of the Covenant itself, and not rather against the way in which it was applied, it is not altogether fair, members of the League could always exercise their 'friendly right' under Article XI, and bring before the Assembly or the Council 'any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends' The real difficulty in dealing with international trouble at an early stage is not one of machinery, it is a political or psychological difficulty, for it is an invidious thing to suggest to another state, and particularly to suggest publicly by bringing the matter before a body like the League, that that state is meditating an attack on its neighbour If troubles are to be tackled at an early stage before they become acute, and it is very desirable that they should be, it can probably only be by states having made it clear beyond all doubt that the trouble will be sternly dealt with if it comes to a head, and this the members of the League never did This particular criticism of the Covenant therefore, so far as it is justified, is a criticism of one special manifestation of the fundamental weakness

which paralysed the whole system, that it never succeeded in inspiring that confidence without which any security system must fail, because the members had undertaken commitments which, it was generally known, they were not going to honour.

The Covenant did not abolish neutrality, but it had far-reaching effects on the position of neutrals as that had developed in the law of the eighteenth and nineteenth centuries It was possible, as we have seen, but most unlikely, that states might be involved in a war without a breach by one of them of its undertaking not to resort to war, in that event it appears that the position of other states would have been unaffected, they would have been neutrals, bound by the rules of the neutral status as these had come to be established in the law But in the far more probable event of a war in which a state had broken its undertaking, and in which therefore other states were committed to take sanctions, the covenant-breaking state, by the very act of joining the League, had agreed that they should be released from the duty of impartiality which had become the basic principle of the neutral status, it had agreed not only that they should be free, but under actual obligation, to help the other party to the war [1]

[1] It may be useful to add here a note on the effect of the Kellogg Pact on neutrality The Pact contained nothing to make it obligatory on the parties to depart from the strict observance of traditional neutrality towards a state that might have gone to war in breach of the Pact, but it did make it permissible for them to do so if they chose It had this effect because by going to war such a state had broken a treaty obligation towards the other parties to the Pact, and by the rules of the ordinary law in such a case the parties whose treaty rights have been violated have a right if they choose to retaliate by action which would otherwise be illegal Hence, as the International Law Association declared in its Budapest Resolutions about this matter, which have been generally regarded as being sound in law, 'in the event of a violation of the Pact other states may, without thereby committing a breach of the Pact or of any rule of international law, do all or any of the following things (*a*) refuse to admit the exercise by the state violating the

Pact of belligerent rights, such as visit and search, blockade, &c , (*b*) decline to observe towards the state violating the Pact the duties prescribed by international law, apart from the Pact, for a neutral in relation to a belligerent, (*c*) supply the state attacked with financial or material assistance, including munitions of war, (*d*) assist with armed forces the state attacked' Before the United States entered the present war, while the Lease Lend Act was under consideration by Congress, Mr Stimson, the American Secretary for War, used these Resolutions to convince the Senate that by adopting the Act the United States would not be committing an illegal act, and the Foreign Affairs Committees of both Houses of Congress also cited them in reporting in favour of the Bill (The relevant passages from these reports are given in an article by Professor Quincy Wright, in the *American Journal of International Law*, 1941, p 308) The same reasoning would justify in law the handing over of the fifty destroyers to Britain in exchange for the Caribbean bases, or the action of Portugal in allowing us to use the Azores as a base Under the ordinary law these acts of assistance to us would have been very flagrant breaches of the duties of a neutral state

VI

INTERNATIONAL ORDER

'I say, "Laugh, but listen" I affirm that the Government should express in the strongest terms our adherence to the Covenant of the League of Nations and our resolve to procure by international action the reign of law in Europe What is there ridiculous about collective security? the only thing that is ridiculous about it is that we have not got it' (Mr Churchill, in the House of Commons, 14 March 1938)

'AT the basis of every community', Mr Elihu Root wrote to Colonel House in 1918, 'lies the idea of organization to preserve peace Without that idea really active and controlling there can be no community of individuals or of nations It is the gradual growth and substitution of this idea of community interest in preventing and punishing breaches of the peace which has done away with private war among civilized peoples'[1]

There are two possible views about the relation of law to this task of organizing for the preservation of peace. It is a question of priority, of whether law is the instrument which we must use for the organization of peace, or one of the benefits that the organization will bring in its train Professor Kelsen has recently put forward the former of these views in the most uncompromising terms

'To eliminate war,' he writes, 'the worst of all social evils, from interstate relations by establishing compulsory jurisdiction, the juridical approach to an organization of the world must precede any other attempt at international reform The elimination of war is our paramount problem It is a problem of international policy, and the most important means of international policy is international law'[2]

It is believed that this view is profoundly mistaken. There

[1] Quoted in Zimmern, *Modern Political Doctrines*, p. 271

[2] *American Journal of International Law*, 1943, p 397.

is no such phenomenon in human society as 'the rule of law' in the literal sense of that term, force rules always, and the question on which the difference between good government and bad depends is always whether force is behind the law or elsewhere Our common phrase 'law and order' inverts the true order of priority, both historically and logically [1] Law never creates order, the most it can do is to help to sustain order when that has once been firmly established, for it sometimes acquires a prestige of its own which enables it to foster an atmosphere favourable to the continuance of orderly social relations when these are called upon to stand a strain But always there has to be order before law can even begin to take root and grow When the circumstances are propitious, law is the sequel, but it is never the instrument, of the establishment of order

When the circumstances are propitious—for law is not automatically the sequel of order Hitler could probably have given order, at any rate order of a sort, to Europe, if his plans had not been interfered with, but he would never have given it law, he gave order to Germany, but in the process he took from German law that independence which

[1] The same point is well put by Zimmern, *Spiritual Values and World Affairs*, p 112 'There are thus three necessary stages in the process leading from the prevailing anarchy to some form of world organization The first is peace—the cessation of actual fighting The second is order, or what is sometimes called the stage of the hue and cry, the stage at which violence is prevented or punished by the public spirit of the citizen body—in this case the leading democratic peoples The third stage is the stage of law, the stage at which the habit of cooperation developed through common action in repressing violence has hardened into social rules for the conduct of what by then has become a common social life It would conduce to clearness if we transposed the current phrase "law and order" and became accustomed to speaking of "order and law", for judges and courts cannot function except within a framework of order The official formula "peace, order, and good government" is much more satisfactory, as it neatly packs the three stages into a single sentence '

is an essential element in any system of true law Before law can develop under a régime of order there must be some assurance that those on whose possession of power the order rests will not use their power arbitrarily It is conceivable that the holders of power may refrain from this even if they are irresponsible for the use to which they put it, they may voluntarily accept the restraints that law puts upon the exercise of government, but that does not often happen We can only have assurance that law will develop out of order if some means exist of making the holders of power responsible to the community for their employment of it

The future of international law therefore depends on the answers that events may give to two vitally important questions about the future of international order Can we, without being foolishly optimistic, look forward to the establishment of a reasonably secure international order, to some such measure of 'freedom from fear' as we have reached in the state? and if we can, can we also hope that such an order may be a constitutional order?

It seems necessary to point out in the first place that to establish a reasonably assured order internationally within which international law might develop is a more limited object than to aim, as it is sometimes suggested we should, at the creation of a general system of sanctions for the enforcement of international legal rights as such The time may come when this latter may be a practicable aim, but we shall be wise to put first things first, and for the present it is in the highest degree unlikely that the peoples of the world will be ready to make sacrifices or to incur risks for a cause which is so far removed from the life and interests of the ordinary man as that of ensuring that international legal rights shall be respected and if necessary enforced,

merely in virtue of their being rights under the law [1] For we should have no illusions about the price which will have to be paid for any advance, and it is the ordinary man who will have to pay it In any case the need for the larger programme is not an urgent one; we have seen already that normally states do respect the law, observe their treaties, and carry out the judgments and awards of courts The part of the problem of enforcement which is vitally urgent is the subjection to law of the use by states of armed force, and for this generation that will certainly be a sufficient task

Now the most direct and obvious method of subjecting the use of force to law is the establishment of a strong central government That, as we have seen, is the method that states use But it is not a method that is available internationally, for neither a world federation, nor the possibility that in modern conditions some one state should impose its own order on the rest of the world, is worth serious consideration Federations on less than a world scale are no solution for this particular problem, they would only reduce the number of states without solving the problem of the relations between them There is the same, as well as many other objections to the *Grossraum* plan which some German writers, such as Carl Schmitt[2] and Werner Best[3] have invented They have worked out in some detail a scheme, which is really an elaboration of the *Lebensraum* doctrine, for dividing the world into three or four *Grossraume* (great living spaces). There are to be a

[1] It is doubtful whether even in a federation, like the United States, the problem of enforcing the rights of member states *inter se* has yet been solved (See Burdick, *Law of the American Constitution*, p 97)

[2] See his book published in 1939, *Volkerrechtliche Grossraumordnung mit Interventionsverbot fur raumfremde Machte*

[3] See an article, 'Grossraumordnung und Grossraumverwaltung', in the *Zeitschrift fur Politik*, June, 1942

few super-great Powers, round each of which are to revolve a number of small client states, each in some varying degree of dependence on its 'leader' state It would be part of the arrangement that none of the 'leader' states should interfere in the *Raum* of any of the others But this again is not a plan for securing world order, though it professes to be so, for the only security it offers is the prohibition of intervention in another state's *Raum*, and a prohibition of that sort has always existed between the present sovereign states The number of states would be reduced to three or four giants, but collisions between these would be as likely to occur as they are between the states of to-day, and probably more so It would hardly be necessary to refer seriously to the fantasies of these German writers, although Hitler's *Mein Kampf* and Germany's conduct of the war show that they are more than the irresponsible ebullitions of a few eccentric individuals, if it were not that the notion that underlies the *Grossraum* is much the same as that which from time to time induces some of our own people to toy with ideas of dividing the post-war world geographically into Anglo-American and Russian spheres of influence, and it is hardly possible to exaggerate the dangers implicit in thinking on these lines We have too a warning from recent history For one of the effects of the Treaty of Naval Disarmament of Washington of 1922, whether foreseen at the time or not, was to divide the world, so far as concerned the control of the seas, into *Grossraume* for Britain, the United States, and Japan, and we are seeing the disastrous result of that arrangement to-day.

There remains only one other possibility If order cannot be secured by the action of any single state, and if the responsibility for it cannot be divided between a few great states on geographical lines, it must be secured, if at all, by

a sufficient number of states being willing to co-operate or combine together to establish and maintain it That means that security for all can only be collective security, and it would be foolish not to admit at the outset that the difficulties of constructing a dependable system of collective security are very great No doubt it is to the interest of every state that international order should be maintained always and everywhere, but we cannot on that account be sure that every state will take its share in maintaining it That, as Bacon said, 'were to imagine people to be too reasonable, who do often spurn at their own good' At the best to participate in a collective security system will involve risks for the member states, and we must expect that each of them will try to estimate for itself whether or not these certain risks are balanced by the prospective benefits There is nothing cynical in assuming that in this matter every state will act on a calculation of its own interests, and that if it reckons as good the chance of maintaining its own security by standing aloof, it may prefer to rely on isolation or neutrality rather than to take its part in a collective effort to create a stable order the benefits of which would be shared by all The prospects of any plan for collective security therefore are intimately related to the question whether or not in modern conditions neutrality can offer an alternative which will be more attractive to states or to some of them

In the last century the case for neutrality was often based, at any rate by implication, on moral arguments, the neutral was supposed to be somehow more deserving than the belligerent, and therefore it was only just that the law should do what it could to make his position as easy as possible That of course was nonsense But we shall make a great mistake if we think to advance the cause of law merely by inverting this moral argument and attacking

neutrality as a purely self-regarding policy It may be so, it means that a state deliberately disinterests itself in the maintenance of international order, at any rate to the extent of refusing to incur any risks in that cause, and when the individual seeks to stand aloof from the evil in the world around him and thinks only of saving his own skin, we do of course condemn him on moral grounds. But that comparison is not a just one States are not individuals, and those who guide their policies are trustees for millions of human beings whose welfare they have neither the duty nor the right to sacrifice even in a noble cause That is one of the reasons that make the analogy between collective security and security within a state an imperfect one States may and often do require the individual to sacrifice not only his interests but even his life for others, but the society of states cannot require that of one of its member states Further, even if the moral case against neutrality were much clearer than it is, it is not in the least likely to yield to arguments on that score We shall be wise to make our plans on the assumption that neutrality will only disappear when states come to believe that as a national policy it is short-sighted, unlikely to secure the result that it professes to offer, that is to say, to save a state from involvement in the wars that other states begin [1] But is it true that it is a short-sighted policy?

Unfortunately that is not a question to which an unqualified yes or no answer can be given Probably it is true that for some states in most circumstances, and for all states in some circumstances, neutrality is still a safe policy on which to rely In recent years we have often been told that

[1] 'The real interests of his country must always be the first consideration of the statesman, but to identify a policy of neutrality with the interests of international peace is one of the strangest hallucinations that ever took possession of clearheaded men' (Lorimer, *Institutes of the Law of Nations*, vol II, p 126)

peace is 'indivisible', which presumably means that if war breaks out in any part of the world it is never safe to assume that it will not spread to any other part, however remote and apparently isolated from the original cause of the trouble So it may, but also it may not, for even in our modern interdependent world limited wars are still possible, the Chaco war was a war of that kind, for it was never in the least likely to engulf the states of other continents When therefore states are asked to base their policies on this supposed 'indivisibility' of peace, they are asked to base it on what is at most a tendency and not a literal fact The slogan is useful if it reminds us that neutrality cannot be relied on, as its development during the nineteenth century implied that it could, as even a reasonably sure means of circumscribing the area of a war, irrespective of the circumstances and by any state that chooses to practise it, in short, if it warns us that there is no security for a state in the mere fact that its neutrality has the shield of law

For peace is certainly much less 'divisible' than we used to suppose We in Britain have been inclined to look on the question of security as one that affected others rather than ourselves, we knew that some nations were too weak to make good their own defence if they should be attacked, and we knew that others had the misfortune to be situated dangerously near the most probable source of aggression These were regrettable facts in the situation of others But most of us did not seriously doubt our own ability to defend ourselves out of our own resources, and the unconscious background of much of our thinking about the matter has been that if we were to make a contribution to the cause of world security, it would be in the nature of a favour for which we should neither ask nor expect any real return Perhaps after this war we shall be less complacent and

priggish about this matter There were formerly perhaps two countries, the United States and Russia, which might plausibly have supposed that their favourable geographical situations, their immense natural resources, and their great reserves of man-power, made it safe for them to stand aside in well-grounded confidence that no other state would be so rash as to attack them unprovoked Both of them have tried that policy, and for both it has been a disastrous failure Americans were even willing to sacrifice their secular claim for the 'freedom of the seas' and all the commercial interests for which that catchword has been the shield, if only they could buy their own security at that price Yet in this war the United States and Russia have both been attacked, and it is safe to say that both of them have been glad that in the event they have not had to depend on their own unaided action For the United States this is the first and so far the only time in her history when it has not been left to her to decide whether she should enter on war or not, and her neutrality policy was not unnaturally based on the assumption that that would always be so But it is an expensive way of providing collective security to have to improvise the system after war has begun

Still, the history of past wars does throw some light on the reliability of a policy of neutrality as a safeguard against involvement in a war from which a state would prefer, if it can safely do so, to stand aloof In his monumental *Study of War*[1] Professor Quincy Wright, defining a 'major' war as one which has lasted for more than two years and in which at least one Great Power has been engaged on each side, states that there have been fourteen major wars since the Thirty Years War, and that into all but three of these every one of the Great Powers of the day

[1] p 239

has been drawn before the end It looks therefore as if in a major war the chances of any Great Power being able to maintain its neutrality throughout were slightly better than one in five, and these are not very attractive odds on which to base a national policy of isolation [1] As to the smaller Powers, Professor Wright's conclusion on the evidence is that in modern times they have only been able to keep out in one or other of two events one is when they have been safely distant from the theatre of war, and the other is when it has suited the interests of both sides to have them remain neutral That does not cover the case of Eire in the present war, for the Allies have respected her neutrality, although it has been wholly favourable to their enemies But it is true of all the other states which have so far maintained their neutrality, South American states have been able to choose whether to be neutral or belligerent, and if belligerent to limit their liabilities, because they have been safely distant from the Axis Powers, and the few remaining neutral states of Europe are so only because Germany has so far not considered it in her military interest to bring them in Some reasons have already been given for thinking that the prospects of neutrality for small states will be no less precarious in any future wars [2]

These conclusions are valuable because uncertainty as

[1] Mr Walter Lippmann, *United States Foreign Policy*, pp 59–60, gives what is undoubtedly the reason, and he rates the odds even lower 'The principal military powers', he says, 'form a system in which they must all be at peace or all at war It is nothing but an illusion, fostered by the false reading of history that America has ever been able to stay out of any great war in which there was at stake the order of power in the oceans which surround the Americas' He points out that this was so even in colonial days Americans fought then in British wars, but American interests were at stake in them It is only from wars in which the order of power was not at stake that the United States has been able to remain aloof

to where the immediate interests of any particular state will lie when war breaks out is at the root of the difficulties which beset the construction of any system of collective security For it is of the essence of such a system that states should declare beforehand what they will do in future circumstances, and unless these undertakings can be relied on to be honoured they are worse than useless, they are a trap for any state which may have allowed its security to depend on them More than half the value of a security system lies in its having a deterrent effect, for if war breaks out and force has to be used to suppress it, it fails in one of its main purposes, which is to maintain, and not merely to restore, the peace But this it can only do if it is known, as certainly as any future political event can be known, that overwhelming force will be available if it should be needed, for in that case it is unlikely that it will ever have to be used If peace were literally indivisible, and if men were really convinced of its indivisibility, the matter would be greatly simplified, for then every state would know in advance where its interest would lie, and its promise to support the system could be relied on with reasonable confidence But peace unfortunately still is, or at least it may be, 'divisible'

It is essential therefore that before a state binds itself to take any specified action in a future event it should have asked itself whether, if that event occurs, it will, so far as it is humanly possible to foresee its own action, be both able and willing to perform what it proposes to undertake It is better that it should under-estimate its own ability and willingness than that when the time comes it should find that it has over-estimated them On that point the history of the League contains a tragic warning, and knowing what we know now of the fate of its obligations it is difficult to understand the extraordinary levity with which they

were undertaken For when Parliament agreed to the ratification of the Treaty of Versailles, of which the Covenant was a part, as it did with practically no consideration of the articles about sanctions, it bound us, if a member of the League should resort to war in disregard of its covenants, 'immediately to subject it to the severance of all trade and financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking state, and the prevention of all financial, commercial, or personal intercourse between the nationals of the covenant-breaking state and the nationals of any other state, whether a member of the League or not'. Whether this bound us absolutely to use military force is not quite clear on the construction of the Covenant, though it is hard to see how the obligations which we undoubtedly were accepting could be carried out unless we were ready to do so, if necessary In any case we agreed that it should be the duty of the Council of the League 'to recommend to the several governments what effective military, naval, or air force the members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League', and we had no right to accept that provision unless we intended at the very least to give the most serious consideration to any recommendation that the Council might make

When we recall these provisions of the Covenant it becomes more than ever hard to understand how there can still be critics of the League who suppose that it was a pacifist fad. There are points about them which deserve to be criticized and which we must try to correct at a second attempt; but on the main point, the function of power in support of the law, the Covenant was absolutely sound But the event showed that it was based upon a miscalculation of what states would be willing to do. The

result was disastrous, for when it was realized that there had been such a miscalculation, as it soon was, it meant that the League system had failed to fulfil the first condition of an effective security system, it had failed to inspire confidence in those who were asked to rely upon it, or to deter those who might be tempted to defy it We sometimes speak as though the event which marks the failure of the League was the withdrawal of the sanctions against Italy in 1936, but the truth is that it had failed long before that date The sanctions against Italy were a desperate belated attempt to breathe life into a system which had been stillborn years before

In a speech which he made on 14 March 1938 Mr Churchill used these words

'There is a weight of historic judgment piling up that in all these matters of international strife and danger it is most necessary that nations should declare plainly where they stand, and of all the nations which should so declare itself our country, with her insular characteristics still partially remaining to her, has an obligation to give a perfectly plain statement of what she will or will not do in certain contingencies when those contingencies approach the threshold of reality'

This is a hard saying, and especially so for a democracy The limits are narrow within which any constitutional government can safely accept commitments which will be binding on its successors, especially those which in certain events may involve the use of the armed forces of the state, as all commitments to support a collective security system must, it is absolutely right that a government should be chary of doing so Yet unless it does, there cannot be collective security What then should be its course? There can be only one answer It must try to forecast, as accurately as possible, what will be the real interest of the country in a given contingency, what it will wish to do and

what it will be able to do, and it must let the world know the result To some extent the Great Powers do this already Some at least of the interests for which, if necessary, they will use armed force are known It is known that Britain will fight to prevent the Low Countries falling into the hands of a great military Power, or to keep the Mediterranean open to peaceful traffic, or to protect the Persian Gulf, or of course to repel aggression against any part of the British Commonwealth or Empire It is known that the United States will fight to uphold the Monroe doctrine, and now that she has had to fight two wars in one generation for the purpose, it should be known, both to Americans themselves and to the rest of the world, that she is likely to fight to keep the highway of the Atlantic Ocean from falling under the domination of an aggressive European Power But these are only particular specified dangers which it is known that the states in question will in their own interests resist There are others, only they are not defined beforehand If they could be, the danger that states might have to fight for them might be less than it is

What is needed then as the basis of any reliable security system is that each state should first decide to what extent and in what circumstances, geographical and other, the preservation of order is a national interest of its own which it will be prepared to help in defending It should make known the result of this examination with as much particularity as it safely can, but desirable as it is that commitments should be as precise as states can be persuaded to make them, it is still more desirable that precision should not be bought at the expense of any uncertainty that they will be honoured if need be Perhaps, at any rate in the first instance and until the system has won confidence, it may not be practicable to go further than some such

formula as was contained in Article 11 of the Geneva Protocol of 1924 which proposed to oblige 'each of the signatory states to cooperate loyally and effectively in support of the Covenant of the League of Nations, and in resistance to any act of aggression, in the degree which its geographical position and its particular situation as regards armaments allow' Such a formula is not very precise, it leaves almost everything to depend on the loyalty of the states concerned But after all we can in the last resort have nothing but that to rely on, however precise the formula of commitment may be

In any case we must this time avoid the mistake which the Covenant made of assuming that every state's interest in the maintenance of international order was equal to that of every other, and also that every state's interest would be the same without regard to the region of the world in which order might be threatened or broken If these assumptions were true, the plan of the Covenant, according to which every state accepted the same obligation and every state's obligation was a perfectly general one, would logically follow But the assumptions were not well founded, they were founded on the notion of the 'indivisibility' of peace, though that particular phrase was only invented later Some grading of the obligations which the members of a security system are asked to undertake will almost certainly be necessary at this second attempt,[1] for 'tradition, trade, and strategy will continue to induce each state to be more interested in some external areas than in others' [2]

[1] The rules of guidance referred to above did to some extent recognize this, for they empowered the Council to postpone the application of sanctions by a state so far as might be desirable for the success of the common plan of action or for reducing the losses that sanctions would otherwise entail for that state

[2] Quincy Wright, *A Study of War*, p 1343

It was suggested above that for international law the problem of order is a twofold one that law can only develop within a stable international order, but that even then it will develop only if that order is established in a constitutional form, and something must now be said about the second part of the problem The main difficulty arises out of the fact that the power upon which any system of collective security must depend can only come from those who have power to give When this war ends, the overwhelming preponderance of power in the world will be in the hands of three particular Powers, the United States, Soviet Russia, and the British Commonwealth, to which one may hope that a restored France will be added before long Whether we like it or not, this will be a fundamental fact of the post-war situation It may not be an eternal fact, but it is an immediate fact of which account will have to be taken It follows that if a security system is to be built at all, it must be built in the main on the power that these three or four states will be able to provide Whether they will provide it we do not yet know They may throw away their power as the victors did after the last war, or one or all of them may refuse to use it for the common purpose In either of those events there will be no security system after the war, and the world will have started on its journey towards the next But it is only worth while to discuss collective security at all if we assume that these states will be willing to supply the motive power

But this basic fact in the post-war situation creates a formidable problem for the international lawyer We may be sure not only that anything like an irresponsible hegemony of the Great Powers will not be tolerated, but that even if it could be established it would not be adequate to the task. For in a security system the smaller Powers have

an essential role, though it is not the same as that of the greater They cannot, or at any rate they cannot always, contribute actual military power, but there are many ways in which they can either assist or obstruct the use of their power by the states which do supply it They may be so situated geographically that bases need to be established on their territories to make the system effective, or they may have resources, such as a merchant navy or raw materials, which are essential to military efficiency We need not regret this partial dependence of the Great Powers upon the small There is no warrant whatever for supposing that the failure of the League security system was in any way due to a reluctance of the small states to play their part in it, on the contrary, in the episode of the Italian sanctions in 1935–6, and again in 1937 at the Nyon Conference on the submarine outrages in the Mediterranean,[1] they showed that, provided only that Britain and France were willing to lead, they were ready to follow A hint of the formula which might be adopted to describe the relations between the greater and the smaller Powers in this matter of security might perhaps be taken from the Balfour Declaration of 1926 on the relations of the self-governing parts of the Commonwealth to one another, all states, great and small, would be recognized as 'autonomous communities, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs', but it would also be recognized that 'the principles of equality and similarity, appropriate to status, do not universally extend to function'

Perhaps it is not too optimistic to believe, as Mr Walter Lippmann has suggested,[2] that there is implicit in the facts of the situation a safeguard against any attempt at a Great

[1] On this see H B Butler, *The Lost Peace*, p 46

[2] *United States Foreign Policy*, p 101 et seq

Power hegemony masquerading under the guise of a collective security system Mr Lippmann's thesis is that while combined action by the three Powers is the irreducible minimum guarantee of security for each of them, this collaboration will only be possible in a wider order of security A mere alliance between them would have no chance of enduring if they failed to adopt a liberal policy towards other nations, unless in short they sought to maintain liberty through law That is so because, when the pressure of a common enemy is removed, their conflicting interests will be free to reassert themselves, and if any of them should seek to aggrandize itself at the expense of another or of lesser states, the fissures would appear and soon become a breach They cannot combine to oppress the rest of the world because its resistance would disrupt them They cannot divide the world into spheres of interest, for these would overlap and they would become rivals Provided only that they are guided by their own interests, the inexorable logic of their relations will compel them to recognize the liberties of others

Some such relation between the small and the Great Powers was perhaps in Mr Churchill's mind when he spoke, as long ago as 1938, of 'a group of powers, as it were mandatories of the League, who would be the guardians of civilization, and once this was set up strong and real it would liberate us, at least over a long period, from the torments of uncertainty and anxiety which we now have to endure '[1] Mr Sumner Welles expressed much the same idea in an address to the New York *Herald Tribune* Forum on 17 November 1942

'Peace,' he said, 'freedom from fear, cannot be secured until the nations of the world, particularly the Great Powers, and that includes the United States, recognize that the threat of

[1] *Arms and the Covenant*, p 460

war anywhere throughout the globe threatens their own security and until they are jointly willing to exercise the police powers necessary to prevent such threats from materialising into armed conflicts And since policemen might be tyrants if they had no political superiors, freedom from fear also demands some form of organised international political co-operation to make the rules of international living and to change them as the years go by '

World organization then, as well as world order, is a prerequisite for the advance of international law, and organization implies institutions As *The Economist* pointed out recently, the institutions which we created after the last war failed because there was no power behind them and because they were merely superimposed upon international anarchy, it would be folly after this war to supply the power and remedy the anarchy but to abandon the institutions But the details of the system are not a matter on which lawyers have any special competence Lawyers are entitled to point out the conditions which they believe must be fulfilled if a society desires to live under law, but it is for statesmen to decide whether and how those conditions can be realized Only they can feel the pulse of public opinion and judge what risks and sacrifices their people will be willing to accept, and only they have access to the military advice which is necessary before they can judge whether the commitments they have in contemplation will be practicable In any case it is not likely that at this second attempt we shall try to construct a single system of world order complete and rounded off from the beginning [1] We are more conscious this time of the

[1] Mr Walter Lippmann (*United States Foreign Policy*, p 46) criticizes President Wilson for trying to do this Wilson, he says, ignoring the lessons of history, was not content to look for the evolution of union from a nucleus of firmly allied strong states He profoundly distrusted alliances, and he thought mistakenly that he could find an alternative in an association of fifty

magnitude and complexity of the task before us, and more inclined to be humble in our forecasts of the shape of things to come But a few of the more general considerations which it seems likely that the architects of a security system must this time keep in mind may here be tentatively suggested

Firstly, they will have to remember that military power is not a constant, but a variable factor, it does not depend on the absolute number of ships and divisions and aircraft which make up its sum, but also on the circumstances, geographical and other, in which it may have to be used They will have to recognize therefore in all likelihood that the problem of security is not one but many problems, and that different conditions, political, economic, or strategic, in different regions of the world make different arrangements necessary Thus the system may turn into a composite pattern made up of many particular arrangements among the states most directly concerned in the security of particular regions, such as the Atlantic or the Indian Ocean or the Mediterranean Sea But if so, it will be essential that these regional arrangements should be interlocking arrangements, made within the ambit of, and according to principles accepted by, a wider association of states charged with the general supervision of world security as a single problem The world cannot be neatly divided into closed geographical regions either for strategic or any other purposes, nor can the interests of all states be localized

Secondly, it seems necessary to recognize that security

juridically equal states, and that the formation of the American Union was a model which could be applied internationally Hence, though he was willing to accept the guarantee treaty with France, that was only as the price which he had to pay in order to secure his own system, whereas, in Mr Lippmann's view, it was in that treaty that the real promise of a stable order lay.

plans cannot be improvised at the last moment when the danger to be guarded against has actually arisen, they have to be thought out beforehand with reference to all the relevant political and strategic circumstances, and particularly to the source from which danger is most likely to come In modern military conditions, as Professor Carr has pointed out,[1] it is an illusion to suppose that states can wait until war breaks out and then take sides with whichever party is in the right, if they are to be associated together in war and to make their military co-operation effective, they must tie up their fortunes together beforehand Inside the state everyone knows that the police recognize that some persons are more likely to commit crimes than others, they know too that certain persons specialize in certain types of crime, and when a person has been through their hands once or more than once they keep him under observation If they were obliged to act as though bishops were as likely to commit crimes as gangsters their task would be made impossible, yet something very like that was implied in the Covenant scheme No future scheme will be effective unless it is based on a realistic recognition of contemporary facts, and the overwhelmingly important fact with which the world will be concerned after this war will be the possibility of a revival of German or Japanese aggression That may not be an eternal fact, but it is the fact which most concerns this generation

Lastly, though the obligations which states undertake will probably not be uniform, there seems to be a minimum obligation which every state may fairly be required to accept, and having accepted may be expected to honour This would be a negative undertaking, a promise at least not to assist any state found under the agreed procedure to

[1] *The Future of International Government*, 'Peace Aims' pamphlet, No 4

be an aggressor, and not to impede the action of other states taking more positive steps for enforcing the law The details of such a minimum obligation would require careful consideration, but at the least it would mean that every state would be bound to deny to an aggressor the rights that neutrals have traditionally been expected to accord to belligerents It could not be tolerated that any state which had agreed to enter the system even with limited obligations should supply, or allow its nationals to supply, an aggressor with the kind of assistance that neutral Swiss factories or neutral Swedish mines have been affording the aggressor in this war

VII

LAW AND WELFARE

No abstract intellectual plan of life
Quite irrespective of life's plainest laws,
But one, a man, who is man and nothing more,
May lead within a world which (by your leave)
Is Rome, or London, not Fool's-Paradise
(Robert Browning, *Bishop Blougram's Apology*)

ALTHOUGH law does not create order, it can be used, as it is habitually used within the state, to underpin the fabric of order once this has been established There are two main ways in which, to use Machiavelli's phrase again, 'good' international laws can help to support the 'good arms' of a system of security They may aim at increasing the common welfare of states generally, or they may aim at reducing particular occasions of friction by offering redress for the grievances of particular states The distinction is not an exact or scientific one, for the two objects overlap, but it is convenient In this chapter we shall be concerned with the use of international law as an instrument for promoting the general welfare of states

We have already seen that international law has hitherto been in the main a *laisser-faire* system, having as its chief function to demarcate the spheres within which each sovereign state is to be free to exercise its domestic jurisdiction without any legal obligation to defer to the interests of any other state We have seen, too, that in some of their relations states have recognized that they all have something to gain by abandoning this exclusiveness, since in fact none of them can serve the interests of its own people in the best way unless it arranges to co-ordinate its action with that of other states. They began to recognize this

truth about the middle of the last century, but the creation of the League of Nations marked a great advance towards its fuller acceptance For in pre-League days when a matter of government action was thought to call for international regulation it had to be taken up as a piece of business unrelated to other matters in a similar situation, a special conference would be summoned through the slow-moving channels of diplomacy, a secretariat improvised, and perhaps a special organ created to give effect to the decisions of the conference after it had broken up Under the League system there existed a permanent organization which could be used for taking up any matter which states had decided to regulate internationally, which could collect the relevant information on which to base an agreement, and which could supervise the working of an agreement if one should be concluded In this aspect of its work the League was simply a standing conference system, and as a matter of business efficiency the modern world can hardly conduct its international relations without a system of this kind For not only are there many functions that states cannot perform at all efficiently unless they collaborate—for instance, the control of disease, the germs of which recognize no frontiers—but their more intimately domestic policies, especially in economic matters, are often only practicable if other nations, with whom they may have to compete in the world's markets, do not adopt a different line

The need for machinery such as the League provided is increasing for at least three reasons, all of which are reducing the field of action within which any one state can work out its socially desirable purposes without taking into account what other states are doing in the same matters.[1]

[1] This growing modern interdependence of states makes the problems of international law more urgent, but not necessarily, as is often assumed, easier For it is in the main an interdependence in material things, and

In the first place, new technological developments in industry and transport are making the economy of every country, even the greatest and most nearly self-sufficing, ever more sensitive to what happens in other countries In the second place a great change in our ideas of the proper functions of government has increased the sphere of state, at the expense of private, activity, and much of the business which now takes place across the frontiers of states, although until recently it was the concern of private individuals, has become business which has to be negotiated between governments And thirdly, the needs of post-war reconstruction will certainly increase for a long time to come, and probably permanently, the amount of business of a social and economic kind that governments have to conduct with one another

We are concerned here only to consider how far international law can provide an instrument which governments can use effectively for promoting the welfare of their peoples, and not with the specific reforms which it may be desirable that they should introduce into their relations But Article 23 of the Covenant contains a list of matters which in 1919 states regarded as fit subjects for co-operative international action It mentions the securing of fair and humane conditions of labour for men, women, and children, the just treatment of the native inhabitants of territories under their control, the supervision over the execution of agreements with regard to the traffic in women and children, in opium and other dangerous drugs, and in arms and ammunition, the securing and maintaining of freedom of communications and transit, and of equitable treatment for commerce, and the taking of steps for the prevention and control of disease On most of these tasks

leads as easily to increased friction as to a stronger sentiment of community

the League has been able to do something, and on some of them to do much, but on the specifically economic side it has done very little, and yet from one point of view this is the most urgent of all For although economic grievances are rarely, if ever, a direct cause of war, they are a predisposing cause, they prepare the way for the demagogue and the warmonger, and they weaken the power of resistance in the countries against which aggression is planned Yet at present it is the normal practice for each state to try to cure its own economic ills by its own separate action, though except on a short view of its own interests it can rarely succeed in doing so in our modern interdependent world, and if in making the attempt, by raising its tariffs, for example, to prohibitive heights, by imposing quotas, by depreciating its currency, or by any of the other devices which make up a policy of economic nationalism, it injuriously affects the economy of other states, that incidental effect not only does not affect the legality of its action, but in the present state of feeling on these matters it hardly even excites any serious moral disapproval If the world succeeds in establishing a system of security after this war, nothing would do more to underpin it than that states should begin to show greater consideration for the economic interests of other nations And, security apart, that would not be a counsel of generosity, but only of enlightened self-interest [1]

Regarded as an instrument for promoting the general welfare of states international law, compared with muni-

[1] The preamble to Part XIII of the Treaty of Versailles (which set up the International Labour Organization) brings out clearly the two reasons which make international action for the promotion of social justice necessary, namely, that 'peace can be established only if it is based upon social justice', and that 'the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries'

cipal law, has one great disadvantage The general body of states has no legislature, no machinery, that is to say, which allows a majority to outvote a dissentient minority and to pass measures into law which will then become binding on all, whether they have agreed or not, for the member states are 'sovereign', and one of the consequences of sovereignty is that a state's legal position cannot be altered without its own consent This feature of the international system is sometimes referred to as the 'rule of unanimity', or sometimes it is said that states have a right of 'veto' on changes in the law There is no objection to the first of these expressions, but the second is misleading. It exaggerates the handicap A state can refuse to have its own rights or duties changed, but a veto would imply that it can debar other states from introducing changes which are only to affect themselves, and that a state cannot do The distinction is important, because many international reforms can produce good results even though not every state accepts them Of course the adhesion of a particular state or states may be sometimes so important that a change is not worth making which it or they do not accept, there could, for instance, hardly be an effective convention on a maritime matter which Great Britain refused to accept, or one on quinine without Holland, or on sugar without Cuba But it is not necessary as a matter of principle that legal rights and duties should be the same for all states

However, the rule of unanimity is undoubtedly a serious handicap, and it is natural to ask whether it is likely that states will agree to modify it In a recent study of the *Majority Rule in International Organisation* Mr C A Riches has made a careful examination of the present practice, and he has shown that the instances in which the taking of decisions by majority vote has been introduced into international business are very numerous, almost every

international agency finds it convenient to admit the method with reference to some at least of the decisions that it has to take On the other hand, Mr Riches brings out the important fact that very few of these agencies have power to make decisions which will have the effect of imposing new obligations on states, and in the rare cases where such a power does exist its limits are without exception exceedingly narrow, for the power never relates to matters of more than secondary or even less importance The functions of those bodies which do admit majority decisions are generally confined to such matters as the supervision of international technical bureaux, the adoption of resolutions which will have merely advisory force, or the drafting of conventions *ad referendum*, that is to say, to take effect only if they are subsequently approved by the states concerned

A few illustrations will show how carefully the present practice of states guards them against the imposition of obligations without their own consent Many international bodies, notably the International Labour Organization, adopt conventions by some form of majority voting, but the conventions must be ratified before they take effect A few have supervisory functions to secure that the members fulfil the obligations which they have accepted, and they sometimes use majority voting in carrying out these functions, the Central Opium Board is an example, and it has power to recommend, but only to recommend, the stoppage of exports to a country which is a defaulter under the Opium Convention of 1925 But what is most significant of the present attitude of states is probably the extreme rarity of the instances in which any of these international bodies can in any way change the legal position of a state, and the trivial importance of the matters to which such a power applies when it exists at all Mr Riches has

found only three or four cases in all, and such as they are they are the only true examples of majority legislation in the whole of our present international system, a typical case is the power of the Air Commission to amend, not the Air Navigation Convention of 1919 itself, but the annexes to the Convention which deal with purely technical matters. Moreover, there is no sign of any present willingness on the part of states to depart from this cautious attitude, on the contrary there is every reason to think that all of them would endorse one of the articles in a convention of the Pan-American Union of 1928 which says that 'whenever a state believes its vital interests are involved in a question, or that an obligation may thereby be imposed on it, such state may require that the resolution of the board be adopted by unanimous vote' Mr Riches quotes a case from the practice of the League where states have been unwilling even to receive advice in which they have not previously concurred, the general practice of the League's technical organizations is to make their recommendations to states by majority voting, but the Advisory Commission for military questions is required to be unanimous, presumably because in such a delicate matter as armaments states will not risk the embarrassment of having even advice tendered to them which they may want to reject

Now it is of course possible to hope, if not to expect, that all this will be changed after the present war In that case the problems which will arise will concern the organization of a majority system, it will be necessary to decide the limits within which such a system is to be accepted, whether decisions are to be taken by a bare majority, or, say, by a three-quarters majority of the votes, and whether all states are to have equal voting power, which is hardly conceivable, or if not, then what weight is to be given to such

factors as population, economic resources, foreign trade statistics, educational standards, and so on It does not seem profitable to speculate on possible solutions of these questions, for if there are to be departures from the unanimity rule, they are almost certain to come by piecemeal innovations, by the admission of majority decisions in this or that specific case, and not by the acceptance of any general formula, in short, the process will be one of cautious extension of the small beginnings which have just been referred to It seems certain that for a long time to come plans for using international law as an instrument for raising general social and economic standards will have to be based on the principle that the legal rights and duties of a state can only be changed with its own consent

But although it has to be admitted that the unanimity rule is a serious handicap, it is a mistake to suppose that it is a fatal one No doubt a majority system does, at any rate formally, ensure that there will be no deadlock in the process of reaching decisions, but experience shows that its absence does not make deadlocks inevitable The English jury and the English Cabinet are somehow able to reach decisions without the advantage of majority voting, and international bodies can often do the same League experience, too, has shown that when the possibility of action depends on unanimity being secured there are certain procedural devices which can be used to make agreement more probable, though of course they cannot make it certain One such device is that before a matter is brought before the plenary body, where the real decision will be made and where it can only be made by unanimity, it should be discussed in a committee, where, since the decision will bind no one, it can be taken by majority One might suppose that if a state has voted against a proposal in the committee, it will also vote against it in the plenary meeting, and certainly

it can do so if it chooses, if it does, nothing will have been gained But unless the dissentients are a numerous body, or unless some of them feel bound to oppose because they have some important interest of their own at stake—and in either of those cases it is probably better that the proposal should not be persisted with—they often refrain from continuing their opposition, the reason is probably a psychological one, for statesmen, like other men, do not like to be regarded as merely obstructive by their colleagues As one would expect, a sentiment of this kind develops more easily in a permanent organization such as the League, where the members are used to working together, and where there is generally a real desire to reach agreed results if that is at all possible, than in a special conference which meets once and then breaks up Another way of introducing some elasticity into the working of a unanimity system is to allow states, if they wish, to make reservations in accepting a convention; this makes it possible to take into account any special circumstances affecting a particular state, but as it has the disadvantage of admitting diversity into the obligations which are being undertaken, it is a device which has to be used sparingly

An interesting situation has arisen in the Universal Postal Union which has made the position of a small dissentient minority almost untenable This result has come about because, although under the Union's constitution decisions of the Postal Congress, which are made by majority, have to be ratified before they become binding, yet the only alternative to ratification that a state has is to leave the Union, and states are known to be so unlikely to do that that a practice has grown up of treating the decisions of the Congress, even if they are only majority decisions, as in force without even waiting to see whether they will be ratified by the states which have opposed

them This is of course a very special case, for postal changes do not often raise controversial political issues, and it is not likely that it will be possible to circumvent the unanimity rule so completely in other cases, but there may none the less be a moral to be drawn from it It suggests that one method of tempering the rigour of the unanimity rule may be to make the membership of international organizations so valuable that states simply cannot afford to leave them, even though to continue their membership may mean that they must defer to the wishes of a majority of other states

The present system, then, under which a state's legal position cannot be affected without its own consent works better than the *a priori* critic sometimes supposes Moreover, it is easy to exaggerate the advantages that would follow from the substitution of a majority for a unanimity system, supposing that states could be induced to agree to the change For much more than the bare legal power to override the wishes of a minority is needed to make a majority system work, because of the simple fact that for legislation to effect its purpose it has not only to be enacted, but also to be accepted and applied by those whom it affects But whereas municipal legislation affects weak individuals, whose conduct can be fairly easily supervised and who can be punished if they disregard it, international legislation is addressed to states, and its success generally depends, not on states doing some specific act, but on their willingness to make it part of their organized life Their legislatures may have to incorporate it into the domestic law, and their administrative machines will probably have to apply it in a continuing course of action We may hope that, if states had once accepted the new system, they would loyally carry it out even when it led to the imposition upon them of changes which they disliked,

but that is a large assumption, and even without any formal repudiation of obligations, the opportunities for evasion would be wide, and the possibilities of checking it almost non-existent

In other ways too it is easy to exaggerate the real powers of a majority, they are always limited, whatever the formal powers may be, and it is fortunate for all of us that that should be so Inside the state, even though the legislature has all the advantages of working under a majority system, important reforms do not as a rule find their way on to the statute book either swiftly or easily, they nearly always have to contend with powerful social forces, vested interests, public apathy, and other obstacles which cannot be overcome merely by outvoting them If a majority is wise it does not try to ride roughshod over all opposition, if it does so habitually, the result may be to stiffen and unite its opponents, and to create difficulties which a more conciliatory procedure might enable it to avoid This is especially true when the measures which it is desired to pass into law will affect the interests of strong organized groups within the state, such as trade unions, or employers' associations, or banks, or insurance companies, or the profession of the law or of medicine, such measures generally go through a long process of negotiation and consultation before they are even introduced into the legislature, drafts are modified to meet objections, and every effort is made to avoid having to use the power of a majority to vote down unconverted opponents, in fact to approximate, as near as may be, to unanimity Of course the power is in reserve, that is what distinguishes the procedure from a system of formal unanimity, and sometimes it is used and used successfully But if we are to form a true picture of the size of the obstacle that a unanimity rule creates, it is important not to over-simplify the normal

working of a system based on majority voting by thinking only of the letter, and not of the spirit, which makes such a system work It is very far from true that the introduction of a majority rule into international legislation would overcome all the obstacles which at present make it lag behind the needs of international society [1]

For the most fundamental of the causes which retard the pace of international reforms are psychological rather than constitutional, and the procedural defects are only the outward sign of these deeper factors of the problem Public opinion is as a rule apathetic in the matter, there is no organized continuous pressure behind proposals, however beneficial they may be, no devices such as exist within the state for educating opinion and making it ripe to accept change, no party programmes, public meetings, discussion in the press and on the wireless, and other similar means The result is that in every country most people tend to adopt an attitude towards change in the international order which is quite different from that which they have to domestic change Inside the state even the most conservative of us regard change as a normal incident of social and political life, we look on every settlement of a problem as provisional and not final, and take it for granted that it can be revised if defects are found in it But outside the state we all, even the radicals among us, have a different mental approach to questions of change, as Sir Norman Angell once wrote, a defect in our attitude towards international affairs is that we use the 'catastrophic method', we regard their management as a matter of settling crises as and when they arise, instead of as one of adjusting the law to ever-changing conditions

[1] This point is developed in an admirable discussion of the majority principle and its justification in Professor Ernest Barker's *Reflections on Government*, pp 65–9

Thus the use that we may make in the future of international law as an instrument of social welfare will depend more than on anything else on the creation of an informed public opinion alive to the opportunities that it opens out When the Treaty of Peace Bill was before the House of Commons in 1920 Lord Robert Cecil, explaining why the unanimity rule need not make the League ineffective, said, 'The great weapon we rely upon is public opinion, and if we are wrong about it, then the whole thing is wrong ' But public opinion was never strong or intelligent enough to provide the backing needed to make an immediate success of a scheme which demanded a new outlook on international affairs, and in recent years the position has deteriorated with terrifying rapidity Mr Walter Lippmann wrote some time before the thing had become clear to most of us, that 'the making of one general will out of a multitude of general wishes is not a Hegelian mystery, as so many social philosophers have imagined, but an art well known to leaders, politicians, and steering committees',[1] but probably even he did not foresee the pitch to which totalitarianism would be able to carry that art, or the wild extravagance of nationalism that it could be used to promote Now, however, we know that it is possible for a government utterly to destroy freedom of speech and of the press and almost freedom of thought, to bar access to all sources of information except those that it chooses to provide, to turn education and even religion into political weapons, and in short to 'condition' a whole people for aggressive war by controlling all those means on which the formation of public opinion normally depends. We need have no delusions about the rationality or the dependability or even about the pacific tendency of men in the mass to see that one at least of the conditions on which the

[1] *The Phantom Public*, p 47

future of international law and co-operation depends is the liberation of the individual from this new and terrible subjection

Hitherto the impact of international law on the lives of individual men and women has not been direct or immediate, it has reached them only through the medium of the state of which they are members This characteristic, though international lawyers have sometimes been inclined to erect it into an immutable dogma, is really a survival from the original character of international law as a law between personal monarchs or sovereigns, after the personified state had taken the place of the personal monarch it was maintained because it was on the whole found to be convenient that the collectivity to which an individual belongs, and not the individual himself, should be treated as the subject of the rights and duties which make up international law But one of the consequences of the rule has been that the manner in which a particular state chooses to treat its own subjects has hitherto been considered by the law to be a matter of domestic jurisdiction and not one of international concern, and though states have often intervened in the affairs of other states with the real or alleged object of protecting the subjects of the latter from oppression by their own government, yet most international lawyers would take the view that such interventions can be justified, if at all, only on political or humanitarian, and not on legal, grounds

But to-day the appalling vista which totalitarianism has opened out is forcing us to question the expediency of maintaining this limitation on the range of the law We are reminded that the boundaries of domestic jurisdiction are not fixed by any immutable principle, that in fact they are changed whenever a treaty deals, as most treaties do, with a matter which would otherwise fall within the domestic

jurisdiction of one of the parties, since the effect of the treaty is then to convert that particular matter into one of international concern There is therefore nothing in the nature of international law as such which makes it impossible for the conduct of states towards their own subjects to be brought within its range, the only question is whether states will decide to use international law in this way, and, if they do, to what extent and by what sort of procedure it can be made a suitable instrument for the purpose Whatever the theory of the law may be, it never has been true in fact, and to-day it is wildly untrue, to say that the kind of government that a state chooses to set up for its own people is a matter which does not affect other states There is room in the society of states for great variety in systems of government, but there is also a standard of decency below which the general body of civilized states cannot allow the government of one among them to fall without danger to themselves It would not even be something wholly new for international law to protect the rights of individuals, it does so already, though only through the state to which they belong, in those of its rules which aim at securing a reasonable standard of treatment for aliens by states which are not their own, and in the Minorities Treaties it has even been used to protect those among a state's own subjects who belong to a racial or religious or linguistic minority, against unfair discriminatory treatment by their own government Recently it has been proposed to extend this protection in what has been called, after the analogy of those declarations of individual rights which are contained in many state constitutions, an 'international bill of rights'

This is a proposal which is attractive both on political grounds—since one of its results would be to bring the law more nearly into harmony with the facts on the subject

of misgovernment and oppression—and even more obviously on humanitarian grounds, on that score the arguments have been burnt into the minds even of the least imaginative of us by the satanic cruelties of Nazi Germany towards Jewish and other classes of German subjects in our own times The only question about the proposal which really merits discussion is whether it could be effective, and here it has to be admitted that the difficulties are very formidable One difficulty is that whereas the rights which are guaranteed in any declaration of rights must be expressed in broad general terms—and that is especially true of a declaration which, like the one proposed, is to be of universal application—they have to be applied in practice to particular situations which vary in different countries and even in the same country at different times However generally they are expressed, therefore, they cannot be absolute or unqualified, they are not so even in states whose constitutions contain declarations of the rights of individuals, they are always rights within the law, and the law has other interests to protect, those of other members of the community and the stability of the community as a whole, and when these interests conflict, as they often do, it must do its best to strike a fair balance between them Thus even in normal times every state finds it necessary to qualify the rights of personal freedom, of freedom of speech and of the press, of worship and of association and the like, by laws against libel, blasphemy, incitement, unlawful assembly, sedition, and many other restrictions, and the question how stringent such laws ought to be can never be answered by reference to any general formula It is essentially a political question, which can only be settled on a consideration of such matters as the greater or less stability of the institutions of the particular state, and the measure of responsibility in

the use of liberty that a particular people can be relied upon to show Only a government that is very sure of its own stability can dare to allow these freedoms From time to time, too, there occur in every state, even in the most constitutionally minded, emergencies which both justify and necessitate restrictions on liberty of an exceptional kind To-day, for instance, *habeas corpus* is virtually, though not formally, suspended in our own country, and this by general consent, and, war-time exigencies apart, crises may occur in any state in which the only alternative to anarchy may be governmental action which either is, or may seem to the detached external observer to be, arbitrary Only some body which has access to all the relevant information, much of which in the public interest may have to be confidential, a body, too, which bears the ultimate responsibility for the maintenance of order in the particular case, can safely be entrusted with the right to judge whether such extraordinary restrictions are necessary, and only the government of a country is in that position No doubt, unless governments can be subjected to some form of control, they will always be able to abuse their powers and to restrict freedom when restriction is not really necessary, and that is a great evil, but in a constitutional state the control is supplied from inside the state, and in the long run that is the only source from which it can come The difficult art of constitutional government cannot be imposed from the outside, and not much can be done to teach it to those who have not learnt it for themselves by their own experience. In fact, this danger, that governments are likely to abuse the right to decide what restrictions on liberty are demanded in the general interest if it is left in their hands, brings out a point which is crucial in any consideration of the practicability of an internationally guaranteed declaration of individual rights, namely, that

these rights, despite the famous phrase in the American Declaration of Independence, are not 'self-evident truths' They are not even universal ideals, however much we may wish that they were, they are the ideals of those who believe in democracy, and democracy, though we may think it is the best, is also far the most difficult, and the rarest, of all systems of human government

As yet there is no official draft of an international bill of rights, and it is therefore only possible to discuss it in general terms, but if the more fundamental difficulties already considered were to be overcome, it would still be difficult to imagine an effective procedure for making the rights effective It is of the essence of the proposal that there should be some means whereby an individual who deems that his rights have been infringed in his own country should be able to appeal for redress to an international authority, and it is almost as essential that this body, whatever its constitution may be, should be able to exercise a continuous supervision over the observance of the declaration, and, if necessary, to take the initiative in enforcing it It seems generally to be assumed, on the analogy of the American Supreme Court, that the most appropriate form of international authority would be a court of law, though a court could hardly fulfil the second of the two functions just mentioned, and it may be that some form of independent, but non-judicial, commission, perhaps on the model of the Mandates Commission, would be preferable But whatever the form of this ultimate international authority, its task would be a most difficult one It must somehow be able to secure that access to itself shall be free, yet it would be easy for a government, if it were ill-disposed to the would-be appellant, as we must assume it might be, to put pressure on him to prevent him from making the appeal, or to put difficulties in the way of its proper

presentation Such pressure might be suspected, and the appellant might allege it, but it could hardly be proved unless the authority had in its service independent machinery for informing itself, and this seems to involve something like an international detective force able to operate, without interference from governments, in any country of the world In adjudicating on a complaint the authority would need means of checking the allegations of the two parties, and for that it must have a right to call and examine officials of the accused government, if their evidence is material, as in most cases it would be Complaints would often relate to some act of administration of which the tracks could easily be covered, and at every stage of the proceedings a government could make it almost impossible for the authority to discover the true facts Finally, if we suppose that it has satisfied itself that it has learnt all the facts that are relevant and has given its judgment upon them, there is still the question what it is to do, or what other states are to do, if the decision has been given against the defendant state and that state is in contempt One can invent sanctions for such a contingency which look well enough on paper, for example, the delinquent state might be expelled from some association of states which may have been formed in the post-war world, but it is not easy to feel confident that they would be applied with the regularity and impartiality that would be necessary to provide an effective guarantee of the rights, since other states might be unwilling to intervene for a variety of reasons which might have nothing to do with the merits of the particular incident The difficulties of international sanctions in any circumstances are well known, and as yet very little progress has been made towards solving them, it does not seem likely that states are yet prepared to accept an obligation to impose them on one

another, not to protect some interest of their own, but for the sake of an ideal [1]

Proposals for an international bill of rights seem to a large extent to be inspired by the analogy of the Bill of Rights contained in the first ten amendments to the American Constitution, and to assume that the function of the American Supreme Court could be transferred to an international court or other body without any drastic change in a system which has been found to work in the United States But like most analogies between the American Union and the international society of states, this analogy is certainly misleading The Supreme Court plays its part in interpreting and applying the Bill of Rights to the satisfaction of Americans because it is itself part of the government of the Union, and since it holds this position in American life it can mould the rights declared in the Constitution so as to make them harmonize with American ways of living and ideas of government It does this despite the fact that the rights are stated in the Constitution, as they were bound to be, in absolute terms For example, although the First Amendment says that 'Congress shall make no law abridging the freedom of speech or of the press', the Court has often pointed out that this 'cannot have been, and obviously was not, intended to give immunity for every possible abuse of language',[2] and it has formulated a test for distinguishing between abridgements which do, and those which do not, contravene this test which is particularly instructive, because it brings out very clearly the difficulty that an international court would have in applying any similarly just and workable

[1] It is worth remembering that the Treaty of Versailles placed the constitution of Danzig under 'the guarantee' of the League of Nations Unfortunately, when the guarantee fell due, the League had not been provided with the resources needed for its honouring

[2] *Frohwerk* v *U S* (1919) 249 U S 204

rule 'The question in every case', the Court has said, 'is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent '[1] In other words, although the Constitution says without qualifying words that Congress shall not abridge freedom of speech and leaves the matter there, the Court says that if it is necessary to abridge it in order to prevent some even greater evil falling upon the state, then Congress may do this without violating the Constitution On this principle it has been held that freedom of speech may be abridged when it is used to obstruct recruiting,[1] or to cause mutiny in the army,[2] or to spread false reports with intent to interfere with the success of military operations [3] 'To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale and spirit of the army may not be broken by seditious utterances, freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy, deserters and spies put to death without indictment or trial by jury '[4]

Let us suppose then that an international authority is called upon to decide whether or not a state has violated the international bill of rights by some abridgement of the freedoms guaranteed thereby, and that it sets itself to apply a test similar to that adopted by the Supreme Court The question for decision will then be whether, if the freedom which the complainant claims and the state denies to him were to be allowed, it would bring about evils which the government of the state is entitled to prevent The

[1] *Schenck* v *U S* (1919) 249 U S 47
[2] *Sugarman* v *U S* (1919) 249 U S 182
[3] *Schaefer* v *U S* (1920) 251 U S 466
[4] *U S* v *Macintosh* (1931) 283 U S 605

Supreme Court can answer that question because it can be advised of all the circumstances, but no international body could do so, not because it might not be as impartial and as learned as the Supreme Court itself, but simply because, being necessarily unfamiliar with the intimate life and problems of the state whose conduct is impugned, and having no responsibility for its good government, it could not form an opinion which would either win or deserve to win confidence All it could do would be to deduce the logical consequences of an abstract principle, it could not, as the Supreme Court does, shape the principle to a situation of which it is fully informed

It has been assumed in this discussion that an essential part of proposals for an international bill of rights is some form of international supervision and machinery of enforcement, and it is this that makes their practicability so doubtful The difficulties which have been referred to would not arise if states were merely to covenant with one another to incorporate in their own municipal laws certain rights which they all undertake to maintain for their own subjects, and which each of them would interpret and apply according to its own forms of procedure Many state constitutions already contain declarations of this kind, and on this assumption the effect of an international bill of rights would be to make it obligatory for all states to have a declaration of this kind, and also to make its observance a matter of international, and not merely, as at present, of domestic concern. It may be objected that the fate of the declaration against war in the Kellogg Pact is a warning of the futility of a mere manifesto, and there is of course a serious risk that a bill of rights on these lines would be observed no more honourably than was the Pact On the other hand it would have one important legal consequence The failure of a state to maintain the rights would be the

breach of a treaty, and it would therefore be permissible, though not obligatory, for other parties to the treaty to intervene and insist on the treaty being observed [1] This would do away in its present absolute form with the principle that the kind of government under which a nation chooses to live can never legally be the concern of other nations, and it would make intervention legal in the two special cases in which recent events have shown that it surely ought to be so, namely, when a state treats its own subjects or certain classes of them with gross inhumanity, and when it abuses its powers in order to 'condition' them for war upon their neighbours [2] The exercise of a right of intervention in such cases should probably be safeguarded against abuse by requiring the authorization of whatever international authority may be set up after the war

[1] The importance of this result in the case of the Kellogg Pact has been referred to on p 71, *supra*

[2] It is interesting to note that though the Atlantic Charter promises respect for 'the right of all peoples to choose the form of government under which they will live', it also says that we look forward to a 'destruction of Nazi tyranny' which is to be 'final' That seems to imply that we shall not again regard the reversion to barbarism of a state as a matter which only concerns itself This is a statement of policy, but its translation into terms of law seems to involve an extension of the right of intervention on the lines here suggested

VIII

INTERNATIONAL DISPUTES

'All thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need for change The social interest in the general security has led men to seek some fixed basis for an absolute ordering of human action whereby a firm and stable social order might be secured But continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests as well as to new modes of endangering security Thus the legal order must be flexible as well as stable ' (Roscoe Pound, *Interpretations of Legal History*, p 1)

ONE of the obvious functions of law in any society is to serve as a basis for the peaceful settlement of disputes among the members, and states have always been able to use international law in this way by setting up a court of arbitration Since 1921, too, they have been able, if they preferred it, to take their disputes to a standing court, the Permanent Court of International Justice at the Hague [1] The machinery of international judicature, as it already exists, is in the main satisfactory, it is in fact far ahead of international organization on any other side, and it is not likely that it will need any major amendment So far as institutions can make it easy for states to submit their disputes to judicial settlement, the present institutions do so There are certain advantages in a standing court, it

[1] Arbitration, as the Hague Convention for the Pacific Settlement of International Disputes lays down, 'has for its object the settlement of disputes between states by judges of their own choice and on the basis of respect for law' The distinction between a court of arbitration and a court of justice is therefore one of constitution and not of function, arbitrators are judges, but they are chosen by the parties to hear a particular case, whereas the members of a court of justice are appointed for a term during which they hear any cases that may be submitted to the court Both are equally bound to decide on the basis of the law, unless the parties have asked them to decide on other grounds, e g by applying special rules agreed on by the parties for the case, or *ex aequo et bono*, that is to say, according to the court's own view of what would be a just and reasonable settlement

can develop the law from case to case more systematically than can a court of arbitration, and it has a high symbolic value But it would be most unwise to take away the present alternative of arbitration and require all cases to be submitted to the Permanent Court, even if that were practicable, there will continue to be cases which states prefer, for one reason or another, to take to arbitration, and what matters is that disputes should be settled, and not that they should be settled by a particular procedure

But hitherto the submission of disputes to judicial settlement of any kind has been voluntary, and there is a natural and widespread feeling that this state of things is not satisfactory Some approach towards compulsory jurisdiction has indeed been made recently in two ways In the first place, it has become common for treaties to provide that if disputes arise as to the interpretation or application of their terms they shall be submitted to judicial settlement without it being necessary to make a special agreement to that effect when a dispute has actually arisen, and in the second place many states have accepted, though often with reservations which deprive their acceptance of much of its force, the so-called 'Optional Clause' of the Statute of the Permanent Court Under this they

'recognise as compulsory, ipso facto and without special agreement, in relation to any other member [of the League of Nations] or state accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning (*a*) the interpretation of a treaty, (*b*) any question of international law, (*c*) the existence of any fact which, if established, would constitute a breach of an international obligation, (*d*) the nature and extent of the reparation to be made for the breach of an international obligation '

But even with these alleviations it is difficult to defend

the present freedom which states retain to submit or not to submit their disputes to be decided on the basis of law, it means that they can, if they choose, interpose their veto on the regular course of justice so far as it would affect themselves The freedom can be and often is abused for reasons which are sometimes trivial, sometimes unworthy But it is easier to see that the present system is to be condemned than to suggest a remedy for it which is free from difficulty To demand that states should submit *all* their disputes to judicial settlement is a perfectionist policy which has not the slightest chance of being accepted even if it were more plainly reasonable than it is To some international lawyers this question of the willingness or otherwise of states to accept a comprehensive and compulsory system has become the acid test upon which the very existence of an international legal community seems to them to depend, but if they are right, it will only mean that states do not and are not likely to form a legal community within any period of time which we need consider But quite apart from its impracticability there is much to be said against the reasonableness of any such extreme demand

The analogy of the compulsory jurisdiction of municipal courts is in many ways deceptive For one thing they are part of an elaborate social organization which provides for the enforcement of legal rights as such, and there is no near prospect of that in the international field It is no answer to this objection to point out, though it is the fact, that states do habitually accept and carry out the judgment of an international court, even if it goes against them, so long as the jurisdiction of such a court is voluntary, they can and do count the cost before they make their submission to it, and if they are not willing to accept an adverse decision, they do not allow the case to come

before the court at all It is not safe to assume that this habitual acceptance would continue under a system of compulsory jurisdiction Then again it is not the case that *all* disputes are decided by courts of law within a state, we have already seen that many disputes between states are of a type to which states normally apply methods of settlement which are essentially political and not legal, their true analogy within the state is with the disputes of parties and large associations and not with those of individuals Further, the subjective element, which always exists in the process of adjudication, is much greater in international than in municipal adjudication For practical purposes decision according to law means decision according to that which judges say the law is, and in a developed municipal system of law the judges are provided with a vast store of precedents and enacted rules on the basis of which they form their opinions But that is not so when an international court has to decide a case, at any rate one the determination of which depends on the customary law, all judges *make* law in some degree, but international judges, from the nature of the system they have to administer, make it with a freer hand than municipal judges do, for they often have to choose between conflicting rules each of which is equally entitled to claim to be the true rule of law until the court has spoken. Lastly, the existence in the relations between states of the problem of 'peaceful change' is of itself sufficient to show that judicial settlement is not a method that can be applied to *all* their disputes with any assurance that the settlement by the court will be a true settlement in the sense that it will dispose of the dispute for the future, but it is convenient to postpone the discussion of this very controversial question

If then we reject the view that all disputes ought to be

submitted to courts of law, the question arises how to distinguish between those that it is reasonable to expect states to submit to this method of settlement and those for which it will be necessary to rely on some other procedure That question is often answered by saying that 'justiciable' disputes ought to go to a court, whereas 'non-justiciable' should be dealt with in some other way But these terms are only labels, and they are far from being self-explanatory They gloss over the real difficulty, for they imply that there are two distinct kinds of disputes, and that one kind is *intrinsically* suitable for submission to a court and that the other is not Unfortunately the matter is not so simple as that *Any* dispute is justiciable if the parties are willing so to treat it, because any dispute can be expressed in the form of a claim by one state upon another, and there is never any technical or formal difficulty which can prevent a court from declaring whether this claim is or is not well founded in law The difficulty is not that a court cannot decide a dispute, but that the parties or one of them are not willing that it should Their quarrel may perhaps not relate to their respective legal rights at all, those rights may be known already without any declaration of them by a court, and the dispute may have arisen because one or other of them is dissatisfied with its rights and thinks that they ought to be changed in its favour For example, a dispute about territory is not necessarily settled when the law has declared that it belongs to state A rather than to state B, any more than one about wages would be settled by a declaration that the rate claimed is or is not due under some existing agreement In such cases a decision on the basis of law as it exists is only too likely to leave the dispute to continue on the plane not indeed of law, but of interests. In the last resort there is no escape from the fact that judi-

cial process, national or international, can settle a dispute in the sense of finally disposing of it only on one of two conditions, either the parties must be willing, or they must be compellable, to accept their rights according to law in full settlement of their demands

In its present form therefore the distinction between justiciable and non-justiciable disputes does not help us because there is no objective test for its application, it turns on the attitude of the parties to the subject-matter of their difference Before we can say whether any particular dispute is justiciable or not we have to ask how the parties regard it, and that throws us back to the unsatisfactory position from which we are trying to escape, in which each party is free to withhold a dispute from judicial settlement at its pleasure

Is there then no way out of this apparent impasse, no arrangement which will secure that states should be obligated to submit to courts of law those disputes which it is reasonable should be submitted, but those only? We have seen that disputes do not of themselves fall into these two distinct categories On the other hand, it ought to be possible to single out certain common subjects of disputes and for states to undertake to regard these as always justiciable, and probably this method, one of enumeration rather than of definition, is the most promising line of advance It is the method used by the Optional Clause, and the first two of the matters mentioned in that clause, the interpretation of treaties and questions of international law, probably cover between them far the majority, though as we shall see not the most dangerous, of the matters about which states quarrel We cannot be sure that even the interpretation of treaties will not raise issues of high political importance, but it does not often do so, and on the whole it seems reasonable that states

should not be able to withhold them, as they can at present, from judicial settlement It is perhaps more doubtful whether, in the present state of the law, it is reasonable to expect them to submit, without any reservations, every dispute which concerns a question of international law, for so wide a commitment raises at least two difficulties one that, as pointed out already, the uncertainties of the customary law extend the discretionary powers of the court beyond those that are normally entrusted to judges and so introduce a strongly subjective element into their decisions, and the other that, as there is no time limit in the present international law, corresponding to the rules of prescription in municipal law, for the bringing forward of claims, it may lead to rights, and especially titles to territory being brought into question, when they ought in justice to be protected by long enjoyment But it is not necessary here to draft the details of the commitment that states might reasonably be expected to undertake, it is enough to suggest that the true line of progress from the present indefensible freedom to withhold their differences from judicial settlement whenever they think fit lies in persuading them to enumerate the kinds of disputes which they will agree to regard as in all circumstances justiciable

But important as the future of judicial settlement is for the progress of international law, it is not the most important part of the whole problem of the settlement of disputes. The most difficult disputes, those that endanger international peace, are never likely to be settled by courts, the disputes which endanger civil peace inside the state are not settled in that way either Consequently a more important question is how those disputes which cannot be settled judicially are to be dealt with It is no use, even if it were right, simply to say that if states will not be

content to receive their legal rights nothing shall be done about their demands On the other hand, in any society that aspires to live under law there is, and there always should be, a bias against the satisfaction of demands which are not based on the law as it exists For law by its very nature is a conservative force This bias, too, ought to be stronger in international than it is in municipal law, for whereas the latter has to adjust the ever-shifting demands and interests of millions of people jostling one another in close and continuous relations, the states with which international law is concerned are few in number, and their needs are far more stable and therefore do not constantly call for fresh adjustments This is not to say that in international law no problem of change exists, but only that we should see that problem in its proper focus So much has been said and written in the years between the wars about the urgency of the need for new methods of peaceful international change that there is a real danger of getting the problem out of focus altogether Almost before the ink was dry on the settlement of 1919 an agitation was started for its revision Well-meaning people, and others who were not so well meaning, tried to prove, or more often asserted without worrying over the question of proof, that the treaties had been a monument of injustice, and that unless they could be quickly altered the world would be headed for a new war They had very little thought to spare for the sheer complication of the issues on which the treaty-makers had had to take decisions, and they did not ask whether, if their decisions had been different, as great or greater grievances would not have been created for states other than those which appeared to them to have been hardly treated. Instead of arguments we were offered clichés about the essential 'dynamism' of international relations, or about the danger

of allowing a division of states into 'haves' and 'have-nots' to continue, until one might almost have supposed that the mere fact that a state was dissatisfied was enough to create a bias in favour of changing the law to its advantage It is important therefore that from the outset we should try to get a clear picture in our minds of the real nature and extent of the contribution that we expect a procedure of peaceful change to make to the international order [1]

We are presumably entitled to assume that the object of such procedure would be to facilitate the making of changes when changes are just, and not merely when they are politically expedient No doubt expediency will continue to be a factor in international relations even if the maintenance of order becomes more firmly assured than it

[1] It is misleading to refer, as is often done, to the problem of peaceful change as a problem of the 'revision of treaties' The revision of treaties is only one aspect of it, and that a minor one The grievance which a state desires to have removed may indeed be a burden that some treaty imposes on it Thus when Turkey demanded at Montreux in 1933 that the régime which the Treaty of Lausanne had established for the Bosporus and the Dardanelles should be amended, she was asking for the revision of a treaty which was still in force and still creating obligations which she regarded as burdensome But this is not the most common case As a rule when a state puts forward a grievance against the existing order it does not ask to be relieved from some continuing, or as lawyers would call it some still 'executory', obligation of a treaty which is still in force, it asks that some established condition of things—and an existing frontier is the commonest and the most difficult case—should be altered to its advantage That condition of things may have originally come into existence by virtue of a treaty, or it may have arisen in some other way, the problem is exactly the same in either case Even if it did arise out of a treaty, it is a misuse of terms to say that when it is altered the treaty is 'revised', just as it would be absurd in municipal law to describe a conveyance of property as a 'revision' of some earlier conveyance under which the grantor had acquired it The treaty, like the conveyance, is merely a link in the chain of events which has brought about the situation or condition of things which is now being revised Most treaties do not create permanent obligations, and the revision of treaties in the proper sense of the phrase only exceptionally creates a difficult problem, hence if peaceful change is identified with it, it is made to appear a less difficult problem than it really is

has been, and changes will be made, as we know they often are inside the state, not because they are just, but because they are demanded by those who have the power to make their demands prevail It is often comforting to our self-respect, too, to confuse the two motives, to persuade ourselves that we are promoting justice when we are really only appeasing the strong, many people defended Munich to their consciences on this ground But no one would suggest that we need some improved international procedure for bringing about changes which are in the nature of 'appeasement'. The only legitimate object of such procedure would be to ensure, so far as we can, that when a demand for some change is put forward by a state, the justice and not merely the expediency of acceding to it shall be fairly considered, and that the change shall be made if it is decided that it is just, but not otherwise

Now it can be agreed without any reservation at all that to remove injustices from the international order is a worthy aim for its own sake Not only that, but the existence of injustices is an irritant which may make the peace more difficult to maintain than it need be, and their removal therefore is yet another way in which 'good laws' can be used to sustain 'good arms' But in the practical working out of this admirable ideal we shall find that certain factors present themselves which it is easy to overlook while the question is merely being considered in the abstract

One such factor is that in many, perhaps in most, of those differences between states which arise out of the dissatisfaction of one of the parties with things as they are there is no single solution which can be called 'just' in contradistinction to other possible alternative solutions, and even more rarely any which both the parties concerned are likely to consider just. Nearly always the

business of settlement is one of balancing one against another interests which are not merely diverse but actually incommensurate The same question, for example, often involves political, strategic, economic, and even sentimental or historical interests, and all these interests may deserve to be weighed in the account because all of them may be reasonable interests in themselves, yet in the imperfect world in which we have to live they cannot all be satisfied by any conceivable solution because they conflict with one another The Polish-German frontier, which provided the occasion for the present war, is a striking illustration of this kind of difficulty We may call it 'unjust' that East Prussia should have been cut off from the rest of Germany by what German propaganda succeeded in making most of us call 'the Polish Corridor', but would the settlement have been more 'just' if it had adopted the only alternative solution of barring Polish access to the sea and leaving in Germany a considerable population which was non-German in race and sympathy? Some of the perfectly legitimate interests of one side or the other or of both had inevitably to be disregarded in any possible settlement of that intolerably complicated question, and the settlement that was actually adopted by the Peace Treaties of 1919 was the result of a meticulously careful attempt to weigh one interest against another and to lay down an arrangement as nearly just as the circumstances allowed Those circumstances were not created by the makers of the peace; they were the product of geography, of economics, of centuries of history The settlement left grievances behind it, and because it satisfied neither party both of them regarded it as 'unjust', whereas in fact it was precisely the kind of settlement that a procedure of peaceful change in working order, and having for its object the promotion of just settlements,

would probably have arrived at It was not because it was unjust that it led eventually to trouble, but because the justice which it tried to establish had not been provided with a backing of power It had been assumed apparently, as many of the arguments for peaceful change still assume, that justice would be self-maintaining

There is another important fact which is too often overlooked It concerns the relation of peaceful change to the general problem of order It is often lightly assumed that the reason, or at least a very common reason, which induces states to resort to war is that at present international affairs are so ordered that war is the only method which gives them the prospect of satisfying their just and reasonable demands But the facts of history do not support this simple explanation of the nature of the impulse which leads states to war They do not make war in order to get something which a better arranged international order would give them without their having to fight for it No doubt if we search the records of past wars we may be able to find here and there a war in which the aggressor has sought only what it was just and reasonable that he should have, but that is not a common case, it is not an accident that 'aggressor' has become a word of sinister associations In most wars the justice of his case does not enter into the calculations of the aggressor at all, except perhaps as a deception which deceives no one but himself, or as the tribute that vice finds it expedient for propaganda reasons to pay to virtue If, for example, the most admirably devised machinery of change had been instituted after the last Great War, and if it had remained in perfect working order correcting injustices as they were brought to light in the years between the wars, it would not have averted a single one of those wars, or of the even more numerous aggressions which only failed to lead to war

because the victim was too weak to resist Peaceful change has been too often recommended to us as if it were an alternative to power in the organization of security, a sort of 'soft option', for why, it is argued or implied, should states want to fight if they can get their just grievances redressed by a peaceful procedure? Of course the answer is that whereas peaceful change would give them what it is just that they should have, war, if it succeeds, will give them what they want, and it is a dangerous self-deception to suppose that these two things coincide On the contrary, a procedure of peaceful change will itself depend absolutely for its working on a prior assurance of a stable order, and like all other proposals for the better development of international law, it leads us back to the fundamental question of security Without a solution of that problem, whatever we build will be built on the sand [1]

One further general consideration Is the present order as full of remediable injustices as we sometimes suppose? It is full of dissatisfactions, of unrealized national ambitions, of inequalities between states, but most of these grievances do not have their source in the state of the existing law, most of them are created by geography, or climate, or the distribution of nature's resources, or by historical events which happened centuries ago When

[1] Sir Norman Angell made this point as long ago as 1936 'It is fashionable', he wrote, 'just now to point to the redress of grievances, or of injustice, as the road to peace, and in a sense to regard such redress as an alternative to the coercive functions of the League Now surely on that point we have had experience Suppose that we could ensure the most thorough-going revision imaginable, so favourable to Germany as to go beyond all German dreams, giving her back all that she had in 1914 Would it give us much assurance of peace? We know by experience that redress of grievances, the granting of equality of economic opportunity, revision to that impossible degree, would in fact be no guarantee of peace at all Because when Germany was in that situation, enjoying all these things, she, like other European states, was a factor of disturbance' (*The Future of the League of Nations*, p 35)

these things can be remedied or alleviated by changes in the law, it is right and necessary that those changes should be made, and that is why, even when we have made due allowance for the considerations which have been advanced above, peaceful change remains a problem which deserves serious consideration But it will be well if we do not pitch our hopes too high

Any machinery of peaceful change must aim at ensuring that when a state has some grievance under the existing law, the justice or injustice of changing the law in its favour shall be considered as fairly as possible in some form of third-party procedure Hence there arises at the outset of any discussion of ways and means a question of the powers that should be entrusted to the body, whatever it may be, which is to be charged with the examination of a demand for change Should this body be empowered, if the parties cannot be brought to settle the difference for themselves, to settle it for them, or should it merely recommend the settlement that it deems reasonable in all the circumstances of the case and try to induce the parties to accept it? The disadvantage of a body with merely advisory powers is obvious, for there is no certainty that the process will lead to a settlement at all, whereas if a decision can be given which the parties will be bound to accept, a settlement, at least on paper, is assured

Plans for an authority with power to decide fall into two main types according as their authors regard this function of deciding as a judicial, or as a political, one To the former type belong plans for what has sometimes been called an 'equity tribunal', that is to say, for an arbitral body authorized to depart from the legal rights of the case if it thinks that a legal decision would not also be a just one, and to decide *ex aequo et bono*, according to

the arbitrators' own sense of what would be the justest and most reasonable settlement But to this kind of proposal the objections are overwhelming These arbitrators would not be judges, and yet they are to exercise a judge's powers Judges can be entrusted with a power to decide issues even of momentous importance for the parties that come before them, whether these are states or individuals, because, though a subjective element can never be wholly excluded, the law does provide an objective standard which does not depend on their own individual preferences or idiosyncrasies But the members of an equity tribunal would have nothing but their own feeling for what is just and reasonable to guide them to a decision, and however earnestly, and indeed successfully, they might try to view the issue objectively, to rise above any kind of bias to which their training or their temperament might incline them, their decision, from the very nature of the case, could never be anything but arbitrary They would be empowered to make far-reaching changes in the existing rights of states, to order, for example, the transfer of territory from one state to another, without being accountable to anything but their own consciences, and without having any responsibility for the consequences to which their decision might lead The argument that English judges decide according to 'equity' is merely verbal, for English equity is something quite different from the equity that this tribunal would apply, English equity is merely one element in the English legal system and just as fully law as any other element in it, although for historical reasons it is called equity and not law Neither in England nor in any other constitutionally governed state does any body exist which exercises a power of altering established rights, even the rights of individuals, which is at all comparable to the power that this

equity tribunal would exercise over states, and its true nature would not be altered by dressing it in the outward trappings of the judicial process For essentially it would be not a judicial power, but a power to legislate, and whatever the future of international legislation may be, it is certain at least that it will never be entrusted to a few irresponsible individuals however eminent and fair-minded [1]

Proposals of the second type do at least recognize this basic fact They would entrust the decision to a political body, such as the Assembly of the League, and a few very simple drafting changes in the Covenant would convert some of its articles into a scheme of this kind Thus under Article 19 as it stands the Assembly has power to 'advise' the 'reconsideration of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world'. So, too, under Article 15 the Council, when considering a dispute, is directed to publish the 'recommendations which are deemed just and proper in regard thereto', and nothing prevents the Council from deeming it just and proper that some change should be made in the existing legal rights of the parties before it But it is only from the draftsman's point of view that it would be a simple matter to change these powers of 'advising' and 'recommending' into a power of deciding, actually that would be to introduce a revolutionary change into international organization, and though of itself that may be no reason why we should reject it if it can be shown to be

[1] An 'equity tribunal' to which recourse would be voluntary is of course a totally different proposal States have often agreed to ask a court of arbitration to decide not merely what their rights are, but what they ought to be in relation to some particular matter, and no doubt they will do so in the future, though the matters which they have allowed to be settled for them in this way have never been of more than secondary importance

both desirable and practicable, whether it is so is the very point at issue [1]

Some reasons have been given earlier for thinking that there is no present prospect that states will abandon the practice of insisting that in all important matters their legal rights shall not be changed without their own consent But the effect of the proposal which we are now considering would be to place all the rights of a state at the mercy of the authority to which this power of deciding on peaceful change had been entrusted, that authority need only say that for reasons which seemed to it to be good a state should surrender some right at present belonging to it, the right, for instance, to some piece of territory which the other party to the dispute covets, and that state would be bound to do so That would create something very like a world federation, but minus the safeguards that are essential to protect the rights of federated states For even when states federate they do not make a sacrifice of their independence anything like so far-reaching as is here proposed, they delegate some of their original powers to a central government, but these delegated powers are always limited powers which are carefully defined in the federal constitution, and at the same time this constitution secures that the powers which are not to be delegated shall be beyond the reach of any organ of the central government In regard to these reserved rights the federating states remain, to use the catch phrase, 'judges in their own cause' Thus in the American Union neither Congress nor any other federal body can alter the boundaries of a state of the Union without that state's own

[1] In 1930 a committee of jurists appointed by the Council of the League did propose that a recommendation made under Article 15 should be binding on the parties to a dispute, provided all the other members of the Council were agreed in making it, but nothing came of the proposal

consent to the change, and in the Australian Commonwealth the federal Parliament can alter a state's boundaries only with the consent of the Parliament, and with the approval of a majority of the electors, of that state More-over, it is an essential feature of federalism that the central government should be responsible, not merely to the governments, but to the peoples of the constituent states, and this security too would be wanting in this proposal Yet federated states are far more closely bound to one another in interest and sentiment than are the independent states of the international society, and it is unreasonable to suppose that the latter either will or ought to go farther in surrendering their rights of self-determination to some central authority than do the former If an international authority wielding legislative power over states ever does come into existence, its powers are certainly likely to be narrower and not wider than those that are normally entrusted to the legislature of a federation

It may, however, be objected that this difficulty at least could be overcome by the adoption of an international constitution, under which states could be given the same kind of protection for those rights that they do not wish to surrender that federating states enjoy That could in theory at any rate be done The objection is that every state would then certainly insist on safeguarding just those rights for the changing of which a procedure of peaceful change is generally regarded as being desirable, they would, for instance, probably be unanimous in saying that no change should be made by the authority in their territorial boundaries, and there would be other interests which they would say were vital to them and therefore ought to be reserved Unfortunately it is just these vital interests, and particularly the matter of territory, that lead to dangerous international frictions, and a procedure

which had to exclude them would fail in its chief purpose The comparable interests of the member states of a federation can be reserved in this way without impairing the effectiveness of the arrangement because it can be assumed that they are unlikely to be challenged, the very possibility of forming the federation at all and its continuance depend on a tacit agreement that the *status quo* on these matters is satisfactory to all concerned A system under which the boundaries of, say, Virginia can in no circumstances be changed if Virginia objects can work because it is unlikely that any other state will very much want to change them. But that condition is absent in the international field, and because it is absent, a supra-national authority with the limited powers that are ordinarily delegated to a federal authority would leave the most difficult part of the problem of peaceful change unsolved That, however, does not make a supra-national authority with unlimited powers of ordering changes in rights any the more a practicable proposal

Another matter which cannot be left out of account is the question how the decisions of an international body, whether of the judicial or the political type, in which power to order changes in the rights of states had been vested, could be enforced No doubt if the state from which the decision required a sacrifice were a weak state and without powerful friends, it might be coerced into compliance without much difficulty That has often happened in the past when the Great Powers have been agreed amongst themselves in demanding some concession from a weak Power in the interest or supposed interest of the general body of states, without any formalized procedure of peaceful change the Great Powers decided at Munich that Czechoslovakia should surrender the Sudetenland, and she accepted the decision because she could do nothing else But when we are devising a method of peaceful

change by due process of law, we cannot be content with one that would work only against a small and weak state, it must be one in which the decision will be given, and if necessary enforced, without either fear or favour. Unfortunately it is always possible that enforcement might need the use of armed force, and if we believe in the practicability of a compulsory system of peaceful change, we must be prepared to say how this force is going to be provided. It does not seem realistic to suppose that states will bind themselves to use their armed forces in order to compel other states to accept changes in which they themselves have no direct interest merely because an international authority has decided that the changes are 'just and proper' ones

It looks therefore as though the only kind of procedure of peaceful change that is likely to be practicable in any future with which we need concern ourselves is one in which third states may be able to influence, but not to decide, the manner in which a demand for a change in legal rights is to be dealt with This may seem a disappointing conclusion, and it will probably be pointed out that Article 19 of the Covenant was a plan of that kind, that only one or two attempts were made even to invoke it, and that nothing came of any of them But the very failure of Article 19 reinforces this conclusion It had probably little, if anything, to do with the wording of the article, though that might have been improved [1] The

[1] For example, the word 'inapplicable' was so narrowly interpreted that it made the part of the article relating to the reconsideration of treaties to all intents and purposes unworkable, and since the Assembly's only power was to 'advise', it is hard to see why it should only have been allowed to advise on 'international conditions' which were so serious as 'to endanger the peace of the world' Why should not the Assembly have been allowed to consider *any* grievance which a state might think it worth while to bring before it? But, as Professor Rappard says (*The Quest for Peace*, p 176), 'I cannot see any real connexion between the rigidity and consequent impracticability of

really significant fact about the matter is that throughout the years between the wars treaties were continually being revised and international conditions were being changed by other methods The neglect of the article cannot therefore have been wholly due to the obstinate determination of states to stand on their existing rights, though no doubt there were some matters which it would have been hopeless to raise under any form of procedure, the question of frontiers was certainly one of these Yet the matters in which changes were being peacefully made were neither unimportant nor uncontroversial, as, for instance, the Reparations question, and the régime of the Dardanelles and the Bosporus Why was it then that states preferred to use the methods of old-fashioned diplomacy and to disregard the new machinery which one would suppose had been devised for exactly such purposes as these?

No doubt there was more than one reason, but it seems likely that once it is accepted that changes in the rights of states are not to be imposed on them by an international authority, and that the only practicable method is somehow to persuade them to accept changes when it is in the general interest that they should do so, a formal specialized procedure ceases to be either necessary or desirable Such an issue needs to be approached cautiously, the parties directly concerned must not take up positions at the outset and inform the world exactly where they stand, as under a set form of procedure they are tempted to do, and the mediating or conciliating action of third states must allow of tentative suggestions which can be withdrawn or modified or pressed further according to the

Article 19 and the wars that have been waged against members of the League in the course of the last years No matter how generously the framers of the Covenant might have provided for the pacific revision of international treaties, they could not have made legally possible such events as the rape of Manchuria, Abyssinia, Czechoslovakia, Albania, and Poland '

way in which the issues develop Article 19 had assumed that the question of changing rights is a question which can be isolated from its context and treated as a problem to be solved independently, but in practice that is not how it presents itself, it more often arises incidentally in the consideration of some wider question, especially as one of the possibilities that come up for examination in the ordinary course of the settlement of a dispute. Actually that was how it did come before the League, for the failure of Article 19 did not mean that the League never had to consider the question of peaceful change When the Council had to deal with a dispute under Article 15, it assumed as a matter of course, though the article contained no express provision to that effect, that it had the right to recommend as 'just and proper' terms of settlement which would involve changes in the rights of the parties For example, in the dispute which arose out of the action of Japan in Manchuria in 1931, the Council adopted the report of the Lytton Commission which had recommended very extensive changes in the existing relations between China and Japan in Manchuria In that case the attempted settlement did not succeed, but the failure was not due to any defect in the procedure, but to the belief of Japan that by flouting the League and relying on her own superiority of power she could obtain a settlement which would be more favourable to herself than the justice of the case entitled her to Japan knew that the League's system of collective security was only a paper system, and that the members probably could not, and certainly would not, honour their obligations under it, and the event showed that she was right One lesson at least that we ought to learn from the League's attempt in the Manchurian episode to effect a peaceful change in established rights is that a system of security in which states can have

confidence is an absolutely essential condition to the success of any plan which has for its object to ensure that when changes are made in the international order it shall be on the basis of justice and not of naked power Not only that, but it is impossible to imagine a system of collective security which would not also incidentally be a system for the consideration of peaceful change, for the aim of any security system is to deal with threats to the peace, and since such threats more often than not arise from the dissatisfaction of some state with the existing order, the security system must necessarily provide for the consideration of the grounds of this dissatisfaction and of the question whether some concession should or should not be made to the dissatisfied state Even so, we cannot expect that the influence of power will be wholly eliminated, it has not been eliminated in the state in spite of all its advantages But in the state the demand of a class or section to have its grievances redressed normally has to commend itself as reasonable to the rest, and it is put forward within, and subject to the restraints of, a system which rules out the use of power at least in its more violent forms The same safeguards, provision to ensure that the sentiments of other more or less disinterested states shall be able to influence the issue, and reasonable assurance against the use of armed force to back a demand, will be equally necessary internationally 'Willingness to accept a system of peaceful change', as Professor Quincy Wright has said, 'is dependent upon general confidence in a system of collective security If the states are convinced that they cannot be deprived of their rights by violence, they may be willing to yield certain rights in the interests of justice, especially if the world community is organized to exert political pressure to that end '[1]

[1] *A Study of War*, p 1323

From the nature of the case the procedure for bringing to bear this influence of third states cannot, as has been already said, be prescribed in detail, only the outlines can be drawn beforehand in a formal document But the two essentials seem to be the constitution of some form of international standing conference, and an obligation on states to submit their disputes to such a body, not indeed for decision, but for consideration The lines upon which this body should proceed should be laid down in very general terms, but we know from the invaluable experience of the League the kind of agencies that it would be able to use The Council of the League was a permanent body, the members of which acquired the habit of working together, it was served by an efficient secretariat, it could conduct inquiries and receive advice from committees chosen with the qualifications likely to be most useful in the circumstances of the particular matter in hand, whether political, economic, legal, or technical It has been objected that the Council was a political body, and that its members sometimes allowed political considerations, and not solely the merits of a question, to influence their conduct No doubt there is some truth in the criticism, but it is one that might be brought against the members of any body, international or national, whose business is to take decisions on matters of policy

This discussion of peaceful change may have seemed to be a digression from the question with which we started, which was how those disputes which are not settled judicially on the basis of the legal rights of the parties as they are, 'non-justiciable' disputes, if we like to use the term, can be disposed of But it is not really a digression, for peaceful change, as has been implied already, is not a separate problem, but rather a particular aspect from which this general problem can be viewed. To provide

the means of facilitating international changes is in fact merely a method which has seemed to many to offer the best hope of solving the problem of justiciable disputes, and all that has been said of it in this chapter will apply equally to any other formalized method aiming at the same object But there is one criticism which the views that have been here advanced naturally invite about which perhaps a word should be said It may be objected that they offer no absolute assurance even in theory that *all* disputes will be settled somehow. That is true, and yet no sensible man expects to find such an assurance in the institutions of our national public life, which is in fact littered with unsettled controversies which often remain open for generations, although men on both sides may feel about them deeply It is probably because for most of us international affairs are remote from the things we understand from personal experience and therefore only half real, that we persist in assuming that there must be some device which will promptly and infallibly give their quietus to all our international differences, if only we can find it But that is to imagine that international affairs are more malleable than national, whereas in fact they are unfortunately far less so

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