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In a society of independent states there is no law-making authority, nor is there any general and regularly functioning system of courts. But the need for development—the need for change—is no less urgent in the international society than it is in any civilised state. How is this need to be met ?

The author examines the underlying causes which make changes necessary, the various processes by which they are accomplished and, finally, recent developments in the law of nations.

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THE CRISIS
IN
THE LAW OF NATIONS

By

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PREFACE

THE greater part of this book incorporates the substance of five lectures delivered at the University of Istanbul during November, 1946. Two of the lectures, with some modifications, were later repeated at Athens. The sixth chapter has recently appeared in *International Affairs* and is now reprinted by the courtesy of Chatham House. The seventh is mainly new.

The people of both Greece and Turkey are fully aware of the dangers with which they are now threatened, and this consciousness of a common peril has, at any rate for the time being, created a sense of solidarity between them such as has not been known since the storming of Constantinople by Mahomet II. Some of those who heard me said that my lectures were ' pessimistic ', others that they were ' realistic ', and I would not dispute either of these epithets. I can only say, though without claiming the authority of an expert, that both the pessimism and the realism are those of a physician honestly trying to make the diagnosis of a very serious case. In the last chapter I have ventured to hint at a possible remedy, but without any illusion that the remedy is either quick or easy.

In case this little book should be read in either of the countries which I visited I should like to express my very warm appreciation of the hospitality which I everywhere received, and also of the attentive patience with which unexpectedly large audiences listened to lectures in a foreign tongue.

H. A. SMITH

Childrey, Berks.

March 1947.

Chapter 1

THE PROBLEM OF CHANGE

INTRODUCTION

If the law of nations changes, as it must change, how and why are these changes to be made? All those who have been actively concerned with the practical application of the law during recent years are conscious of this problem. We have all found that the standard textbooks do not give us answers to the questions which the course of events compels us to ask. This applies, not only to the ancient and classical works, such as those of Grotius and his successors, but also to those books which are generally accepted as authorities in our own day. Sometimes an answer is given, but it is expressed in terms which have no real application to the practical problem which we are called upon to solve. More often there is no answer at all, since the authors whom we consult have never envisaged the situation with which the lawyer of today finds himself confronted. As we study these books we seem to be looking at the picture of a world which has largely passed away. The language in which the authors write, and the ideas which they seek to express, belong to the later years of the nineteenth century and the opening years of the twentieth. But the world in which we now live is more remote from that of our fathers than that of our fathers from the age of Grotius. Indeed we may go further and say that the world has changed more in the last fifty years than it did in the previous five hundred.

This problem of change is of the first importance, not only to the scholar and the lawyer, but also to the statesman. We are concerned, not only with changes in the general rules of law, but also with the problem of effecting by lawful means changes in the political and territorial situation which at any

given time results from the operation of those rules.[1] The function of law is to give expression to justice, but the perfect achievement of this purpose is one which human law can never fully attain. Perfect justice is an attribute of God, and of God alone. Law is made by man, and in an imperfect world there must always be a large gap between the actual works of man and the perfect achievement of the will of God. In other words, the law is never the perfect expression of justice, and the political situation which at any given moment results from the law is never that which ideal justice would prescribe. Just as in our personal lives our duty is that of constant self-improvement, so in that common and corporate life which is ruled by law it must be our unceasing endeavour to be continually amending and improving the law in order that we may make it, so far as lies in our power, a more nearly perfect expression of perfect justice. For this reason every state, every political society, finds it necessary to have some law-making authority to study the need for changes in the law and to make such amendments as are required by its own ideas of what justice demands. Again, every state has an organised system of courts, and these courts also have their function to perform in the development of the law, applying and interpreting the rules laid down by the supreme authority in such manner as the needs of the community may demand.

In the society of independent states there is no law-making authority, nor is there any general and regularly functioning system of courts. But the need for development, the need for change, is no less urgent in the international society than it is in any civilised state. How is this need to be met? Can the law itself, and the political situations which result from the law, be changed by lawful and peaceful means when the

[1] The Security Council of UNO now has the power, if the "Big Five" and two other members can agree, to make territorial changes even against the will of states concerned. But the problem of territorial changes is beyond the scope of this book. The power of the Council is limited to cases in which there is a threat to peace, and at present the likelihood of it being exercised is remote. See Chapter vi.

international society is not equipped with any institutions for making these necessary changes? Is this in fact achieved, and, if so, how is it achieved?

Let us begin by examining the underlying causes which make it inevitable that changes should take place. Then let us consider the various processes by which these changes in the law have been, and are still being effected. Finally, we shall examine in more detail a few particular matters in which the consequences of recent developments are most apparent. As might be expected, it is chiefly in the law of war that changes have been most striking and most rapid.

The causes which bring about changes in the law of nations are essentially the same as those which produce changes in the national law of particular states. That is to say, they are the response of the law to demands made by the society which the law purports to control, or at least by those who bear rule in that society. It is a great mistake ever to consider human law as an abstraction, as something existing by its own power above and outside the community which it claims to govern. At our own level all law is made by living men to serve some human purpose which they consider to be desirable. There is no law without some purpose, whether that purpose be wise or unwise, good or evil. In other words, all law is functional, in the sense that it expresses an attempt on the part of those who make it to regulate the conduct of a particular community in some particular way.

That is the reason why the laws of particular states differ so widely from one another. So long as the world remains various the law must also vary from place to place. So long as the world continues to be inhabited by communities holding different religions and inheriting different kinds of civilisation, so long it must be impossible for the whole world to be governed by a single system of law. For example, the law of a Moslem state can never be the same as the law of a Christian state, except in so far as the Christian and the Moslem religions are agreed upon the rules which should govern the conduct of men. If a single political power, such as the Turkish Empire

or the British Empire, rules over several communities which differ widely in race, religion, and civilisation, it is impossible for the law to be uniform throughout the territories of such a state. The political unity of the state can in such cases only be preserved by a wise toleration of internal differences.

For the same reason, any important changes of ideas which occur within a political community will soon find expression in the development of the law. Thus the adoption of Christianity in the Roman Empire gave a new form to the Roman law, and so the civilisation of western Europe came to be established upon a Christian foundation. When the nations of western Europe some centuries later expanded their boundaries by discovery, colonisation, and conquest, they carried with them their religious and legal inheritance, so that in the course of time a very large part of the world came under the influence of the Christian religion and the Roman law. In the same way the Moslem conquests carried the Islamic faith and the Islamic law into these countries which came under their control.

But is is not necessary to look back to distant centuries in order to find examples. Within our own generation we have seen in Turkey the far reaching changes which have been introduced under the leadership of Kemal Atatürk. All that need be said of them here is they are the result of new ideas which have come to be widely accepted by the Turkish people, and that they have produced profound changes both in the Turkish law and in the social structure of Turkish life. Unfortunately it is also true that in other countries the advent of new ideas has produced disastrous results, both in law and in politics. In those countries which have unfortunately fallen under the power of false and evil doctrines not only has the national law been corrupted and the ideal of justice perverted, but the law of nations has been treated with contempt, thus plunging nearly the whole world into war and revolution. It cannot be emphasised too strongly that both the horrors of the war through which we have just passed and the grave perils with which we are now faced are the direct result of the fact

that the false doctrines preached originally by a few have been willingly accepted by millions of men and women. We can never hope for a true and lasting peace until these false doctrines, whatever form they may take in different countries, have been driven out, and their places taken by those true principles of law and justice upon which all right thinking men are agreed.[1]

What is true of national law is equally true of the law of nations. This is not the place to discuss the natural or divine law to which all human law should endeavour to conform, but only those rules of international conduct which have been made by men in an imperfect world. Like the law of particular states, these rules are functional, in the sense that they have been devised with the purpose of regulating the conduct of independent rulers and powers under the political conditions prevailing at the time when the rules were made.

THE EUROPEAN SOCIETY OF THE SIXTEENTH CENTURY

Let us now consider for a moment the character of the international society as it was at the time when the earliest attempts were made to draw up rules for its conduct. The first exponents of the law were the canon lawyers of the western Church. The task which they set themselves was that of drawing up a body of rules which, it was hoped, might be accepted by a large number of independent princes who recognised no earthly superior. In the absence of any common authority the only hope lay in the acceptance of some common principles, and in western Europe, as it then was, the only possible common ground lay in the combined authority of the Christian religion and the Roman law. For this reason the law of nations in its earliest form was Christian and Roman. It was the child of the international society into which it was born.

At ths point we should note two important differences between that society and the international society as we know it today. The first difference lies in the fact that the geographical area to which the earliest law applied was very

[1] Upon this see ch. 7.

small. Today we think of international law as a body of rules which applies equally, or at least claims to apply equally, to the whole world. But this is a relatively modern conception. The world with which the canonists were concerned was limited to those parts of the former Roman Empire which had not been conquered by the Moslem invasions, that is to say, to what we now call western Europe. The canonists were practical men, and they did not waste their time drawing up rules for those who were not likely to accept their authority. Nor did they address themselves to the vast expanse of eastern Europe which we now call Russia, of which they knew and cared but little. They only thought of Russia as a semi-barbarous country which, although Christian, did not accept the teaching of Rome. Between Russia and western Europe there was little trade or intercourse, little common culture, and no exchange of ideas. For different reasons we are witnessing something of the same kind today, and perhaps we shall find the isolationism of modern Russia easier to understand if we remember that it is in part an inheritance from the past.

Thus we see that the law of nations, in its earliest form, was only intended to apply within an area which to our eyes seems very small, a continuous stretch of territory within which there was a large common ground of religion and of law, of political institutions and of social traditions. But there is also a second point in which the international society of the later Middle Ages differed from ours. Though the geographical area to which the law applied was very small, the number of independent units within that area was very great. In the whole world, as we know it today, the total number of sovereign and independent states is perhaps sixty or seventy. Under present political conditions it is not easy, and perhaps it would even be indiscreet, to give a more precise figure. But in the sixteenth century the number of rulers who claimed sovereign rights in Europe was something approaching two thousand. It need hardly be added that for the most part the territories of these rulers were very small. A very few have somehow managed to survive to the present day. We

may now regard such petty principalities as Andorra and Lichtenstein as picturesque curiosities, museum relics of a bygone age, but we should at the same time remember that they are the survivors of a class of sovereign states which was at one time normal in Europe.

Such was the character of the international community for which the fathers of the law of nations sought to lay down rules of conduct. Being practical men, they framed their rules with a view to the settlement of the kind of disputes which experience shewed to be most common. In that period what we now call the territory of a state was regarded as being the individual property of its ruler. Its ownership was therefore to be determined by rules similar to those which regulated questions of title to land between adjoining landowners. In the intricate society of Europe, as it then was, the title to state territory, like the title to privately owned land, depended upon such facts as wills, successions, marriages, sales, gifts, and exchanges. A ruler, like a private owner, could even hypothecate part of his territory to a foreign prince as security for the payment of a money debt, and the creditor could seize the land if the debt was not paid. It was in this way that the Orkney and Shetland Islands were transferred from Norwegian to Scottish ownership, later to become part of the territory of Great Britain. When we think of the vital importance of these islands in the two world wars, it is strange to reflect that they only became part of Great Britain because a Scandinavian king in the fifteenth century was unable to find the money to pay for his daughter's dowry.

THE PROBLEM OF WAR

At this point we must turn to consider the teaching of the early lawyers upon the most vital of all problems—the question of the right to wage war and the question of the rules, if any, which should govern the conduct of war. As practical men, they knew very well that it was impossible to abolish war, and that the best that could be hoped for was to bring it in some measure under legal control. The rules which they worked out fell under three main heads, and may be classified as

answers to three great questions. In the first place, who has the right to make war? The answer to this was that war can only be lawfully waged by a sovereign or independent ruler. Secondly, what are the causes which alone can justify a ruler in going to war? The answer to this was that war could only be lawfully undertaken for the reparation of an unredressed wrong or for the recovery of property of which the prince has been unlawfully deprived. Thirdly, what are the rules which should govern the conduct of war? So far as the answer to this question can be briefly summarised, it was to the effect that so much violence, but no more, might be used as was necessary in order to attain the lawful purpose of the war. Upon the answers to these questions depended the all-important decision whether any particular war was ' just ' or ' unjust '.[1]

In other words, the founders of the law of nations regarded a ' just ' war as a form of legal process for the enforcement of a legal right. Its function in the community of independent rulers was exactly equivalent to the function of litigation as between private individuals. If an individual is wronged and fails to obtain redress by agreement, he may bring an action against the wrongdoer in a court of law. In the same way, if one independent ruler is wronged by another and cannot obtain redress by peaceful means, he is entitled to go to war, since there is no common superior to whom the dispute can be referred for judgment.

At the time when the law of nations first began to take shape, this question of the right to make war was the fundamental question to which all other legal problems were subordinate. The right of war thus became the criterion by which all other legal rights were to be judged. A legal right in the international sense could indeed be defined as a right the violation of which entitled the aggrieved ruler to seek redress by war. In theory the right of a sovereign ruler to obtain redress by force of arms was regarded as the exact equivalent of the right of a private individual to seek redress in a court of law.

[1] I have not overlooked, but need not now discuss the problem of " just intention."

It need hardly be said that practice was very far from conforming to theory. The doctrine of the ' just war ' represented an ideal rather than a reality. It could never become a reality unless agreement could be reached upon a common authority which could determine disputes by applying the agreed principles to particular cases, and in this all-important matter the world of mediæval Europe was no more fortunate than the world of our own time.

THE WORK AND INFLUENCE OF GROTIUS

In the year 1625 the Dutch author, Hugo de Groot, whom the world calls Grotius, published his great work on ' The Law of War and Peace ', in which for the first time the whole mediæval system of the law of nations was presented to the world as a single and logical body of legal rules. The importance of Grotius lies in the fact that in reducing the mediæval system to its final and most perfect form he laid at the same time the foundations of the modern law. For this reason we may take the work of Grotius as our starting point when we come to compare the ideas underlying the traditional law with the new ideas which have brought the world to its present chaos. At this point we may try to summarise very shortly the ideas which Grotius, following in the steps of his mediæval predecessors, assumed as the basis of his work.

In the first place, he assumed that the many hundreds of independent rulers in western Europe, being reasonable men, might agree to accept a common body of legal rules which should govern their relations to one another.

Secondly, he assumed that such an arrangement was possible for two main reasons. In the Christian religion which they all professed they had a common moral standard of conduct, agreed principles for determining what was morally right or wrong. In the Roman jurisprudence they had a legal code which was capable of expressing those agreed moral principles in terms of positive law.

Thirdly, he assumed that the legal rules which govern ordinary men in their daily life were equally adequate for controlling the international relations of independent rulers.

These assumptions should be borne in mind when we come to discuss the ideas, confused and conflicting, which govern the relations of independent states at the present time.

Within the limits of this chapter it is not possible to trace the development of the law from the time of Grotius down to the end of the nineteenth century, nor is it necessary to do so. The changes which are of most fundamental importance have all taken place within living memory. It is indeed a remarkable testimony to the essential wisdom of the mediæval system, as set forth by Grotius, that it was accepted in all its main principles from his time down to our own. In one respect only was there a real departure from the Grotian doctrine. As time passed, both lawyers and statesmen gradually abandoned the effort to distinguish between just and unjust wars. This made it possible to develop a law of neutrality in time of war, a principle for which there was no room in the original system. Apart from this consequence, the abandonment of the attempt to distinguish between just and unjust wars had more theoretical than practical importance.

In the two centuries which followed the Peace of Westphalia in 1648, vast political changes took place. Exploration, settlement, and conquest extended to new continents the civilisation of those countries which occupied the Atlantic seaboard of Europe. Commercial and political intercourse expanded until it came to cover the whole world. Notwithstanding these gigantic developments, the essential principles of the Grotian system continued to be accepted as the fundamental basis of all international relationships. In the great controversies which arose from the conflicting interests of European powers in the newly discovered lands, all sides still appealed to the law of nations as it had been expounded in the sixteenth and seventeenth centuries. Nor was the authority of the law diminished by its claim to embrace communities which inherited other types of civilisation. Not only the Islamic states, but even the ancient monarchies of the East found it possible to accept, at least in theory, a system of law which had originally been devised for western Europe alone.

The law of nations now claimed to be a law for the whole world.

Such changes as took place in the law during this period were developments rather than innovations. They signified the ability of the law to adapt itself to new conditions rather than the impact of new ideas about the fundamental principles of law. For example, the development of the ocean routes gave a new character to sea warfare and a new importance to the ancient conflict between belligerent and neutral rights at sea, but in all the controversies which arose both sides always appealed to ancient principles of law. This is also true of the innumerable territorial disputes which arose during this period. They were argued as if they had been disputes between adjacent landowners over the title to a farm. Nobody, unless he is a specialist, now remembers the controversy between Denmark and Prussia over Schleswig-Holstein, which led to the war of 1864, but the arguments put forward while the parties were still at peace might equally well have been used in the fifteenth century.

If we ask ourselves why it is that the mediæval and Grotian system of law continued to maintain its authority throughout a long period of vast expansion and great political upheavals, the answer is that these developments were not accompanied by any great change in basic ideas as to the nature of the state itself or as to the general principles of international conduct. Political controversies might be fierce and their consequences might be revolutionary, but they were usually concerned with the distribution of power within a state, not with the nature and functions of the state itself. Again, it was generally agreed that changes, however drastic, in the system of internal government did not affect the external rights and duties of a state or its position in the family of nations.

When we come to examine these two points, the question of the nature and functions of the state in so far as its own subjects are concerned and the question of its external relations with other independent powers, we find that in practice they are inseparable. Both in peace and in war the relations

between states depend upon the characteristics of states themselves, the authority which they claim, and the functions which they assume. As in private law, the law which governs rights and duties between political societies must be determined by the nature of the societies which it seeks to control. To what extent has this changed?

CHANGES IN THE NATURE AND FUNCTIONS OF THE STATE

It is broadly true to say that the ideas concerning the internal functions and authority of the state which were accepted at the time of the Congress of Vienna were not substantially different from those which prevailed in the age of Grotius. In the course of the nineteenth century a certain development of ideas did take place, but its general direction was liberal and individualistic. Its tendency was to emphasise the freedom of the individual, to assert the rights of the individual as against the government under which he lived, and generally to limit the powers of government to the minimum required for the maintenance of external defence and internal order. In particular, it was considered axiomatic that the state should interfere as little as possible with individual enterprise in trade. In the laws of war at sea this movement had important consequences, for it laid emphasis upon the right of the neutral merchant to trade with both belligerents and thus diminished the importance of sea power in time of war. In the Declaration of Paris at the end of the Crimean War (1856), this movement, inspired chiefly by commercial interests, succeeded in overthrowing an ancient principle of the laws of war at sea and in thus riveting upon the lawful exercise of sea power a chain which was not broken until 1915. The unratified Declaration of London in 1909 was the last attempt, happily an unsuccessful attempt, to embody in the law of nations the doctrine that the right of the merchant to enrich himself in time of war was superior to the right of a nation to defend itself by intercepting supplies going to its enemy.

By the end of the century the liberal movement had almost exhausted its strength, in so far as internal politics were concerned, and the growing influence of socialist ideas was directed towards emphasising the rights of the state as against those of the individual, but the general conception of external relations remained substantially unchanged. A very sharp distinction was drawn between external and internal affairs. It was generally agreed that every state was entitled to have whatever form of government it pleased and to rule its own subjects in its own way without interference from outside. But this right of internal freedom was balanced by a corresponding duty, for it was agreed that every national government, however it might have been formed, was bound to fulfil the international obligations of the government which it had displaced.

In the opening years of the twentieth century it seemed to many that the law of nations had reached its final stage, and that nothing remained to be done but to state its rules for all time in the form of permanent codes. In the first instance the efforts of the codifiers were directed towards the laws of war, and in the two Hague Conferences (1899 and 1907), followed shortly by the London Naval Conference of 1908, earnest attempts were made to draw up codes which should govern the conduct of war by sea and land. But to do this was to begin at the wrong end. No serious attempt was made to define the rights and duties of independent states in time of peace. If these rights and duties had been defined in precise terms we should have had a standard of conduct which would have enabled men to judge whether a particular war was just or unjust. But the world had long since abandoned the attempt made in earlier times to define the difference between just and unjust war. It was assumed that the outbreak of war was something which the law could not hope to control, but that it was within the power of law to prescribe the methods by which war should be waged. The clearer vision of a more rational age had seen that these two problems were inseparable, and that the question of fundamental rights

was logically prior to the question of the procedure by which rights were to be enforced.

FIN DE SIECLE

In the war of 1914 the changes which were to come could only be imperfectly foreseen, and most of the books which were written in the period between the two wars were still expressed in the language of the nineteenth century. At the beginning it was assumed on both sides that the established rules would be adequate for the conduct of operations, but this assumption only lasted for a few months. In the spring of 1915 the Germans introduced methods of submarine warfare which could not possibly be reconciled with the accepted rules, and the Allies immediately retaliated by abandoning the Declaration of Paris and adopting a policy designed to cut off all commercial intercourse between neutrals and the Central Powers. On the German side the innovation was defended by the very dangerous argument that new weapons called for new rules. On the Allied side the new policy was defended as being ' reprisals ', by which it was meant that a violation of the law by one belligerent permits the other belligerent to redress the balance by other illegal methods of his own choice.

But the formal reasons given on each side were not the real reasons, nor were the real reasons fully perceived at the time. New technical inventions would never have been put forward as a reason for violating fundamental principles of law if those who used these new weapons had not themselves formed new ideas as to the nature and purpose of war itself. On the other side it is equally clear that the doctrine of reprisals is one which is ultimately destructive of law itself, and that the real reason for the new policy was that the German conception of the nature of war had made it impossible for the Allies to conduct their operations according to the rules laid down in the nineteenth century.

In the years which followed the war it was admitted that the traditional rules had not been observed, but the real reasons were not yet understood. It was hoped and believed

that the first world war might be regarded as an unfortunate and exceptional experience, and that the authority of the old rules might yet be restored. Under the influence of this theory an agreement was drawn up at Washington in 1922, and later embodied in the London Treaty of 1936, to the effect that submarines were bound to observe the same rules as surface ships. If this agreement had been observed, it would have been impossible to use submarines for the purpose of cutting off trade with the enemy, and they would in effect have been restricted to attacking ships of war. For the same reason the official manuals drawn up by maritime powers for the guidance of naval officers in the period between the two wars were all expressed in nineteenth century language. The writers of textbooks followed the official lead and agreed in expounding the pre-war rules as if they were still authoritative law.

In 1939 this unreal and fictitious structure collapsed almost at once. Although the German Prize Code published just before the outbreak of war was expressed in the orthodox language of the nineteenth century, the rules which it laid down were disregarded from the first, and German submarines at once began to sink ships in complete defiance of the London Treaty of 1936. After two months of hesitation the Allies accepted the challenge, and in November a British Order-in-Council once more proclaimed a general attack upon all intercourse between Germany and neutral countries. Once more the policy adopted was justified on the ground of ' reprisals ', but again this argument was purely technical. As time went on, the increasing disregard by the enemy of traditional rules compelled the Allies also to adopt an increasingly drastic policy. Enormous areas of the high seas were taken under Allied military control, and neutral commerce was in effect compelled to operate under Allied direction. All enemy ships were liable to be sunk at sight, and the traditional distinction between warships and merchant vessels was in substance abandoned. It was also abandoned with regard to our own ships. Every ship of every kind was in effect put into war service and armed to take its part in the war. Every

movement of every ship, every cargo imported or exported, was directed by the government with the single purpose of achieving victory in war.

It would be easy to give many more examples to illustrate the extent to which the practice of the late war departed from the traditional rules, but it is sufficient here to say that on both sides it went far beyond anything which had been attempted before. It now seems clear that we cannot persuade ourselves again, as we did after the first world war, that our experience may be regarded as accidental and exceptional, and that we can now put everything right simply by asserting once more the continued validity of the old law. On the contrary, we must now face the fact that we have broken with the past, that we live in a changed and changing world, and that the law, if it hopes to maintain its authority, must take account of these changes. To the future historian what has happened during the late war may perhaps appear as part of a single and consistent process, directed by a dreadful logic of events, terrible in the memory of what men have suffered, and terrifying in its warning of what might be yet to come. Of that terrible process we may regard the two atomic bombs which brought the war to an end as the perfect example and the natural conclusion.

Chapter 2

THE DANGER TO THE FOUNDATIONS

If we accept the fact that the old law cannot now be revived, our next task is to study the reasons for the great changes which are taking place. It is only by so doing that we shall be able to understand the position in which we now find ourselves and make even an approximate estimate of the developments which are likely to take place in the future. The examples given in the first chapter were taken from the laws of war, since war provides the quickest and clearest expression of the influence of new ideas in the law of nations. At th same time it is clear that the forces of change do not express themselves solely in time of war. They are profoundly influencing the law as a whole, and it is for this reason that the relations between states which are at peace are no longer what they were at the beginning of this century.

The picture of the international society as seen by Grotius remained substantially true until the outbreak of war in 1914, and the really important changes have all taken place since then. It remained true because the basic ideas upon which the international community was founded did not materially change until our own time. Of the changes in ideas which have taken place in the last thirty years two seem to be of outstanding importance.

THE LOSS OF UNITY

The first is the loss of any real sense of human unity. In its earliest form the law of nations only came into being within a limited area and within that area it was based upon the assumption of a common faith, a common culture, agreed standards of right and wrong, and a common inheritance of law. The universal character of the law was first realised in

the sixteenth century, when the progress of colonial expansion brought the states of western Europe into relations with non-Christian rulers in many parts of the world. In practice it also proved to be possible to conduct diplomatic and trade relations with the Ottoman Empire on the basis of western usage, though this was not formally recognised until the Treaty of Paris in 1856. In the middle of the nineteenth century the western powers, led by Great Britain and the United States, forced open the doors of China and Japan, two ancient empires which had hitherto succeeded in isolating themselves from the outside world. It is important to note that the use of force for this purpose was defended on the traditional ground that the law of nations gave a right of free intercourse between all countries of the world, the same reason which the Spanish canonist Vitoria had put forward more than three centuries earlier as justification for the Spanish invasion of South and Central America. Thus it came about that in the Far East the law of nations was really introduced by force, but the use of force was itself justified by an appeal to the law. In due course the obligations of the law were accepted by the states concerned, though it remains doubtful to this day how far this formal acceptance is supported by the real opinion of the peoples of the Far East. In theory, at any rate, the nineteenth century closed upon a world in which every state that claimed to be civilised professed itself to be bound by the obligations of the law of nations.

What has happened within the last thirty years is that the common cultural unity upon which the law was originally founded has been destroyed by its own original home, that is to say, in Europe. The process began, but unfortunately did not end, with the Bolshevik revolution in Russia in 1917. We have seen that Russia originally formed no part of the cultural community of Europe, in which the law of nations first arose, and perhaps we need not be surprised that it was in Russia that the disintegration of our common civilisation began. The new government started upon its career by a formal repudiation of its international obligations, alleging (to

quote its own words) that ' governments and systems that spring from a revolution are not bound to respect the obligations of fallen governments '. Such a pronouncement struck at the very foundations of the law, for it is obvious that the normal and peaceful intercourse of states is only possible if it is agreed that the life of a state is continuous and that every new government will accept and honour the undertakings given by its predecessor.

The new peril to international society was fully realised at the time, and for some years the Bolshevik government of Russia was treated as an outcast from the community of nations. For some time it was hoped that the revolutionary order would be overthrown by counter-revolution, and the western powers even gave active help to those Russian forces which continued to resist the Bolsheviks. But these hopes were not realised, and the course of events made it necessary for the rest of the world to accept the revolution as an accomplished fact. The best that could be hoped was that the new government would be content with its domestic victory and that it would in due time settle down and accept its normal place in the international community of civilised states.

This optimism proved to be unjustified, for the Bolshevik revolution was much more than a domestic upheaval. From the first it was deliberately planned, not only as a movement of internal reform, but as a conscious challenge to the traditional world order. It was inspired by the vision of a new world community which would overthrow and supersede the system governed by the law of nations. According to the traditional law, the world was divided into a number of independent states which, however much they might differ in size and in power, were equal in their fundamental rights and acknowledged their obligations to one another. Since they did not normally concern themselves with one another's domestic affairs it was quite permissible for any state to set up a communist or any other form of government, provided that the new government was prepared to honour its international obligations and refrained from interference in the affairs of

other countries. So long as these principles continued to be observed, the peace and order of the world commonwealth could be reasonably secure.

Since this world community was based upon the ideas which I have tried to explain, it became necessary for the Bolsheviks to attack these ideas, first in their own country and then throughout the world. No system of thought can be destroyed unless another can be set up in its place. In the writings of Karl Marx the new rulers of Russia found a gospel ready to their hand, and the teachings of Marx were ruthlessly enforced by all the means at their disposal. Within their own territory this doctrine was enforced by persecution and by massacre. In other countries it was propagated by whatever methods seemed most likely to promise success, and a considerable measure of success was in fact achieved.

This is not the place in which to discuss the economic and social principles of the Marxist system. We are at present concerned only with its conception of world order. In place of the society or commonwealth of independent and sovereign states, all equally bound to respect one another's rights, the Marxist theory envisaged a single world organisation based upon the principles of communism and directed from a common centre. In other words, there was to be only one sovereign power in the world, and that power was to be the communist dictatorship.

In this way the first and most important step was taken towards the disintegration of the traditional system of world unity. If the new doctrine could have been confined to Russia it could easily have been fitted into the existing system, for the law of nations had already proved itself capable of tolerating and absorbing the most widely different forms of government. Unfortunately the essential principles of the Marxist system, though not the detailed form of its expression, appealed very strongly to other minds which had never fully accepted the principles upon which the law of nations rests.

There is no need to dwell upon the Fascist revolution in Italy. It now seems fairly clear that the Mussolini régime, like that of earlier Italian tyrants, was only an incident of

transient importance. Under the impact of defeat it collapsed of its own weight. But what happened in Germany was very different.

It is broadly true to say that those parts of modern Germany which lie beyond the Danube and the Rhine, and particularly the kingdom of Prussia, had never fully accepted that common culture of Europe upon which the law of nations was founded. This may possibly be due in part to the fact that these territories never came under the Roman or the Byzantine Empire, but into purely historical speculations we need not now enter. What seems to be true beyond dispute is that the Prussian tradition has for a very long period, certainly as far back as the time of Frederick the Great, been essentially hostile to the idea of the objective and independent authority of the law of nations. Frederick himself was a complete sceptic, and he certainly acted upon the principle that no rules of law or of ethics could be allowed to stand in the way of Prussian expansion. Upon that doctrine Frederick's successors in the government of Prussia and of Germany have consistently acted during the last two hundred years, and we know now that the profession of loyalty to international ideals during the short régime of the Weimar Republic was no more than a pretence. Contempt for the law seemed to be justified by experience, and a long series of successful acts of aggression brought the Prussian monarchy in 1871 to a point at which it could assume the visible control of all Germany and the authority of the most powerful state in Europe. Of this process the subsequent career of Germany under Hitler was merely the logical development.

In so far as foreign relations were concerned, the Nazi system at the beginning differed from the Bolshevik in that it did not formally repudiate the international obligations of Germany, and for this reason the advent of Hitler did not involve any immediate disturbance of normal diplomatic intercourse. Indeed the new government repeatedly took pains to emphasise its respect for the law and its determination to uphold the sanctity of treaties, though these assurances from the first were false and only intended to deceive.

In their methods the two systems differed widely, and the essential conflict between their ultimate purposes expressed itself in the hatred, fed by constant propaganda, which divided their peoples. War between them was inevitable, since each system aimed at the domination of the whole world, and the world cannot serve two masters. For this reason both systems were equally in conflict with the fundamental ideas upon which the traditional law of nations was based.

It cannot be emphasised too strongly that the whole idea of a single world government, one universal power, is in direct conflict with the very idea of any true international law. If any such power should ever be established, the law of nations would not merely be changed. It would simply cease to exist. The unity upon which that law is based is not the unity of submission, but the unity of free consent. Ultimate authority rests in the law itself, not in any human power visible upon earth. In order to maintain the authority of the law it is therefore necessary that there should be substantial agreement upon what it means and what it involves. The hopes of mankind until the beginning of this century were based upon the belief that, notwithstanding differences in religion and culture, all men were agreed upon the essential principles of a common law. It was in this that the unity of the world consisted. This was the solid foundation upon which, and upon which alone, it could be hoped to build the towering structure of world peace.

It was this belief in a common agreement upon the fundamental principles of law which inspired the great experiment of the League of Nations. In the preamble to the Covenant the members of the League declared it to be their purpose to ensure ' the firm establishment of the understandings of international law as the actual rule of conduct among governments ' and also ' a scrupulous regard for all treaty obligations '. Those who signed this pledge were well aware that this common faith had been directly challenged by the experience of the war which had just ended, but they believed that the ancient authority of the law could still be restored.

The founders of the League were building, as they hoped, for the future, but their inspiration lay in the past, and they believed that it was possible to repair the foundation which had been so badly damaged. In turning their eyes to the past they were right, for upon no other foundation could it have been possible to build the framework of world peace. We cannot blame them if they failed to realise how seriously the old foundations had been undermined.

At this point let me try to summarise the essentials of that world unity upon which the law of nations rested. It was not uniformity, but unity in diversity. The benefit of the law was open on equal terms to all who would accept its principles and honour its obligations. Within the law there was room for every possible variety of civilised government, for every religion, and for every kind of culture and civilisation. In a word, tolerance was of the very essence of the law of nations.

Under the Marxist and Nazi systems the exact opposite is true. Here there is no room for tolerance. A single pattern of political and social life is laid down by the central authority, and to this pattern all those who fall under its power must conform. Every country which was occupied by the Germans during the late war was compelled by them to adopt the German system of government and social life. Today we see that every country which is occupied or controlled by the Russians is in the same way compelled to accept in all essentials the Russian system.

I have said that the loss of any sense of world unity, the loss of a common belief in the value of a world of free and independent states, united by their free acceptance of common principles of law, is the first of the fundamental reasons for the changes which are taking place today. I now pass to the second main reason, which I can summarise in two words—the ' totalitarian state '.

TOTALITARIANISM

This second reason may seem to be very closely connected with the first, but it is important to understand that the two

are really quite distinct. In a world that is ruled by the traditional law of nations there is room for totalitarian or despotic governments, as there is for every kind of government. In the course of history there have been many examples of despotism, but the law can find room for them, so long as the despots accept its authority in their external affairs and are willing to respect the rights of other nations. There is no reason why a despotic government should necessarily be aggressive, and a belief in despotism as the best method of internal government does not necessarily involve a desire for world domination. Both in theory and in practice the two doctrines are quite distinct, and many who hold the one do not hold the other. We should also note that so far the belief in the need for world domination is geographically limited. The only states which have as yet fallen under the spell of this doctrine are Germany, Japan, and Russia, and of these three the first two have now been decisively defeated in war. But the belief in totalitarianism has in greater or less degree penetrated into almost every country, and it must be reckoned with as one of the most important factors which are at present changing the traditional law of nations.

By totalitarianism I mean a political theory which seeks to extend to the utmost the power and control of a government over its own subjects. In substance it is the same as the more extreme forms of socialism. The constitutional form which any particular government may take is quite irrelevant. It may be an absolute monarchy or it may be a parliamentary republic or indeed it may take any other constitutional form. Even in Great Britain it seems clear that the doctrine has infected an appreciable number of those who support the government which at present holds office. The essence of totalitarianism does not consist in the legal procedure by which a government may be appointed, but in the absence of any substantial restraint upon its powers. In its more extreme forms this doctrine denies the existence of any limits to state authority beyond those which are imposed by natural forces.

The function of the law of nations is to control the conduct of independent states in their relations with one another. States are the units, the individual entities, with which the law is primarily concerned. From this it follows that any important change in the character or functions of these units is bound to have its effect upon the rules of law which govern their relations with one another. Let us now try to estimate the changes which have taken place, for the most part within the last fifty years.

By the end of the nineteenth century the law of nations had reached a point at which its main principles seemed to have been settled by general agreement, and for this reason much attention was given to the problem of codifying the law in a permanent form. Such agreement upon the law itself was only made possible because it was based upon agreement as to the nature of the units which the law controlled, in so far as their external relations were concerned. Within national boundaries states, even in the nineteenth century, differed widely in their conceptions of the functions of government. Some countries had gone much farther than others in the development of what we may call socialist practice, but such divergences did not impair the general agreement upon the character of the state in its external relations. In diplomatic and legal arguments between governments no attempt was ever made to argue that the internal policy of a state entitled it to be treated differently from others. In other words, socialism, where it existed, was regarded as being something for home consumption and not for export.

THE RIGHTS OF THE INDIVIDUAL

Under normal conditions the external relations of states are chiefly concerned with matters of commerce and shipping, and it is therefore in these that we shall find the clearest illustrations of the difference between the nineteenth century state and the state of our own days. Every state considered that it had a right and a duty to protect the commercial interests of its nationals in foreign countries, and until recently

this right was regarded as being of a higher order than the right of another state to legislate upon domestic matters within its own borders. For example, it might happen that a government inspired by socialist principles might decide to nationalise a particular industry or to carry out some extensive expropriation of large landed estates. In so far as its own subjects were concerned, this right could not be denied, but foreign governments were always entitled to insist that such measures should not be applied to their own nationals without full compensation. In other words, the foreigner in such a case was privileged over the natives of the country, the local law being overruled in his favour by the law of nations. In the law of nations property had a sanctity which it might have lost under the law of the land, and socialist governments might be reminded that the power of a state, whatever it might be over its own nationals, was subject to permanent limitations in so far as foreigners were concerned.

The reason for this is clear. The law of nations is not a body of abstract rules standing by itself and having no relation to ordinary law. As we have already seen, the Grotian system was based upon the assumption that the rules which govern men in their private relations could be applied to the relations between independent princes. From this it followed that principles which were common to the law of all civilised communities could be applied to the intercourse of states with one another. In the Roman law, and in all the European systems which were derived from that law, the rights of property were sacred. In the middle of the nineteenth century we find this principle formally laid down in Fourteenth Amendment to the Constitution of the United States, a document which gives us a very good illustration of the general conceptions of law prevailing at that time. For this reason the sanctity of private property was deemed to be a natural right under the protection of the law of nations. This principle might be violated by the legislation of some particular country, and in such a case the natives of that country were left to seek their own remedy by such means as were available to them, but the rights of

foreigners within the national territory could be protected by their own governments, to whom the law of nations gave the right of intervention.

It now seems that this right can no longer be effectively asserted. What this means is that the individual state has gained ground at the expense of the law of nations, and the right of property is no longer protected by any law superior to the law of any particular country, the reason being that the principle of the sanctity of property has ceased to be a conception common to the law of all civilised countries. We need not now stop to enquire whether this change is for the better or for the worse. The point is that it is the inevitable consequence of a profound change in the ideas formerly common to civilised mankind. From this it will be clear that one consequence of the growth of the totalitarian idea is to weaken the protection which the individual could expect to receive from the law of nations.

I will take my next example from the law governing neutrality in time of war. In this case we are able to start from a clear formulation of the general agreement as it was expressed at the beginning of this century, since the Hague Conventions of 1907, however limited their scope, do give us a perfect illustration of the ideas which were common to civilised men at the time when they were adopted.

In the Fifth and the Thirteenth Conventions it is very clearly laid down that in time of war neutral states are forbidden to export munitions to the belligerents, but that private neutral merchants are entirely free to do so at their own risk. It would be impossible to find a clearer statement of the sharp distinction which the traditional law had always drawn between the functions of the state and those of the individual. For a state to supply munitions to a belligerent was an unneutral act, but trade was a matter for the private merchant. He was concerned only with his own profits, and the government to which he owed allegiance was under no duty to control his activities, provided that he was willing to accept the risks of his trade. If his ships and cargoes were

captured at sea, it followed that he could not expect any protection from his own government, so long as the belligerent who made the captures conformed to the recognised rules of war.

This principle was perfectly valid so long as it corresponded to the facts, and in the nineteenth century it was generally true that foreign trade, both in peace and in war, was mainly carried on by individuals and commercial companies seeking only their own profits. So strong was the belief in the sanctity of the right of trade that there was even much pressure in influential quarters to abolish the right of capture at sea and thus to place the merchant's right of profit upon a higher level than the right of the belligerent to defend his national existence. Although this demand, which was strongly supported in the United States, never achieved complete success, it did succeed in influencing the development of the law. In the unratified Declaration of London of 1909 it was provided that neutral merchants could freely export all raw materials to belligerents, provided that the goods were sent through neutral territory. If this rule had been binding and observed in the war of 1914 the supremacy of the Allies at sea would have been a thing of almost no value to them. Probably it would not have been observed, since no nation could have been expected to sacrifice its national existence for the sake of a legal rule which had ceased to have any real relation to the facts.

The fundamental question which we must ask ourselves is this—how far is it still possible to draw a clear line, as it was drawn in the Hague Conventions, between the activities of a state and the activities of its subjects? Can we still continue to say, with any sense of reality, that a state is not bound to prevent its subjects from doing something which it is itself forbidden to do?

In my view, it is no longer possible to maintain this distinction. All law, if it is to be effective, must be based upon the facts, and law can only ignore the truth at its own peril. In nearly all countries to-day, foreign trade is controlled

by the state to an extent which in effect makes the state a partner in every commercial enterprise. The agreements upon which international trade is based are made between governments rather than between merchants. It is the government which decides what goods shall be imported or exported, and to what countries exports shall be directed. If a merchant wishes to sell war material to a belligerent power, he can only do so today with the express consent of his government, with the necessary result that the government thereby becomes implicated in his enterprise. If so, it would seem that neutral governments will be guilty of a violation of neutrality if they allow their subjects to sell war material to belligerents.

I do not know what will be the future solution of this problem. At present I am only concerned to point out that the problem exists, and that it raises further issues of grave importance. If it becomes impossible for belligerents during a war to import war material from foreign countries and they are therefore compelled to carry on the war entirely with their own resources, it is obvious that those countries which are well provided with raw materials and have a well developed munitions industry will have an immense advantage over opponents who are less fortunate in these respects. A nation whose wealth consists chiefly in agriculture will find itself helpless in the face of an enemy who has a well organised heavy industry.

So long as the distinction between the state and its subjects existed both in fact and in law the rule laid down in the Hague Conventions worked very well in practice. But obvious difficulties arise as soon as the private merchant disappears from the scene. If a neutral government permits its subjects to export war material it will be accused of taking sides with the belligerent who has command of the sea. If it forbids export it will be accused of favouring the side which is better equipped for war. Within recent memory we have had examples of each of these accusations.

It will be clear that these difficulties are bound to increase with every new extension of the activities of the state. A

neutral state in which all industry is nationalised and all export trade is carried on by the government is obviously forbidden under the traditional rules to export war material to either belligerent, and in less extreme cases this will still be true in so far as the more important industries have been nationalised. What will be the consequence? Under modern conditions we know that the words " war material " cover nearly the whole field of commerce, since almost everything is now of some direct use in war. Will the countries which have nationalised their industries, whether wholly or only in part, be content to allow a large part of their export trade to pass into the hands of their commercial rivals? Once more, I will not here attempt to answer the question which I have put. At present I am only concerned to point out that the growth of totalitarianism is not merely a matter of internal interest to this state or to that, but is bound to have grave consequences for the law of nations.

THE FUTURE PROSPECT

It would be easy to multiply examples, both from the law of peace and from the law of war, but at this point perhaps we may venture to look into the future and try to estimate the general tendency of these two movements. We have seen that the two chief reasons for the unsettled state of the law to-day are the loss of the former unity of agreement upon basic principles and the growth of the idea of the totalitarian state. Let us now briefly consider the general tendency of each of these causes.

We have seen that the unity which lasted until our own time was compatible with wide differences in religion and in culture. In what then did it consist? The answer is that the one idea which makes possible the existence of a law that is really international is agreement upon the principle of the division of the world into a number of independent states. It is of the very essence of the law of nations that it rests upon free consent and not upon superior authority. In the last chapter of his great work Grotius summed up the whole

problem when he said that in the last resort the law of nations rested upon good faith.. If independent governments can be trusted to keep their solemnly pledged word and to honour their engagements both in the letter and in the spirit, nothing more is needed. If this is lacking nothing whatever can save us from war and anarchy.

For this reason the idea of a single world government which lies at the basis of both the Marxist and the Nazi systems is in direct conflict with this basic idea of a law binding and uniting a number of independent states. At the same time it is well to bear in mind that the same is true of all schemes of universal world government, whatever form they may take. Co-operation is essentially different from coercion. No form of world government, however constituted, can be effective unless it has the right and the power to interfere in the internal affairs of its member states.[1] If it has this power, nothing can prevent it from becoming a world tyranny. If it has not this power nothing can make it effective. Federal government can only be efficient within a limited area and over a people who share a common tradition. Any attempt to extend it beyond its natural limits only ensures its disruption.

From this it follows that the authority of the law of nations, now so badly shaken, can only be restored if we return to the Grotian principle upon which the law was first founded and built up. In a word we must restore good faith and the confidence that agreements will be observed. How that is to be done is a spiritual and not a legal problem, which this book cannot now attempt to solve. Our experience has already taught us, that no form of international organisation, whatever it may be called, or however elaborate it may be, can be any substitute for good faith, for unity of purpose, and for mutual respect for the freedom of every state.

[1] The first American "Confederation" of 1781 ended in failure because the federal government could only deal with the state governments and had no direct power over their citizens as individuals.

Lastly, what of the totalitarian state? Here it seems clear that we cannot find the solution of our problem merely in a return to the ideas of the past. For many reasons we must accept the fact that modern conditions, particularly those which result from scientific discoveries, have made it inevitable that the governments of today and of the future should exercise much more authority over their peoples and should enter upon a wider range of activities than their predecessors. Undoubtedly this must result in some changes in the law. Some of these changes are taking place before our eyes, and others are bound to follow. But here the problem is quite different. The law of nations is a living law, not bound irrevocably to the past, but capable of adapting itself to the changes which take place in the society of independent states which it seeks to control. It has done this in the past and can continue to do so in the future. In its more extreme forms totalitarianism is full of perils to international security, since we have seen that it may lead very easily to the idea of world domination and universal tyranny, but there is no cause for alarm in such a reasonable extension of state enterprise as may be required by changes in modern conditions. If we ask where the line is to be drawn, what are the limits of this reasonable extension, we shall find the answer, as so often, in another basic idea of the old law, the conception of the fundamental rights of the individual man. So long as the governments of our time are willing to respect this natural limit, we need not fear that any extension of state enterprise is likely to imperil the law of nations or the peace of the world. If, on the other hand, the rulers of modern states are corrupted by the temptations of absolute power and refuse to accept the limits which natural law imposes upon all political authority, then the outlook for the future is dark indeed.

Chapter 3

THE PROCESS OF CHANGE

The development of human ideas is complex and varied, but they do not by themselves change the law. Something more is needed, and our next problem is to examine the actual processes by which a change passes from the field of thought into the field of action and practice. By what means, by what procedure, is a change in the law of nations actually put into effect? How do we get rid of an old rule and replace it by a new one?

Here we are faced with one of the outstanding differences between international and national law. In every organised state the constitution provides a supreme legislative authority, either an assembly or an individual, and this authority is continually occupied with the task of making such changes in the law as national requirements may demand. Within the limits set by this supreme authority the courts of justice also perform a subordinate legislative function in interpreting the law and adapting it to particular cases. But the society of independent states has no legislature and no regular system of courts. How then is it possible to make changes in the law, if there is no procedure for so doing?

In substance, the answer to this question is that the law is changed in the same way as it is made. In so far as international law is the expression of the divine or natural law it is unchangeable, but with this we are not at the moment concerned. At our own level it is substantially true to say that the law of nations was founded and still rests upon the common consent of civilised mankind. The general agreement of men expressed through the agency of their respective governments is therefore the international equivalent of the supreme legislative authority which makes new law in any independent state. From this it follows that the general

consent of states must be obtained, directly or indirectly, by express agreement or by tacit acquiescence, before we can say with certainty that any given change has acquired the force of binding law. Since the process of obtaining this consent is often slow and difficult we find that there are many matters upon which it is impossible to speak with the certainty which we may reasonably expect in stating the law of any particular country. This uncertainty is inevitable unless and until men can agree to set up a regular system of international tribunals whose decisions will be accepted by all mankind.

For convenience we may divide the different methods of changing the law into those which are formal and those which are informal. Let us consider each of these in turn.

FORMAL METHODS OF CHANGE

The formal method is that of the international conference, which is convened in order to produce a convention for signature and ratification by as many states as possible. Of this method the best known examples are the Hague and Geneva Conventions dealing with the laws of war. Most of these were signed and ratified by a very large number of states. Less well known, but generally much more useful, are those which deal with more technical matters, such as the conventions which have established the Universal Postal Union, the international system of copyright, or the agreed rules for preventing collisions at sea.

The value of this formal method of legislation depends almost entirely upon the extent to which the subject matter of the conference raises questions of political controversy. For this reason international conferences are seen at their best when they have to deal with some topic which is of mainly technical or administrative interest. A good example may be found in the international code of rules for preventing collisions at sea. Here no political or controversial interests were involved, and the Brussels Convention was controlled by specialists who had a common interest in drawing up a body of rules for meeting purely practical needs. Perhaps it would

even be true to say that such conferences are successful precisely because the general public takes no interest whatever in their proceedings. It is unfortunately the fact that public interest in international affairs can seldom be aroused unless the occasion presents some opportunity for a quarrel.

If the rules of the law of nations could be settled entirely by professional lawyers, as the rules of sea traffic are determined by professional sailors, the world might be reasonably assured of peace. Unfortunately the most important topics of international law are almost always involved with matters in which there are sharp conflicts of national interest. The result is that the difficulty of arriving at an agreed statement of legal rules increases in exact proportion to the political importance of the matter under discussion. For this reason it has never proved to be possible to arrive at general agreement upon the very important question of striking a just balance in the laws of sea warfare between the right of the belligerent to intercept supplies going to his enemy and the right of the neutral merchant to carry on his trade. In the course of history the balance has swung, sometimes in one direction and sometimes in the other. In the nineteenth century the balance inclined strongly in favour of the neutral. In the last two wars it has swung heavily in the opposite direction. The unratified Declaration of London represented a final attempt to give permanence to the views prevalent in the nineteenth century. We may indeed be thankful that it did not succeed.

This difficulty is no less in the law of peace than in the law of war. In the period of international optimism which followed the first world war it was hoped that some progress might be made with the task of drawing up codes of agreed rules upon important branches of the law, and in 1930 a conference was convened in London at which three such subjects were selected for discussion—the law of territorial waters, the law of nationality, and the law of state responsibility. Upon all three subjects there was a complete failure to reach agreement except upon vague general

principles. This failure was not due to any technical difficulties. All the prepartory work had been excellently done by the experts, and the real cause of failure lay in the conflicting national interests which the delegates were instructed by their governments to represent.

Even when such a conference does succeed in producing a convention for signature, the success is often more apparent than real. In many cases nominal agreement is only obtained by allowing individual states to enter what are called " reservations," that is to say, to sign the convention with the exception of certain articles to which they object. Since these articles are often of vital importance, the result is that the effective text consists only of those articles to which no objection has been taken and the conference has really failed in its task of producing an agreed code of binding rules. Another method by which apparent agreement can be deprived of all reality is to append to the signature or ratification an elaborate explanation in which the state concerned explains that its acceptance of the text is subject to certain conditions. Of this practice an excellent example may be seen in the famous " Kellogg Pact " of Paris in 1928, in which the whole world professed that it " renounced war as an instrument of national policy." Nearly all the more important powers qualified their acceptance by elaborate explanations, and the general effect of these explanations was that every power reserved the right to make war whenever it might think fit to do so.

To this it must be added that the agreed texts are often deprived of any real value as legal rules by the fact that they are made deliberately ambiguous. Of this perhaps the best example is to be found in the Hague Conventions of 1907. Nearly all these texts are freely sprinkled with such expressions as " so far as possible " or " except when absolutely necessary " or " so far as military necessity permits." It need hardly be said that the effect of such words is to deprive the text of all value as a binding rule of law, since it gives those concerned permission to disregard the rule whenever

they may think fit to do so. A careful study of the text of the Hague Conventions compels us to conclude that the powers were really agreed only upon vague general principles. Such agreement is easy, but it is also almost entirely useless. What is needed in a true code is a series of definite and unambiguous rules which will tell the officers concerned precisely what they may and may not do in the actual conduct of operations, and this guidance is exactly what the Hague texts fail to give.

Nothing is easier than to reach agreement upon noble sentiments and high moral principles, and these abound in the preambles to almost all international conventions. Only when we come to apply these principles to particular cases, to translate them from abstract ideas into positive action, do we find that the same words carry different meanings to different minds. In the Charter of the United Nations, to take a recent and familiar example, expressions of the most noble purposes and principles are to be found on almost every page, but the debates in the Security Council and in the Assembly have now made it clear that such words as " justice " or " equality " or " democracy " have different meanings in different countries.

Most of these difficulties arise from the fact that formal agreement requires unanimity, and the price to be paid for unanimity is often either platitude or ambiguity, or sometimes both. But all attempts to introduce the principle of majority decision into international assemblies raise difficulties hardly less serious than the unanimity rule itself. Upon these it is sufficient here to say that the unanimity rule could only be abolished by unanimous agreement, and that no such agreement is in the least likely to be reached.[1]

The practical conclusion to which we are compelled is that in a society of states divided by so many conflicting interests the method of international conference is of little or no use in effecting changes in the law. When the subject matter is of purely technical or administrative interest this method has

[1] For the problem of unanimity under the UNO Charter, see below, Chapter vi.

often proved to be of real value, but it fails when important political issues are involved. This is not the fault of the lawyers. In such cases law is subordinated to politics, and the lawyers can only begin to do their proper work when the statesmen are agreed. We have already seen that the loss of any sense of fundamental unity among the peoples of the world has gravely undermined the authority of the traditional law. To this we may now add that the same reason makes it very difficult to effect such reforms in the law as are necessary to meet changing conditions.

INFORMAL METHODS

But the difficulty of effecting changes by formal means does not mean that the law is unchangeable. If change is in fact necessary and formal methods are impracticable, other means must be found. In order to understand what may be called the informal process of change we must consider the nature of the law itself from another point of view.

In the development of all law custom or usage plays an important part. In the field of national law the influence of custom has been stronger in the past than it is today, since the influence of custom is strongest when legislative activity is slow, and the present vigorous activity of legislatures is a comparatively modern development. In the law of nations, where there is no legislature, custom has always played an important part and it is still active to-day. It remains true that the law rests upon general agreement, but the authority of custom is itself recognised by agreement, and indeed we may say that custom itself is no more than agreement finding expression in practice rather than in words.

From its very nature the process of customary development can never be described in precise terms, nor is it ever possible to give an exact date at which any particular usage acquires the force of general law. When the authority for new law is to be found in a treaty or other document we can date the change with precision from the day on which the document takes effect, but the date at which a gradual process becomes

complete obviously cannot be defined. The part played by custom in the formation of the law has been frequently recognised by the Permanent Court and by arbitration tribunals, and if the international community possessed a system of regular courts to which all doubtful questions could be referred it might be possible to say with certainty whether this or that usage had acquired the force of law at any given time. But in the world as it is such uncertainty cannot be avoided. It is part of the price which we must pay for preserving the community of independent states.

About custom in the abstract no more need be said. It is easier to explain its influence by giving historical examples.

THE DOCTRINE OF CONTINUOUS VOYAGE

Let us briefly trace the development of the principle which is generally known as " the doctrine of continuous voyage." Its history now covers nearly two hundred years and shews very clearly how a legal rule can be developed without any formal agreement, and even in the face of much opposition, to meet changing conditions.

In the eighteenth century it was universally agreed that every maritime state was allowed, if it so desired, to reserve its own colonial trade to ships under its own flag. During the Seven Years War (1756-1763) the French, faced with the superior strength of Great Britain at sea, decided to invite neutrals to share in the French colonial trade. This they were fully entitled to do, and the British government was equally entitled to decide, as it did, that neutrals who took advantage of this concession must be treated as if their ships were sailing under the French flag. The neutral shipowners then tried to circumvent the new order by calling at a neutral port in the course of the voyage between the two French ports. To this Great Britain replied by disregarding the intermediate port of call and treating the whole voyage as continuous between the two enemy ports of departure and destination. This was the first stage.

More than a century later the United States government, then engaged in war with the southern or 'Confederate' states, found itself faced with a novel problem. The whole of the southern coast was blockaded by the federal navy, but at a very short distance from the Florida coast lay the British colonial port of Nassau in the Bahama Islands. Nassau, being neutral, could not be blockaded, and it was impossible to prevent small and swift vessels from making the short passage between Nassau and the mainland of Florida. As a result of this geographical situation a large trade in war material for the southern forces quickly sprang up. Ocean-going ships brought their cargoes from European ports to Nassau, where they were transferred to small and fast craft which found it easy to run the federal blockade. If the United States government had accepted this position the blockade would have been defeated, and without an effective blockade they had small hopes of winning the war.

The United States government refused to be thwarted by an accident of geography and took the bold step of capturing neutral ships and cargoes on their voyages between European ports and Nassau. To many lawyers at the time this action seemed to be wholly illegal, since it assumed the right to capture a neutral ship on her voyage from one neutral port to another. No clear precedent could be found for the American action, and to the purely legal mind anything which is novel is likely to appear illegal. But the government of Great Britain, which was the neutral with the largest interest in the matter, was wise enough to understand the force of the American argument and refused to join in any formal protest. The federal courts continued to condemn the captured ships and cargoes, and thus the second step was taken in the development of the doctrine of continuous voyage.

The third and final development came in the war of 1914. Again there was a new geographical and military situation. In this case there were no small neutral islands lying close to the German coast, and deriving from the outbreak of war a commercial importance which they had never known in time

of peace. The problem now presented itself under a new aspect. The final stage of the transportation was not by sea, but by land.[1] It passed through neutral countries of great commercial importance, which even in peace time had always carried a very large part of the German import and export trade. Were the Allies justified in capturing neutral ships and cargoes making voyages between America and the Dutch or Danish ports, if the ultimate destination of the cargoes was German? It is not too much to say that the whole outcome of the first world war depended upon the answer to be given to this question.

To such a question only one answer was possible. From the outset the Allies decided, notwithstanding an article in the unratified Declaration of London, that they would capture war material going to Germany through adjacent neutral countries. This action was taken once again in the late war, and there can be little doubt that in any future war in which the geographical position is similar the same right will be claimed by any naval power which is able to make it effective.

Such, very shortly stated, is the history of the doctrine of "continuous voyage." Let us now pause for a moment to analyse what it means. In a period covering more than a century and a half we have seen three decisive steps taken by maritime powers engaged in war. In each case the state concerned was engaged in a struggle upon which its existence depended, and in each case it was faced with an enemy who could not be defeated except by the fullest use of sea power. But this does not mean that what was done on any of these three occasions was merely an arbitrary assertion of the right of force. On the contrary, they are all linked together by a clear chain of legal principle—three stages in the logical development of a single process.

The basic principle is that the legal right of the belligerent to intercept his enemy's trade at sea cannot be defeated by

[1] I have not overlooked what are called the "Matamoras cases" in the American Civil War, but it is obvious that this obscure Mexican village gave no real precedent for the problem presented by Holland and Denmark

attempts on the part of neutral merchants to do indirectly what they are not allowed to do directly. In each of the three cases which we have noted the action taken was based upon this principle, though the particular form which it took varied according to the geographical situation and the different circumstances of the three wars.

On each occasion the government concerned took the initiative and decided to do something which had never been done before, and was prepared to meet the objection that no precedent could be cited for its decision. In the development of law by custom it is obvious that somebody must be willing to take the initiative, and in so doing it will inevitably expose itself to criticism based on the absence of precedent. In order to meet such criticism it is essential that the government concerned should be able to shew that its action is logical and reasonable, which means that it must be consistent with some accepted principle of the law. If changes introduced in this way cannot be defended on grounds of principle they have no chance of general acceptance, and in the law of nations general consent is necessary before any particular practice can pass beyond the region of controversy and establish itself as an indisputable rule of law.

In a word, custom can only be effective as a means of developing the law within the limits set by reason and justice. Acts and practices which are merely the expression of arbitrary power, such as the atrocities committed during the recent war, can never find a place in the law of nations unless the common conscience of mankind should itself be so utterly corrupted as to tolerate what is essentially evil. In the present state of the world this cannot be said to be impossible, but in that case the question would no longer arise, for in the corruption of all moral principles the law of nations would itself disappear.

NEUTRALITY

To take an example of wider interest, the whole law of neutrality is in itself the result of the development of custom.

In this case we cannot point clearly to any single act as being the first step in a long process. We can say with certainty that the law of neutrality, as we now understand it, was unknown in the sixteenth century and was indeed quite inconsistent with the accepted practices of that age. With equal certainty we can say that it was fully developed by the middle of the nineteenth century, and a little later we may point to the Hague Conventions as expressing the formal acceptance by the whole world of the law in its developed form. In the long period which lies between we can only say that the legal position is uncertain and confused. The first clear formulation of the duty of absolute impartiality, which is the basis of neutrality, was made by the Dutch jurist Bynkershoek in 1737, but it was long before the general practice of states conformed to this theory.

Perhaps the most outstanding political step in the development of the modern law of neutrality may be found in the action taken by the government of the United States in 1793. On this occasion President Washington issued a proclamation forbidding belligerents to set up prize courts in American territory or to equip privateers in American ports. At the same time he declared that the territory of the United States extended to a limit of three miles from the shore, and that within this limit belligerents were forbidden to conduct any naval operations.

Both the reasons for this action and its importance need to be emphasisesd. The United States was a new member of the international community. For the first time in history the law of nations had to concern itself with an independent power separated from Europe by the width of the Atlantic Ocean and determined to pursue a policy of complete detachment from the stormy politics of our continent. For the government of the new republic impartiality in the quarrels of Europe was not merely a legal formula, but a political reality. The real reason why the law of neutrality could not be developed at an earlier stage was that in Europe it was not in practice possible for any state to be really impartial when other states

were at war. Every war in Europe was a matter of direct or indirect concern to every European state, even for those which found it possible to avoid being actually involved in the conflict.

With the establishment of the United States as an independent power the law of nations ceased to be what it had always been hitherto, a law between European states only. In the first quarter of the nineteenth century a number of other republics also obtained their freedom on the American continent, and somewhat later on the Asiatic states were brought within the field of the law. In a comparatively short space of time the law of nations ceased to be a law for western Europe alone and became a law for the whole world.

For this reason it became possible for a true law of neutrality to be developed in accordance with reason and justice, and so to obtain the general consent of the civilised world. In this we can see an excellent example of the way in which custom works in the formation of law and at the same time of the limits within which it works. During the course of the nineteenth century vigorous efforts, supported by powerful commercial interests, were repeatedly made to enlarge the legal rights of the neutral merchant to a point at which the effective use of sea power in war would have been impossible. For this reason all these proposals ultimately failed, since it is obvious that it would be a violation of natural justice to set the right of individual profit above the right of national self-preservation.

To me it seems quite possible, though this is nothing more than my own speculation upon the future, that we may now see the beginning of a reversal of the process which I have tried to describe, and for similar reasons. I have said that the development of the law of neutrality was made possible because the expansion of the law to embrace the whole world made it easier for a large number of states to observe a strict impartiality towards distant wars. But we may now be entering upon a phase of history in which every war that is more than a merely local quarrel becomes a matter of direct

interest to the greater part of the world. Even in such a small conflict as the recent civil war in Spain, it was very difficult to observe strict neutrality, and certain foreign powers did not attempt to do so. In the second war neutrality became still more difficult, and only a small minority of states found it possible to maintain their neutrality to the end. Some states, which had been most punctilious in the observance of their duties as neutrals, found themselves attacked without any provocation merely because the occupation of their territory suited the military interests of the aggressor. Ohers, which had not actually been attacked, were drawn into the conflict either because they wished to be on what they thought was the winning side or because they realised that their own independence would have been imperilled by a German victory. Whether any such situation will arise again in the future we cannot tell, but no man can say that it is impossible. The operations of modern war are so complex that it is becoming more and more difficult to confine them within territorial limits. Aircraft may soon be able to encircle the globe in a single flight, and projectiles with a capacity for destruction which staggers the imagination may be hurled for thousands of miles. The materials needed for the conduct of war now have to be obtained from every quarter of the earth, and the countries which control the sources of essential war materials cannot fail to be concerned in the course of the conflict. These and other causes, including the totalitarian developments which we have already discussed, suggest that in the wars of the future, at least if they are of major importance, it may be almost impossible for most of the world to avoid being involved. This is recognised in the Charter of the United Nations, as it was in the Covenant of the League of Nations. Perhaps the expression of the principle in the League Covenant was premature, in the sense that world opinion was not yet ready to accept it, and the law of nations cannot move more quickly than the minds of men. When war broke out in 1939 we know that the great majority of governments hoped that they would be able to remain neutral,

and it was only by bitter experience that they learned that neutrality has no special sanctity for those who care nothing for the law.

WAR CRIMES

But it is not every innovation which makes new law, and a serious failure to recognise the limits within which alone custom and precedent can help to build up the legal structure appears in the recent ' War Crimes ' trials at Nuremberg.[1] The limits are those set by fundamental principles of justice, and in two respects these were violated.

It is not disputed that the law under which the accused were charged was enacted, and enacted by the prosecuting powers themselves, long after the commission of many of the acts specified in the indictment, particularly the charge of waging and conspiring to wage aggressive war. Clearly there was here a violation of fundamental principle. By the Statute of the Permanent Court of International Justice ' the general principles of law recognised by civilised nations ' are declared to form part of international law, and these words are repeated in the Statute of the new International Court constituted under the United Nations. Among these principles none is more certain than the rule of *nulla pœna sine lege*. Not only is this a well known principle of English law, but it is common to all modern penal codes, and is expressly affirmed in the Constitution of the United States. It is beyond all doubt that any legislation in violation of this principle is an offence against international law.

A half-hearted attempt was made to justify the indictment made by bringing in the ' Kellogg Pact ' of 1928, whereby the signatory states renounced war ' as an instrument of national policy '. Upon this it is sufficient to say that in all the voluminous literature to which the Pact gave rise it would be impossible to find the slightest hint by any responsible

[1] The passage dealing with Nuremberg did not form part of my lectures at Instanbul. So far as I could gather from private conversation, Turkish opinion was unanimous in condemning the trials, which have undoubtedly impaired the British reputation for justice.

writer to the effect that it created a new crime for which individual statesmen could be punished. Between 1928 and 1939 there were many violations of the Pact, some of them serious, but in no case was it even suggested that criminal proceedings could be taken against individuals.

In so far as the other counts of the indictment were concerned, it is important to notice that until 1942 the British *Manual of Military Law* contained an article (ch. xiv, art. 443) to the effect that superior orders constituted a good defence to charges of war crimes. This article had been sufficient to secure the acquittal of most of those who were accused at the Leipzig trials in 1920. In April, 1942, the War Office made an amendment to the text which in substance destroyed the defence of superior orders. Here again there is obviously an extreme example of legislation *ex post facto*.

The second fundamental principle which was violated was that of impartiality—the ideal symbolised by the traditional figure of Justice blindfolded and holding a balanced scale. Not only was the Nuremberg tribunal manned exclusively by nationals of the victorious powers, but no attempt whatever was made to deal with war crimes, including the crime of aggression, committed on the Allied side. It will be remembered that the Russian attack on Finland in 1939 was formally condemned as an aggression by the Council of the League of Nations, and for this act Russia was expelled from the League. This act of aggression did not stand alone, and it is broadly true to say that many acts enumerated in the Nuremberg indictment could be paralleled by crimes committed on the Allied side.

For these reasons[1] the Nuremberg trials cannot form a precedent for the customary development of the law of nations.

[1] The comments contained in these paragraphs are limited to those which are immediately relevant to the present chapter. They are far from exhausting the criticisms which could properly be made upon the Nuremberg and other " war crimes " trials. See Mr. Montgomery Belgion's recent book, *Epitaph on Nuremberg*, and an article by Mr. J. H. Morgan, K.C , in the *Quarterly Review* for April, 1947.

In the speeches for the prosecution it was claimed that they would form a precedent for the punishment of future aggressors, although many acts which would come under any possible definition of aggression were being openly committed even while the court was sitting. Unfortunately, it is quite possible that the case may form a precedent, but a precedent of the worst kind. For the first time it attempts to import into the law of nations the Marixist and Nazi conception of justice as the instrument of power[1], the means by which those who have the power at any given moment are entitled to enforce their will. In practice this may mean that in future statesmen who take the grave decision to commit their country to war will do so at the risk of being hanged by their opponents if they do not win. If this should happen, the law will have became corrupted beyond all remedy, since its basis in natural justice will have been destroyed.

By their very nature all the examples given are highly controversial, and none of these difficult problems can be adequately treated within the limits of this chapter, but they combine to make it clear that the part played by custom in the development of the law is not merely a matter of past history. Indeed, we may even venture to say that the importance of custom and practice is increasing. The world has now become somewhat disillusioned by its experience of international conferences, and we can scarcely believe that the further development of the law will be greatly advanced by means of formal conventions. The law, if it hopes to survive, if it still seeks to exercise any real control over the conduct of governments, must shew itself capable of adapting itself to the rapidly changing conditions of the world in which we live. That is not the kind of task which an international conference can perform. A conference can only register the largest measure of agreement to be found among its members. It is of the essence of development that it is concerned with matters which are doubtful and controversial by reason of the various interests which they affect in various ways. Upon such

[1] Upon this see below p. 88.

questions it is idle to look for formal and universal agreement. Nothing can be done to bring the law into accordance with the needs of the time unless important governments are prepared to assume the initiative and to take the action which some new situation demands. It is certain that the steps taken will provoke criticism and opposition, for they are bound to affect the immediate interests of other states, and for this reason much time may elapse before during which there will be controversy and uncertainty, but there is no other method to which we can look for the development of the law.

DIPLOMATIC IMMUNITIES

These examples have been drawn from the laws of war and neutrality. It is in time of war that the need for action and bold initiative becomes most urgent and the process of change is thus most easily seen. But it is also true that the greater part of the law which controls the normal relations of states in time of peace has also been developed by custom, and this is likely to continue. Consider, for example, the law of diplomatic immunities. The origins of this are very ancient, for it can be traced back to the customary immunities of heralds in classical times. It could not fully develop until the practice of diplomatic intercourse became regular and permanent instead of being occasional and exceptional. Upon the broad principle there is now general agreement, but upon the precise extent and scope of the immunities there are still divergences in state practice. This is a branch of the law upon which the growth of totalitarian practices may yet have considerable influence. When the number of agents who could claim immunity was very small and these agents were almost entirely occupied with strictly diplomatic activities the recognition of their immunity could not seriously affect the normal legal systems of the countries in which they lived. If, however, a state chooses to take entire control of its own foreign trade, the number of its representatives living abroad will be greatly increased, and to grant them all complete immunity from the ordinary processes of law would have a

serious effect upon the normal commercial life of the countries in which they operate. The Soviet state monopoly of foreign trade has already created some perplexing problems for the courts of many other countries, and there is as yet no uniformity in the solutions which have been given. Again, it is impossible to predict what form general agreement upon this difficult problem may ultimately take. What is certain is that this is one of the subjects upon which the law is in transition, and it may be suggested that ultimate agreement, if it is ever reached, is more likely to come by customary development than by formal conference[1].

TERRITORIAL WATERS

A brief reference may be made to the problem of territorial waters. This was one of the subjects on the agenda for the Codification Conference of 1930, and it proved quite impossible to arrive at any general agreement, except upon the point that every state possesses sovereignty over its own belt of territorial sea. The subject has a long history, and its development hitherto has been entirely by practice, practice including the negotiation of treaties of limited scope. We can at least record a general agreement that the width of the territorial belt is never less than three nautical miles, and that within this limit every state possesses sovereign authority. Beyond this we cannot yet say that there is any universal agreement. In the general problem of defining the width of the territorial belt a great many other problems are involved, and upon these there are some important conflicts of national interest. Even if this question of the limit is settled, there still remain other problems, such as the question of the right to extend jurisdiction for special purposes beyond the agreed limit. At present the general movement of opinion seems to be in the direction of increasing the distance within which the shore state is permitted to protect its vital interests. Whatever the future

[1] One aspect of the problem was dealt with at the Brussels Convention of 1926, which, in so far as it is in force, severely limits the immunities of state-owned ships engaged in trade.

may have in store, it is already clear that this is one of the subjects upon which the process of amendment by formal conference has been tried and failed, and that general consent, if it is ever reached, will have to be achieved by other means.

The process of development by custom and practice is necessarily slow, and unfortunately it is also unavoidable that there should be long periods during which controversy rages and the law cannot be stated with that certainty which every lawyer desires. If the community of nations possessed a single central authority whose decision upon all doubtful questions of law would be accepted by the whole world, then this weakness, for it is a weakness, of the law of nations would disappear. But such an authority could only function as the agent of a general world government, and upon the constitution of a government for the whole world there is much less likelihood of universal agreement than upon any particular problem of the law.

Chapter 4

SOME PROBLEMS OF MARITIME LAW

We may now turn to consider in more detail some branches of the law in which the influence of changed conditions has made itself most apparent. Perhaps the most important of these is the question of the legitimate use of naval power in cutting off an enemy's supplies by sea.

CONTRABAND

Let us begin with the problem of contraband of war. For many centuries every maritime war has led to controversies upon the categories of goods which might or might not be included in the prohibited lists. In the unratified Declaration of London in 1909 an attempt was made to close these controversies by drawing up agreed lists, of which it need only be said here that they represented a last effort to stabilise the law in the terms of nineteenth century ideas, with a strong bias in favour of the neutral merchant as against the maritime power.

The Declaration also preserved the traditional distinction which Grotius had drawn between what we now call 'absolute' and 'conditional' contraband. The former comprised all articles, such as guns and ammunition, which could only be used for military purposes, while the latter included everything which was of practical use both in peace and in war. Absolute contraband could be condemned upon mere proof of destination to enemy territory, but in order to condemn conditional contraband the captor had to bring further proof in order to shew that the cargo was consigned either to the enemy government or to the enemy forces. These were the basic rules of the traditional law. How do they stand today?

The solution of this problem depends upon our answer to two questions. First, is it possible to distinguish today between those goods which are of military use and those which are not? Secondly, is it still possible to recognise a real distinction between the enemy government and armed forces on the one hand and the enemy civil population on the other? Let us consider each of these questions in turn.

The answer to our first question becomes apparent when we consider that modern war cannot be carried on without a very large use of all the raw materials which are now used in heavy industry. Today the question of the import of ' munitions ' in the narrow sense, such as guns and shells, is of relatively minor importance. In all the more powerful states industry is now fully equipped for the manufacture of all kinds of weapons and military equipment. On the other hand, it is probably true to say that no state, perhaps not even Russia, can find every kind of material that it needs within its own borders. That being so, the only really important problem is to determine the extent to which the essential raw materials of industry may lawfully be captured at sea.

Once the problem is stated in this form it at once becomes clear that no logical distinction can be drawn between one essential raw material and another, or between one form of fuel and another. The distinctions which the Declaration of London attempted to introduce cannot be defended on any logical ground. For example, the Declaration includes railway material in the list of conditional contraband, but excludes the metallic ores without which railway material could not be manufactured. Fabrics suitable for military clothing are included in the conditional list, but the Declaration excludes the yarns and textile raw materials without which clothing could not be made. In a word, a state with a fully organised system of industry, such as Germany, would have been free under the Declaration to import all essential raw materials, since another article of the Declaration provided that conditional contraband could not be captured if it was imported through a neutral country.

Let us look at the same question from another point of view. In time of war a modern state, even if it has not done so in time of peace, immediately takes control of the whole import trade and forbids the importation of any goods which do not directly serve the war effort. In effect this means that the importing state itself determines what is and what is not contraband, and its opponent therefore becomes entitled to capture all goods the import of which is not forbidden. In substance, that was the position which we reached in the late war, and there is little doubt that this practice, which was adopted by all the active belligerents, will be followed in any major wars of the future. If so, it seems that the old controversies about what is and what is not contraband have died a natural death. They could not survive in the new conditions created by the needs of modern war.

It should be emphasised that no new question of principle is raised by this development. The principle has always been accepted that cargoes of military importance could be captured at sea upon a reasonable presumption that they were going to be used for military purposes. The only difference between the old law and the new lies in the fact that the list of contraband now comprises all cargoes which the enemy permits to be imported, since this permission in itself furnishes sufficient evidence of their military importance.

Let us now turn to our second question and ask whether it is still possible to draw a distinction between goods which are imported for the state or its armed forces and those which are imported for the use of the civil population. Again we find our answer in the practice of modern states in time of war. For example, shortly after the outbreak of the late war, the German government enacted a series of decrees covering a wide range of all the more important commodities. The decrees provided that all stocks of these commodities were deemed to be seized in favour of the Reich, imported goods being seized at the moment of crossing the frontier. From this it followed that all cargoes of these commodities found at sea

could be regarded as being consigned to the enemy government, and no further proof of destination was necessary. Once more we find that the policy of the modern totalitarian state gives us the solution of a problem which has caused much difficulty and controversy in earlier wars. By organising the whole of its population for military purposes the state has relieved the opposing belligerent from the difficulty of discriminating between military and civilian requirements.

This brings us to a somewhat more difficult problem to which reference has already been made—the problem of the right to capture war material consigned to the enemy through adjacent neutral countries. The difficulty here is not one of principle, but only of proof. As we have seen, the most important part of contraband now consists of raw materials which are as necessary for normal industry as they are for military purposes. To cut off the whole of these commodities on the ground that they might find their way into enemy hands would be to do a grave injustice to the neutral state by treating it as if it were enemy territory. How are we to distinguish between cargoes destined for the enemy and cargoes intended to meet the normal requirements of the neutral? To prove by formal evidence the destination of any particular cargo or part of a cargo is very difficult, and indeed often impossible, since the complicated technique of modern commerce provides many means of concealing the true destination. Even when sufficient proof is available, the purpose of capture could usually be defeated by the simple expedient of using the imported cargo to release an equal quantity of the same commodity held in the neutral country.

Faced with these difficulties the Allies were driven in the first world war to adopt a system of rationing for the neutral countries which adjoined Germany. The principle had already been adopted in the American Civil War, but its application in that case presented no serious difficulty, since it was easy to estimate the normal requirements of a small island whose ordinary peace-time trade was almost negligible. The problem was obviously much more difficult when it was a question of

Holland and Denmark, countries which at all times handled a large transit trade and also had considerable requirements of their own in raw materials. But the problem had to be faced, since the alternative would have been to abandon the commercial isolation of Germany as a serious weapon of war, and the Allies therefore adopted the policy of allowing the adjacent neutrals to import commodities in such quantities as might reasonably be considered to meet their normal requirements.

GREAT AND SMALL WARS

Whether this policy will be followed in future wars is very difficult to say. Much will depend on the general geographical and military situation and on the importance of the conflict from the point of view of general world order. In other words, we may find that the law, if it is to be reasonable and effective, will find it necessary to distinguish between major and minor wars. Such a distinction is unknown to the traditional law of nations, which sees no difference between one war and another, but lays down the same rules indifferently for all. The problem of drawing such distinctions is really only one aspect of the problem, to which we have already referred, of maintaining the traditional law of neutrality under modern conditions. Experience has now taught us that in such a war as that through which we have just passed it proved to be possible for only a few few states to maintain their neutrality to the end, and this suggests a possible solution of this problem of contraband traffic through neutral countries.

If the war is of such a character that the interests of the whole world are involved in its outcome, then those states which decide and are able to maintain their neutrality must expect to suffer inconveniences greater than they would suffer under the ordinary rules. If, on the other hand, the conflict is on such a small scale that its effects can be easily localised, then it is probable that the neutral powers will insist upon the belligerents conforming to the traditional law.

Perhaps it is at least doubtful whether such a distinction between great wars and small will ever be accepted as a legal principle, but it seems fairly certain that this is what we may expect to happen in practice. Indeed, it has already happened, for in the recent Spanish civil war the major European powers agreed that neither of the contending Spanish factions should be allowed to exercise any belligerent rights on the high seas, and such action goes even further than what I have suggested. In so doing the powers may have established a precedent with far-reaching possibilities. For example, let us suppose that a war breaks out between two of the small republics in Central America. We may be quite sure that neither the United States nor any of the adjacent neutrals will tolerate any claim by the belligerents to impose rationing on neutral countries, and it is quite possible that the belligerents might even be forbidden, as in the Spanish case, to exercise any belligerent rights at sea. If, on the other hand, the world should have the misfortune to find itself engaged in a third general war, then we may be sure that the few states which succeed in remaining neutral will again find themselves compelled to subordinate their traditional rights to the greater interests which will depend upon the outcome of the world conflict.

BLOCKADE

From the lawyer's point of view the effect of what has been done during the two great wars has been to merge the law of contraband in the law of blockade. In the old law the word ' blockade ' had a precise and technical meaning which it now seems to have lost. It meant the cutting off of all access to a specified part of the enemy coast, but the right to do this was strictly limited by law. An adequate naval force on the spot was required to make the blockade effective, and it was forbidden to obstruct in any way the normal access to neutral ports. The broad difference between the law of blockade and the law of contraband was that the former was limited in area and the latter in scope. The right to capture contraband was limited to goods on the contraband list, the enemy destination

of which had to be fully proved, and it did not permit interference with the enemy's export trade.

For technical reasons blockade in the old sense has now become impossible under the conditions of modern war between fully armed powers, but the law of contraband has been adapted to perform the functions of blockade, and without the narrow geographical limitations to which the old blockades were restricted. What has been done on both sides during the two great wars amounts to nothing less than an assertion of the right to destroy the whole of the sea-borne trade which serves the needs of the enemy, under whatever flag it may be carried and through whatever countries it may pass. The methods used by the opposing belligerents differed widely and the policy adopted by the Allies was technically justified as a reprisal for the illegalities committed by the enemy, but the purpose on each side was the same, and we must not allow the technical arguments used by official lawyers to blind us to the truth that the real reason for what was done lies in the changed conditions of modern war and the totalitarianism of the modern state.

Although these developments are modern in this sense they are not entirely without precedent, and the real lesson which they teach us is that there must always be a difference between wars in which vast interests are at stake and wars of limited interest, such as those which are fought for the possession of some particular piece of territory. Napoleon's Berlin and Milan decrees attempted to prohibit all trade between Great Britain and Europe. They were futile because Napoleon lacked the naval strength to make them effective, but they gave an opportunity to the British government to invoke the argument of reprisals and to proclaim, with better chance of success, the prohibition of all trade with those parts of Europe which Napoleon then controlled. It is interesting to note that in reply to American criticism the British government also made use, perhaps somewhat prematurely, of what we may call the argument from totalitarianism, pointing out that Napoleon had organised the whole French people for the

purposes of war. Going still further back, we find that in 1601 Queen Elizabeth of England issued a proclamation in which she announced, after reciting the perfidies of the King of Spain, that it was her intention to destroy ' all commerce and traffic with him in his territories of Spain and Portugal '. Here let us remember again that the war of England against Spain at that time was nothing less than a struggle for national existence.

The interest of these early examples is now mainly historical, and they are not precedents in the legal sense, for the real problems of our own time are the result of conditions which our ancestors could not possibly have foreseen. The examples quoted date from a period when the law of neutrality had not been fully developed, and we must frankly admit that the policies adopted on both sides during the two world wars cannot honestly be brought within the rules which were generally accepted at the beginning of this century. This does not necessarily mean that they cannot be justified, but that the justification must rest on moral rather than on legal grounds. They raise one of the most difficult of moral problems, the question how far and under what conditions it can ever be right to break the law. In the law of nations it is never possible to draw a sharp distinction, which it is easier to draw in national law, between what is merely legal or illegal and what is morally right or wrong, and there is no earthly tribunal whose decision upon particular cases would be accepted by all mankind. Upon such a difficult question the lawyer must yield place to the professor of moral theology, but he may venture to point out that the right of self-preservation, a right which is itself founded upon natural law, is recognised in varying degrees by the law of every country. It cannot have less value in the law of nations than it has in the law of particular states.

WARSHIPS AND MERCHANT SHIPS

Other consequences necessarily followed from the decision to stop, so far as possible, the entire sea-borne trade of the enemy

One of these consequences was the obliteration in practice of the distinction between the warship or state-owned vessel and the privately owned merchant ship. In the traditional law this distinction was sharply drawn and we meet it at every turn. A warship or a fleet auxiliary might always be sunk at sight, but an enemy merchant ship might not be attacked unless she offered resistance or tried to escape. Provided that she submitted peaceably to the right of visit and search it was the duty of the captor to send her into port to await the decision of a court of prize. If exceptional conditions made this impossible, the law did not allow him to sink her without making adequate provision for the safety of her crew and passengers. On the other hand, the ancient custom of the sea permitted a merchant ship to be armed for self-defence, a rule dating from the times when piracy was common, but she had no right to fire the first shot.

In the recent war the attempt to observe this distinction was almost entirely abandoned[1], and for the same reasons which led to the developments which we have already noted. It was abandoned because it had ceased to correspond to any real distinction in fact. The truth was that under the flags of the belligerent powers there were no ships which were genuinely owned and controlled by private individuals or companies. In the nineteenth century private ownership was a reality, even in time of war. The shipowner decided from what ports his ships should sail, to what ports they should go, what cargoes they should carry, and what routes they should take. If he decided to arm his ships for self-defence, he armed them from his own resources and from his own crews. All this is now a thing of the past, when a maritime power is engaged in war. All these decisions are now taken by state authorities, and every order given is determined by the sole motive of making the ship play her full part in the war effort. The danger from submarines and aircraft now makes it necessary

1 The practice was adopted in official communiqués of describing all enemy merchant vessels as "supply ships" in order to indicate that it was legitimate to sink them at sight.

for most voyages to be undertaken by large numbers of ships sailing under the convoy of warships. The attempt to distinguish between self-defence and offensive action has now been dropped, and in the event of meeting the enemy every ship must do all that she can to further his destruction. The guns carried in merchant vessels, and the crews which serve them, are no longer supplied by the owners, but by the state.

The general result of this great extension of state control is that every vessel, irrespective of her ownership, is now fully mobilised for war service. That being so, it becomes clearly impossible for the old distinctions still to be drawn between the warship and the privately owned merchant vessel. Here again, the law can do nothing but adjust itself to the facts, and the belligerent must be allowed to sink at sight every ship which he encounters under the enemy flag.

NEUTRAL RIGHTS

That brings us once more to the difficult problem of the neutral. To the protection of genuinely neutral shipping against the arbitrary action of belligerents the old law very rightly attached great importance. In the first world war the German attacks on neutral shipping were the decisive factor in bringing the United States and other neutrals into the war. In 1939 this factor proved to be of no great importance. The enactment by Congress of the ' Neutrality Act ' of 1937 meant that the United States had abandoned its traditional policy of standing up strongly for neutral rights, and the new policy of the law was designed to prevent American ships, so far as possible, from entering the combat areas. In general, the neutrals were much more concerned to keep out of the war than to insist upon their legal rights, and the formal protests which they addressed to the belligerents were not meant to be taken too seriously.

The governing factor of the new situation was that it had become impossible for belligerents, even when acting in good faith, to decide correctly which ships, or which cargoes, were genuinely neutral and which were enemy. The system of

international finance and commerce is now so complicated that many devices can be used to conceal the true ownership and control of any form of property, and the real facts concealed behind the camouflage can only be discovered by an equally complicated system of intelligence and espionage. This does not mean that the practice of concealing enemy ownership under neutral disguises was a new invention, for it was common in the Napoleonic wars, but in those days evidence of the fraud could nearly always be found on board the ship herself. In our day the real facts necessary to establish ownership are only to be found in telegraphic and wireless communications which the captor may or may not be able to intercept, and he is thus driven to act on the assumption that every ship and cargo with an enemy destination is engaged in the service of the enemy. The logical consequence is that in effect the maritime power engaged in a major war has now been compelled to adopt the policy of Queen Elizabeth and to prohibit all trade between neutrals and the enemy.

In order to make this prohibition effective further steps then become necessary. In 1915 the first step was taken by the Germans when they published a decree declaring 'the waters surrounding the British Isles' to be a war area into which neutral shipping could only venture at its own peril. This was quickly followed by a British Admiralty notice which declared the whole of the North Sea to be a military area, but it is important to emphasise that the British, unlike the Germans, promised safe conduct to neutral ships which would follow prescribed routes. On both sides the measures taken amounted in effect to a blockade of neutral coasts, but on the allied side the principle was never forgotten that the proper use of sea power carries responsibilities as well as rights.

Without going into further details of the naval history of the two world wars we may say that the belligerents found it impossible to enforce their policy of the total prohibition of enemy trade without assuming the right to control all shipping over wide areas of the high seas. It is fair to say that on the side of the Allies every effort was made to minimise, as far

as possible, the interference thus caused with genuine neutral trade, but the fact remains that practice went far beyond the limits recognised by the traditional law.

CONCLUSION

These examples suggest some general reflections upon the inferences to be drawn from the conduct of naval operations since 1915. The traditional law was essentially reasonable in the balance which it struck between two conflicting rights, each of them perfectly valid in itself — the right of the belligerent to destroy his enemy's sea-borne trade and the right of the neutral merchant to carry on his normal business. But the justice of this compromise was conditional upon the facts which it assumed. The primary assumption upon which it rested was that the greater part of the world would normally be in a state of peace, and that any particular war was merely a temporary and local disturbance of the general order. If this could be assumed, the policy of the law was to localise the disturbance as far as possible and reduce to a minimum the interference of the combatants with the normal activities of peaceful mankind. Secondly, it was also generally assumed that war was essentially an activity of the state as such, to be conducted solely with armed forces whose numbers in proportion to the rest of the population would be very small. The great majority of the people were described as 'non-combatants' or 'civilians', and the policy of the law aimed at protecting both their persons and their property, so far as possible, from the injuries caused by war. The continued validity in future of the traditional law will depend upon how far these basic assumptions continue to be true in fact.

It would seem that the second of these two assumptions has now been permanently destroyed, and that it will not be possible in any future war to draw the old distinction between the activities of the state and those of its subjects. This means, among other things, that naval commanders will no longer be bound to discriminate between enemy warships and merchant vessels, and that all ships sailing under the enemy flag or

under enemy control will be legitimate objects of direct attack. We must accept it as a fact that under modern conditions all wars, great and small alike, have now become totalitarian, in the sense that every belligerent state will in the future find it necessary to mobilise its entire population and all its material resources for its war effort. If that is so, the distinctions so carefully drawn by the earlier law, in themselves entirely reasonable in their own day, have now become obsolete and the law must reconcile itself to this fact.

To prophesy the future of the first assumption is more difficult. There is no sufficient ground for believing that every war is bound to develop into a world war or that peace is necessarily indivisible. In this respect the experience of the United Nations Organisation is likely to resemble that of the departed League. It seems highly probable that from time to time there will be minor wars (including civil wars) which will be allowed to burn themselves out in their own areas, and that the rest of the world will be chiefly concerned to see that the fire does not spread. It may even be thought advisable, as in the case of the Spanish civil war, to forbid interference with neutral commerce at sea and thus in effect to compel the contending states or factions to fight out their differences on land. In any case it seems reasonably certain that the belligerents in minor wars will not be permitted to claim more than the minimum rights which the old law allowed, and perhaps they will not even be allowed to claim so much.

At the same time we must all recognise that the danger of wars spreading from small beginnings and developing into major wars is today much greater than it has even been in the past. In this sense it is true to say that peace is indivisible, and that every conflict must be a source of concern to the world at large. This increased danger under which we all now live is the direct consequences of the causes which were discussed in the second chapter—the loss of any common sense of unity and the growth of totalitarian ideas and practices. Diplomacy and prudent statesmanship may succeed for a long

time, as we hope they will, in preventing the actual outbreak of another general war, but the danger itself will remain until its causes have been removed. Should we have the misfortune to be involved once more in such a catastrophe it is not likely that the belligerent powers will pay much attention to anything which the lawyers may have to say. On all sides it will be agreed that the law of self-preservation over-rides all other law.

CHAPTER 5

WAR IN THREE DIMENSIONS

THE RULES OF TWO-DIMENSIONAL WARFARE

UNTIL very recently war was entirely carried on by armed forces which could only move, whether by land or by water, along the surface of the globe. When two of these opposing forces met the area in which they met became a battlefield or what we now call a ' front '. The large areas behind the fronts were said to be ' occupied ' by the respective forces, but in these areas life and property were free from any immediate danger, since it was impossible even for the most powerful artillery to hurl its projectiles for more than a very few miles from behind the enemy line. Beyond this narrow limit the work of the fields, the factories, and the lines of supply, indeed the whole normal life and work of the people, could be carried on in perfect safety. In a word, active war would only be waged in two dimensions.

When we study the gradual development of the laws and customs of war from the earliest times down to our own day, it becomes clear that these rules were concerned solely with two-dimensional warfare. In this respect there is no difference between the Hague Conventions of 1907 and the writings of the Spanish canonist Vitoria nearly four hundred years earlier. For example, we find it laid down in the Hague Rules of Land Warfare (Article 25) that ' the attack or bombardment, by any means whatever, of undefended towns, villages, dwellings, or buildings is forbidden '. Such language makes it clear that what the authors of the rule had in mind was undefended places which lay in the direct path of an advancing army. The Ninth Convention, which deals with bombardment by naval forces, goes into more detail and expressly permits the bombardment of military installations, even though unavoid-

able injury to the civil population must result. In other words, this lays down what we now call the doctrine of the military objective. If a given target is of military value to the enemy and its destruction would make victory easier, then it may be attacked and destroyed, and no blame attaches to the attacker for any incidental injury to the lives and property of civilians. Precisely the same principle was laid down by Vitoria in 1539, and it may be quoted in his own words:—

> 'I hold that when it is necessary for the attainment of victory to slay the innocent it is permissible to do so. For example, a city is besieged; it is necessary to bombard it; the death of the innocent is a consequence of this bombardment; let them die, since that consequence is incidental. On this point there can be no doubt; it is as if a fortess were being besieged.'

It is reasonable to suppose that a rule which has stood the test of experience for four hundred years is probably sound in principle, provided that it is limited to the purpose for which it is made. But it is clear that both Vitoria and the authors of the Hague Conventions were dealing with substantially the same problem, the question of the right of an advancing army to bombard a fortified place lying in the path of its advance and containing a civilian population in addition to the military garrison. They were concerned only with war in two dimensions.

The progress of science has now made it possible for attack to be vertical as well as horizontal, and thus the operations of war are now carried on in three dimensions. This is something much more than a mere increase in the destructive power of weapons. The range of artillery and the strength of explosives have been steadily growing for centuries, and these developments have had an important influence upon tactics, but they could not in themselves affect the basic principles of war. What has happened as the result of the arrival of the vertical offensive is nothing less than a transformation of the essential character of war itself. For the first time in history war has ceased to be primarily an affair of battlefields and

fronts. It now embraces the whole area, whether of land or of water, which is controlled by any of the belligerent powers. Since all centres of production or distribution are now liable to be attacked it becomes necessary that they should also be defended, and the whole country has thus to be covered with military forces deployed for active operations. The social, political, and commercial consequences of this revolution in the nature of war have been catastrophic, but cannot be discussed here. The mere lawyer must confine his comment within narrower limits, and for him the only question which he can attempt to answer is whether the new methods of attack which science has made possible are permitted or forbidden by the law of nations, as it now stands.

For the reasons already given it seems clear that the Hague Conventions have nothing to do with the matter. They were drawn up solely with reference to war in two dimensions, and upon this they merely stated in formal terms what had in substance been agreed for centuries. It would be quite unreasonable to apply the exact words of these texts, in themselves admirable, to a problem fundamentally different from any problem which their authors knew or could easily have imagined. The real question which presses heavily upon the minds and consciences of most of us is whether it is permissible, either in law or in morals, to destroy the lives of civilians by vertical attack.

COMBATANTS AND NON-COMBATANTS

In order to answer this question we must begin by trying to understand precisely what it is that we mean by such words as ' civilians ' or ' non-combatants '. Behind these expressions there is some history, and to this we must briefly allude.

In the passage from Vitoria already quoted, he said that it might sometimes be permissible to slay ' the innocent '. By the word ' innocent ' he meant what we now mean by ' non-combatant '. The reason for his use of this word will appear if we remember that war, in the eyes of those who founded the law of nations, presented itself, if waged for a just cause,

as a form of legal process for enforcing a legal right which could not be asserted by any less violent means. The armed forces in the service of a prince engaged in a just war were thus regarded as we now regard police employed to recover property or to restore order. Those who actively opposed the forces of law and order were deemed to be 'guilty', and their resistance could be lawfully overcome by force, including, if necessary, the right to kill. On the other hand, those who took no active part in opposing the forces of law and order were deemed to be 'innocent', and in practice this covered the whole of what we should now call the civil population, so long as they attended peaceably to their ordinary business and did not mix themselves up with the active conduct of the war. Such was the origin of the distinction between combatants and non-combatants.

Since all war was two-dimensional, it followed that an army normally did not come into contact with the enemy civil population until after victory had been achieved and a town or other place had been occupied. When the authors prohibit, as they all do, the massacre of non-combatants, this is what they mean, that it is unlawful to kill the peaceful inhabitants of an occupied place after the place has been captured. At the same time, as we have seen, no blame attached to the unintended killing of civilians during the bombardment of a defended place, since this was merely incidental to a perfectly legitimate use of military force. These rules were not always observed, and military history is blotted with the record of many terrible massacres, but the rules were recognised as rules of war for four centuries and more. These are the rules which to-day are formally laid down in the Hague Conventions, and they are still binding, in so far as two-dimensional warfare is concerned.

The basic principle of the law was that all necessary force, including the destruction of life and property, might be used in order to overcome the resistance of all those who actively obstructed the enforcement of a lawful right. All use of force which went beyond what was necessary, and, in particular,

the killing of helpless persons after the achievement of victory, was absolutely forbidden. The principle is the same as that which is recognised in all systems of national law when the problem is one of maintaining public order or preventing serious crime. In all civilised countries the rule is that the police and the troops may use so much force as is necessary to effect their lawful purpose. It may happen that in cases of riot and rebellion the lives of innocent bystanders are lost when the police or the troops are compelled to open fire, but this does not involve any civil or criminal liability.

The principle is really beyond dispute, and it applies to all forms of warfare, whether they be horizontal or vertical. Before discussing the problem of air bombardment let us briefly consider its application to ground operations in terms of modern war.

THE MILITARY OBJECTIVE

When a legitimate objective is situated so near to the front line as to be within the range of artillery, it may always be bombarded. For example, the front line may run close to a town or village from which the inhabitants have not been evacuated. In such a case it is inevitable that the town or village will contain targets of which the destruction by the enemy is permissible, such as a railway station, depots of munitions, or buildings used for the accommodation of troops. In a word, it will be used by troops engaged in active operations, and will therefore be a ' defended place ' within the meaning of the Hague Conventions. The practice of all belligerents in modern wars has now established beyond dispute that such places are legitimate targets for artillery bombardment, and that any loss of civilian life which is unavoidably caused by the bombardment is merely incidental to the lawful use of lawful force. For this reason commanders in the field have always endeavoured, so far as possible, to keep such targets so far behind the front as to be beyond the range of the enemy artillery. It may sometimes happen, as

in the case of a railway junction, that removal to a place of safety is not possible, but this fact does not make the bombardment of the target unlawful, and the civil population in the immediate neighbourhood must accept the consequences.

So much is really beyond dispute. Applying the principle to the problem of air bombardment the first question which we must ask ourselves is whether a target, the bombardment of which would certainly be lawful if it were within artillery range, is to be exempt from attack merely because it is beyond the range of guns on the ground. When we state the question in this form, the aircraft may be regarded as merely a means of extending the range of artillery, and it is obvious that no arbitrary line can be drawn beyond which attack ceases to be lawful. Indeed, we now know that it is possible that the use of aircraft for this purpose may even become obsolete, and that bombardment may be carried out by means of rocket projectiles fired from the ground with a range extending to hundreds or even thousands of miles.

It seems clear that the only logical and reasonable rule is to be found in the ancient principle of the military objective, wherever that objective may be found. If we attempt to draw refined distinctions based either on the distance of the target or on the mechanism of propulsion we can only involve ourselves in absurdities. For example, it is clear from the Ninth Hague Convention that the bombardment of such a port as Hamburg would be lawful if it could be carried out by naval forces from a range of a few miles. If so, it cannot become unlawful merely because the shells are discharged by rockets from the shores of England. If we admit the lawfulness of the rocket, we cannot in reason deny that the explosives may be carried to Hamburg in aircraft and dropped over the port. One step leads to another, and reason, which expresses itself in law, cannot draw any arbitrary line and say that at this point or at that the scientific development of weapons must stop. I need hardly add that the converse of this case is equally

true, and the places in England from which the rockets are fired must also be legitimate objects of attack.

If we agree that a lawful target cannot obtain immunity merely because of its remoteness from the front line, we may next ask whether it is possible to define or to classify such targets with reasonable certainty. There is as yet no authoritative definition of the words ' military objective ', but the committee of jurists which drew up a draft code for air warfare at the Hague in 1923 defined it as being ' an object of which the destruction or injury would constitute a distinct military advantage to the belligerent ', and the definition is followed by the following classification:— ' military forces; military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition, or distinctively military supplies; lines of communication or transportation used for military purposes '. For practical purposes this classification may serve, but the true test, as in the case of contraband, lies in the importance which the enemy attaches to the target in question. If he takes special precautions to guard the target from sabotage, espionage, or external attack, then we may safely say that he regards it as being of high military value, and its destruction is therefore permissible. Upon this point it does not seem necessary to dwell. The real question is not a question of the choice of words. It is something much more than a technical matter of legal draftsmanship.

What the world really wants to know is how far may civilian life be destroyed by bombardment or by other means in order to achieve victory. We have already studied the answer which was given to this question by the founders of the law of nations, an answer which has stood the test of experience and remains fully valid today, at least in so far as horizontal warfare is concerned. Now we must ask ourselves whether that principle still holds good for war in three dimensions. Is it still true that civilian life may lawfully

be destroyed, in so far as its destruction is unavoidable in an attack upon a legitimate military objective? Is our answer to be affected by the fact that the scale of destruction has now passed far beyond anything of which our ancestors could ever have dreamed?

In order to be able to answer these questions we must return once more to the problem of the distinction between combatants and non-combatants. Upon this we have no authoritative modern pronouncement, since the articles in the Hague Rules of Land Warfare (Arts. 1-3) are concerned solely with defining the conditions under which irregular forces may be treated as legitimate combatants. Obviously such matters as the wearing of uniform are wholly irrelevant to the problem with which we are now concerned. Leaving on one side all technicalities and looking only at the essence of the matter, we find that we are unavoidably driven back to the conclusion reached by all the ancient authors, that the only valid distinction is that drawn between those who take an active part in the affairs of war and those who do not. No other distinction will stand the test of war.

If that is so, then the real issue is the same as that presented by the problem already discussed of contraband and enemy property in the laws of war at sea[1]. The complicated nature of modern war and the totalitarian development of the modern state have combined to make obsolete the old distinctions between contraband and non-contraband, between the property of the state and the property of the individual. The same causes have combined to obliterate, for the most part, the traditional distinction between combatants and non-combatants. Modern war calls for nothing less than the maximum effort on the part of every individual in the country who is capable of doing any useful work, and the modern state is now, for the first time in history, so constituted that it is able to command and to co-ordinate the lives of millions of individuals, both men and

[1] See above, pp. 53-57.

women, for the single end of achieving victory. Total war and the totalitarian state are thus merely various expressions of the same development.

THE MEANING OF TOTAL WAR

Under the stress of war even Great Britain, notwithstanding a strong tradition of individualism, was forced to become totalitarian. When the national effort reached its maximum the whole population, male and female, within very wide limits of age, was mobilised for the prosecution of the war. Exemption from compulsory war service was only granted if the applicant could prove that he or she was privately engaged upon work of national importance. No person within the age limits had any free choice of occupation, and every individual could be told by the government what kind of work he or she had to do. Whatever the particular order given might be, whether the conscript was told to join the army or to work in a factory, in every case the only test was how that individual might be most usefully employed for the purpose of winning the war.

To this it must be added that many millions of men and women, in addition to those enrolled in the regular forces, were mobilised for a form of active service which was known as ' civil defence '. The main purpose of this organisation was to reduce as far as possible the damage caused by enemy attacks, and it was therefore a form of direct resistance to the enemy's military effort. Millions of men were also enrolled in what was called the ' Home Guard '. These were combatant troops in the strictest sense when they were on duty and in uniform, but they were only on duty for limited hours and for the rest of their time they were employed on their ordinary work. In the event of invasion they would have been used in active operations together with the regular forces. Obviously a man either is a soldier or he is not. He cannot be a non-combatant for most of the week and a combatant only at week-ends or in the evenings. Clearly we are bound to admit that both the Home Guard and the members of the

Civil Defence services in Great Britain were combatants in the strictest sense of the word.

If so, it follows that every town and every village in the country contained a large number of combatants who could quite lawfully be the objects of direct and deliberate attack at any time. This is quite a different matter from the incidental destruction of civilian life to which I have referred. Every man or woman who is a combatant in the sense that he or she is directly employed on military duties can unquestionably be made the object of direct attack as an individual. The killing of such persons in the course of operations and before victory has been achieved is undoubtedly permitted by the traditional laws of war.

What is true of Great Britain is substantially true of all the belligerent countries which took a major part in the recent war. To this we must add that the principle of complete mobilisation which was applied to persons was applied equally to industry and to property. The whole system of production, importation, and distribution was organised under a single control with a view to the prosecution of the war effort, and nothing more than the barest minimum was permitted for the satisfaction of normal civilian requirements.

In short, the traditional distinction between combatants and non-combatants rested upon the fact that in practice it was usually quite easy to draw a line between those who were taking an active part in the war and those who were not. The great change has entirely taken place within living memory. In all the wars previous to 1914 only a small minority of the population was put into uniform and employed by the government for the purpose of fighting the enemy. The great majority were left free to carry on their ordinary occupations in their own way, and usually there was no difficulty in doing this, except in the immediate neighbourhood of the fighting forces. This distinction was sound in principle, and it is still valid today, whenever the facts enable it to be drawn. If it cannot today be observed in practice, the responsibility lies with the governments and peoples who have decided, rightly

or wrongly, that modern war cannot be carried on with anything less than the combined effort of the whole nation. We must accept the consequences of our choice. We cannot boast, as we have done, that every man and woman in the country is now mobilised for war service, and at the same time claim for them the immunity of non-combatants.

ATOMIC WARFARE

If that is so, the reasoning which justifies air bombardment, even on the largest scale, must also apply to the use in war of the new and terrible development of atomic energy. It is better to use the word ' energy ' rather than ' bombs ', for it is already clear that this new source of power will immensely increase the efficiency of all the existing methods of destruction, even if bombs are not actually used. Upon the purely physical possibilities there is no need to dwell. We already know what has been achieved by the use of the only two bombs which have as yet been dropped, and we are told that the developments which may be expected will be even more terrible. But there is very little which a lawyer can usefully add to the rapidly growing literature upon the future of atomic energy. His point of view is necessarily limited, and few will pay heed to anything that he may say. In so far as the law is concerned, the principle of the new invention is already covered by earlier developments, and the only really new factor lies in the swiftness and the extent of the devastation which science has now put it in man's power to cause.

From the purely military point of view the position is that one aircraft, one raid, and one bomb can now cause as much destruction as formerly required perhaps a hundred raids, many hundreds of aircraft, and many thousands of bombs. The difference between the two methods can therefore be stated in purely arithmetical terms, a difference merely in the time taken and the numbers engaged. Clearly no rational distinction of principle can be based upon figures alone. If the law permits the destruction of many thousands of human lives in

the course of an attack upon a military objective, it cannot in reason demand that the attack shall be spread over some given period of time.

Ever since the Middle Ages attempts have been made to prohibit the use of new weapons in war. The Church did its best, but with no success. The Lateran Council of 1215 denounced certain early forms of artillery on the ground that they were too destructive of human life, and decreed that they should not be used in war, except against the infidels.[1] The basis reason why all these efforts have failed is that it is in fact impossible for the law to arrest at any given point the further application of science to war and in effect to order the belligerents to fight only with weapons that have become obsolete. It would be contrary to all the lessons of experience to believe that a halt could be called at the particular point which we happen to have reached at this moment. Even if it should be possible to negotiate a general agreement forbidding the use of atomic energy in war, there could still be no certainty, perhaps not even a likelihood, that such a convention would be observed. A general international agreement did not prevent the Italians from using poison gas in their war against Ethiopia, and all the major belligerents in the recent war were fully prepared for the possible resumption of gas warfare. Let us also remember that from the very first day of the war the Germans used submarines in violation of the rules laid down in the London Naval Treaty, which the Hitler government had signed only three years before. Clearly we shall only be deluding ourselves if we put our trust in general international conventions. As Grotius pointed out more than three centuries ago, the whole structure of the law of nations ultimately rests upon mutual good faith. If this is lacking, nothing can take its place.

For the same reason it is impossible to rely upon any kind of scheme which may be devised for the international control of atomic energy. Here again we must be guided by experience. The attempt to prevent the re-armament of

[1] This illustration was omitted from my lectures at Istanbul.

Germany after the first world war was a complete failure, although the military defeat of Germany had been complete. It proved to be easy for the Germans to nullify all the efforts which were made to carry out inspection and control, and it is now clear that they could only have been made effective by complete military occupation. The same is true of all the other experiments in international control which were made during the same period. It is sufficient to mention such well known instances as the mandated territories, the protection of minorities, or the scheme of government devised for Dantzig. In no case was it possible to make any of these elaborate schemes effective against the will of any state which was determined to frustrate their purpose.

The plain truth, however unwelcome it may be, is that there is no short and easy way of countering the immense perils with which we are now faced. The root of the trouble lies far deeper, and it is only at the root that it can be tackled. *Quid regna sine justitia nisi magna latrocinia?* It would seem that fifteen centuries have not been long enough to teach the world that St. Augustine was right in saying that power uncontrolled by justice is no better than brigandage on a vast scale.

CHAPTER 6

LAW IN THE UNITED NATIONS[1]

THE PLACE OF LAW IN THE CHARTER

ANY attempt to isolate for detailed analysis those questions arising under the United Nations Charter which might be described as ' legal ' would be both tedious and unprofitable —tedious because it could be of interest only to the most pedantic kind of specialist, unprofitable because any such discussion would be utterly remote from actual realities. From time to time during the meetings such questions have been referred to legal sub-committees, but the lawyers on these bodies have always voted obediently in accordance with the policy of their masters, and there has been none of that independence of judgment which alone can invest the opinions of experts with the mantle of authority. For example, there have been animated debates concerning the precise scope of the so-called ' veto ', and it is possible to represent these discussions as differences upon the legal interpretation of the Charter, the precise meaning to be given to the word ' procedure '. But we all know that even in national affairs it is quite impossible to draw an exact line between questions of procedure and questions of substance. A motion in Parliament ' that this Bill be read a second time six months hence " may in form be procedural, but in substance it is a motion for rejection. The truth is that everything is a question of substance which those concerned consider to be sufficiently important. But this test is subjective, not objective, and the

[1] This chapter was written later as an article and is now reproduced from the April, 1947, issue of *International Affairs* by arrangement with the Royal Institute of International Affairs. Sub-headings have been headed, but the text has been reprinted without change, and I must ask the indulgence of the reader for any repetition which this entails.

problem is one which the lawyer is no better qualified to solve than anyone else.

The real question with which this article will attempt to deal goes far deeper than any superficial technicalities. What place has been assigned to the law of nations in the text of the Charter? To what extend have the proceedings of the Security Council and the Assembly during the first year been governed by a genuine desire to ascertain and conform to the law? In order to answer these questions we must try to examine the meaning and purpose of the Charter in the light of its history and context, for every word of it has some relation to what has gone before. In particular, it must be considered in its relation to the League Covenant and to the history of the years since 1919.

The lawyer who studies the history of the United Nations during its first year can find but little in the record of its proceedings either to encourage his optimism or to flatter his esteem. It is probably true to say that at no time in the three centuries which have followed the Thirty Years War have international law and its exponents been so firmly thrust into the background. In its more general parts the Charter does indeed make formal obeisance to the ideal of international law, as it does to other lofty principles, such as justice and tolerance, the equal rights of men and women, and the equal rights of all nations, both great and small. But every draftsman of international documents knows that nothing is easier or more common than the enunciation of noble sentiments. Preambles and statements of common purposes are passed through the most contentious conferences with but little debate. But the picture changes when we come to study the operative articles of the Charter. It is here that the lawyer begins to realise the extent to which he has been put into the background.

The chief function of law is to impose limits upon the exercise of power, whatever may be the form which power may take. It may be the power of individuals to injure their neighbour, the power of wealth to oppress the poor, the power of a government over its subjects, or the power of independent

rulers to do harm to one another. This last is the proper care of the law of nations. Unlike national law it rests upon no visible authority, nor is it equipped with the legislative, executive and judicial organs or normal government. Lacking all the visible and material means of decision and enforcement, its strength must be purely spiritual. As Grotius pointed out in the final chapter of his great work, in the last resort international law can only rest upon good faith. There must be a common agreement upon certain principles of international conduct, and a willingness to accept these principles as having an inherent authority superior to the interests and to the will of any individual sovereign state, however powerful it may be.

THE LEAGUE COVENANT

In the Covenant of the League of Nations this idea of the paramount authority of international law was definitely accepted. Not only the authority of the law in general but the absolute and unconditional obligation of all treaties was asserted without qualification, and this applied equally to all States, both great and small. Since the Covenant was drafted as an integral part of each of the peace treaties of 1919, this meant that in effect the League and all its members were irrevocably pledged to the maintenance in perpetuity of the territorial settlement drawn up at Paris, and that no changes could lawfully be made in that settlement except by the free consent of all the States concerned. A timidly worded sentence (Article 19) did indeed envisage the possible need for change by permitting the Assembly to ' advise the reconsideration ' of obsolete treaties and dangerous situations, but the futility of this provision was made evident the first time that it was invoked, and in no way qualified the principle that the League was unconditionally committed to the preservation of the map drawn up at Paris by the victorious Powers. Every member of the League was absolutely pledged to guarantee the territorial integrity and the political independence of every

other member (Article 10), and aggression meant any forcible attempt to disturb the *status quo*.

This Article was rightly called ' the keystone of the Covenant ', and the provisions which followed (Articles 11-17) were merely consequential, a logical and reasonable procedure for applying th basic principle to particular cases. Careful provision was made for the settlement of all disputes, both political and legal, and the functions of the Council, the Assembly and the Permanent Court were defined with as much precision as could be expected. The ultimate resort to war was not excluded, but no member of the League could lawfully go to war without previously exhausting all the possibilities of peaceful settlement prescribed by the Covenant, and the so-called ' sanctions ' were provided for the coercion of any State which should ' resort to war ' without going through all the preliminary procedure.

In this we can see the fundamental weakness of the League system. To uphold the absolute authority of law is one thing. To place the authority of law unconditionally and irrevocably behind a particular territorial settlement is quite another. The law of nations, unarmed with visible weapons, can only claim authority in so far as it is the expression of justice, and it was for this reason that all the classical writers had always taught that the lawfulness of war depended upon the justice of the cause for which it was undertaken. In sharp contrast with this historic doctrine the League Covenant now made the lawfulness or unlawfulness of any given war turn wholly upon a question of procedure. The organs of the League could only inquire how far the parties concerned had complied with the procedure laid down for the pacific settlement of disputes. They could not pronounce upon the substantial justice or injustice of the conflicting claims.

THE YEARS BETWEEN THE WARS

In the course of the twenty years which separated the two world wars, the authority of the law of nations was grievously undermined by this unfortunate identification of the law with

the maintenance in perpetuity of a particular map. To this other causes contributed, notably the successful repudiation by the Bolsheviks of the fundamental rule that a new government is bound by the international obligations of its predecessor. Again, it could not be overlooked that in the course of the first world war the accepted rules of warfare, particularly those which governed war at sea, had been disregarded on both sides. Although the Allied departures from the rules were officially justified on the ground of ' reprisals ' for illegalities committed by the enemy, this could not disguise the significance of the outstanding fact that the historic rules had been swept aside in order to achieve success. No confidence could be felt that in the event of a renewal of war the rules would not be broken once more, and that the belligerents would be guided only by such principles of conduct as their own interests might dictate. In due course experience proved that this pessimism was only too well founded.

It would be superfluous even to summarise the successive shocks to the authority of law which marked the next twenty years. Only in some very minor cases of international friction were the agencies of the League instrumental in bringing about a peaceful settlement, and none of these were sufficiently important to affect the general trend. From the Polish seizure of Vilna to the German invasion of Czechoslovakia there was an almost unbroken crescendo of successful lawlessness. A significant feature of the period is that nearly every act of aggression found influential sympathy and support even in those countries which had the greatest interest in maintaining the settlement of 1919, and this division of domestic opinion made it impossible for the governments concerned to take any effective action. As the pace of lawbreaking became faster and its successes more spectacular, faith in the possibility of a world ruled by law dwindled to vanishing point. Only one practical question dominated men's minds, and that was the question at what point, if any, aggression would be met by active resistance. When resistance at last was offered, it seemed to have come too late, and in the summer of 1940 the

greater part of the world had made up its mind that all hope of controlling power by the force of law must be abandoned.

THE SECOND WORLD WAR

In the second world war the experience of the first was repeated, but with one important difference. Once more the traditional rules were set aside, but this occasioned no surprise and very little argument. The war of 1914 has left behind it a voluminous literature of legal controversy. Both belligerents and neutrals deemed it necessary to employ the most skilful advocacy and to marshal all the resources of legal learning in order to persuade the world that their respective claims were well founded in law. On all sides it was felt that whatever was done had to be justified by an appeal to the law of nations. The arguments used were often far-fetched, but the fact that they were felt to be necessary showed that the idea of the supreme authority of law had not yet lost its control. In the second world war there was scarcely any legal argument after the spring of 1940. If the belligerents no longer observed the laws of war, it is no less true that the neutrals, led by the United States, ceased to observe the obligations of neutrality. The jurisprudence of the Prize Courts came to an end, since the new methods of war at sea reduced the Prize Courts to little more than administrative organs of the maritime States. The whole process was fittingly symbolised by the appalling demonstration of absolute power which brought hostilities to an abrupt end. In the instantaneous obliteration of Hiroshima and Nagasaki the closure was applied to centuries of debate about the precise distinction between combatants and non-combatants.

THE DRAFTING OF THE CHARTER

It was against such a background that the delegates of the victorious States assembled at Dumbarton Oaks and San Francisco to lay the foundations of a new world order. Unlike the Paris Conference of 1919 these gatherings had nothing to

do with drawing up the terms of peace, and the first difference between the Covenant and the Charter is that the latter is completely independent of any peace settlement which may hereafter be made. For this reason the Charter could not commit the members of the United Nations to the maintenance of any particular map. Frontiers were still fluid while the conferences were sitting, and the reign of lawlessness had not ended with the achievement of victory. In defiance of all accepted rules violent annexations of territory were being carried out without waiting for any peace treaty, and these annexations were ruthlessly enforced by the immediate deportation, carried out with the greatest cruelty, of millions of peaceful inhabitants. By no ingenuity could such proceedings be reconciled with the law of nations, but this had ceased to matter. Nobody thought it worth while to take the trouble of preparing any legal justification for what was being done. All this, and more, was going on while the two conferences were sitting.

In such an atmosphere there could be but little doubt about the outcome of the debate. The actual choice before the delegates lay in substance between two alternatives. The first was to set up something which would in effect be a restored League of Nations, perhaps with a revised procedure for the settlement of disputes and a clearer definition of the obligation of enforcement, but still embodying the basic principle that all States, great and small alike, should be at least formally equal in the eyes of the law. Was such a solution in fact possible?

The answer to this question turned upon the attitude of Russia. The Soviet Union had no reason to love either the law of nations or the League. Almost the first official act of the revolutionary government had been a formal repudiation of its legal obligations, and for some years the League and all its works were a favourite theme of Russian vituperation. The Soviet Union was one of the last States to apply for membership, and it was the only State to be formally expelled. The reason for expulsion was the Russian aggression against Finland in 1939, and this action, though without any practical

effect, was significant in so far as it showed that the law as applied by the League could be invoked even against a Great Power. Meanwhile the aggression was entirely successful, and it was scarcely remembered when Russia herself in 1941 became the victim of a German attack. Before the United Nations came into being the ' Charter ' of the Nuremberg Tribunal gave dramatic expression to the new principle that aggression, if successful, has the effect of promoting the accused from the dock to the bench.

Clearly it was not to be expected that Soviet Russia should consent to any form of organisation which would amount in substance to a revival of the League, and it is not easy to understand the pained surprise with which most of the press recorded the Russian insistence upon a perfectly intelligible policy. The Soviet delegates were entirely consistent in demanding that the new international society should be based upon a conception of law which Russia, no less than Germany had uniformly applied in her own domestic legal system.

In their theory of the nature of law the Marxist and the Nazi dectrines are agreed. Both concur in rejecting the principle hitherto accepted in western Europe, and most clearly expressed in the Constitution of the United States, that the function of law is to control the exercise of power. The Germans branded this principle as being ' liberal ', while the Russians denounced it as ' capitalist ', these epithets being the most abusive in their respective vocabularies, but behind this verbal difference the substantial reason in each case remains the same. In the totalitarian State the function of law is wholly different. So far from controlling the exercise of supreme power, it becomes merely the form or the agency through which power translates itself into action. Hitler did not definitely commit himself to this doctrine until 1942, but it was consistently applied in Russia since the earliest days of the revolution.

Such was the second alternative before the San Francisco Conference, and the course of the discussions soon made it clear that this alternative must be accepted if Russia was to

become a member of the new organisation. Many of the minor Powers, including the British Dominions, put up a strong fight for the preservation of the principle that all States should be equal before the law. These efforts naturally commanded widespread sympathy throughout the English-speaking world, but the governments of the United Kingdom and the United States took what is called the ' realistic ' view that the Russian demand must in substance be conceded. They saw clearly that Russia would accept membership upon her own terms or not at all, and they considered that Russian abstention would be even more damaging to the United Nations than American abstention had been to the League. In return the Soviet delegates made the small concession that even a Great Power should refrain from voting in the case of a dispute to which it was formally a party, but they absolutely refused to yield upon the basic principle that no action could be taken against any one of the ' Big Five ' without its own consent.

THE APOTHEOSIS OF POWER

For these reasons the conference was reluctantly compelled to accept the totalitarian doctrine, already established in the Marxist and Nazi internal régimes, that supreme power is above all law. In the Charter as finally adopted this doctrine finds expression in two ways, each of which must be carefully considered. They may be described as the positive and the negative expression of the same principle.

All power is vested in the Security Council and can be exercised by seven members of the Council, provided that these include all the ' Big Five '. Assuming that a majority so constituted can be obtained, the Charter imposes no legal limits whatever upon what the Council may do. This is the positive expression of its principle. In its decision the Council is not bound to observe any rules of law or to respect the provisions of any treaties. There is nothing in the Charter corresponding to the well-known safeguards included in the American and Australian Constitutions to the effect that no State can be deprived of its territory without its own consent.

If the Council decided that Utopia must surrender the whole or any part of her territory to Arcadia, the decision is not only binding upon the parties but all the members of the United Nations are pledged to assist in carrying it into effect. The fact that Utopia may have an unassailable legal title to the territory in question ceases to be relevant, for all merely legal rights are subordinated to the right of absolute power. The law, as such, no longer affords any security.

For the first time in the history of the law of nations an international authority has now been set up with the legal right to make such changes in the existing order as it may think desirable. The vague permission which the League Covenant gave to the Assembly to ' advise the reconsideration ' of treaties is thus translated into definite terms, and in effect it is vested in the five permanent members of the Council, provided that they can obtain the agreement of two others. In the exercise of this power the Assembly has no share, the rights of the remaining members of the United Nations being limited to their right to elect non-permanent members of the Council. Over the actual decision in any particular case no State not represented on the Council has any control, although every State, irrespective of its own opinion upon the merits of its case, is pledged to enforce the decision taken.

The situation thus created may be new in law, but in history there is ample precedent. The partitions of Poland in the eighteenth century and the partition of Czechoslovakia in 1938 were effected by unanimous decisions of the Great Powers concerned. We may also recall the various occasions on which which the ' Concert of Europe ' asserted its authority during the nineteenth century. But it was never claimed that such decisions were taken within the framework of international law. They were admitted to be assertions of arbitrary power and justified as emergency extra-legal actions taken in the interests of general peace. What the Charter has done is in effect to set up a new ' Concert ' with jurisdiction over the whole world. The decisions of the Council, in so far as it can agree upon any decisions, will not be controlled by law, but

will be in themselves the source of law. Law thus becomes the voice of power, and the procedure of Munich, if not the actual decision, is now consecrated by the Charter of the United Nations.

All this is subject to the very important qualification that power itself becomes powerless if it is not unanimous. No decision involving positive action can be taken unless the ' Big Five ' are agreed. Without this unanimity the new authority cannot function at all, and in such cases the world order remains as it was before.

The negative aspect of the doctrine finds expression in the so-called ' veto ', the principle that no positive action can be taken against a Great Power without its own consent. Upon this there seems to be considerable popular misunderstanding. The innovation introduced by the Charter does not lie in the establishment of the veto, but in its limitation. The rule of unanimity has long been accepted in all international proceedings and is merely the expression of the principle that no State can be legally bound by decisions reached without its consent. As such it has hitherto been the essential safeguard of the principle that all States, great and small, are equal in the eyes of the law. For this reason the rule of unanimity, subject to some minor exceptions, was accepted as a principle of the League Covenant, and in the proceedings of the Council or the Assembly all members alike could avail themselves of its protection.

The revolutionary character of the change introduced by the Charter lies in the fact that the principle of unanimity can now no longer be invoked except by the five States who are permanent members of the Security Council. The outstanding feature of the new world order is to be found, not in the rights which it confers, but in those which it takes away. Assuming that the ' Big Five ' can agree among themselves and can carry with them two other members of the Council, all the remaining members of the United Nations are now deprived of the protection which they formerly enjoyed under the traditional rule of unanimity. They retain the right to be

heard in any debate which may affect their interests, but over the decision itself they have no control, and the whole body of members is pledged to support and enforce any decision at which the Council may arrive.[1]

To these basic principles of the Charter the subsidiary provisions entirely conform, and they may best be explained by contrast with the corresponding provisions of the League Covenant. For example, the Assembly is now in effect limited to the discussion of what lawyers call ' non-contentious ' business, since it is explicitly forbidden to discuss any matter upon which the Security Council may have assumed jurisdiction. Presumably this provision was intended to exclude the possibility of a vote being taken in the Assembly which might conflict with a decision of the Council. Again, it will be noted that the new system of ' trusteeship ' discards the rigid legal obligations which the Covenant imposed upon the administration of the mandated territories. The trust territories will in future be administered under agreements negotiated with the trustee States, and it may reasonably be expected that these will not consent to any limitations which would in substance hamper the full exercise of their sovereignty. In particular, the use of native troops will no longer be limited to the local defence of the territory itself, and any territories which are designated as " strategic areas " are transferred from the authority of the Trusteeship Council to that of the Security Council. The dominant note of all these provisions is that power, as centred in the Security Council, must be both absolute and undivided.

CONCLUSION

In the proceedings of the Council and the Assembly during the first year of the new organisation there is really nothing of specifically legal interest. The Persian complaint about

[1] At this point it may be appropriate to quote Article 2 (i) of the Charter, which declares that " The Organisation is based on the principle of the sovereign equality of all its members." For this a footnote is sufficient, and comment would be superfluous.

Russian interference in Azerbaijan, which was presented early in 1945, is of historic interest as being the first case in which a ' dispute ' was formally brought before the Council. Since the application of certain treaties was involved the case might have given some opportunity for legal debate, but an opportune change of government in Persia resulted in an agreement being reached, and the case was removed from the agenda. No questions of international law were raised by the Russian and Ukrainian complaints relating to affairs in Greece and Indonesia. So far as appears at present, Russian policy seems to aim at the radical alteration rather than the preservation of the existing legal structure. From the Caucasus to Spitzbergen all the demands which are now being ventilated by the Soviet Union involve far-reaching changes to the advantage of Russia in the territorial position established by treaties now in force.[1]

The Charter, although structurally independent of any peace treaty which may yet be made, resembles the great peace settlements of the past in that it is the child of its age. Unlike them, it does not seek to perpetuate any particular map, since the map still remains to be drawn. What it does attempt to perpetuate is the supremacy of the Great Powers which existed *de facto* when hostilities came to an end. When Japan surrendered, the combined military strength of Great Britain, the United States, and Russia was sufficient to dominate the whole world. Granted that the League experiment had failed and could not be repeated, it was considered by those in authority that the best hope of preserving peace lay in the continuance of the combination which had won the war. It might almost be said that we are now trying to reverse the famous epigram of Clausewitz and make policy the continuance of war. Once more we are attempting the task which has always proved to be impossible in the past, the task of keeping together a military alliance without the binding element of a common enemy.

[1] The complaint of Great Britain against Albania arising out of the mining of the Corfu Channel was formally presented while this article was being written.

A study of the first year's working of the United Nations certainly gives no ground for optimism. Perhaps a lawyer may be suspected of professional bias if he ventures to suggest that the present disorder of the world is at least largely due to the fact that the continued toleration of successful lawlessness for more than a quarter of a century has undermined the traditional belief, a belief which lies at the basis of European civilisation, in the impersonal authority of law as a force which should control the exercise of all power, even the mightiest upon earth.

If this view be well founded, it may further be suggested that the dominant problem of our own time has some resemblance to that which confronted Grotius three hundred years ago. His great book was published in 1625 during the course of the Thirty Years War, and in the preface he paints a sombre picture of the devastation and misery which that horrible struggle had inflicted upon a large part of Europe. Notwithstanding all these horrors he still saw grounds for optimism. He wrote in the belief that a reasonable measure of international order could be assured if the rulers of western Christendom could be persuaded to accept a common code of rules which should govern their normal relations in time of peace. The basis for such a system lay ready to his hand, since at that time he could assume that these rulers were agreed, at least in theory, in acknowledging the authority of the Christian faith and the principles of the Roman law. Grotius did not fall into the modern error of imagining that peace could be preserved by devising some elaborate procedure for the settlement of disputes. With truer insight he perceived that the avoidance of war depends upon the acceptance and observance of an agreed law of peace.

That is still true today, but there is no hint of it in the Charter beyond a suggestion that the Assembly should "initiate studies and make recommendations" upon the development and codification of law. Such words are far from suggesting either the difficulty or the urgency of the task which lies before us. If it be true that the problem which confronts

us today is in substance the same as that which faced the world of Grotius, it is no less true that its solution is both more difficult and more urgent.

It is more difficult because the common cultural and religious foundation upon which the Grotian system was built has been deliberately destroyed by a vast propaganda which seems to have conquered the minds of hundreds of millions of human beings in many countries. The schisms and hatreds which now divide mankind go far deeper than any of the divisions of Europe in the seventeenth century, and there is no longer any common standard of reference to which all disputants are willing to appeal. These dissensions are fomented and accentuated by an elaborate system of mass propaganda, the achievements of science having now placed in the hands of governments the power of dictating the thoughts of their subjects.

A solution is more urgent because the danger which now threatens us, though different, is much greater and perhaps more imminent. What Grotius had reason to fear was the peril of anarchy, but the anarchy of the seventeenth century was primitive and semi-barbarous, the disorder which would result from the collapse of organised government. The danger which now threatens does not lie in the possible collapse of authority, but in the fact that supreme political power has now become irresistible. In a world distracted and divided beyond all human experience science has now bestowed upon those in supreme authority an almost inconceivable power both of controlling their subjects and of destroying their enemies. At the same time they have been set free from the restraints of law.

CHAPTER 7

THE PROBLEM OF RE-BUILDING

THE PESSIMISM OF TODAY

IF the analysis offered in the previous chapters is even approximately correct certain inferences are unescapable. It is clear that neither the constitution nor the practice of the United Nations gives us the least reason to expect that in that quarter we may look for a lead in restoring the authority of law. Again, there cannot now be many who still believe that international conferences of any kind are likely to contribute much to the work of reconstruction. This indeed was clear as far back as 1930, but since the war practice has now developed the method of conference as a specialised and highly efficient machinery for the public aggravation of international discord. Should the world be involved once more in general war, it seems certain that no rules will avail to restrain those in command from the unlimited use of the appalling means of destruction which science has now placed at their disposal. Against the renewal of war we have no more security than before, unless it can be found in the general poverty and exhaustion in which most of the world is now plunged. Certainly the vengeance taken upon the German war criminals has not proved to be any deterrent to continued aggression, and most of the other crimes for which they were punished are still being committed with impunity every day. To these reasons for anxiety we may add, though only in bare enumeration, such problems as those presented by the many millions of " displaced persons," the devastation and economic ruin of immense areas, or the racial and communal animosities which now menace the peace of the world.

Those who have followed the argument of this book so far will not expect it to end by advocating some simple remedy

or adopting some current slogan. Such panaceas as ' Federal Union ' or ' United Europe ' are likely to prove as delusive as ' the New World Order ' or ' the dictatorship of the proletariat.' No particular form of government, no scheme, however elaborate, of international organisation, can offer any real promise of achieving the discarded and almost forgotten ideals set forth in the " Atlantic Charter." The root of our troubles lies far deeper. Both diagnosis and remedy must seek for the root.

To some readers this pessimistic survey may recall the sombre picture painted by Grotius of the misery to which central Europe was reduced by the Thirty Years War. For the evils which he saw he proposed a remedy, and we may fairly ask whether the remedy which he offered did any good. The war came to an end in 1648, and within a short time the work of Grotius was translated into every European language, and it is fair to say that it was accepted as a general standard of international conduct down to the nineteenth century. Was the world any better when this standard was generally accepted than it is to-day? That it was far from perfect we may all agree, and also that life was without the material and physical comforts which we owe to modern invention. But it is possible, after making all allowances, to draw some comparison between the life of Europe under the Grotian system and the life of today, at least in so far as general security and stability are concerned.

THE OPTIMISM OF THE PAST

The historian Gibbon, writing in 1781, pauses in the middle of his work to make some ' General Observations on the Fall of the Roman Empire in the West,' and this moves him to ask whether there is any real danger of Europe being once more overwhelmed by barbarian invasion. His reply to this question is one of sober and reasoned optimism, and this optimism is based upon a sense of the essential solidarity of Europe against the forces of external barbarism. After saying that Europe is much stronger when divided into independent states than

under a centralised government, he goes on to give this picture of the European community as he saw it:—

> 'Europe is now divided into twelve powerful, though unequal, kingdoms, three respectable commonwealths, and a variety of smaller, though independent, states; the chances of royal and ministerial talents are multiplied, at least with the number of its rulers; and a Julian, or Semiramis, may reign in the North, while Arcadius and Honorius again slumber on the thrones of the Bourbons.[1] The abuses of tyranny are restrained by the mutual influence of fear and shame; republics have acquired order and stability; monarchies have imbibed the principles of freedom, or, at least, of moderation; and some sense of honour and justice is introduced into the most defective constitutions by the general manners of the times. In peace, the progress of knowledge and industry is accelerated by the emulation of many active rivals: in war, the European forces are exercised by temperate and indecisive contests. If a savage conqueror should issue from the deserts of Tartary, he must repeatedly vanquish the robust peasants of Russia, the numerous armies of Germany, the gallant nobles of France, and the intrepid freemen of Britain; who, perhaps, might confederate for their common defence. Should the victorious Barbarians carry slavery and desolation as far as the Atlantic Ocean, ten thousand vessels would transport beyond their pursuit the remains of civilised society; and Europe would revive and flourish in the American world, which is already filled with her colonies and institutions.'

After arguing at some length that the scientific and other improvements introduced by civilisation are imperishable, Gibbon ends his chapter with the following words:—

[1] Thus in the first edition. These words displeased Louis XVI and were altered in later editions to "thrones of the South."

> 'Since the first discovery of the arts, war, commerce, and religious zeal have diffused, among the savages of the Old and New World, these inestimable gifts: they have been successively propagated; they can never be lost. We may therefore acquiesce in the pleasing conclusion that every age of the world has increased, and still increases, the real wealth, the happiness, the knowledge, and perhaps the virtue, of the human race.'[2]

Such was the picture which Europe presented to one of the keenest and most detached minds of the eighteenth century. It is impossible to read this chapter as a whole without feeling that it is dominated by an intense sense of unity in all the essential things of civilisation. Even the wars of Europe are 'temperate and indecisive.' Gibbon had lost his personal faith and wrote with a strong bias against Christianity, but he fully acknowledges the immense contribution which the Christian religion had made to the creation of a fundamental unity in Europe. This, coupled with the general acceptance of the principles of Roman law, formed the firm basis of the common civilised order.

Upon such a basis Grotius, following in the steps of his mediaeval predecessors, could venture to propose a system of law between the nations which there was some reasonable hope of presenting for acceptance by a number of independent rulers who recognised no common earthly superior. It was in fact accepted, at least in principle, with the results which Gibbon describes, and this optimism, this sense of steady progress, has been repeatedly expressed by innumerable writers down to the beginning of the present century.

THE TASK OF THE FUTURE

The loss of this essential unity of civilised men, the disruption of this common foundation, makes it impossible for the work of Grotius to be repeated to-day. No man, whatever his

[2] The quotations are from the last part of ch. xxxviii of *The Decline and Fall of the Roman Empire.*

genius, can now hope to write a book upon the law of nations which will be accepted as setting an agreed standard of conduct for the rulers of our present world. For the present, at least, there is no common foundation upon which he can build, since there is no common agreement upon a Divine or ' natural ' law to which all human law and all political power, even the mightiest, is bound to conform.

In direct and irreconciliable opposition to such a conception of law is the doctrine, common to both the Marxist and the Nazi systems, and seriously infecting others, that law is merely the instrument or agency through which those who hold supreme power make known their will. Between these two conceptions of law there can be no compromise. The future of the law of nations, which is the same thing as the future of civilisation, depends upon which of the two is going to prevail. At the moment this issue is still undecided, and that is the real reason for the confusion in which the world finds itself today. Certainly the question has not been settled by the military victory of the Allies in the recent war.

The tragic paradox of the present situation is that in the course of a very few years science has placed in the hand of governments a control of physical forces far beyond anything which the founders of our civilisation could have imagined, but that there has been no moral progress which could control and direct the exercise of these gigantic powers. On the contrary, the traditional restraints have been almost entirely cast aside, and the moral situation is worse than it has ever been before.

The present disunity of mankind is something for which civilised history affords no precedent. The ' temperate ' wars of the past usually arose from disputes between rulers over such questions as the title to some particular territory. They were fought by relatively small numbers of men on each side, and the great mass of people, except in the combat areas, was but little affected. Today whole nations and all that they possess are mobilised for war, and science has now made it as

easy for governments to excite and to organise the passions of men as to control their persons and their property.

If that be so, it is clear that the process of rebuilding must begin with the foundations which have been so grievously undermined. Nobody is likely to be under any illusion that such a task is going to be either quick or easy. Somehow or other men must be persuaded, if not of the truth of the Christian religion, at least of a Divine order, a natural law, a common standard above the human level by reference to which all human conduct can be judged. Idolatry, which is the worship of things made by man, must be destroyed, and this takes various forms. It may be the belief that happiness can be achieved by the use of machines and the multiplication of possessions, or it may be the belief that there is no authority higher than those human organisations which we call ' states.'

In a word, the world cannot be saved except by a common faith. At this point it will be obvious that the mere lawyer has reached the limit of what he can usefully say.