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THE GROTIAN TRADITION IN INTERNATIONAL LAW

By PROFESSOR H. LAUTERPACHT

Whewell Professor of International Law in the University of Cambridge

THE tercentenary of the death of Grotius—he died on 29 August 1645—passed almost unnoticed in the literature of international law.[1] When compared with the solemn prominence accorded twenty years before to the three hundredth anniversary of the appearance of *De Jure Belli ac Pacis*, that absence of remembrance of a life so rich in fame and achievement is significant. It coincided with a period in which international law, after having survived the fiercest assault ever made upon it, proved as yet unable to impose its authority over the essentials of the new international system.[2] At no time was it therefore more necessary than after the Second World War to sustain hope by drawing inspiration from works in which principle has asserted itself against makeshifts. It is believed that instruction of this kind may still be derived from the ideas which Grotius bequeathed to international law and which supply the key to the attraction and the influence of his treatise in the course of centuries. This is so although the principal work on which his fame rests may be faulty in its method, pretentious in its learning, and, unless it is studied with a sense of historic perspective, unreadable in the twentieth century. The object of this essay is to attempt to supply that perspective through an estimate of his teaching in the light of the enduring problems of international law. A survey of that nature is bound to show that the contribution of Grotius is more than a mere link in the evolution of thought; that there is about it a unity and a consistency which transcend its evasions and contradictions; that it is representative of the main problems with which international law has been confronted since its inception; and that, upon final analysis, the true value of his teaching is bound to assert itself over the repetitious and often uncritical adulation which has threatened to obscure the true import of his work.

Admittedly, the significance of his achievement has been, and probably will remain, a subject of controversy. Although the criticism is unlikely to reach the low level of vituperation by Rousseau,[3] and some lesser writers,[4]

[1] Professor Lee's article in *Law Quarterly Review*, 62 (1946), pp. 53–7, is a notable exception.

[2] It was with some difficulty that the authors of the Charter of the United Nations were persuaded to assign to international law a place within the scheme of the United Nations. The view is widely held that, conceived in the spirit of realism, the Charter in many respects preferred order to law.

[3] *Contrat Social*, Book I, chs. ii and iv. He reproaches Grotius with favouring tyrants and says: 'His constant way of reasoning is to establish law by reference to the facts' (ch. ii). See below, p. 45.

[4] See, e.g., Dugald Stewart's outspoken criticism expressed in his first *Dissertation on the Progress of Philosophy*, and answered by Hallam, *Introduction to the Literature of Europe* (1839), vol. iii, pp. 439 ff.

it is by no means a relic of intolerance or of hasty reading. Thus we find a distinguished modern author referring in the following terms to the principal work of Grotius:

'That learned medley, *De Jure Belli ac Pacis*, which, however valuable as a first attempt to lay the foundations of International Law—and even here it is vitiated by a perpetual confusion between fact and Right—is, for all speculative purposes, a nest of sophistries and contradictions.'[1]

There is no reason to assume that he was ignorant of the fervent advocacy of Grotius's merits by writers of no mean calibre such as Sir James Mackintosh,[2] Hallam,[3] and Whewell.[4] Grotius himself, when at the close of his day he surveyed the achievements of a lifetime, may well have had his doubts. In a very real sense he was one of the greatest international figures of his age—a prodigy, almost a miracle, of learning; an intimately familiar name to all interested in religious controversy at a time when questions of religious dogma and polemics were in the very centre of public attention; a brilliant literary scholar; the acknowledged greatest exponent of the law of nations. It would be necessary to go back to Erasmus to find a figure who was as much a household name wherever learning and culture reached. But we can well understand the doubts which beset Grotius as he lay on his death-bed in the town of Rostock, in Pomerania. He was then on his return journey from Stockholm, where he had gone to tender what was in fact an enforced resignation as Swedish Ambassador to the French Court and to attempt to obtain a diplomatic appointment of comparable dignity and usefulness. No such offer materialized. There he lay, shattered in body by a storm which made his ship a total wreck, and broken in spirit, his long and varied career unfolding itself before his mind's eye. According to a report, as to the authenticity of which there has been some controversy, among his closing words there was the exclamation of despair: 'By undertaking many things I have accomplished little.'[5]

Posterity has successfully challenged that self-deprecatory judgment. Yet he may well have had reasons for his doubts, for the final estimate of his work is not so self-evident as the lavish praise often bestowed upon it may lead us to assume. This is so not because of the fact, which possibly was foremost in his mind in August 1645, that his diplomatic career was not an unqualified success. He had had to contend with difficulties which any ambassador of Sweden, then allied with France, would have had to meet at that time. For French diplomacy oscillated, with transparent unscrupulousness, between the desire to extract the maximum of help from

[1] Vaughan, *Studies in the History of Political Philosophy* (1925), vol. i, p. 22.
[2] *Discourse on the Study of the Law of Nature and Nations* (ed. of 1828), pp. 23 ff.
[3] Op. cit., vol. iii, ch. iv.
[4] See his Preface to the Abridged Translation of *De Jure Belli ac Pacis* (1853).
[5] As quoted by Knight, *The Life and Work of Hugo Grotius* (1925), p. 289.

the subsidized ally and the determination to prevent Sweden from establishing herself as a dominant power in Europe. But it is probable that he did not feel strongly about the set-backs in his diplomatic career, which for him was merely a source of livelihood. It is not even certain that international law had been or remained the centre of his interest. He was busy with the successive editions of *De Jure Belli ac Pacis*. But the mysteries of the doctrines of Atonement and of Transubstantiation were more real to him than the work on which his fame eventually rested. What affected him more deeply was the failure of his persistent efforts, through writings and otherwise, to promote the unity of the Church—a unity conceived as an aim praiseworthy in itself and as a pre-eminent instrument of peace.[1] He was not primarily a man of affairs, and his powers as negotiator were impaired rather than enhanced by the range and the conviction of his scholarship. His main literary activity—which was not in the sphere of international law but of poetry, literary criticism, religious dogma, and biblical exegesis—has proved of ephemeral value. There are very few, if any, who now draw their inspiration or knowledge from these writings.

What is perhaps more important is that the merits of that very work which has secured for him a permanent place in history are not by any means above controversy. The view is widely held that as an exposition of international law—or even as a presentation of a jurisprudential system —*De Jure Belli ac Pacis* is in many respects a somewhat superficial, hasty, and pretentious production. It is impossible to brush aside that view with astonished impatience. That monumental work is a dazzling exhibition of learning, but much of that learning creates the impression of being irrelevant. This is so not because he overwhelms the reader with a mass of ancient authorities while neglecting those nearer home. For this was the custom of the time. Witness, for instance, the way in which Machiavelli, the realist, relied almost exclusively upon the experience of antiquity. Hobbes, the atheist, devotes a substantial portion of the *Leviathan*—a secular work if ever there was one—to a discussion of the Scriptures. The principles and practice of the Greeks and Romans were used as the basis of the revival of the study of military science in the seventeenth century. This also was the case with political science and constitutional law. Neither is there more substance in the facile criticism pointing to Grotius's promiscuous reliance on what appears to the modern eye to be the exotic authority of poets, philosophers, schoolmen, scholastic writers, the Holy Scriptures and their innumerable commentators. For he is at pains to prove not only the law of nations—the evidence of which he sought in unbroken custom and the testimony of those skilled in it[2]—but also the law of nature in its diverse

[1] See below, p. 47.
[2] Book II, ch. i, § xiv. 2.

connotations. For the latter purpose it was legitimate for him to draw upon a manifold variety of opinions. The impression of irrelevancy is largely due to the ostentatiousness and prolixity in the piling up of authorities. The unwieldy mass of authorities cited from various periods other than that coeval with his own and from most diverse spheres of human thought almost seems to suggest that Grotius had never outgrown the mentality of the precocious youth who at the age of fifteen had published work to his credit and had joined a Dutch diplomatic mission to Paris, where he was greeted by the King of France as the miracle of Holland.

However, this somewhat exhibitionist learning is not limited to the method of spectacular assembling of authorities. It seems to extend to the treatise as a whole. For one-half of the work is concerned with matters which, to all appearance, have no connexion with international law. That part of the treatise includes a general jurisprudential theory of the law of property, of contract, and of reparation; in part it comprises also a general theory of constitutional law, especially in relation to such questions as sovereignty and the social contract. It may not be difficult to find an explanation—and a justification—of what thus appears to be something in the nature of a patchwork. The explanation is that as, according to Grotius, the main cause of a just war is a threatened or actual violation of a legal right[1] or the refusal of reparation, it was necessary to give an account of the substantive law which may be affected by a breach of legal duty. The explanation may appear to some far-fetched. Thus it may not be easy to see the relevance of the chapters on the rights of parents over children, of the husband over the wife, and of the master over the slave; or those on the law of wills and succession; or that on the right of sepulchre (which follows immediately upon the chapter on the right of legation). Another explanation of the somewhat patchy character of the work is the circumstance, for which there now appears to be substantial evidence,[2] that while composing it Grotius made use of a great deal of material assembled many years before in a work entitled *De Jure Praedae Commentarius*, written about 1604 in connexion with a case in which he appeared as counsel for the Dutch East India Company. Of that work, discovered in 1864 and published in 1868, only one part—*Mare liberum*—had previously been published in 1609.

To that seemingly deficient and artificial construction of the treatise there must be added a defect of method which, apparently, has no redeeming feature. That defect does not consist in the fact that it is impossible to classify Grotius as belonging to any of the accepted schools of thought in the matter of sources of international law. He is not a pure positivist

[1] Book II, ch. i, § ii.

[2] See Scott's Introduction to the translation of *De Jure Belli ac Pacis* in the 'Classics of International Law' (1925).

—a mere chronicler of events laboriously woven into a purely formal pattern of a legal system. Neither is he a naturalist pure and simple for whom an irresistible law of nature is the overriding—or the only—rule of conduct. We cannot even consider him as what is usually described as a 'Grotian' who has accomplished a workable synthesis of natural law and state practice. The fact seems to be that on most subjects which he discusses in his treatise it is impossible to say what is Grotius's view of the legal position. He will tell us, often with regard to the same question, what is the law of nature, the law of nations, divine law, Mosaic law, the law of the Gospel, Roman law, the law of charity, the obligations of honour, or considerations of utility. But we often look in vain for a statement as to what is *the* law governing the matter. Occasionally we obtain a glimpse of how useful the treatise would be if Grotius had adhered to these distinctions for the practical purpose of indicating the existing legal rule. Thus in discussing unjust causes of war he distinguishes between strictly legal obligations and those arising from generosity, gratitude, pity, or charity, which obligations must not be enforced by war any more than they can be enforced in a court of law.[1] But this is an exception rather than the rule. With regard to the crucial aspect of the work, namely, the law of war, it is often wellnigh impossible to elicit what is the law on the subject. Thus Grotius asserts the legality, under the law of nations, of killing of enemies or of devastation. But these permissive rules he qualifies by the statement that such things are permissible not for the reason that they can be done 'without violence to right conduct and rules of duty, but because among men they are not liable to punishment'.[2] It is not easy to decide whether that distinction is of legal relevance or not. Things, he says, which are permissible—i.e. lawful—may not be consistent with justice[3] (which on some occasions he identifies with honour) or with what he describes as moral justice or internal justice.[4] Yet, on the other hand, conduct though consistent with 'justice' may not be in conformity 'with goodness, with moderation, with high-mindedness'[5] or with 'equity and goodness'.[6]

There is almost a touch of levity in this indiscriminate and confusing eclecticism in the use of sources. Thus, after giving an account of the unmitigated rigours—of which he occasionally seems to approve—of the law of war in the light of actual practice, i.e. of the law of nations, he says in a passage entitled 'With what meaning a sense of honour may be said to forbid what the law permits':

'I must retrace my steps, and must deprive those who wage war of nearly all the

[1] Book II, ch. xxii, § xvi.

[2] Book III, ch. iv, § ii. 1–3. Ibid. § v. 2 ('We must not understand such a law as would free what is done from all blame, but such immunity from punishment as I have mentioned').

[3] Book III, ch. x, § i. 1.

[4] Book III, ch. xi, § ii.

[5] Book III, ch. xi, § vii.

[6] Book III, ch. iii, § xv. 1.

privileges which I seemed to grant, yet did not grant them. For when I first set out to explain this part of the law of nations I bore witness that many things are said to be "lawful" or "permissible" for the reason that they are done with impunity, in part also because coactive[1] tribunals lend to them their authority; things which, nevertheless, either deviate from the rule of right (whether this has its basis in law strictly so called, or in the admonition of other virtues), or at any rate may be omitted on higher grounds or with greater praise among men.'[2]

By way of explaining[3] the meaning of the passage he quotes with approval Agamemnon's answer to Pyrrhus in Seneca's *Trojan Women*. While the latter invokes the law as laying down the victor's full power over the captive, Agamemnon's retort is that such conduct although permitted by law may be contrary to our sense of justice and therefore forbidden. Upon which Grotius's comment is that 'in this passage the sense of shame signifies not so much a regard for man and reputation as a regard for what is just and good, or at any rate for what is more just and better'. This appeal from law to justice is made, we are told, only with regard to things which are done in an unjust war though undertaken in a lawful way.[4] In such a war 'all acts which arise therefrom are unjust from the point of view of moral injustice' (*interna injustitia*). What are we to make of all this? The distinction between just and unjust wars is clear enough. Grotius repeatedly explains it in the treatise: it is a legal distinction and various legal consequences follow from it.[5] But we have not been told so far that it affects the legal quality of the acts of those engaged in an unjust war. On the contrary, Grotius asserts the opposite view.[6] What is meant by the statement that they are now to be 'deprived' of all the privileges which the author 'seems' to have granted to them? Is that denial of privileges and rights a precept of law or a dictate of morals or of the law of nature which is paramount over all? His explanation does not help us: '. . . in consequence, the persons who knowingly perform such acts, or co-operate in them, are to be considered of the number of those who cannot reach the Kingdom of Heaven without repentance.'[7] Neither does his insistence that 'true repentance . . . if time and means are adequate, absolutely requires that he who inflicted the wrong, whether by killing, by destroying property, or by taking booty, should make good the wrong done'.[8] We are thus uncertain, once more, whether we are in the realm of law or morals.

Neither should we be appreciably better off if we were to have more definite guidance on the subject, for it is possible—we are not altogether

[1] The original text uses the expression *judicia coactiva*. Possibly 'enforceable judgments' conveys more accurately the intention of the author. The quotations in the present article are taken, unless otherwise stated, from the translation of Kelsey in the 'Classics of International Law' (Carnegie Endowment for International Peace, 1925).

[2] Book III, ch. x, § i. 1.

[3] Book III, ch. x, § i.

[4] Book III, ch. x, § iii.

[5] See below, p. 38.

[6] See below, p. 39.

[7] Book III, ch. x, § iii.

[8] Ibid.

sure—that considerations of moral justice (*justitia interna*) enter the province of the ultimately binding law of nature. If it were otherwise, what is the meaning of the statement that he is now about to deprive those who wage war of nearly all the privileges which he seems to have granted them, and yet has not granted them? Nor are we always certain, in the important chapters on moderation in a just war, at what point precepts of 'goodness, moderation, and high-mindedness' merge into the relentlessly binding law of nature—a confusion which is apparent especially in the chapter on moderation in punishments, where he speaks of the precepts of 'justice and of the law of nature';[1] or when he insists that 'nature does not sanction retaliation except against those who have done wrong';[2] or when he gives expression to his desire to 'restrict the unrestrained licence of war' in the matter of devastation to 'that which is permitted by nature'[3] (although, apparently, there is little limit to it according to the law of nations). The fact is that we are often at a loss as to the true meaning which he attaches to the law of nature. It is true that he gives a seemingly exhaustive definition of the law of nature as 'a dictate of right reason which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God'.[4] He explains also with some clarity what is the proper evidence of the law of nature, namely, either abstract reasoning showing the necessary agreement or disagreement of a rule 'with a rational and social nature' or *a posteriori* proof by reference to general belief[5]—the kind of evidence which is mainly responsible for the dazzling exhibition of learning displayed in the treatise. But we have only to go back to the *Prolegomena* to find that the law of nature thus defined is identical with law in general as determined by the necessity to maintain the social order and by human nature in general. The law of nature, it appears from the *Prolegomena*, is the law which is most in conformity with the social nature of man and the preservation of human society—a law of nature, in its 'primary sense', which includes the duty of refraining from appropriating what belongs to others, restoration of what belongs to them, the obligation to fulfil promises, reparation of injury, and the right to inflict punishment.[6] With that natural law there is connected, as equally arising from nature, the inclination of man 'to follow the direction of a well-tempered judgment, being neither led astray by fear or the allurement of immediate pleasure, nor carried away by rash impulse'.[7] There is another kind—or consequence—of natural law which causes us to discriminate between and show preference

[1] Book III, ch. xi, § xvi. 1.
[2] Ibid., § xvi. 2.
[3] Book III, ch. xii, § viii. 1.
[4] Book I, ch. i, § x. 1.
[5] Book I, ch. i, § xii. 1.
[6] *Proleg.* 8–10.
[7] Ibid. 9.

'now to him who is more wise over the less wise, now to a kinsman rather than to a stranger, now to a poor man rather than to a man of means'.[1]

This uncertainty as to the meaning of natural law is not relieved by the fact that in both parts of the treatise—in the *Prolegomena* and in Book I—there is a significant attempt to place the law of nature upon a secular basis. The law of nature, he says in a frequently quoted passage of the *Prolegomena*,[2] 'would have a degree of validity even if we should concede that which cannot be conceded without utmost wickedness, that there is no God, or that the affairs of man are of no concern to Him'.[3] That alternative he is unwilling to accept. For such disinterestedness on the part of the Divinity is, he says, contrary both to reason and to all experience, and the duty of obedience to God follows therefore with absolute cogency. Accordingly, he concludes that in addition to the law of nature there is another source of law, namely, the will of God, to which absolute obedience is due and to which the law of nature must be attributed.[4] Similarly, when subsequently defining the law of nature, he asserts that it is 'unchangeable —even in the sense that it cannot be changed by God'.[5] For 'measureless as is the power of God, nevertheless it can be said that there are certain things over which that power does not extend. . . . Just as even God . . . cannot cause that two times two should not make four, so He cannot cause that that which is intrinsically evil be not evil.'[6] But here, once more, he retreats from his position by an ingenious piece of dialectics. It may happen, he says, that while the law of nature is unchangeable the object which it regulates has undergone a change: 'So if God should command that any one be slain, or that the property of any one be carried off, homicide or theft—words connoting moral wrong—will not become permissible; it will not be a case of homicide or theft, because the deed is done by authority of the Supreme Lord of life and property.'[7]

While he thus leaves the reader uncertain—there is no question of abandoning the position altogether—as to his determination to emancipate the law of nature from the shackles of theology, it is by no means clear that the law of nature, as used by him, invariably fulfils a humanizing function in the cause of alleviation of suffering and of progress conceived as an assertion of the liberty of man. Undoubtedly, more often than not

[1] *Proleg.* 10.
[2] Ibid. 11.
[3] Ibid.
[4] Ibid. 12.
[5] Book I, ch. i, § x. 5.
[6] Ibid. This separation of the law of nature from theology was already foreshadowed by Suarez in *De Legibus ac Deo Legislatore* (1612), Book II, ch. xiv: 'God does not, properly speaking, grant dispensations with respect to any natural precept; but He does change the subject-matter of such precepts or their circumstances, apart from which they themselves do not possess binding force. . . .' And see Troeltsch, *The Social Teaching of the Christian Churches* (English translation by Wyon), vol. ii (1931), p. 636, for an interesting comparison of Grotius's rationalism as compared with Calvin's *stat pro ratione voluntas*. And see below, p. 53, n. 1.
[7] Book I, ch. i, § x. 6.

he resorts to the law of nature as a mitigating factor, as, for instance, in the matter of the treatment of prisoners; he contrasts the more severe rules of the law of nations with the principles of the law of nature.[1] But on other occasions his conception of natural law approaches very much that of Hobbes's notion of the right of nature and of a law of nature as expressive of physical laws rather than ethical and juridical norms.[2] Most of the harshness of the law of war he deduces from the law of nature thus conceived. There are, according to it, no limits to the right to kill, to destroy, and to plunder. Thus the law of nature, though not the law of nations, permits the killing of the enemy by poison.[3] By the law of nature, though not by Mosaic law or the law of the Gospel, it is permissible to kill a person in defence of property.[4] But this is not consistent with his basic view of the law of nature as determined by the social nature of man. There is reason to believe that Grotius oscillated between these two conceptions of the law of nature and that, when in difficulty, he resorted to God for assistance. Thus while he admits that according to the law of nature a man who is in imminent danger of receiving a blow or a similar injury has the right to prevent it by killing the enemy, he denies that this is so by the law of the Gospel, which is the law of God; and he asserts that God's will is paramount in the matter: 'For God, the creator of nature, is also able to act freely outside the realm of nature, and has the right to lay down laws for us even concerning those matters which are by nature free and undetermined; even greater is His right to make obligatory what by nature is honourable, even though not obligatory.'[5] On the whole we are probably right in assuming that the most frequent use of the notion of the law of nature by Grotius is what we should describe as general principles of law arrived at by way of a generalization and synthesis of the principal systems of jurisprudence.

The treatise abounds in laborious and elaborate distinctions between diverse kinds of justice and various categories of law, but it is not always clear what object these distinctions are intended to serve. Commentators and biographers have made interesting attempts to explain these classifica-

[1] Book III, ch. xvi, § ii. 3.

[2] 'The Right of Nature, which writers commonly call jus naturale, is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and, consequently of doing any thing, which in his own judgment, and reason, he shall conceive to be the aptest means thereto' (*Leviathan* (1651), ch. xiv); 'A Law of Nature, lex naturalis, is a precept or general rule, found out by reason, by which a man is forbidden to do that, which is destructive of his life, or taketh away the means of preserving the same; and to omit that, by which he thinketh it may be preserved' (ibid.).

[3] Book III, ch. iv, § xv. 1. There seems to be much substance, from this point of view, in Montesquieu's criticism of the manner in which Grotius referred to the law of nature as justifying the rights and cruelties of war; for, says Montesquieu, the essence of the law of nature is preservation, not destruction (*Esprit des Lois*, x. 3).

[4] Book II, ch. i, §§ xi–xiii.

[5] Book II, ch. i, § x. 1.

tions and bring them within the systematic orbit of modern terminology.[1] But there is not much in the treatise which lends itself, with any substantial accuracy, to these well-meant attempts. He distinguishes between the volitional law[2] (including statutory and, generally, positive law) and the law of nature which is unchangeable and impervious, it would seem, even to the will of God—a position which, as has been suggested,[3] he does not find it possible to maintain with uniform consistency.[4] The volitional law is divided into human and divine, the first being in turn subdivided into municipal law and the law of nations (which derives its obligatory force from the will of all nations or many nations), the latter into universal divine law and divine law peculiar to a single people.[5] Occasionally he distinguishes between the law of nations and the law of the better nations.[6] He differentiates clearly between the law of nations improperly so called, i.e. rules of private law which are common to all or some nations and which any people is entitled to change without consulting others and, on the other hand, the law of nations in the strict sense of the word which affects the mutual society of nations in relation to one another.[7]

In a different sphere he distinguishes between *jus aequatorium* (i.e. law applying in the relations of persons on a footing of equality such as citizens or allies) and *jus rectorium*[8] (i.e. law applying to relations of persons on a footing of inequality such as master and slave, or king and subject). He attaches even greater importance to the old Aristotelian distinction between expletive justice (*justitia expletrix*) which, apparently, is concerned with legal rights proper, rights to one's own, with *facultas* (which, again, he divides into private and public), and attributive justice (*justitia attributrix*) which is concerned with aptitudes (*aptitudo*)[9]—something to which a person may be entitled as a matter of 'generosity, compassion, and foresight in matters of government'. Probably this latter distinction figures more

[1] See, in particular, Westlake, *Collected Papers* (1914), pp. 39–47, and Lee, *Hugo Grotius* (Annual Lecture on a Master Mind, British Academy, 1930, Offprint), pp. 53–6.

[2] Book I, ch. i, § ix.

[3] See above, p. 8.

[4] See also, with regard to Punishments, Book II, ch. xx, § x. 1, where he points out that there is nothing strange in the fact that conduct which is permissible according to the law of nature and municipal law is forbidden by divine law 'since this is most perfect and sets forth a reward greater than human nature; to obtain this reward there are justly demanded virtues which surpass the bare precepts of nature'.

[5] Book I, ch. i, §§ xiv–xv.

[6] Book III, ch. iv, § xix. 1.

[7] See, for repeated references to that distinction, ch. viii of Book II (on such questions as acquisition of property in animals *ferae naturae* and on the law relating to islands and alluvial deposits). For a clear distinction between international law proper and *jus gentium* see Book ii, ch. viii, § i. 2: 'Hoc autem non est jus illud gentium proprie dictum; neque enim pertinet ad mutuam gentium inter se societatem, sed ad cujusque populi tranquillitatem; unde ab uno populo aliis inconsultis mutari potuit.' And see *Proleg.* 1.

[8] Book I, ch. i, § iii. 2.

[9] Book I, ch. i, §§ vii, viii. 1.

prominently in the treatise and is more consistently applied than any other. Thus, for instance, only the violation of a perfect right, of a *facultas* (as distinguished from an imperfect right, an aptitude), legitimately gives rise to a just war[1] and, generally, to enforcement by processes recognized by the law. However, on the whole the various distinctions are unhelpful for the purpose of assisting the student or the statesman in discovering what is the legal rule on the subject. There is no hierarchy of legal norms to assist the seeker after the correct rule of law. There is often little to guide us as to whether in case of conflict the law of nature (in its various and often contradictory meanings) is to prevail over the law of nations or conversely. Often it is clear enough that in Grotius's view the law of nature has yielded to the law of nations,[2] but we cannot always be sure that this is his opinion. He supplies a partial clue to the solution of the difficulty by explaining that natural law is unchangeable only with regard to matters which it expressly prohibits and enjoins, but not with respect to those which it merely permits.[3] However, this fact does not explain the various other departures from natural law. The result is that for some purposes the latter appears to act *pro foro interno* only—a kind of moral law.[4] And yet the supposedly unchangeable law of nature is claimed to be superior to God Himself. Westlake[5] summarizes the position by suggesting that according to Grotius *justitia attributrix* (distributive justice) operates in international relations as natural law and that, therefore, in this sphere there is to that extent in the Grotian system no difference between moral and legal rights. This reading of Grotius is probably unwarranted—witness, for instance, Grotius's emphatic insistence that only perfect rights given by *justitia expletrix*, which is determined also by the law of nature, are a legally justifiable reason for war[6]—but the fact that this was the interpretation put on it by a careful scholar like Westlake is symptomatic.

Somewhat similar difficulties arise in connexion with the use Grotius made of Roman law. He often treated it as evidence of the law of nature. But on occasions he was at pains to show that specific rules of Roman law found no confirmation in the law of nations[7] and could not therefore properly be

[1] See p. 37.

[2] See, e.g., Book III, ch. ii, §§ i, ii, to the effect that although according to the law of nature no one, except the heir, is bound by an act of another, this is not so according to the law of nations—with the result, *inter alia*, that the goods of subjects may be seized in respect of the debts and obligations of their rulers and states; or Book III, ch. iii, § vi, to the effect that although a declaration of war is not necessary according to the law of nature, it is required by the law of nations.

[3] Book I, ch. ii, § v. 1.

[4] See, for an analysis to the same effect, Basdevant in *Les Fondateurs du droit international* (1904), pp. 237–9, and Lee, op. cit., p. 55.

[5] Op. cit., p. 40.

[6] See below, p. 37.

[7] See, e.g., as to alluvial deposits, or islands in a river, or dried-out beds (Book II, ch. viii, § viii). And see his frequent references to the 'errors' of Roman law, e.g. in Book II, ch. xi, § xiii; Book II, ch. xvi, § xi; ibid., § xxxi.

adduced as a valid rule of international law. In general his reliance on Roman law is less frequent and less emphatic than is generally assumed.

These conspicuous defects of method are not the only feature of *De Jure Belli ac Pacis* which invites criticism. For the principal part of the treatise, namely, the presentation of the laws of war, is, on the face of it, vitiated by the abandonment of the main object which the author set himself out to achieve. That purpose, which was the humanization of the conduct of war, he expressed in the frequently quoted passage:

'Fully convinced . . . that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write upon this subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.'[1]

This was the avowed object of the treatise. Actually, in the view of many, it is a negation of that purpose. This is so not because of the fact that Grotius elaborates and defends the lawfulness of war[2] with much zeal and learning by reference to the law of nature, to history, to the law of the Gospel, and to arguments drawn from Holy Writ and the practice of the early Christians. To deny the lawfulness of war from the very outset and in all circumstances would have rendered meaningless the object of the treatise as apparently conceived by the author. What is more difficult to understand is that he seems to elevate that 'lack of restraint in relation to war, such as even barbarous races should be ashamed of' to the dignity of a rule of the law of nations. The law of nations gives the right to kill or injure all those who are in the territory of the enemy.[3] The same right is given with regard to the subjects of the enemy wherever they may be found.[4] Captives taken in war may be killed. So can those who surrender but whose surrender is not accepted.[5] Water may be polluted, though not by poison.[6] Both by the law of nations and by the law of nature it is permissible to use assassins.[7] In general, by the law of nations anything is permissible as against an enemy.[8] Enemy property may be destroyed and pillaged, including sacred property.[9] The same law of nations permits the enslavement of those captives with regard to whom the captor does not avail himself of his right to kill them—a rule which he regards as justified and, on the whole, beneficent as being an inducement to the captors to 'willingly refrain from recourse to the utmost degree of severity, in accordance with which they could have slain

[1] *Proleg.* 28.
[2] Book I, ch. ii.
[3] Book III, ch. iv, § vi.
[4] Ibid., § viii.
[5] Ibid., § xi.
[6] Ibid., § xvii.
[7] Ibid., § xviii.
[8] Ibid.
[9] Book III, ch. v, §§ i, ii.

the captives, either immediately or after a delay'.[1] All this has appeared to some, perhaps not without plausible reason, as lending support to the inhuman conduct of warfare by conceding to it the character of law—an effect which seems to be enhanced rather than diminished by his attempts, in the *temperamenta*, to suggest a mitigation of what he considered to be rules of law.

There are various possible explanations of this somewhat surprising outcome. The obvious explanation is that, without in the least approving that practice, Grotius believed it to be part of the customary law of nations —although, if that be so, it may not be easy to see why, in the *Prolegomena*, he spoke of them as evidencing a lack of restraint of which even barbarous races should be ashamed. It is possible that he adopted the device of *reculer pour mieux sauter* by pointing to the inhumanity of the existing practices as an irresistible argument in support of those precepts of humanity, charity, and honour which he developed in the *temperamenta* with so much zeal and fervour. It may also have occurred to him that his exhortations to moderation might appeal to statesmen and commanders in the field only if they knew that the appeal came from a writer acquainted with the realities of warfare and not altogether unwilling to consider the actual practice as a source of legal rules—imperfect as they might be. Neither can the possibility be dismissed that the treatise which he was writing—an exile without private means to support himself and his large family—was being prepared with an eye to diplomatic employment and that, for that purpose, it would have been of advantage to gain the reputation of a lawyer who takes fully into account the practice of states.

On the other hand, in estimating the probable humanizing influence of *De Jure Belli ac Pacis* we must not disregard the possibility that it may have been influential in the opposite direction. When a commanding general finds it laid down in the leading treatise that the killing or enslavement of prisoners of war or devastation of cities is part of the law of nations, he may be disinclined to decide that it is his imperative duty to act upon a different rule. He may, with some justification, disregard the exhortation which Grotius addresses to generals that 'it is the duty of the highest authorities and commanders, who wish themselves to be regarded as Christians, both by God and by men, to forbid the violent sack of cities and other similar actions'.[2] They may have considered that their calling was not a proper occasion for exhibiting the virtues of Christian charity—kindly and humane as they may have been as individuals. We recall the extraordinary episode

[1] Book III, ch. vii, § v. 1.

[2] Book III, ch. xiii, § viii. 4. Sir Henry Maine (*International Law* (1887), p. 23) expresses the view that the effects of *De Jure Belli ac Pacis* in this respect were 'exceedingly prompt', but this is a matter of conjecture which was not substantiated by the subsequent course of the Thirty Years War.

of Tilly—the general commanding the troops who sacked Magdeburg on 17 May 1631 when 24,000 inhabitants lost their lives—riding amid the confusion of the burning city, clumsily nursing a baby which he had plucked, alive, from the arms of its dead mother.[1] There may be substance in the report that Gustavus Adolphus, King of Sweden, carried with him a copy of *De Jure Belli ac Pacis* wherever he went during his German campaign.[2] He was a devout Christian and, as was his wont, he prayed in front of his troops on the day on which the bullet of the enemy—or was it the hand of an ally?—cut short the span of a gallant life. But he could have used Grotius's work for an opposing variety of purposes. It is not certain that he did not. His practice of systematically devastating the country-side through which his troops passed is a matter of history. This he did as part of the practice—which was then general—of depriving the enemy of the possibility of feeding his armies. The savagery of the concluding phases of the Thirty Years War—at a time when repeated editions of *De Jure Belli ac Pacis* were making their appearance—had not diminished by the time the struggle had reached a drawn-out end of futility and exhaustion. There is no doubt that the conduct of war at the beginning of the eighteenth century marked a distinct mitigation of practice as compared with the Thirty Years War, but more evidence than is as yet available would be necessary to justify us in assuming a connexion between that improvement and the teaching of Grotius.

Finally, while the treatise has appeared to some to fail in the achievement of its avowed object in respect of the law of war, it has drawn upon itself vehement condemnation as a servile and reactionary instrument of justification of established authority. The doctrine of the law of nature has been exposed to the reproach that it has served more often as a bulwark of the existing order of things than as a lever of progress. Grotius seems to have given a semblance of support to that view. He justifies slavery by reference to the law of nature—a proceeding supported by a venerable array of authority from Aristotle to Locke. Although the social contract is an important component of his political theory, he attributes equal weight to the original acquisition of sovereignty by conquest on the part of the ruler. It is in this sphere that he has been denounced, in intemperate terms, as confusing law and fact.[3] He explicitly refuses to commit himself to any unqualified affirmation of the sovereignty of the people. He expressly rejects the view that 'everywhere and without exception sovereignty resides in the people so that it is permissible for the people to restrain and to punish kings whenever they make a bad use of their power'.[4] He supports his opinion by an

[1] Wedgwood, *The Thirty Years War* (1938), p. 288.

[2] Miss Wedgwood apparently accepts the report as authenticated in Oxenstierna's writings (op. cit., p. 271).

[3] See above, p. 1.

[4] Book I, ch. iii, § viii. 1.

elaborate and lengthy argument the gist of which is that any person may voluntarily enslave himself to anyone he pleases for private ownership.[1] For this reason he denies that the subjects are always entitled to regain their liberty—even if they lost it as the result of force. For, he says, subjection though due originally to force may receive subsequent confirmation by tacit acceptance: 'The will of the people, either at the very establishment of sovereignty or in connexion with a later act, may be such as to confer a right which for the future is not dependent on such will.'[2] In the same line of thought he denies the right of active resistance.[3] This view is qualified, as we shall see,[4] not only by the affirmation of the right and duty of passive resistance in face of orders contrary to the law of nature and the commandments of God,[5] but also by vast and significant categories of exceptions. Viewed in proper perspective, the denial of the right of resistance and the support for the sovereignty of the ruler appear less damaging to the character of the treatise than their intransigence suggests.[6] Yet they are not accidental; neither is the uncompromising expression with which they are affirmed. They are not, as we shall see, due to a perversity of thinking which makes us shrug our shoulders with incredulous astonishment. But they do not add to the greatness of *De Jure Belli ac Pacis*.

These faults of method and substance which we have traced in *De Jure Belli ac Pacis* are such that, indirectly, they suggest qualities so great and so permanent as to give the very fullest measure of compensation for these defects and to explain the enduring influence of that work in the realm of human thought in general and of international law in particular. We are concerned here only with the latter. The standing of *De Jure Belli ac Pacis* as an authority relied upon in judicial decisions, national and international, has been higher and more persistent than that of any other of the founders of international law. This can be seen, for instance, in the lengthy pleadings and arguments before and by the various Claims Commissions established by the Jay Treaty of 1794 between Great Britain and the United States, the first modern treaty of arbitration.[7] What is even more impressive is the reverent recourse to his treatise by the four greatest writers in the field of international law in the century which followed, namely, by Pufendorf, Bynkershoek, Wolff, and Vattel—even when, as often happens, they dis-

[1] Book I, ch. iii, § viii.

[2] Book II, ch. iv, § xiv. 1.

[3] Book I, ch. iv, § ii. 1. He denies that the ruler who maltreats an innocent person by that fact necessarily ceases to be a ruler: Book II, ch. i, § ix. 2.

[4] See below, p. 46.

[5] Book I, ch. iv, § i. 3.

[6] See below, p. 45.

[7] See, e.g., *International Adjudications* (ed. by Moore), vol. iv (1931), Mixed Commission under Article VII of the Jay Treaty, pp. 357, 384–6, 390–2, 413–15 (on carriage of contraband), pp. 232–7, 269–79, 282–3 (on enemy character), pp. 246–7, 251–2 (on reprisals and exhaustion of legal remedies), pp. 419–21 (on measure of damages).

agree with him. Undoubtedly, the general picture of international relations in the two centuries which followed the publication of *De Jure Belli ac Pacis* was not one pointing to any direct influence, in the sphere of practice, of the essential features of the Grotian teaching. But the view that, for that reason, Grotius's work was during that period consigned to oblivion[1] is unwarranted and pessimistic. If it were so there would have been no reason why Grotius should have been the first target of criticism in the opening chapters of *Contrat Social*.[2] Rousseau would have hardly thought it worth while to select for that purpose a writer who had become a dim memory. Voltaire, who, he said, was bored by Grotius's learned quotations masquerading as argument, would not have troubled to read him.[3] De Saint-Pierre's *A Project for Settling an Everlasting Peace in Europe* would not have its title-page adorned with a passage from *De Jure Belli ac Pacis* recommending the holding of international conferences for the purpose of settling disputes.[4] Between 1680 and 1780 there were thirty editions of the work in Latin; nine in French; four in German; three in English.[5] An English historian of international law writing in 1795 attributed to him a lasting influence not only upon the science but also on the practice of international law.[6] In the nineteenth century his authority, in the writings of jurists and in State Papers, remained unimpaired. When in 1925 jurists of many nations united in celebrating the tercentenary of the publication of *De Jure Belli ac Pacis*, it was manifest that the inspiration which for three centuries emanated from that treatise had by no means become a thing of the past.

There are a number of factors which, in a sense, are external to the substance of Grotius's teaching and which had a share in securing its contemporaneous success and its place in the succeeding centuries. The first is its timeliness. At the time that *De Jure Belli ac Pacis* was published the historic process of the disintegration of European political society as hitherto known and the rise of the territorial sovereign state were being consummated. The Thirty Years War, which, to all appearances, was a war of religion, actually began and continued as a war of secular claims and ambitions of dynasties and nations. The rivalry between France and Spain had been a problem of European politics for three centuries. It had been kept in check by the overriding unity of religion. The Thirty Years War,

[1] See Van Vollenhoven, 'Grotius and Geneva', in *Bibliotheca Visseriana*, vol. vi (1926), pp. 15, 16, 30–4.

[2] Book I, ch. ii.

[3] *Dialogues et entretiens philosophiques* (Œuvres complètes, 1824), vol. xxxvi, p. 232.

[4] Book II, ch. xxiii, § vii. 4 (in the English translation of 1714).

[5] For an exhaustive list see *De Jure Belli ac Pacis* (translation in 'Classics of International Law', 1925), pp. 877–86.

[6] Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe from the Time of the Greeks and the Romans to the Age of Grotius* (1795), 2 vols. He says: 'We may probably be safe in assuming, that it is to his comprehensive mind and learning, that the law, as construed at present, has chiefly owed its distinguishing regularity' (vol. ii, p. 604).

when Catholic France allied herself with the Protestant cause in opposition to the dynastic ambitions of the Habsburgs and when the Pope, for similar reasons, stood aloof at a time of deadly peril for the Catholic party, showed clearly the implications of the change. In a different sphere the demise of the feudal system gave a new and higher significance to the territorial state. The need for a system of law governing the relations of the independent states to replace the legal and spiritual unity of Christendom had thus become urgently obvious. If it is accurate to say that Grotius is the founder of modern international law, it is equally true that the necessity for an international law secured to the work of Grotius a place which otherwise it might not have acquired. Of that necessity the lessons of the Thirty Years War were a most compelling reminder. The *temperamenta* may have proved a vain hope so far as the actual conduct of the war was concerned. But its experience proved their urgency up to the hilt. The sacredness of the plighted word of treaties, one of the corner-stones of Grotius's teaching, may have had to stand the mocking test of the treachery of the politics of the Thirty Years War—the state whose interests Grotius represented diplomatically in Paris was bound with France and Saxony by treaties of alliance to which, taught by experience, it attached an importance not superior to that of a precarious armistice with a treacherous foe—but that very experience tended to emphasize the meaning of the fundamental rule *pacta sunt servanda.*

Secondly, however incomplete—when judged by reference to the present scope of international law—*De Jure Belli ac Pacis* may appear to be, it was the first comprehensive and systematic treatise on international law. Grotius was not the first writer on the law of nations. Belli in 1563,[1] Ayala in 1581,[2] and, above all, Gentilis in 1598[3] wrote learnedly on the laws of war; Vittoria about 1532[4] and Suarez in 1612[5] laid the foundations of the jurisprudential treatment of the problem of the international community as a whole. But no one before Grotius attempted the treatment of the subject in its entirety. There is in *De Jure Belli ac Pacis* a great deal of matter which is not and never has been within the proper sphere of international law, but there is in it all the international law that existed in 1625.

Thirdly, the very circumstance that a substantial portion of the treatise was devoted to matters which had little to do with what is generally regarded as belonging to international law proved a weighty contributory factor in the success which it achieved. For *De Jure Belli ac Pacis* is to a large extent a general treatise of law in its wider meaning (including constitutional law,

[1] *De re militari et bello tractatus.*
[2] *De jure bellico*; *De officiis bellicis*; *De disciplina militari.*
[3] *De jure belli libri tres.*
[4] *De Indis*; *De jure belli* (published in 1557).
[5] *Tractatus de legibus et Deo legislatore.*

the theory of the state, and the basis of legal and political obligation) and of jurisprudence. International law proper forms merely a part—though the most important part—of a wider system. The reason assigned by Grotius, and by others, for that prolixity is that that peripheral matter was necessary as an exposition of the rights which might be affected by unlawful action providing a legitimate reason for war.[1] But Grotius himself spoke of the treatise as one pertaining to philosophy of law.[2] There is no doubt that, on balance, what many critics regarded as pretentious irrelevancy proved to be an invaluable asset. For there was presented to the world an exposition of international law woven into the structure of a general system of law and jurisprudence—a significant affirmation of the unity of all law and of the final place of international law in the general scheme of legal science. The effect was to enhance the authority of the treatise and of its main theme, namely, the law of nations.

Finally, the probability ought not to be discounted that the contemporaneous success of the work was to some extent determined by the already great reputation of its author. In 1625 Grotius was a European figure in his own right. His name added lustre to and helped to launch a work which in the course of centuries became synonymous with his fame.

However, all these factors—the timeliness of the treatise, its comprehensiveness as an exposition of international law, its wide jurisprudential background, and the already considerable reputation of its author—are, in a sense, circumstances external to the work. While they may account for its success at the time of its publication and the period immediately following it, they do not explain the powerful and sustained influence of what may be called the Grotian tradition in international law. They do not explain why *De Jure Belli ac Pacis* has been in the history of modern international law more than a mere symbol. Undoubtedly, the treatise is no longer a readable work for the purposes of current instruction. Its usefulness as an authority for any specific legal proposition is questionable. Writers and advocates still attach importance to supporting their thesis by reference to a passage from Grotius, but the persuasive power of such arguments is, except for the purpose of historical illustration, distinctly limited. It is doubtful whether any ambitious attempt to rewrite the treatise would impart to it an air of modernity or any appreciable degree of usefulness. Yet the fact is that the impact of *De Jure Belli ac Pacis* is not spent; that the 'father of international law' is still a teacher; and that the significance and the potentialities of the guiding ideas of the treatise as a moulding force are such as to preclude it from being consigned to the province of mere legal history.

What are the aspects of the teaching of Grotius which, notwithstanding

[1] *Proleg.* 33–5. [2] Ibid. 30.

shortcomings of method and defects of substance, lift his work above the plane of a mere episode, however important, in the history of international law and of its development as part of jurisprudence? There has been controversy whether Grotius could justly claim to be the 'founder' of international law or whether others, especially Gentilis and Vittoria, cannot more accurately be regarded as having laid the foundations of the modern law of nations. But the dispute is, in essence, one of words. For no one denies to Grotius the representative quality of pre-eminence. What, once more, is the reason? What permanent qualities have prompted eulogies such as that by a great man of letters and a wise statesman who referred to *De Jure Belli ac Pacis* as one of the 'cardinal books in European history'[1] and as being, together with Adam Smith's *Wealth of Nations*, among the dozen products of literature which have been 'wide spreading acts', not books?[2] The answer is that the principal and characteristic features of *De Jure Belli ac Pacis* are identical with the fundamental and persistent problems of international law and that in nearly all of them the teaching of Grotius has become identified with the progression of international law to a true system of law both in its legal and in its ethical content. These main features of the Grotian tradition will now be considered.

1. *The Subjection of the Totality of International Relations to the Rule of Law.* In the first instance, Grotius conceives of the totality of the relations between states as governed by law. This is the central theme of the treatise and its main characteristic. There are no lacunae in that subjection of states to the rule of law. Modern international law recognized for a long time the existence of gaps which obliterated altogether the border-line between law and lawlessness in international relations. Of these gaps the admissibility of war as an absolute right of states, requiring no other legal justification, is the outstanding example. In laying down the distinction between just and unjust war Grotius rejected the claim to any such right.[3] Neither did he concede to states the absolute faculty of action in self-preservation—a right which, till recently, writers coupled with the legal power of the state to determine, with finality and to the exclusion of any outside tribunal, the justification of action in self-defence.[4] The emphasis

[1] Viscount Morley, *Politics and History* (1912), in *Collected Works* (1921), vol. iv, p. 57. And see below, p. 53, n. 1, for Lord Acton's view.

[2] Ibid., p. 13.

[3] See below, p. 37.

[4] Thus writers have interpreted the various declarations accompanying the General Treaty for the Renunciation of War and reserving to the Parties both the right of resorting to war in self-defence and of determining when such action is necessary as meaning that the Parties have the exclusive and ultimate right to pronounce upon the legitimacy of the action said to have been taken in self-defence. No such right is implied either in the Treaty or in the reservations thereto. The state which believes itself to be in danger is entitled to determine, in the first instance, whether action in self-preservation is necessary. The ultimate determination of the legitimacy

with which Grotius denies the absoluteness of the right to act in self-preservation is deeply impressive. That denial of an unqualified right of self-preservation was not a seed which fell on totally barren soil. For we find the same idea expressed in pregnant words two and a half centuries later by Westlake. Self-preservation, he says, does not constitute a principle. It is rather 'a primitive instinct, and an absolute instinct so far as it has not been tamed by reason and law, but one great function of the law is to tame it. . . . In principle we may not hurt another or infringe his rights, even for our self-preservation, when he has not failed in any duty towards us.'[1] In the same line of thought Grotius challenged the right of a state to go to war in order to ward off an anticipated attack.[2] There is no trace in his treatise of the suggestion that the regulative power of international law is limited to matters of small import—a view which has gained currency in relation to the question of the compulsory jurisdiction of international tribunals[3] and, more recently, of the function of international law as a whole.[4]

Although he did not achieve the impressive solemnity of the language of Suarez in the affirmation of the unity of mankind[5] and of the existence of a community of nations, he put the recognition of the interdependence of states and of their subjection to law in the forefront of the treatise.[6] Negatively, he interpreted the juridical solidarity of nations as implying that every

of the action taken is a matter for decision by an impartial body. See the Judgment of 31 August 1946 of the International Military Tribunal at Nuremberg: 'It was further argued that Germany alone could decide, in accordance with the reservations made by the many Signatory Powers at the time of the conclusion of the Briand–Kellogg Pact, whether preventive action was a necessity, and that in making her decision her judgment was conclusive. But whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced' (*Transcript of the Proceedings*, p. 16,853).

[1] *Collected Papers* (ed. in 1914), p. 112. He says in the same chapter: '. . . although it is certainly indispensable for the welfare of men that they should be associated in some state tie, it does not follow that their welfare imperatively requires the maintenance in its actual limits, and with resources entirely unimpaired, of the actual state tie in which they happen to be engaged' (ibid., p. 113). And see T. H. Green, *Principles of Political Obligation* (1895), § 166, who says that a state that 'needs to defend its interest by action injurious to those outside it . . . by no means fulfils its purpose . . . it might perhaps be swept away and superseded by another with advantage to the ends for which the true State exists'.

[2] See below, p. 37.

[3] The existing limitations upon the jurisdiction of international tribunals—limitations expressed in specific reservations and implied in one of the many connotations of 'legal' disputes —assume that these tribunals cannot properly be entrusted with compulsory jurisdiction affecting vital interests of states. For an analysis of the underlying theory see the writer's *The Function of Law in the International Community* (1933), pp. 183–201.

[4] See Brierly in this *Year Book*, 21 (1944), pp. 51–7, and in *International Affairs*, 22 (1946), pp. 353–6. And see below, p. 35.

[5] 'Mankind, though divided into numerous nations and states, constitutes a political and moral unity bound up by charity and compassion; wherefore, though every republic or monarchy seems to be autonomous and self-sufficing, yet none of them is, but each of them needs the support and brotherhood of others, both in a material and a moral sense. Therefore they also need some common law organizing their conduct in this kind of society' (*Tractatus de Legibus ac Deo Legislatore* (1612), Book II, ch. 19, § 5).

[6] See below, p. 31.

state is entitled to inflict punishment upon the wrongdoer, who by his very transgression puts himself in a position of inferiority to other states.[1] It may also be noted in this connexion that he did not limit the orbit of international law to the states of Christian civilization. He recognized the binding force of treaties concluded with infidels. There was no room in his system for wars of religion—though he considered that there was a duty incumbent upon Christian states to defend one another against aggression by infidels.

2. *The Acceptance of the Law of Nature as an Independent Source of International Law.* With the affirmation of the rule of law as extending to the totality of the relations of states there is connected the second feature of the Grotian tradition, namely, the view that the law thus binding upon states is not solely the product of their express will. Grotius accepted as self-evident the proposition that the sovereign—the state—is bound by the law of nations and the law of nature.[2] The law of nations proper—*jus gentium voluntarium*—is, of course, the product of consent as manifested in the practice of states. Grotius's *jus gentium* thus conceived is not synonymous with public international law. It is distinguished from municipal law (*jus civile*), which emanates from the civil power of one state; it embraces all law—public and private, international and other—which has been sanctioned by the practice of all nations or of many nations.[3] It is one of the component parts of international law, but not the whole of it—a fact which seemingly escaped some of the early critics of Grotius such as Pufendorf and Barbeyrac, who reproached him with basing all international law on consent. Similarly, though a great deal of international law proper rests on consent, much, but not all,[4] of it follows from the precepts of the law of nature. In a wider sense, the binding force even of that part of it that originates in consent is based on the law of nature as expressive of the social nature of man.

It would be a mistake to judge the importance of the part played by the law of nature in *De Jure Belli ac Pacis* by reference to its use in relation to matters affecting international law proper such as treaties between states, the law of diplomatic immunities, and, above all, the law of war. For, as Grotius points out in the opening passages of the chapter on the Right of Legation,[5] in these matters he relies largely on the 'voluntary' law of nations as evidenced by international practice. The significance of the law of nature in the treatise is that it is the ever-present source for supplementing

[1] Book II, ch. xx, § iii. 1; ibid., § xl. 1.

[2] Book I, ch. iii, § xvi. 1. [3] Book I, ch. i, § xiv.

[4] There is probably no sufficient warrant for Sir Henry Maine's view (*Ancient Law* (192c reprint), p. 103) that Grotius identified *jus gentium* and *jus naturae*.

[5] Book II, ch. xviii.

the voluntary law of nations, for judging its adequacy in the light of ethics and reason, and for making the reader aware of the fact that the will of states cannot be the exclusive or even, in the last resort, the decisive source of the law of nations.

This aspect of the system of Grotius has become an integral part of the doctrine and of the practice of the modern law of nations—a part more real than the accepted terminology in the matter of sources of international law has accustomed us to assume. For who are the positivists of whom it may be said, with any approach to accuracy, that they regard the will of sovereign states as the exclusive source of international law? Bynkershoek, generally regarded as the typical positivist of his period, not only repeatedly invokes custom and reason as a source of the law of nations.[1] When confronted with an apparently uniform chain of treaties and municipal enactments cited in support of a view which he considered unreasonable, he refused to accept them as an authority for an asserted legal rule on the ground that 'the law of nations cannot be deduced from these, for reason, the preceptress of the law of nations, will not permit a general and indiscriminate interpretation of these practices'.[2] Hall, the leading British positivist, who appears to limit the sources of international law to usage and treaties,[3] actually bases international law on the natural law foundation of postulates and assumptions. 'The ultimate foundation of international law is an assumption that States possess rights and are subject to duties corresponding to the facts of their postulated nature.'[4] What is that assumed nature? 'It is postulated of those independent states which are dealt with by international law that they have a moral nature identical with that of individuals, and that with respect to one another they are in the same relation as that in which individuals stand to each other who are subject to law.'[5] Kelsen, who denounces natural law as being both unscientific and, historically, an instrument of reaction, assumes as the basis of international law the same jurisprudential maxim on which, in substance, Grotius made it to rest, namely, the rule *pacta sunt servanda*—the difference being that for Grotius the rule *pacta sunt servanda* is a precept, perhaps the main precept, of natural law while for Kelsen it is a 'meta-legal' initial hypothesis. The methodological difference may be considerable, but we cannot be sure of its practical relevance.

The fact is that while within the state it is not essential to give to the ideas of a higher law—of natural law—a function superior to that of providing the inarticulate ethical premiss underlying judicial decisions or, in the

[1] *Quæstionum juris publici libri duo* (1737 edition), Book I, ch. vi, p. 46; ch. viii, p. 66; ch. x, p. 77.
[2] Book I, ch. xii, p. 95 (Tenney Frank's translation in 'Classics of International Law', 1930).
[3] *A Treatise on International Law* (3rd ed. 1890), Introduction, p. 7.
[4] Op. cit., § 7 (p. 44).
[5] Op. cit., § 1 (p. 18).

last resort, of the philosophical and political justification of the right of resistance, in the international society the position is radically different. There—in a society deprived of normal legislative and judicial organs—the function of natural law, whatever may be its form, must approximate more closely to that of a direct source of law. In the absence of the overriding authority of the judicial and legislative organs of the state there must assert itself—unless anarchy or stagnation are to ensue—the persuasive but potent authority of reason and principle derived from the fact of the necessary coexistence of a plurality of states. This explains the pertinacity, in the international sphere, of the idea of natural law as a legal source. With modern writers that search for a legal source supplementing the ordinary sources of positive law expresses itself in the doctrine of implied acquiescence of any single state confronted with the fact of general consent.[1] Implied consent in this sphere is, upon analysis, a recognition of the law-creating result of the existence of a society of states, of the 'reason of the thing' inherent in that fact, of the natural law of international relations. The same necessity has found expression in treaties laying down the rules of law to be applied by international tribunals[2] and, in particular, in Article 38 (3) of the Statute of the International Court of Justice which enumerates among the sources of law to be applied by the Court 'general principles of law recognized by civilized nations'. Neither is that view absent from judicial decisions. Of these, Mr. Justice Story's judgment in *La Jeune Eugénie* is one of the most lucid and most uncompromising assertions of this aspect of the Grotian tradition. He refused to admit 'that no principle belongs to the law of nations which is not universally recognized as such, by all civilized communities, or even by those constituting what may be called the Christian States of Europe'. 'It may be unequivocally affirmed', he said, 'that every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligations, may theoretically be said to exist in the law of nations; and unless it be relaxed or waived by the consent of nations which may be evidenced by their general practice and customs, it may be enforced by a court of justice whenever it arises in judgment.'[3] This may appear to some an exaggerated affirmation of the authority of the higher law—of the law of nature—in the international sphere. It is not suggested that it is in accordance, in all its challenging rigour, with the predominant view on the subject. But the gist of it expresses accurately that particular aspect of the Grotian tradition

[1] See, e.g., Westlake, *International Law* (2nd ed. 1910), vol. i, p. 16. Professor Borchard says: 'The rules [of international law] rest partly on the assent of States and partly on generally approved practice, assent to which is either presumed or, in respect of a single State declining adherence, immaterial' (*Encyclopædia of the Social Sciences* (1932), vol. viii, p. 167).

[2] For a survey of these treaties see Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), § 26.

[3] 2 Mason 409, 448.

which, in broad outline, has become part and parcel of modern international law. We are not concerned here with the controversy as to the merits or otherwise of the law of nature. Undoubtedly the law of nature has often been resorted to in support of causes dubious and retrogressive. But this ambivalence of the ideology of natural law is only slightly relevant in the field of international law. There, by and large, it has acted as a lever of progress.[1] The law of nature has been rightly exposed to the charge of vagueness and arbitrariness. But the uncertainty of the 'higher law' is preferable to the arbitrariness and insolence of naked force. These considerations explain the significance of this aspect of the Grotian tradition in the history of the law of nations. He secularized the law of nature. He gave it added authority and dignity by making it an integral part of the exposition of a system of law which became essential to civilized life. By doing this he laid, more truly than any writer before him, the foundations of international law.

3. *The Affirmation of the Social Nature of Man as the Basis of the Law of Nature.* The place which the law of nature occupies as part of the Grotian tradition is distinguished not only by the fact of its recognition of a source of law different from and, in proper cases, superior to the will of sovereign states. What is equally significant is Grotius's conception of the quality of the law of nature which dominates his jurisprudential system. It is a law of nature largely based on and deduced from the nature of man as a being intrinsically moved by a desire for social life, endowed with an ample measure of goodness, altruism, and morality, and capable of acting on general principles and of learning from experience.[2] He admits that man is an animal, but one different in kind from other animals. That difference consists in his impelling desire for society—not for society of any sort, but for peaceful and organized life according to the measure of his intelligence. It is a difference the essence of which is the denial of the assertion that 'every animal is impelled by nature to seek only its own good'.[3] There is perhaps no political writer in whose system that conception of the nature of man is more prominent. The theme is, of course, one of the persistent problems—perhaps *the* problem—of political thought. For Machiavelli and Hobbes man is essentially selfish, anti-social, and unable to learn from experience; *homo homini lupus* is the fundamental truth; human nature does not change; pessimism as to the potentialities of its improvement is of the essence of

[1] On the part of the law of nature as a pioneer of reform see Gierke, *Das deutsche Genossenschaftsrecht*, vol. iv (1913): 'Die Staats- und Korporationslehre der Neuzeit', p. 276.

[2] *Proleg.* 5–9.

[3] *Proleg.* 6. He says elsewhere: 'If other ties are wanting, the tie of a common human nature is sufficient. Nothing belonging to mankind is indifferent to man' (Book II, ch. v, § ii. 1 (Whewell's translation)).

sanity; the basis of political obligation is interest pure and simple; the idea of a sense of moral duty rising supreme over desire and passion is a figment of imagination fatal alike to action and to survival. This is the typical realistic approach of contempt towards the 'little breed' of man. On that line of reasoning there is no salvation for humanity but irrevocable subjection to an order of effective force which, while indifferent to the dignity of man, yet contrives to prevent his life from being 'solitary, poor, nasty, brutish, and short'. The approach of Grotius and—to mention a writer as distinguished and as influential—Locke is diametrically different.

One of the salient characteristics of *De Jure Belli ac Pacis* is not only the frequency of the reliance on and appeal to the law of love, the law of charity, of Christian duty, of honour, and of goodness, and to the injunctions of divine law and the Gospel: the element of morality and the appeal to morality are, without interfering decisively with the legal character of the exposition, a constant theme of the treatise. An equally persistent feature is Grotius's faith in the rational constitution of man and his capacity to see reason and to learn from experience. This aspect of *De Jure Belli ac Pacis* goes a long way towards explaining the force of the Grotian tradition in the international sphere. For there, more than anywhere else, the implications of the pessimistic estimate of human nature reveal themselves in all their paradoxical and depressing clarity. Writers and statesmen dwell lucidly and persuasively upon the incongruity and absurdity of the fact that modern civilized states live in a primitive state of nature in their mutual relations. They admit that the resulting situation is such as to threaten not only the rational growth of states but, in the age of scientific weapons, their very existence. They concede that only effective submission to a comprehensive rule of law and a corresponding curtailment of the sovereignty of states may avert these dangers. But after having thus diagnosed the evil and after having disclosed the remedy, they lay down the pessimistic proposition that governments and peoples are unlikely to agree to any such solution. That renunciation of faith in the sovereignty of the rational human will shows itself in the widely adopted view that the great events and trends of history, including the phenomenon of war, are impervious to and outside the conscious and responsible volition of man and that the 'irresistible march of events' is the ultimate arbiter of human fate.[1] This lack of faith in the power of man conceived as a rational social being manifests itself not only with respect to the crucial aspect of international relations, but also with regard to specific questions of international organization. Thus it is generally admitted that international legislation, conceived as a process of enacting binding rules of law by competent organs of the international

[1] For a philosophical refutation of this view see Viscount Samuel's *Belief and Action* (1937), pp. 194–9.

society, is a vital condition of the normal functioning of international law and of the compulsory jurisdiction of international tribunals which, in default of an international legislature remedying and developing existing law, may have to render judgments inconsistent with progress and dangerous to peace. Yet those who propound and admit the force of that view point with resignation to the improbability of states ever acquiescing in a limitation of sovereignty implicit in a true legislative competence of the international community.

Now it is characteristic of that pessimistic school of thought with respect to the social and moral nature of man that it has applied itself consistently only to the international relations of human beings. Within the state, it has advanced means for overcoming the evils of strife and anarchy. Thus, according to Hobbes,[1] it is a law of nature that the individual, by giving up in the social contract his right to do all things, should achieve a relative degree of security; and it is a law of nature that the contract be kept (so long, at least, it appears, as the security which it gives is effective). No such law of nature, in either sense, is asserted to be in operation among states; they are—and apparently can[2] and must remain—in the true and original state of nature. We are thus confronted, in addition to the double standard of morality as expressed in the doctrines of 'reason of State', with what may not inaccurately be described as the double standard of reason and foresight. There is no room for either in the system of Grotius. In fact, much of the appeal and potentialities of the Grotian tradition lies in the lesson which can be drawn from his conception of the social nature and constitution of man as a rational being in whom the element of moral obligation and foresight asserts itself triumphantly over unbridled selfishness and passion, both within the state and in the relations of states.

4. *The Recognition of the Essential Identity of States and Individuals.* That all-pervading element of morality and rationality which is the result of Grotius's conception of law as based in the social nature and the intrinsic goodness of man is not limited to the conduct of individuals. It extends to

[1] *Leviathan*, ch. xiv.

[2] In fact, Hobbes, Spinoza, and Vattel—who may not inaccurately be described as belonging to the 'state of nature' school of international law—seem to have faced the problem in that way. They did not ignore it. They arrived at the conclusion that the dangers which beset the individual and which call for his submission to law do not threaten independent states. Vattel, who, notwithstanding his disapproval of the 'paradoxes' and the 'detestable principles' of Hobbes, followed him closely, is explicit on the subject. 'Individuals', he says, 'are so constituted that they could accomplish but little by themselves and could scarcely get on without the assistance of civil society and its laws. But as soon as a sufficient number have united under a government, they are able to provide for most of their needs, and they find the help of other political societies not so necessary to them as the State itself is to individuals' (Preface to *The Law of Nations and the Principles of Natural Law* (1758), Fenwick's translation in the 'Classics of International Law', (1916), p. 9*a*). He gives reasons, characteristically plausible, why the mutual intercourse of states can be sufficiently regulated by natural law.

the conduct of nations and of rulers acting on their behalf. In fact, one of the most decisive features of the teaching of Grotius is the close analogy of legal and moral rules governing the conduct of states and individuals alike. 'Populi respectu generis humani privatorum locum obtinent'[1]—this is a pregnant and persistent theme in the teaching of Grotius. This analogy of states and individuals has proved a beneficent weapon in the armoury of international progress. It is not the result of any anthropomorphic or organic conception of the state as being—biologically, as it were—assimilated to individuals, as being an individual person 'writ large'. The analogy is much more simple, more direct, and more convincing. The analogy—nay, the essential identity—of rules governing the conduct of states and of individuals is not asserted for the reason that states *are like* individuals; it is due to the fact that states *are composed of* individual human beings; it results from the fact that behind the mystical, impersonal, and therefore necessarily irresponsible personality of the metaphysical state there are the actual subjects of rights and duties, namely, individual human beings.[2] This is the true meaning of the Grotian analogy of states and individuals. The individual is the ultimate unit of all law, international and municipal, in the double sense that the obligations of international law are ultimately addressed to him and that the development, the well-being, and the dignity of the individual human being are a matter of direct concern to international law. Vattel, writing in 1758, apparently gave emphatic and lucid expression to the analogy, thus conceived, of states and individuals; though, *more Vatteliano*, this was mere meaningless lip-service to the 'natural Law of Nations' destined to yield to another natural law, that 'which declares every Nation free and independent of all other Nations'.[3] At the end of the nineteenth century Westlake was propounding, without compromise or circumlocution, the same doctrine as a matter of sound international law and of international morality. 'The society of states', he says, '. . . is the

[1] *Mare liberum*, ch. v. See also *De Jure Belli ac Pacis*, Book II, ch. xv, § xii. 1.

[2] In the judgment given on 31 August 1946 by the International Military Tribunal at Nuremberg we find an illustration of the practical implications of the problem. The Tribunal said: 'It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals . . . these contentions must be rejected. . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced' (*Transcript of the Proceedings*, p. 16,878).

[3] *Le Droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des Nations et des Souverains*, Introduction, §§ 7, 9. The 'natural' or 'necessary' law of nations, he says, 'contains those precepts which the natural law dictates to States, and it is no less binding upon them than it is upon individuals. For States are composed of men, their policies are determined by men, and these men are subject to the natural law under whatever capacity they act' (§ 7). Yet he proceeds to lay down—in § 9—that that natural law of nations is, in fact, valid only as an inner law of conscience. 'The liberty of a Nation would not remain complete if other Nations presumed to inspect and to control its conduct; such a presumption would be contrary to the natural law which declares every Nation free and independent of all other Nations' (Gregory's translation in the 'Classics of International Law').

most comprehensive form of society among men, but it is among men that it exists. States are its immediate, men its ultimate members. The duties and the rights of states are only the duties and the rights of men who compose them.'[1] Hall's similar view has already been noted.[2]

Undoubtedly, international law is primarily—though not exclusively—a body of rules governing the relations of states, i.e. of individuals organized as a state. But this circumstance cannot affect decisively the moral content of international law and of the dictates of reason and of the general principles of law which underlie it. It may be true to say that 'after all' states are not individuals; but it is even more true to say that 'after all' states are individuals. For this reason there can be no insuperable difficulty in applying generally recognized principles of law to the conduct of individuals acting as members of a state and on behalf of their state. There are psychological factors which explain the tendency towards the relaxation of the moral code of conduct of individuals acting in a group. But these inducements do not partake of the immutability and of the necessity of a physical law.[3] Like other manifestations of desire and instinct, they can be regulated and curbed by reason, by the impact of moral ideas, by law. Moreover, in a group association which, like the state, is to a large extent the artificial product of law and force rather than of the more direct and intimate interplay of crowd emotions, there is even less justification for treating as permanent and inevitable the factors which tend to weaken moral restraints in the collective activities of men. The modern state is not a disorderly crowd given to uncontrollable eruptions of passion oblivious of moral scruples. It is, as a rule, governed by individuals of experience and ability who reach decisions after full deliberation and who are capable of forming a judgment on the ethical merits of the issues confronting them. Admittedly that judgment is often warped by the notion, inculcated or excused by theoreticians of 'reason of State', that rulers of states, being trustees of interests other than their own, are not entitled to act invariably upon the precepts of the moral code as generally recognized.

In stressing the practical analogy of states and individuals Grotius derived substantial assistance from the fact that in the century in which he wrote the emerging territorial state was a creature of personal rule. The history of Europe could still, to a large extent, be conceived as a history of

[1] *Collected Papers* (ed. in 1914), p. 78.

[2] See above, p. 22.

[3] It has become a hall-mark of what is considered to be the realistic approach to expatiate on the lower morality of states as compared with that of individuals. See, for instance, Niebuhr, *Moral Man and Immoral Society* (1933), and, in particular, Carr, *The Twenty Years' Crisis 1919–1939* (1939), ch. 9. There is an advantage in drawing attention to factors which impair the strength of moral obligation in individuals acting on behalf of the state. On the other hand, the theme lends itself to exaggeration. In particular there has been a tendency to ignore the factors which operate in the opposite direction and to represent the existing manifestations of the 'double standard of morality' as inescapably inherent in state action in the international sphere.

dynasties and dynastic ambitions. The three hundred-odd independent sovereignties in Germany were a living example, in a variety of forms, of the patrimonial conception of the state. Marriage settlements and testamentary dispositions continued to be an important medium of territorial changes. The policy of the state was the policy of the ruling prince. The rules of conduct binding upon states were deemed to be rules binding upon their sovereigns. They were rules of law and morality governing the conduct of individual human beings. In the middle of the eighteenth century we find one of the leading treatises—that of Vattel—indicating in its title that the law which it propounds is one relating to the conduct of nations and sovereigns.[1] 'The Law of Nations is the law of sovereigns', says the author in the Preface. Yet, essentially, the situation did not change radically with the disappearance of the patrimonial theory and practice. That event had an effect on the rules which assimilated state territory to private ownership of land, and the like. It was not relevant to the more general question of subjects of the obligations of international law. For whatever may be the form of the government of the state, those who rule it and act on its behalf are individual human beings, and it is to them only that, upon final analysis, rules of law are addressed.

Thus the analogy of states and individuals which is one of the crucial aspects of Grotius's teaching was the twin result of two distinct causes. One, which was of a transient character, was the patrimonial character of a considerable number of European states. The other, more enduring, was the realization of the true nature of rules of international law as addressing themselves to individual human beings acting on behalf of the state. The cumulative effect of these two causes was to further the scientific development of international law and to emphasize the moral content of its rules. Largely on account of the recognition of that fundamental analogy, the door was wide open for the enrichment and advancement of international law with the help of rules of private law, Roman and other, as expressive of the general principles of law recognized by civilized states. Critics of the positivist complexion have frequently raised doubts as to the propriety of that process of borrowing from private law. Even if that criticism had been justified—and it is not believed that it was—it was a lament after the event. There have been few branches of international law which have remained unaffected by the influence of private law. We have only to think of Grotius's contribution, by reference to private law, to the development of the rules of law relating to acquisition of territorial sovereignty, the principle of the freedom of the sea, and the law of state responsibility. The very notion of sovereignty, which Grotius conceived, like property, as dominion held under law, helped to deprive it of the character of absoluteness and

[1] See above, p. 27.

indivisibility.[1] Neither was it a process confined to the exposition of international law by writers; governments and international arbitrators relied upon it frequently and effectively. If we were to ignore or to underestimate these 'illicit borrowings' we should be depriving ourselves of the possibility of understanding what is perhaps the major part of international law. To discard them as a matter of future practice is impossible. To do so would mean to jettison a substantial part of positive international law in which the rules derived by analogy have become crystallized. It would mean challenging the purpose of that significant provision of the Statute of the International Court of Justice which constitutes the general principles of international law as recognized by civilized states one of the three principal sources of the law to be applied by the Court. To discard them as a matter of principle would mean to abandon the view, which is amply justified by experience, that upon the continued vitality of this aspect of the Grotian tradition depends the progressive approximation of international law to a system of legal rules worthy of that name.

5. *The Rejection of 'Reason of State'*. The recognition of the social and moral nature of man as the principal source and cause of law explains, when coupled with the persistent affirmation of the analogy of states and individuals, the fifth characteristic of the Grotian tradition, namely, his denial of the 'reason of State' as a basic and decisive factor of international relations. That denial of the principle of double morality is for Grotius so obvious and so fundamental that, it would seem, he regards it as below the dignity of his work to engage in the then customary argument *ad hominem* on the subject. A startling feature of *De Jure Belli ac Pacis* is the absence not only of any polemics, but of all reference to Machiavelli. Bynkershoek, in discussing the observance of public agreements, refers with contempt to 'the master of iniquity [who] in his *Principe* teaches that treachery is lawful for princes' and to the '*ratio status*, a monster of many heads which almost no prince resists'.[2] Elsewhere he speaks of 'that *monstrum horrendum, informe, ingens, cui lumen ademptum*' which we call 'reason of State' and observes that 'if nations will yield to this beast . . . it will soon be useless to argue further about the principles of international law'.[3] Grotius's disapproval is one of silence. There is simply no mention of the great realist. The flood of books and pamphlets on the 'reason of State', which at that time assumed the dimensions of a torrent, is ignored.[4]

[1] This is probably one of the reasons why Grotius never advocated the principle of absolute equality of states. See Dickinson, *Equality of States in International Law* (1920), pp. 34–67.

[2] *Quaestionum Juris Publici Libri Duo*, Book II, ch. x (p. 190 in the 'Classics' translation).

[3] Ibid., Book I, ch. xxv (*in fine*).

[4] At the time when *De Jure Belli ac Pacis* was in preparation, the famous—and notorious—Machiavellian tract, attributed to Father Joseph, the *éminence grise* behind Richelieu, was being

But although he does not mention Machiavelli by name, he takes up the issue of 'reason of State' at the very beginning of the treatise. After remarking upon the usefulness of a knowledge of the law 'which is concerned with the mutual relations among states or rulers of states',[1] he points to the special necessity of studying that branch of law. For, he says, there are 'in our day' persons who view it with contempt as having no reality; who consider that for a king or a state nothing is unjust which is expedient; and that the business of the state cannot be carried on without injustice.[2] He sees an intimate connexion between the rejection of the ideas of 'reason of State' and the affirmation of the legal and moral unity of mankind. He insists that if no association of men can be maintained without law, 'surely also that association which binds together the human race, or binds many nations together, has need of law'.[3] This means, he says, quoting Cicero with approval, that shameful acts ought not to be committed even for the sake of one's country.[4] It means also that the hall-mark of wisdom for a ruler is to take account not only of the good of the nation committed to his care, but of the whole human race.[5] 'The name of Minos became odious to future ages for no other reason than this, that he limited his fair dealing to the boundaries of his realm.'[6] While denying that law is based on expediency alone,[7] he was ready to meet the theorists of 'reason of State' on the ground of their own choosing, namely, that of advantage. He records the fact that according to many the standards of justice applicable in the relations of individuals within the state do not apply to a state or the ruler of a state. The reason usually given for that assertion of the double standard of justice is, he says, that law is indispensable to individuals who, taken singly, cannot protect themselves, while great states, which dispose of everything needed for adequate protection, are in no need of law. Grotius rejects this view. Such, in his opinion, is the impact of economic interdependence or of military security that there is no state so powerful that it can dispense with the help of others.[8]

Grotius's rejection of the ideas of *raison d'état* finds more direct expression

composed: *Discours des Princes et Estats de la Chrestienté plus considérables à la France, selon leurs diverses qualitez et conditions.* It was published in 1624. The no less famous *De l'intérest des Princes et Estats de la Chrestienté* by Prince Henry de Rohan was not published till 1638, and Naudé's *Considérations politiques sur les coups d'état* appeared in 1639. Both were able expositions of the Machiavellian doctrine and they testified to the wide interest which the subject evoked at the time. There is no trace of all this in *De Jure Belli ac Pacis.*

[1] *Proleg.* 1.
[2] Ibid. 3.
[3] Ibid. 23.
[4] Ibid.
[5] Ibid. 24.
[6] Ibid.
[7] Ibid. 5, 22, 57.
[8] Ibid. 21, 22. See also ibid. 18: 'For just as the national, who violates the law of his country in order to obtain an immediate advantage, breaks down that by which the advantages of himself and of his posterity are for all future time assured, so the state which transgresses the laws of nature and of nations casts away the bulwarks which safeguard its own future peace.' And see above, p. 24, n. 3, and p. 26, n. 2.

in relation to concrete issues. It expresses itself in the denial of the right to resort to war unless in pursuance of a good legal cause;[1] in the rigid limitation of the right of self-defence (including the right of war in order to ward off an anticipated attack); in the concession of the right—indeed, in the injunction of the duty—of passive resistance against orders and laws contrary to the law of nature and the law of God;[2] in the concession to the subject of the right—and, again, in the injunction of the duty—to refrain from participation not only in unjust wars but also in wars the justice of which is doubtful;[3] in his stressing of the sacredness of the principle *pacta sunt servanda*.[4] There is in the treatise a challenging absence of recognition of anything approaching the ideas of reason of State directly or—as, for instance, in the case of Pufendorf[5]—indirectly. In this rejection of *raison d'état* Grotius went farther than Bodin—although Bodin, to whom Grotius was perhaps more indebted than is generally assumed,[6] had gone far in that direction. There are, indeed, in Bodin's writings passages reminiscent of the 'reason of State' when he says that 'nothing can be shameful which is connected with the well-being of the State',[7] but these are not typical of the treatise. On the contrary, although known principally as one of the main architects of the modern theory of the sovereignty of the State, he subjected that sovereignty to the precepts of the law of God and of the law of nature.[8]

There is a symbolic significance in this rejection of *raison d'état* by the founder of modern international law. For there is an inherent antagonism between international law, which, except when conceived as an empty and

[1] See below, p. 37.

[2] See below, p. 46.

[3] See below, p. 38.

[4] See below, p. 42.

[5] Thus we find the latter saying that it is the duty of the Prince to subordinate entirely his personal life and his personal inclinations to the interest of the state (*De jure naturae et gentium*, Book VII, c. 8, §§ 1–3); or that compacts of Princes possess validity only for so long as they are not inconsistent with the interest of the state (ibid. c. 6, § 14; c. 9, § 5).

[6] See, for instance, the close resemblance between the insistence on the part of Grotius on the duty of submission and obedience when the struggle against triumphant power seems hopeless (see below, p. 45) and Bodin's emphatic advice to the same effect (Book V, c. 5). And see Chauviré, *Bodin*, pp. 279 ff.

[7] Book V, c. 5.

[8] He approved with emphasis Seneca's maxim 'Caesari dum omnia licent, propter hoc minus licet' (see Book I, c. 8). 'The Prince', he taught, 'must not overstep the limits which God Himself, of whom the Prince is the living and breathing image, has set up through the enduring laws of nature' (ibid.). The prince is bound by the principles of good faith to observe compacts both with other states and with his own subjects, for 'good faith is the foundation of all justice. Good faith holds together not only States but the entire human society.' God Himself is bound by His promises. As the prince is the guarantor and the avenger of right and good faith within the state, he must himself observe them even at the cost of his interests. He condemns sharply the numerous examples, cited in the chapter on the Law of Nations (*De jure feciali*, Book 5, c. 6), of breaches of treaties and of treachery. Treaties must be kept even if loyalty to them threatens the existence of the state, except when what has been promised 'is by nature iniquitous or which is impossible of performance'. Neither need compacts be kept which are 'so shameful that they cannot be kept without committing a crime or confirmed by oath without wickedness' (ibid.). He was unsparing in his repeated condemnation of Machiavelli, that *homo levissimus ac nequissimus*'. (See also Chauviré, op. cit., p. 276.) At the same time he was expressing the view that law common to all nations is binding although it may not coincide with the law of God or nature (Book I, c. 8).

contradictory 'law of co-ordination', means restraint upon freedom of action, and the idea of reason of state, which means freedom from restraint. It would be mere speculation to attempt to assess the influence of Grotius on curbing the profane outlook which drew its inspiration from Machiavelli —just as it may be difficult to estimate the actual impact of *The Prince* upon the practices of international politics and diplomacy. It is immaterial that the succeeding four centuries witnessed the unprecedented ascendancy of the ideas of 'reason of State'. To attribute that phenomenon to any substantial degree to Machiavelli is to simplify the issue and to ignore the decisive factor, namely, the rise of the territorial state and of the dogma of its unlimited sovereignty. After all, Cesare Borgia was not the product of *The Prince*; he was his prototype. Machiavelli provided a philosophy, an explanation, a rationalization which was in keeping with the inductive and secular temper of the renaissance. That does not mean that he supplied an indispensable inducement. What must remain a subject for reflection is not the merits of the teaching of Machiavelli as a scientific foundation of rules of conduct. For seldom has a doctrine been propounded which fails more obviously in the primary test of a scientific rule, namely, its capacity to serve as a general canon of behaviour. Neither need we take seriously its shallow and naïve claim to exclusive realism—to seeing things as they are, and not as they ought to be. What is disquieting in the matter is the continued fascination, in one form or another, in the science of history and in the literature of international law, of the basic ideas of 'reason of State' and the apparent difficulty experienced by those who condemn it to cut themselves adrift from it wholly and unequivocally. Witness, for instance, the embarrassed hesitation, on the part of a shrewd writer, between the emphatic condemnation of the Machiavellian doctrine; the admission that there *is* a difference between public and private morality; the exhortation not to treat as iniquitous selfishness the statesman's regard for the existence, safety, and strength of his country; the view that certain actions of Bismarck which can be neither admired nor condoned 'must be treated more leniently than any dereliction of his cardinal duty, devotion to his people'; and the consummation of the elaborate argument in which he concedes that such actions are blameworthy, but that they are to be regarded as the natural faults of the politician.[1] A more recent treatment of the subject on the part of a distinguished historian follows the same inconclusive lines.[2] He associates himself fully with the general condemnation of the basic idea of *The Prince*. But he attaches importance to qualifying his condemnation: a private individual, he says, when confronted with a conflict between

[1] Figgis, *Studies of Political Thought from Gerson to Grotius* (1907) (reprint of 1931), pp. 87, 88.

[2] Gooch, *Studies in Diplomacy and Statecraft* (1942), chapter on 'Politics and Morals'.

survival and moral duty, may choose to sacrifice his life. 'A state cannot and must not make such a sacrifice, for it is the trustee of generations to come. If brutally attacked or summoned to surrender its independence, its duty, I believe, is to resist.'[1] The argument, which is often used in this connexion,[2] injects, it is submitted, a somewhat artificial element of controversy into the fundamentally simple question of what Lord Morley called the 'awful difference'[3] between good and evil. It has not been customary for critics of the ideas of *'raison d'état'* to urge that a state, when attacked, should sacrifice its independence. The state's right of self-defence or existence is not in question. But the manner in which distinguished historians, such as those mentioned, have approached the subject is symptomatic of the lure of relativism also on that issue. Lord Acton, one of the greatest and perhaps the most majestic figure in historical science, stands practically[4] alone in the uncompromising condemnation of crime clad in the garb of 'reason of State'.[5]

The great issue of 'reason of State' is still with us and, while it will continue to be an absorbing dilemma of historical science, it is one of the main problems of international law—perhaps the central problem if by law we understand restraint and if by 'reason of State' we mean rejection of any substantial restriction upon the freedom of action of sovereign states in matters which matter. The *'raison d'état'* may no longer present itself in the international sphere in the cruder forms of treacherous violence, of brazen perfidy, and of outright deceit—although recent history has shown that species of *ratio status* to be not altogether obsolete. Modern formulae such as that international law is possible only as a 'law of co-ordination' effected by agreement of sovereign States express ideas of distinct affinity with those of 'reason of State'. For there is probably more truth than exaggeration in the view that uncompromising insistence upon the unlimited rights of state sovereignty in contempt of the interests of other nations, of the interdependence of states, and of the public opinion of the

[1] Ibid., p. 322. See also, for a similar trend of argument, Lindsay, *The Modern Democratic State*, vol. i (1943), pp. 98, 99.

[2] See, for instance, Meinecke, *Die Idee der Staatsräson* (1924), pp. 531 ff.—a laborious and somewhat fatalistic affirmation of the idea of 'reason of State'.

[3] Morley, *Machiavelli*, Works (ed. of 1921), vol. iv, p. 115.

[4] Lord Morley and Thomas Arnold are in the same category. The majority of historians have deemed it incumbent upon them to refrain from passing moral judgment. The serene detachment of Ranke, of Prescott, and of Bishop Creighton is typical of that attitude, although it did not descend to the level of justifying crime or explaining it away so as to bring them within Lord Acton's bitter dictum of the strong man with the dagger being followed by the weak man with the sponge.

[5] Yet the almost legendary grandeur of his personality is due largely to the rigid consistency of his attitude on this vital problem of politics, national and international. There is no conclusive evidence that at the very end of his life Acton retracted from the fanaticism of his judgment on the subject. Nothing short of conclusive evidence can, in the circumstances, be regarded as sufficient for assuming as proven a departure from a life-long attitude.

world, is one of the manifestations of the spirit of ruthless egotism which has become associated with the idea of *raison d'état*.[1] The claim of sovereign states—a claim fully admitted by existing law—to be entitled to deny to other members of the international legal community the benefit of judicial determination of disputed legal rights belongs, essentially, to the same category. So does the practice—reminiscent of the Machiavellian doctrine of the virtues of the pretence of virtue—of cloaking the refusal to limit the state's full freedom of action in the garb of pretentious phrases and purely nominal declarations implying some such submission.[2] So does the assertion, which is an attempt at a rationalization of the existing practice, that the subjection of states to the rule of law in the international sphere is and ought properly to be limited to matters which are not 'political' and which do not affect their vital interests.[3] It may be difficult to form an estimate of the influence of *De Jure Belli ac Pacis* in curbing the spirit of *The Prince*. But there ought to be no doubt as to the place which the rejection of the ideology of *raison d'état* occupies in the Grotian system—a repudiation significant both in the absence of direct reference to Machiavelli and, more particularly, in Grotius's attitude to the questions which 'reason of State' has pretended to solve in its crude and realistic fashion.

6. *The Distinction between Just and Unjust Wars.* In the assertion of

[1] These aberrations are embedded in international practice. They are, essentially, part of existing international law. As such they have acquired a degree of respectability. It is, therefore, to be expected that some may decline, with impatient surprise, to regard them as manifestations of 'reason of State'. Such reaction, which is a natural product of habit, does not mean that the description is arbitrary or far-fetched.

[2] Of these the most prominent are the various types of undertakings of compulsory judicial settlement which leave to the state concerned the legal power to determine the extent of its own obligation.

[3] One of the reasons recently adduced in support of this view is that even within the state it is difficult, if not impossible, to enact and to enforce laws in opposition to organized groupings of vast numerical strength, such as powerful trade unions, and that the proper approach to the regulation of their interests is therefore 'political'. See, in particular, the illuminating discussion of the problem by Professor Brierly, op. cit. above at p. 20, n. 4. However, while compromise is of the essence of true democracy in the sense that the majority ought not to ride rough-shod over the interests of the minority, once a decision has been reached in accordance with constitutional practice it is enforced and, as a rule, obeyed by groups however powerful. Witness, for instance, the enactment in England, against the resentful protest of the Trade Union movement, of the Trade Disputes Act of 1927. The subjection of states members of a Federation to federal law is another example. Neither does the fact that the normal subjects of international law—i.e. sovereign states—are few in number impart a decisively 'political' character to the social regulation of their conduct and of their interests. A very substantial number of statutes in a modern state is concerned with problems and interests affecting particular groups—social, professional, geographical, and others. Probably the argument, in its entirety, is intended to show that Great Powers cannot properly be expected to submit to an outside body in matters affecting their vital interests. Under the Charter of the United Nations all members other than the Great Powers are under a legal obligation to abide by a decision, reached without their consent, of the Security Council which may involve them in war or which may determine disputed points affecting their vital interests. There may be a disadvantage in expressing in terms of general principle the attitude of all or some Great Powers at any particular period.

'reason of State' and of the double standard of morality, the claim to an unrestricted right of war, though not the most conspicuous, is the most important. It is not the dagger or the poison of the hired assassin or the sharp practice of the realistic politician which expresses most truly, upon final analysis, the ideas of *'raison d'état'*. It is the infliction, without a shadow of a specific right and without a claim to any particular right, of the calamities and indignities of war and of the territorial mutilation and the very annihilation of statehood following upon defeat in war. Prior to the changes introduced by the Covenant of the League of Nations, the Pact of Paris of 1928, and the Charter of the United Nations, that central idea of 'reason of State' formed part of international law. States claimed—and had—the right to resort to war not only in order to defend their legal rights but in order to destroy the legal rights of other states. In the sphere of political theory Machiavelli put the position with his usual terseness: 'That war is just which is necessary.'[1] And he added, by way of explanation: 'The people will complain of a war made without reason.'[2] Bacon, who did more than anyone else to transplant the ideas of *The Prince* to English soil, and who praised Machiavelli for seeing 'things as they are', expressed similar views in holding that while a civil war is like the heat of a fever, a foreign war is like the heat of exercise, and helps to keep the body in health. To this set of ideas Hegel, Treitschke, and other nineteenth-century German theoreticians of 'reason of State' may have added the nebulous and arrogant pretentiousness of philosophical jargon; in fact they added to it little.

But although this particular—and most important—manifestation of 'reason of State' became and for centuries continued to be part of international law, it was not an unchallenged doctrine. It was opposed by the parallel and powerful current of opinion that distinguished between wars which, in law, were just and those which were not. That current of opinion is represented by yet another aspect of the Grotian tradition, namely, his denial of the absolute right of war and his consistent differentiation between just and unjust wars. Grotius did not invent that distinction. It was part of the heritage of the Middle Ages; it was fully discussed and adopted by scholastic writers and other forerunners of Grotius. Saint Augustine elaborated in detail the notion of a just war and limited it to action taken for the punishment of wrong-doing and to restoration of property taken away.[3] Isidore of Seville wrote on similar lines in the seventh century. The *Decretum Gratiani* gives elaborate definitions of a just war. In Giovanni da Legnano's *De Bello, De Repraesaliis, et De Duello*, written in 1360, there was

[1] *Thoughts of a Statesman*, ch. ii.
[2] Ibid.
[3] *Quaestionum in Heptateuchen*, lib. vi. 10.

a detailed disquisition on the subject. But it was in the works of the two great scholastic writers, Franciscus de Vittoria[1] and Suarez,[2] that the doctrine of just war—as the only war permissible in law—was developed with a juridical acumen and a moral fervour hardly surpassed by Grotius himself. Like some of their predecessors they held that, because of 'invincible ignorance', a war may be legally just on both sides.[3] They both denied the right to wage war on infidels for reasons of religion only.

In the elaboration of the causes of just war Grotius made no obvious advance upon the already elaborate treatment of the subject by his predecessors. The merit of his own contribution lies in the clarity and in the emphasis with which he treated the subject. For a war to be just there must exist a legal cause for it—a reason which would be recognized by a court of law as a cause of action. As he points out, war begins where judicial settlement ends. It follows that a war undertaken to enforce a claim which 'is not an obligation from the point of view of strict justice'[4] is not a just war. He devotes an entire chapter to an enumeration, by way of example, of various kinds of unjust war.[5] On the other hand, the causes of just wars are limited to defence against an injury either actual or immediately threatening,[6] to recovery of what is legally due, and to inflicting punishment. He definitely excludes wars undertaken in order to weaken a neighbour who is a potential threat to the security of the state. He says, with regard to such a war, in a passage typical of the temper of the work in its challenging rejection of *raison d'état*: 'That the possibility of being attacked confers the right to attack is abhorrent to every principle of equity. Human life exists under such conditions that complete security is never guaranteed to us. For protection against uncertain fears we must rely on Divine Providence, and on a wariness free from reproach, not on force.'[7] He says in another part of the book: 'That defence may be just, it must be necessary; and it cannot be this, except there be clear evidence, not only of the power, but also of the *animus* of the party; and such evidence as amounts to moral certainty.'[8] By way of example he discusses the case of the justice —which he denies—of a war undertaken against a neighbouring state on the ground that it engages in building a fortress or fortifications which might prove a source of danger. Against such apprehension, he says, the

[1] *De jure belli* (about 1541). [2] *Opus de triplici virtute theologica* (1621).

[3] A conclusion rejected by Ayala, *De Jure et Officiis Bellicis et Disciplina Militari Libri III* (1582), but approved by Gentilis, *De Jure Belli* (1589), provided that there is reasonable doubt as to the justice of the war. And see *De Jure Belli ac Pacis*, Book II, ch. xxiii, § xiii.

[4] Book II, ch. xxii, § xvi. [5] Book II, ch. xxii.

[6] Book II, ch. i, § ii. 1; § v; § xvi. In the latter paragraph he permits a state to forestall an act of violence not actually present but threatening from a distance. But even in this case he excludes direct action—which he considers unjust—and limits it to obtaining satisfaction for a delinquency begun but not yet consummated. [7] Ibid., § xvii.

[8] Book II, ch. xxii, § v. 1. (The translation is from Whewell's edition as it seems, on this point, more precise than that in the 'Classics of International Law'.)

proper remedy is to build counter-fortifications, not to resort to arms.[1] The relevant section of Book II[2]—the shortest paragraph in the treatise—consists of one sentence, significant and impressive in its brevity, referring to the causes of war: 'Advantage does not confer the same right as necessity.' He also denies that there is any question of a justifiable war of defence in the case of those who deserved the war waged against them.[3]

But it was in the drawing of the practical consequences from the distinction between just and unjust wars that Grotius went beyond anything taught by his predecessors. This applies not only to the all-important question of neutrality,[4] or to such matters of detail as the rule that a state bound by treaties of alliance with states engaged in war ought to give preference to that engaged in a just war, for 'there is no obligation to undertake unjust wars';[5] that a treaty of alliance is not binding in relation to a state waging an unjust war;[6] or that a state engaged in a just war may, under certain strictly defined conditions, take possession of a place situated in a neutral country;[7] or, though apparently only as a matter of *interna justitia*, with regard to restoration of property taken in an unjust war;[8] or even to the assertion of the right of the belligerent fighting an adversary waging 'a very unjust war' to inflict capital punishment upon those carrying contraband.[9] It applies to the more fundamental question of the duty of the subject to serve in a war which is unjust or doubtful, an aspect of his teaching which is of particular significance in view of the respect—some thought servile respect—with which Grotius treated established authority and with which he discouraged any thought of rebellion. He is emphatic that the subject when ordered to take up arms in a clearly unjust war ought to refrain from doing so.[10] Moreover, after much careful deliberation and weighing of authorities, he considers that the obligation is the same when the justice of the war is doubtful. He admits the dangers of disobedience, but he is content to take the risk: 'For when either course is uncertain that which is the lesser of two evils is free from sin; for if a war is unjust there is no disobedience in avoiding it. Moreover, disobedience in things of this kind, by its very nature, is a lesser evil than manslaughter, especially than the slaughter of many innocent men.'[11] The only concession that he is prepared to make is that in the case of a doubtful war the ruler may impose

[1] Book II, ch. xxii, § v. 2.
[2] Ch. xxii, § vi.
[3] Ibid., ch. i, § xviii.
[4] See below, p. 40.
[5] Book II, ch. xv, § xiii. 1.
[6] Book II, ch. xxv, § iv. He regarded as not permissible military alliances concluded without regard to the cause of the war in which the ally may be involved. Book II, ch. xxv, § ix. 1.
[7] Ibid., § x. 1.
[8] Book III, ch. x, § iii. 1.
[9] Ibid., ch. i, § v. 3.
[10] Book II, ch. xxvi, § iii. 1.
[11] Ibid., § iv. 5; ibid., § iv. 8. With this may be compared the view of Pufendorf, *De jure naturae et gentium libri octo* (1688), Book VIII, ch. i, *in fine*, who points to the dangers of destroying civil sovereignty and advises the citizen to 'leave the supreme sovereign accountable to God for the injustice of his war'.

an extraordinary tax upon those refusing to carry arms.[1] At the same time, in conformity with the view which has remained unchallenged and which is in accordance with the humanitarian character of his treatise, he lays down that the question of the justice or injustice of the war is irrelevant for the purpose of observing the rules of warfare as between the belligerents.[2] Any other rule would add to the inherent evils of war the horrors of unrestrained licence and cruelty accentuated by what must often be an unverified *ex parte* claim to wage a just war.

International law, in the three centuries which followed *De Jure Belli ac Pacis*, rejected the distinction between just and unjust wars. War became the supreme right of sovereign states and the very hall-mark of their sovereignty. To that extent international law was deprived of a reasonable claim to be regarded as law in the accepted sense of the word. The law on the subject has now undergone a fundamental change. War has ceased to be a supreme prerogative of states. The Grotian distinction between just and unjust war is once more part of positive international law. Factors more potent and more irresistibly compelling than the influence of any single writer have had a share in that achievement. Yet, among the imponderables which have worked in that direction, the Grotian tradition occupies a high place.

7. *The Doctrine of Qualified Neutrality.* It followed from the emphasis of the distinction between just and unjust wars that no affirmation of absolute impartiality on the part of neutral states in relation to the state waging an unjust war was to be expected in a legal treatise in which the element of moral obligation was as prominent as in *De Jure Belli ac Pacis*. It is theoretically possible for international law to declare that some wars are illegal and criminal and yet to lay down that the neutral states not involved in the war must act with absolute detachment in relation both to the aggressor and to his victim. The legal consistency of such a system of international law would be questionable; its ethical impropriety would be obvious. In any case such a solution would not have been in keeping with the spirit of *De Jure Belli ac Pacis*. Grotius's view on the subject is expressed tersely in the brief chapter on neutrality entitled 'On those who are of neither side in war'.[3] He says: 'It is the duty of those who keep out of war to do nothing whereby he who supports a wicked cause may be rendered more powerful, or whereby the movements of him who wages an unjust war may be hampered.'[4] It will be noted that these duties do not include the positive obligation to assist actively the state waging a just war. But

[1] Book II, ch. xxvi, § v.
[2] Book III, ch. iv, § iv.
[3] Book III, ch. xvii.
[4] Ibid., § iii. 1. But he counsels impartiality in doubtful cases.

they clearly imply a right to do so. The duty not to hinder may in practice not always be distinguishable from the right to give assistance. There are various passages in the treatise in which Grotius applies in detail that principle of qualified neutrality. Thus he states that the right of passage ought to be granted to a people which is seeking to recover by a just war what is due to it.[1] He is equally emphatic that the right of passage can be refused to a state commencing an unjust war.[2] He is not prepared to attach decisive importance to the fears and even the safety of the state through the territory of which passage is requested. In particular, he says, fear of the ruler against whom a just war is being waged is not a valid reason for refusing passage. 'My right is not extinguished by your fear.'[3]

While in elaborating the distinction between just and unjust wars Grotius was following a centuries-old tradition, in propounding the principle of qualified neutrality he was breaking new ground. As may be surmised from the passages just referred to, he was aware of the dangers in which the application of the doctrine of qualified neutrality involved small states and principalities interested in avoiding any pretext for being dragged into the struggle. Principle seemed to him, in this matter as in others, more important than 'reason of State'. Over a hundred years later Christian Wolff, in a somewhat involved exposition, affirmed the right to neutrality when the justice of the war is doubtful or when it is in the interest of the state to remain neutral, 'for every right of a people by nature should be determined by the purpose of the State'. Yet he had no doubt that by the law of nature it was illegal to give aid to a state waging an unjust war.[4] Vattel followed Grotius closely. In one respect, though subject to an important qualification, he went farther. He says: 'It is lawful and praiseworthy to assist in every way a Nation which is carrying on a just war; and such assistance even becomes a duty for every Nation which *can give it without injury to itself*. But no assistance may be given to one who wages an unjust war.'[5] Again following Grotius, he was also of the opinion that every treaty of alliance is subject to the implied reservation that it is not operative in cases in which the ally wages or is about to wage a war which is manifestly unjust, of which question the other ally is the only judge 'because you owe it no assistance except in so far as its cause is just and it is convenient for you to give it help'.[6] Even Bynkershoek, who impatiently rejected Grotius's view that the character of neutral duties must be determined by considerations of the justice of the war, admitted that the question becomes relevant in the matter of the fulfilment of treaties of alliance.[7] In general, the right

[1] Book II, ch. ii, § xiii. 1.
[2] Ibid., § xiii. 4.
[3] Ibid.
[4] *Jus gentium methodo scientifica pertractatum* (1740), § 674.
[5] Op. cit., Book III, ch. vi, § 83.
[6] Ibid., § 86.
[7] Op. cit., Book I, ch. ix.

of neutrals to form a judgment on the legal justice of the war waged by belligerents and to adopt discriminatory treatment in accordance with that judgment was generally recognized in the eighteenth century under the influence of Grotius.

The doctrine of qualified neutrality was rejected in the nineteenth century —with perfect logical consistency—by the overwhelming majority of writers. If every war is, in law, just, then neutrality must be an attitude of absolute impartiality. Occasionally writers of authority expressed their disapproval of neutrality thus conceived as being morally intolerable.[1] But that denunciation of neutrality was in fact a condemnation of a system of international law, fully in operation at that time, in which resort to war was an unlimited right of sovereign states.

With the drastic limitation of the right of war as adopted in the Covenant of the League of Nations and in the General Treaty for the Renunciation of War, the law restored the historic foundations of the doctrine of qualified neutrality as taught by Grotius. The Covenant of the League, in permitting neutrality and in obliging the Members to resort to sanctions and other measures of discrimination against the Covenant-breaking state, was, in this respect, based on the principle of qualified neutrality. When in 1940 and 1941 the United States committed itself to a determined departure from the customary and conventional rules of absolute neutrality as they obtained in the nineteenth century, it invoked, among others, the argument that with the general renunciation and condemnation of war as an instrument of national policy, the right, asserted by the founders of international law, to discriminate against the aggressor was fully restored. Grotius's teaching on the subject was adduced in support of the attitude thus adopted.[2]

Under the Charter of the United Nations neutrality is no longer an absolute right. Members of the United Nations are bound, if called upon to do so by a valid decision of the Security Council, to resort to war against a state waging an aggressive, an unjust, war. But it is possible that the call made upon them may fall short of a summons to resort to war. In that case, the principles of qualified neutrality would once more be applicable. It is, of course, highly questionable whether in a system of collective security—such as that set up by the Charter of the United Nations—in which force has been renounced, there is properly room for any neutrality at all, qualified or otherwise. We may be able to appreciate the legal and ethical merits of this aspect of the Grotian tradition—and the service which it has rendered—without holding it applicable in an international society which claims to have made a radical advance along the path both of the prohibi-

[1] See, in particular, Westlake, *International Law*, vol. ii (2nd ed., 1913), p. 90.

[2] See the speech of Attorney-General Jackson on 27 March 1941 (*American Journal of International Law*, 35 (1941), p. 351).

tion of unjust war and of the fundamental obligation to suppress it by collective action.

8. *The Binding Force of Promises.* The denial of the right of war, unless for a cause recognized by law, and the principle of qualified neutrality constitute the main application, with regard to the law of war, of Grotius's rejection of the ideas of reason of State. In the sphere of the law of peace, that same tendency expressed itself most conspicuously in the emphasis which he placed upon the binding force of promises and the obligation of good faith in their fulfilment. The subject is treated at great length in the six chapters of Book II on Promises, on Contracts, on Oaths, on Promises of those holding Sovereign Power, on Public Treaties and Sponsions, and on Interpretation.[1] In addition, the five concluding chapters of the treatise are devoted to the subject of promises and good faith in war.[2] The last exhortation, in the final chapter of the treatise, is an appeal to the sacredness of good faith.[3] To Grotius the obligation to abide by pacts is not only the basis of municipal law and of civil society; it is of the essence of the social contract.[4] Without it the social contract is meaningless.[5] As such, the obligation to keep promises is the principal tenet of the law of nature. It is an obligation which binds the ruler in relation to the contract which he has entered into with his subjects; they derive a clear legal right under it. And this, he adds, 'holds even between God and man'.[6] It is not surprising that to him the binding force of treaties is the basis of international law. They must be kept even in relation to pirates and tyrants, in peace or in war;[7] they may be made, according to the Christian law and otherwise, with infidels,[8] and faith must be kept even with them.[9] He lays down the modern and, in the circumstances, unexceptional rule that promises made during war or for the purpose of terminating a war are valid even if extorted by fear.[10] The reason for this seemingly repulsive qualification is that unless this rule were adopted most wars would be incapable of termination.

This categorical affirmation of the sanctity of promises—even in relation to God Himself—had a pointed meaning at a time when the Pope claimed the right to release rulers from the binding obligation of oaths and treaties,

[1] Chs. xi–xvi.
[2] Book III, chs. xix–xxiii.
[3] Book III, ch. xxv, § vii.
[4] *Proleg.* 15.
[5] This explains why he is prepared to base the right of punishment on implied contract (Book II, ch. xx, § ii. 3).
[6] Book II, ch. xiv, § vi. 2.
[7] Book III, ch. xix, § ii. 1, 2.
[8] Book II, ch. xv, § x. 1.
[9] Book III, ch. xix, § xiii. 1. Although he advises caution in concluding treaties of alliance with infidels, he regards such alliances as permissible and, above all, as binding (Book II, ch. xv, § ii).
[10] Ibid., § xi—unless such duress is, in turn, contrary to the law of nations, as, for instance, in the case of a promise extorted from a captured ambassador (ibid., § xii).

by way of interpretation or express dispensation,[1] and when the view was widely adopted and acted upon that there is no binding force in treaties concluded not only between Christians and infidels but also those between Catholics and Protestants. But its significance goes considerably beyond that. It supplies a scientific basis—that of the law of nature and of the social nature of man—for the 'volitional' law of nations, i.e. international law based on agreement whether expressed in a treaty or implied by custom. In modern terminology, the rule *pacta sunt servanda* is the initial hypothesis of the law of nations. Some prefer to consider it as being in itself of an extra-legal character for the reason that the validity of the ultimate source of legal obligation cannot, logically, be explained in terms of law; Grotius grounded its binding force in the law of nature. As suggested above, the difference is perhaps not so profound as may appear at first sight. What is important is that at a period of European history when the authority of the pledged word of treaties had become a byword—a phenomenon which was destined to become a recurrent phase in international relations—he made it the very pivot of his teaching.[2]

9. *The Fundamental Rights and Freedoms of the Individual.* There is one perplexing aspect of the work of Grotius which appears to be alien to the spirit of his teaching as outlined so far and which calls for careful examination, namely, his attitude to the question of the freedom of the individual in his relation to constituted authority. The importance of this subject is not confined to the field of political theory. In many ways it is closely connected with international law. It has given rise to scornful and impatient reprobation of Grotius's work as a whole. What is the reason for this exception—if an exception it is—to the otherwise uniformly progressive trend of the treatise? On the face of it the record is disillusioning. Grotius justified slavery and claimed to have found support for it in the immutable canons of the law of nature. He rejected the idea of the sovereignty of the people.[3] He denied the right of resistance to oppression by the ruler.[4] He did not see why, if an individual can voluntarily sell himself into slavery, a whole people should not be able to do so collectively. He attributed an irrevocable legal effect not only to collective voluntary submission, but also to conquest. He completed this chain of reasoning by including in his

[1] For numerous examples of such releases see Laurent, *Histoire du droit des gens* (1865), vol. x, pp. 432–9.

[2] It is interesting to note that in his chapter on Observance of Public Agreements (Book II, ch. x) Bynkershoek refers with some disapproval to the numerous exceptions and qualifications, laid down by Grotius, of the binding force of treaties. These exceptions and qualifications, though they may have been abused by others for the purposes of specious pleading, testify to the thoroughness of Grotius's treatment of the subject. See below, p. 49.

[3] Book I, ch. iii, § viii.

[4] See in particular Book I, ch. iv, §§ i–vii.

examples of unjust wars a contest waged by an oppressed people in order to regain its liberty.[1] It is not easy to fit all this into the general pattern of the treatise. The matter becomes even more obscure when we consider the personal circumstances of its author. Here was a refugee who escaped from the sentence of a political court set up by an arbitrary decree. Yet he deprecated resistance to oppressive rule. Here was a Dutchman, the loyal son of a people which half a century before had by force thrown off the yoke of the Spanish oppressor who, at the very moment when *De Jure Belli ac Pacis* was being written, was preparing war against the United Provinces to reimpose upon them the tyranny of alien rule. Yet Grotius considered to be unjust a war waged by an oppressed people for the sake of its freedom.

What is the explanation of these views, so foreign to the spirit of his teaching and to his personal condition? It is true that, writing as he did in a country under an absolute monarch to whom he dedicated the treatise, who bestowed a pension upon him, and from whom he might have expected the favours of remunerative appointment, he could hardly write in the vein of *Vindiciae contra Tyrannos*. It is possible that, in view of the intransigence with which the right of resistance was advocated, both in the latter tract—which appeared in 1579 but which had not by any means fallen into oblivion—and in Hotman's *Franco-Gallia*, published in 1573, he felt it incumbent upon himself to give to the matter a special argumentative emphasis. But this in itself is an inadequate explanation. What is much more to the point is that this frowning upon rebellion and the favouring of authority were in accordance with what were considered to be the essential needs of the times. The horrors of civil war were foremost in the minds of political thinkers. There was not, in this respect, much difference between Hobbes and Bacon on the one side, and Hooker, Gentilis, and Bodin on the other. They discussed in detail the right of resistance; they all rejected it. So, perhaps with less justification, did Pufendorf.[2] At a time of general uncertainty and of loosening of traditional ties of society, national and international, order was looked upon as the paramount dictate of reason. In the period preceding the Thirty Years War the territorial sovereign state which emerged from the dissolution of the feudal system of society on the Continent of Europe had hardly taken over the functions of the feudal lord; the resulting vacuum accentuated the necessity for stability even at the expense of freedom.[3] Considerations of this order must have

[1] Book II, ch. xxii, § xi.

[2] *De jure naturae et gentium*, Book VII, ch. 8, §§ 5, 6.

[3] He says, after stating that by nature all men have the right of resistance in order to ward off an injury: 'As civil society was instituted in order to maintain public tranquillity, the state forthwith acquires over us and our possessions a greater right, to the extent necessary to accomplish this end. The state, therefore, in the interest of public peace and order, can limit that common right of resistance' (Book I, ch. iv, § ii. 1).

weighed heavily with one in whose work the desire for peace was the dominant motive and the ever-recurring theme. This particular feature of Grotius's outlook appears clearly from his unheroic advice given to defeated peoples to yield to fate rather than to engage in a suicidal fight for liberty, for, he says, reason prefers life to freedom.[1] Strange as it may sound, his attitude towards slavery was to a large extent determined by humanitarian considerations. Enslavement of those captured in war was an alternative preferable to the unlimited power, including the right to kill, which, in his view, the customary law of nations and, probably, the law of nature gave to the captor. His treatment of the institution of slavery is permeated throughout by a spirit of charity and mercy.[2]

What is more important than these explanations is the fact that behind the façade of the general disapproval of the right of resistance there lay qualifications so comprehensive as to render the major proposition almost theoretical. Thus, according to Grotius, there is a right of resistance in cases in which the ruler, by virtue of an original or subsequent contract, is responsible to a free people (as was the case in Sparta);[3] against a king who has renounced his authority or has manifestly abandoned it;[4] who attempts to alienate his kingdom (but only so far as is necessary to prevent the transfer);[5] who openly shows himself the enemy of the whole people —an elastic and formidable exception;[6] who attempts to usurp that part of the sovereign power which does not belong to him;[7] and, finally, where the people have reserved the right of resistance in certain cases.[8] These exceptions as laid down by Grotius were relied upon as an authority for the justification of the resistance to and deposition of James II.[9] If Rousseau had concentrated on the reality of these exceptions rather than on the appearance of the general proposition he would have found less reason for vituperation.[10] It is unlikely that one or more of these exceptions did not

[1] Book I, ch. ii, § xxiv. 6. See also ibid., § vi. 5, and ibid., ch. iii, § xxv. 4. Grotius, who in 1643 read *De Cive*, expressed agreement with Hobbes's view on political authority though he was unable to agree with the bases of the Hobbesian argument: 'Librum de Cive vidi, placen quae pro Regibus dixit. Fundamenta tamen quibus suas sententias superstruit, probare nor possum. Putat inter homines omnes a natura esse bellum . . .' (*Epistolae quotquot*, 1687, Appen dix No. 648).

[2] Book III, chs. vii and xiv.

[3] Book I, ch. iv, § viii.

[4] Ibid., § ix.

[5] Ibid., § x.

[6] Ibid., § xi.

[7] Book I, ch. iv, § xiii.

[8] Ibid., § xiv.

[9] An interesting illustration of this recourse to Grotius will be found, for instance, in an anonymous pamphlet published in 1689 in London by 'A Lover of the Peace of his Country under the title *The Proceedings of the Present Parliament Justified by the Opinion of the mos Judicious and Learned Hugo Grotius; With considerations thereupon. Written for the Satisfactio of some of the Reverend Clergy who yet seem to labour under some Scruples concerning the Origina Rights of Kings, their Abdication of Empire, and the People's inseparable Right of Resistance, Depos ing, and of Disposing and Settling of the Succession to the Crown.* The author invoked Grotiu 'the famous Civilian . . . because of the great Credit and Authority he has obtained in the world especially amongst the Clergy, and is above all other of his Faculty, most tender of the Right and Prerogatives of Crowned Heads' (p. 6).

[10] The same applies to the observations of Dr. Figgis on the subject (op. cit., p. 185).

recall to the mind of the reader the various articles of the Dutch Act of Abjuration against Philip of Spain.

Finally, in this connexion we must bear in mind other indications of Grotius's true attitude. Thus it is significant that, notwithstanding his reluctance to sanction recourse to war, he considers as just resort to war to prevent the maltreatment by a state of its own subjects. In such cases, he says, if a ruler 'should inflict upon his subjects such treatment as no one is warranted in inflicting, the exercise of the right vested in human society is not precluded'.[1] This is, on the face of it, a somewhat startling rule, for it may not be easy to see why he permits a foreign state to intervene, through war, on behalf of the oppressed while he denies to the persecuted themselves the right of resistance. Part of the answer is, perhaps, that he held such wars of intervention to be permitted only in extreme cases which coincide largely with those in which the king reveals himself as an enemy of his people and in which resistance is permitted.[2]

However that may be, this is the first authoritative statement of the principle of humanitarian intervention—the principle that the exclusiveness of domestic jurisdiction stops where outrage upon humanity begins. The doctrine of humanitarian intervention has never become a fully acknowledged part of positive international law. But it has provided a signpost and a warning. It has been occasionally acted upon, and it was one of the factors which paved the way for the provisions of the Charter of the United Nations relating to fundamental human rights and freedoms. In that development the teaching of Grotius has some share. Neither must we forget that although he denied—with substantial qualifications—the right of active resistance, he permitted and enjoined the right of passive resistance;[3] that he safeguarded the conscience and the freedom of the individual in such matters as the right to refuse to carry arms in an unjust, and even doubtful, war;[4] and that he championed the cause of such claims of the individual as the right of expatriation, the rights of economic freedom, and the right to share, through a plebiscite, in the decision to transfer part of national territory.[5]

10. *The Idea of Peace.* The tenth—and not the least important—aspect of the Grotian tradition is his pacifism. He does not deny that war is a legal institution. On the contrary, he is at pains to show that war is not inconsistent with the law of nature and with many other kinds of law. There were good reasons—in addition to the recognition of a patent fact—for this initial legitimation of war. It would not be feasible to attempt to

[1] Book II, ch. xxv, § viii. 2. See also ibid., ch. xx, § xl. 1.
[2] See above, p. 45. But this would not apply to the cruel treatment of a minority.
[3] See above, p. 38.
[4] See above, p. 38.
[5] See below, p. 49.

introduce a measure of legal regulation into a relation not recognized by law. A corresponding method suggested itself—and was adopted—with regard to the contents of the rules of warfare. Thus Grotius's treatment of the laws of war seems to be open to the charge that, after setting out to humanize rules of war, he gives the imprimatur of law to rules of pronounced inhumanity.[1] His answer to any such criticism would probably have been that the proper course was not to deny the character of law to practices which apparently had secured a wide degree of acceptance, but to urge a mitigation of their rigours. Ayala went as far as Grotius—and farther—in treating these practices as law, but he did not propose anything in the nature of *temperamenta.*

In general, there breathes from the pages of *De Jure Belli ac Pacis* a disapproval, amounting to hatred, of war.[2] There is nothing in that work reminiscent of the Baconian conception of war as a healthy exercise. Grotius is clear that where the question of legal right is doubtful, a state ought to refrain from war.[3] He proposes various methods of settling disputes, including negotiation[4] and arbitration.[5] He suggests that 'it would be advantageous, indeed in a degree necessary, to hold certain conferences of Christian powers, where those who have no interest at stake may settle the disputes of others, and where, in fact, steps may be taken to compel parties to accept peace on fair terms'.[6] He devotes a whole chapter to 'warnings not to undertake war rashly, even for just causes'.[7] Elsewhere, he distinguishes between justifiable wars, namely, those for which there is a true legal cause, and those in which the law is but a pretext. These latter he describes simply as wars of robbers.[8] He fully approved of the view of St. Augustine that aggressive wars of conquest are nothing but 'wholesale robbery'.[9] And he cited other distinguished authorities in support of the same opinion.[10] It is probable that his persistent striving towards the unity of the Christian Church and the appearance of leanings towards Catholicism[11] were the outcome of the realization that no other basis was as yet possible for the international organization and preservation of peace.

[1] See above, p. 12.

[2] It is the same overriding desire for peace which explains the extraordinary passage in which, with some uneasiness, he elaborates the view that a state may surrender to an enemy an innocent subject in order to avoid a greater danger (Book II, ch. xxv, § iii).

[3] Book II, ch. xxiii, § vi.

[4] Ibid., § vii.

[5] Book II, ch. xxiii, § viii.

[6] Ibid., § viii. 4.

[7] Book II, ch. xxiv.

[8] Ibid., ch. xxii, § iii. 1.

[9] Book II, ch. xxii, § iii. 2.

[10] Book II, ch. i, § i. 3.

[11] There seems to be no warrant for the suggestion that before his death, prior to leaving France on his journey to Sweden, he expressed the desire to become a Roman Catholic. That possibility is discounted by the most judicious of his biographers: see De Bourigny, *The Life of the Truly Eminent and Learned Hugo Grotius* (translation from the French, 1754), pp. 300 ff. See also Hanshagen in *Zeitschrift für Völkerrecht*, 23 (1939), pp. 13–48, and, in particular, the illuminating Preface of Schulte to Broere's *Hugo Grotius' Rückkehr zum katholischen Glauben* (1871). However, the legend of Grotius's Catholicism dies hard. See, e.g., Pastor, *Geschichte*

11. *The Tradition of Idealism and Progress.* The pacifist strain which runs through the entire work of Grotius is only one feature of the more general aspect—the last to be here considered—of the Grotian tradition, namely, what may not inappropriately be called the tradition of progress and idealism. He initiated or gave his support to progressive ideas in various fields in the sphere of international relations. He was one of the first to assist the cause of international co-operation in the suppression of crime by urging extradition of criminals as a matter of legal duty.[1] He did more than any of the other founders of international law in developing the theory and in elucidating the practice of diplomatic immunities. He supplied the basis of the modern law of state responsibility founded on fault as distinguished from absolute liability[2] and thus helped to displace the indiscriminating and anarchic practice of reprisals as a normal means of redressing grievances. He urged, and laid down as a rule of law, the principle of freedom of navigation on international rivers and canals.[3] His share in the evolution of the principle of the freedom of the sea needs no elaboration. In all these matters his teaching became part of international practice, wholly or in part. In others, although it has remained a mere postulate of reason, it is not without significance.

Thus in matters of economic freedom he spoke the language of uncompromising free trade expressed in terms of legal right. Men are entitled to obtain things without which life cannot comfortably be lived. And although this is an imperfect right inasmuch as the owner retains the power of disposition, no obstacles to the free acquisition of necessaries of life must be raised by 'law or by conspiracy'.[4] To do that, he says, quoting Ambrose, is 'to separate men from relation with their common parent, to refuse fruits freely produced for all, and to do away with the community of life'.[5] He reiterates that all men have the right to buy such things at a fair price unless, as in time of extreme scarcity of grain, they are needed by those from whom they are sought'. As if in anticipation of some

der Päpste, vol. xiii (1929), p. 783. The source of the belief, occasionally expressed, that Grotius was converted to Catholicism lies probably in the fact that much of his theological doctrine was in the nature of an approximation to or, at least, of a sympathetic understanding of the Catholic point of view. To what extent that tendency was, in turn, due to his desire to assist in bringing about the unity of the Christian Church must remain a matter of conjecture. In any case, it was that practical problem which constituted the main preoccupation of his life from the time that he entered the public service of his own country till his death. That cause he served with a sustained fervour and ability which reveal a stature more impressive than that of an essentially academic person who had never grown into full practical maturity—a picture presented by some biographers. See on this aspect of his life: Krogh-Tonning, *Hugo Grotius und die religiösen Bewegungen seiner Zeit* (1904); Schlüter, *Die Theologie des Hugo Grotius* (1919); Wernle, *Der schweizerische Protestantismus im XVIII. Jahrhundert* (1922), vol. i, pp. 471 ff. See also von Luden, *Hugo Grotius nach seinen Schicksalen und Schriften dargestellt* (1806), and Knight, *The Life and Works of Hugo Grotius* (1925), pp. 245–90.

[1] Unless the state of refuge itself chooses to mete out punishment (Book II, ch. xxi, §§ iii, iv. 3).

[2] Book II, ch. xvii, § 20; ch. xxi, § 2.

[3] Book II, ch. ii, § xiii.

[4] Book II, ch. ii, § xviii.

[5] Ibid.

modern monopolistic practices, he inquired, in this connexion, whether it is permissible for one people to make an agreement with another to sell to it exclusively products which do not grow elsewhere. He thought this permissible and not inconsistent with the law of nature provided the latter was prepared to re-sell at a fair price.[1]

It will be noted that these various claims are not postulates of mere ideal justice. They figure in the part of the treatise which is concerned with the causes of war—one of which is 'injury actually received',[2] 'an injury to that which actually belongs to us'.[3] He was clearly in advance of his time when he urged that refugees driven from their homes have the right to acquire permanent residence in another country provided they submit to the government in authority;[4] that deserted and barren portions of national territory be given to immigrants who ask for it, and that they are entitled to take possession, subject to the sovereignty of the original people, of uncultivated land;[5] that a state is bound to grant freedom of passage through its territory to a people which has been forced to leave its country and is seeking unoccupied lands, or desires to carry on commerce with a distant nation;[6] that freedom of passage for the purpose of carrying on commerce extends, as a matter of right, not only to persons but also to merchandise;[7] and that such freedom of passage includes freedom from taxation unless in return for services rendered.[8] He urged with emphasis the right of the individual to expatriate himself from his country of origin,[9] and he acknowledged the right of self-determination to the extent of requiring the consent of the population to the transfer of national territory.[10]

Some of these proposals appear to be chimerical; others have been partly adopted in practice. But they all illustrate the temper of the treatise and explain much of its attraction throughout the centuries. There is about it the atmosphere of strong conviction, of reforming zeal, of moral fervour. These qualities were typical of Grotius himself. This does not mean that the argument in *De Jure Belli ac Pacis* is not often specious and involved. Some of the apparently tortuous character of his exposition is explained by the fact that elaborate qualifications are often of the essence of a conscientious presentation of the legal position. Thus Grotius's detailed treatment of the exceptions to the binding force of promises—a subject as to which his integrity was above suspicion—elicited some caustic remarks from Bynkershoek on the ground that it was abused for the purpose of denying in practice the validity of treaties.[11] Yet this is clearly one of the

[1] Book II, ch. ii, § xxiv.
[2] Ibid., § i.
[3] Ibid.
[4] Ibid., § xvi.
[5] Ibid., § xvii.
[6] Ibid., § xiii. 1.
[7] Ibid., § xiii. 5.
[8] Book II, ch. ii, § xiv.
[9] Ibid., ch. v, § xxiv.
[10] Ibid., ch. vi, § iv.
[11] See above, p. 43, n. 2.

cases in which a simple statement of the legal position may be neither convincing nor accurate. The same applies to other examples of apparent casuistry as, for instance, to the section entitled 'The question whether a war may be just from the viewpoint of both parties, with many qualifications',[1] or to his submission that although a belligerent must not resort to assassination he may accept an offer to that effect,[2] or that though waters must not be poisoned they may be polluted.[3] Some of the tortuousness of the argument must be put to the account of the anxiety not to offend religious feeling. Thus the secularization of the law of nature and the assertion of its supremacy over God Himself was hedged round by highly strained pieces of casuistry such as that if God should command a person to be killed this would not render murder lawful, but that the act having been commanded by God, the Supreme Lord of Life, it would cease to be murder.[4] His efforts to reconcile the apparent denial of the right of resistance with a measure of popular sovereignty have already been noted.[5] Although he considered the contract between subject and king to be binding upon the latter, he was of the view that the contract cannot be enforced.[6] Neither was he invariably above altering his views in deference to the changed political situation—witness the modification in *De Jure Belli ac Pacis* of the rigidity of the principle of the freedom of the seas as advocated in *Mare Liberum*.[7] And examples may be found of straining the meaning of an event to fit a purpose, as in the suggestion that the citizens of Rome are inheritors of the Roman Empire—a piece of special pleading which

[1] Book II, ch. xxiii, § xiii. 1.
[2] Book III, ch. iv, § xviii.
[3] Ibid., §§ xvi, xvii.
[4] Book I, ch. i, § x. 6.
[5] See above, p. 45.
[6] Book II, ch. xiv, § vi. 2. This mixture of evasiveness and elaboration in the matter of the mutual rights of the ruler and the subject is, of course, typical of the age. See, e.g., the way in which Pufendorf set out to prove that supreme authority was not necessarily unlimited (as summarized by Gierke, *Natural Law and the Theory of Society*, 1500–1800 (Barker's translation, 1934), vol. i, pp. 142, 143).
[7] Probably these modifications are not so far-reaching as appears at first sight. The sea, he says, cannot be appropriated. However, not inconsistently with the reason for the freedom of the sea, namely, that it cannot be physically occupied, Grotius holds that part of the sea can be acquired by him who holds the shore on both sides as in the case of bays or straits 'provided that the part of the sea in question is not so large that, when compared with the land on both sides, it does not seem a part of them' (Book II, ch. iii, § viii). This applies, generally, by the law of nature to parts of the sea which are shut in by land (ibid., § x. 1–2)—although, in this as in other respects, 'universal customary law, by a kind of common understanding', may prohibit what is permitted by the law of nature (ibid., 3). Moreover, such possession of parts of the sea must not impede unarmed and innocent passage (ibid., § xii). He devotes a long section, backed by numerous authorities, to showing that although ownership over the sea cannot be acquired, that limitation does not apply to jurisdiction in the nature of *imperium*. 'Ut autem solum imperium in maris partem sine alia proprietate occupatur, facilius potuit procedere: neque arbitror, jus illud gentium de quo diximus obstare' (ibid., § xiii. 1). He does not explain the nature of the distinction, for this purpose, between *proprietas* and *imperium*. However, the illustrations which he adduces of the consequences of such *imperium* suggest that they merely embrace such rights as taxing foreign shipping in order to obtain compensation for expenses incurred in connexion with protecting navigation and making it safe by providing lighthouses and buoying shoals (ibid., § xiv).

could be used as a link in the argument in favour of the unity of the Church within the general framework of Catholicism.[1]

These intrusions of opportunism and realism did not decisively influence the character of *De Jure Belli ac Pacis*. But they are symbolic of the perennial problem with which the science of international law has been confronted almost from the outset. It has been exposed to the inducement to supply a rationalization of inferior and irrational practices; to confuse, in the name of realism, the function of chronicling events with that of a critical exposition of rules of conduct worthy of the name of law; to furnish a philosophy of the second best; and to represent the transient manifestations of immaturity and anarchy in international relations as resulting necessarily and permanently from the nature of states the mutual relations of which, it is said, may be regulated by voluntary co-operation but not by a rule of law imposed and enforced from above. Grotius did not succumb to that tendency. This fact explains much of the influence which he has wielded. For, in the history of political ideas and human progress, it will be found that the attraction of the short cuts of sound realism is matched—and surpassed—by the appeal to faith and to principle.

These then are the principal features of what has here been called the Grotian tradition in international law. They may be conveniently enumerated by way of conclusion. They are: the subjection of the totality of international relations to the rule of law; the acceptance of the law of nature as an independent source of international law; the affirmation of the social nature of man as the basis of the law of nature; the recognition of the essential identity of states and individuals; the rejection of 'reason of State'; the distinction between just and unjust war; the doctrine of qualified neutrality; the binding force of promises; the fundamental rights and freedoms of the individual; the idea of peace; and the tradition of idealism and progress. Some of these elements of the Grotian tradition have now become part of the positive law; others are still an aspiration. But they all explain why Grotius's work has remained an abiding force and not merely an episode, however important, in the literature of international law. They explain why writers and statesmen have turned to Grotius not only as a source of evidence of the law as it is, but also as a well-spring of faith in the law as it ought to be. Grotius did not create international law. Law is not made by writers. What Grotius did was to endow international law with unprecedented dignity and authority by making it part not only of a general system of jurisprudence but also of a universal moral code. To many, indeed, it may appear that *De Jure Belli ac Pacis* is more a system of ethics applied to states than a system of law. This would not inevitably imply a

[1] Book II, ch. ix, § xi. And see above, p. 47.

condemnation of the work. For it may be held that at that time—as, indeed, at any time—it was important that the relations of states should be conceived and taught as part of ethics as well as part of law. Grotius's great merit is that he performed both tasks in one work. This combination of functions resulted in much methodological confusion offensive to the purist, who is in danger of forgetting that in the seventeenth century eclecticism was as important as systematic accuracy. *De Jure Belli ac Pacis* is pre-eminently a treatise which must be judged not by reference to its method, but by its influence on the doctrine and on the practice of the law of nations. It satisfied the craving, in the jurist and the layman alike, for a moral content in the law. In stressing and, on the whole, maintaining the distinction between law and morality it vindicated the place of the law of nations in legal science. Last—but not least—it became identified with the idea of progress in international law.

These considerations may help to answer, to a large extent, the question whether *De Jure Belli ac Pacis* is still a proper medium of study and instruction in international law. The reply is clearly in the negative if what we have in mind is assistance in the search for a legal rule which we may assume an international court would now apply in a case before it. From this point of view most text-books and treatises are obsolete. But *De Jure Belli ac Pacis* may nevertheless have its uses not only for the legal historian or for the writer or advocate anxious to embellish a quotation or strengthen an argument by reference to a passage from Grotius. It cannot be rewritten or modernized by the simple device of omitting quotations from the ancient authorities.[1] To do that, as Whewell did in the abridged version of his translation, is to run the risk of depriving the treatise of one of its characteristic features by reducing it to a body of dry propositions unsupported by the ripe wisdom of antiquity. It is not necessary for the average student to examine the whole of *De Jure Belli ac Pacis*, which ought to disappear as a mere ornamental item in reading-lists. But selected portions of the treatise may still be read with advantage as an instance of juridical method typical of the seventeenth century; as a fairly accurate statement, on any given subject, of international law in its formative period; and, above all, as expressive of the various aspects of the Grotian tradition. However, the significance of the subject transcends that of one item in the educational curriculum of international lawyers. In gaining an understanding of the Grotian tradition as a whole—this has been the main object of the present article—we may not only fathom the secret of its influence upon generations of scholars and men of affairs. We may, and that is no less important, obtain an insight into the persistent problems of international

[1] For an interesting discussion of this and cognate questions see Sandifer in *American Journal of International Law*, 34 (1940), pp. 459–72.

law in the past, in the present, and, probably for some long time to come, in the future. It is a measure of the greatness of the work of Grotius that all these questions should have found a place in his teaching and that he should have answered them in a spirit upon the acceptance of which depends the ultimate reality of the law of nations as a 'law properly so called'.[1]

[1] For an appreciation of some aspects of the teaching of Grotius in relation to the development of international law see Bourquin in *Revue de droit international et de législation comparée*, 3rd ser., vol. vii (1926), pp. 86–125; Vlugt in *Académie de droit international, Recueil des Cours*, 1925 (ii), pp. 397–506. See also Hearnshaw, *Some Great Political Idealists of the Christian Era* (1937), pp. 81–104; and Pound, *Philosophical Theory and International Law*, in *Bibliotheca Visseriana*, I (1923), pp. 71–90. And see Klee, *Hugo Grotius und Johannes Selden* (1946).

It appears from the notes left by Lord Acton that he considered Grotius a pivotal figure in the history of freedom conceived as the emancipation of human thought from the shackles of theological dogma and the ideas of reason of state. (The relevant bundle of notes—No. 5434—is part of a large collection in Lord Acton's handwriting deposited in the Cambridge University Library. I am indebted to my son, Mr. E. Lauterpacht, of Trinity College, for drawing my attention to them.) Lord Acton seems to have believed that some of Grotius's influence may have been due to the fact that his competence and reputation extended to the fields both of theology and of law. He says: 'The literature of divines had little influence on the world. The jurists . . . walked independently of theology. To bring the ideas of the divines and of civil law into combination the man was required who was as much a divine as a jurist. This was Grotius' (5434/76). Lord Acton remarks that before Grotius most writers were touched with denominational prejudices. Grotius while not an enemy of religion—he was deeply religious—was independent of any Church. He made morals independent of religion and, therefore, above religion. He made them a test of the best religion. His object was to advocate principle rather than principles; not to promote certain truths, but to see that truth should prevail over interest (5434/45, 53, 88). Elsewhere Lord Acton remarks on 'Grotius's notion of a code distinct from the moral law, yet obliging conscience; not the work of the Church, but requiring the obedience of the Church; not given by God, but claiming to exist even if there is no God, and to precede the law that He gives; taking away the results of 1,000 years of Christian civilization' (5434/104). He compares Grotius with Copernicus as the herald of a new scientific era. Grotius's attitude, discussed above (pp. 30–5), to the ideas of 'reason of State' may have prompted the observation, intimately in keeping with Acton's teaching, that 'there is no state so sacred or so necessary that it must not be sacrificed to a more universal obligation and a higher cause' (5434/99).

There are repeated references in Lord Acton's notes to the great contribution of Grotius to the secularization of the law of nature and of political thought generally. (See above, pp. 8, 50, on Grotius's submission, rendered more emphatic by its verbal qualifications, that the law of nature would be valid even if there were no God.) The importance of that contribution is not affected by the circumstance that actually Grotius was not the first to assert the independence of the law of nature. See Maitland's note in Gierke, *Political Theories of the Middle Age* (Maitland's translation, 1900), p. 174, quoting from Gierke's *Johannes Althusius* that 'already medieval schoolmen had befriended the saying, usually attributed to Grotius, that there would be a law of nature, discoverable by human reason and absolutely binding, even if there were no God'. In that work Gierke cites a passage from Gabriel Biel's *Collectorium Sententiarum* (1501) strikingly reminiscent of Grotius's phraseology. And see above, p. 8, as to Suarez. See also Professor Hazeltine's Introduction to Ullmann, *The Medieval Idea of Law* (1946), p. xxx, where he refers to Hemmingius, *De lege naturae apodictica methodus* (1562), Q. 9, as yet another example of the attempts, prior to Grotius, to emancipate jurisprudence from theology.

THE INTERPRETATION OF THE CHARTER

By POLLUX

1. THE Charter of the United Nations will presumably be the most important international document in the near future. It should take at least as important a place in the development of public international law as the Covenant of the League of Nations did before the decline of the League. As experience accumulates it is hoped that its own constitutional law will develop and become the most important element of the international law of the future. The correct interpretation of the Charter is, therefore, of paramount importance, from the very inception of the Organization. This work of interpretation has, in fact, already begun in regard both to practice and doctrine, as indeed it was bound to do from the day of signature.[1] It will also form the subject of discussions by learned societies and other bodies which make a study of international law and relations. The Charter, like every written Constitution, will be a living instrument. It will be applied daily; and every application of the Charter, every use of an Article, implies an interpretation; on each occasion a decision is involved which may change the existing law and start a new constitutional development. A constitutional customary law will grow up and the Charter itself will merely form the framework of the Organization which will be filled in by the practice of the different organs.[2] The accumulated literature on treaty interpretation is already so voluminous[3] and some of it, at least, so

[1] See among others: Bentwich, *From Geneva to San Francisco—An Account of the International Organization of the New Order* (1946); Bourquin, *Collaboration internationale et défense de la paix*; Dehousse, *Cours de Politique international* (1945); Dulles, 'A First Balance Sheet of the United Nations', *International Conciliation*, no. 420, April 1946, pp. 177–82; Dupuys, *San Francisco et la Charte des Nations Unies* (1945); Goodrich and Hambro, *Charter of the United Nations, Commentary and Documents*, World Peace Foundation, Boston (1946); *Peace, Security and the United Nations* (1946); Guerrero, *L'Ordre international* (1945); Wilcox and Laves, 'The First Meeting of the General Assembly of the United Nations', *American Journal of International Law*, 40, 2 (1946), pp. 346–73.

[2] Kelsen has some interesting remarks on the relation between application of and creation of law in *General Theory of Law and State* (1945), pp. 132 ff.

[3] Adler, 'Interpretation of Treaties', *Law Magazine and Review*, 26 (1901), p. 62; Brown, 'The Interpretation of Treaties', *American Journal of International Law*, 23 (1929), pp. 819 ff.; Chang, *The Interpretation of Treaties by Judicial Tribunals* (1933); Cheng, *Essai critique sur l'interprétation des Traités dans la doctrine et la jurisprudence de la Cour Permanente de Justice Internationale* (1941); David, *De l'interprétation des traités diplomatiques par l'autorité judiciaire* (1909); Duez, 'L'Interprétation des traités internationaux', *Revue générale de Droit international public*, 32 (1925), pp. 729 ff.; Ehrlich, 'L'Interprétation des traités', *Recueil des Cours de l'Académie de Droit international*, 27 (1928) (iv), pp. 5 ff.; Fachiri, 'Interpretation of Treaties', *American Journal of International Law*, 23 (1929), pp. 745 ff.; Fairman, 'The Interpretation of Treaties', *Grotius Society*, 20 (1935), pp. 123 ff.; Hackworth, *A Digest of International Law*, vol. v, pp. 222 ff.; Hoijer, *Les Traités internationaux* (1928); Hudson, *Permanent Court of International Justice 1920–1942* (1943), chapter 29; Hyde, 'Concerning the Interpretation of Treaties', *American Journal of International Law*, 3 (1909), pp. 46 ff.; id., 'Interpretation of Treaties by the Permanent Court of International Justice', ibid., 24 (1930), pp. 1 ff.; id., *International Law* (2nd ed., 1945), vol. ii, pp.

adequate[1] that it might seem presumptuous to add to it. It might also be said that the judicial decisions, particularly those of the Permanent Court of International Justice,[2] are so authoritative and so well established that little remains to be said. On the other hand, it is always useful to be reminded of good judicial practice. It may be not altogether unprofitable to assemble some of the experience of the past and bring it to bear on the problems arising out of the new Charter. These problems are mainly of two kinds. On the one hand, there is the question of who is to interpret the Charter; on the other, the question of how it is to be interpreted.

2. The interpretation of the Charter is rendered difficult by many factors. First, it is a highly political[3] treaty; in the second place, it is multilateral; and thirdly, it is—like many treaties—often faulty in its drafting. Finally, it is signed in five authoritative versions. It is obvious that the absence of any provision concerning interpretation in the Charter itself means that the decision as to which organ is competent to give interpretations will give rise to many difficulties. This was indeed realized at the United Nations Conference on International Organization in San Francisco in 1945. The

1468 ff.; Jokl, *De l'Interprétation des Traités normatifs* (1936); Kelsen, 'Zur Theorie der Interpretation', *Revue internationale de la théorie de droit*, 8 (1934); Lauterpacht, 'Les Travaux préparatoires et l'interprétation des traités', *Recueil des Cours de l'Académie de Droit international à La Haye*, 48 (1934), ii; id., *The Development of International Law* (1934); McNair, *The Law of Treaties* (1938), part ii; Negulesco, 'La Jurisprudence de la Cour Permanente de Justice Internationale', *Revue générale*, 33 (1926), pp. 194 ff., particularly pp. 202 ff.; Pic, 'De l'Interprétation des traités internationaux', *Revue générale de Droit international public*, 17 (1910), pp. 5 ff.; Rousseau, *Principes généraux du Droit international public*, vol. i (1944), pp. 631 ff.; Schwarzenberger, *International Law*, vol. i (1945), pp. 193 ff.; Soerensen, *Les Sources du droit international* (1946); Spencer, *L'Interprétation des Traités par les travaux préparatoires* (1934); Wright, 'The Interpretation of Multilateral Treaties', *American Journal of International Law*, 23 (1929), pp. 94 ff.; You, 'L'Interprétation des traités et le rôle du préambule des traités dans cette interprétation', *Revue de Droit international* (Geneva), 20 (1942), pp. 25 ff.; Yü, *The Interpretation of Treaties* (1927).

[1] See particularly Hudson, Lauterpacht, and Soerensen, op. cit.

[2] The author has limited the references to cases to those decided by the Permanent Court of International Justice. This is so for two reasons: first because the Court has greater authority than any previous court; secondly, because it would lead too far also to include other decisions.

It should be added here that even the quotations from the Permanent Court ought to be viewed with a certain caution. First of all, the quotations are all taken out of their context. Secondly, the Court is in no way bound by its previous dicta which, in so far as they do not figure in the operative part of a decision, are not *res judicata*. Incidentally, the International Court of Justice is, *stricto jure*, a new court and not a mere continuation of the old one. It is submitted, however, that the dicta quoted hereinafter are a good selection. They represent the considered opinion of the Court. The International Court of Justice will not lightly disregard the wisdom and common sense embodied in the long practice of the Permanent Court.

This article is not concerned with the interpretation of treaties before municipal courts. For a study of this, see Sir Arnold Duncan McNair, *The Law of Treaties* (1938), and Ruth Masters, *International Law in National Courts* (1932).

[3] See Goodrich and Hambro, op. cit., p. 16. This statement does not imply that the author is of opinion that there are 'political' or 'unpolitical' treaties in the absolute sense of the word. Every treaty is an embodiment of a decision on policy. The division of treaties and disputes into political and non-political categories is on the whole useless. The expression means here that the interpretation of the Charter may imply fundamental decisions on foreign policy.

participating states, however, were unable to reach any agreement on this important question. The following statement on interpretation was accordingly included in the report of Committee IV/2:

'In the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers. It will be manifested in the functioning of such a body as the General Assembly, the Security Council, or the International Court of Justice. Accordingly, it is not necessary to include in the Charter a provision either authorizing or approving the normal operation of this principle.

'Difficulties may conceivably arise in the event that there should be a difference of opinion among the organs of the Organization concerning the correct interpretation of a provision of the Charter. Thus, two organs may conceivably hold and may express or even act upon different views. Under unitary forms of national government the final determination of such a question may be vested in the highest court or in some other national authority. However, the nature of the Organization and of its operation would not seem to be such as to invite the inclusion in the Charter of any provision of this nature. If two Member States are at variance concerning the correct interpretation of the Charter, they are of course free to submit the dispute to the International Court of Justice as in the case of any other treaty. Similarly, it would always be open to the General Assembly or to the Security Council, in appropriate circumstances, to ask the International Court of Justice for an advisory opinion concerning the meaning of a provision of the Charter. Should the General Assembly or the Security Council prefer another course, an *ad hoc* committee of jurists might be set up to examine the question and report its views, or recourse might be had to a joint conference. In brief, the Members or the organs of the Organization might have recourse to various expedients in order to obtain an appropriate interpretation. It would appear neither necessary nor desirable to list or to describe in the Charter the various possible expedients.

'It is to be understood, of course, that if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable it will be without binding force. In such circumstances, or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter. This may always be accomplished by recourse to the procedure provided for amendment.'[1]

3. This statement has, of course, left the question entirely unanswered. The easiest, the most primitive, and the most unsatisfactory solution is to say that each individual Member has the right to decide for itself how to interpret the Charter. This might be considered to follow naturally from the sovereignty of the states. No state is obliged to accept any jurisdiction without previous consent.[2] A state might consequently say that it and no one else had the power of deciding. This, of course, is exactly what happened under the régime of the League of Nations with regard to the application

[1] United Nations Conference on International Organization, Report of the Rapporteur of Com. IV/2, Doc. 933. IV/2/42 (2), pp. 7–8. *Printed Documents*, vol. xiii, p. 709.

[2] See, *inter alia*, *P.C.I.J.*, Ser. B, no. 5.

of sanctions: it was in practice left to the discretion of each Member of the League of Nations to decide whether to apply Article 16 of the Covenant or not.[1] But the Covenant had to be interpreted in accordance with the canons of good faith, and Member States were not left entirely free to adopt their own individual interpretations. The same applies, with possibly even greater force, to the interpretation of the Charter, since the obligations not to use force and to submit disputes to peaceful settlement are more absolute in the Charter than they were in the Covenant.

On the other hand, it must be admitted that it may at times be extremely difficult for a Member of the United Nations to follow any course other than that of deciding for itself what is the right interpretation of the Charter. No state can reasonably be expected meekly to accept an interpretation of the Charter which it considers completely wrong, however large the majority in favour of such an interpretation may be.[2]

4. The next solution is that each organ of the United Nations should decide its own competence. This would, of course, mean that the Security Council could decide for itself, presumably with the concurring votes of the five permanent Members, to adopt any interpretation upon which it might agree. The General Assembly and the other organs might do likewise, but it stands to reason that no decision adopted by one organ would be binding on the other organs, since each individual organ would be competent—and exclusively competent—to determine its own powers.[3] This is in practice what happens in the Constitution of many individual states. It can hardly be said that the solution is ideal. It might easily lead to conflicting interpretations within the Organization, with ensuing conflicts and deadlocks between the different organs.[4] It is also quite possible that the solution adopted by an organ might be such as to leave the minority entirely unsatisfied.[5] Such an interpretation might not be respected in the future. The foundation might thereby be laid for a conflict of practice, the effects of which would be detrimental to the development of the Organization. More will be said about this in section 7 of this article.

[1] Compare current literature on Article 16 of the Covenant. The fourth article of the 1921 directives stated that each state decided by itself whether a violation of the Covenant had taken place. See Schücking and Wehberg, *Satzung des Völkerbundes*, 2nd ed., p. 610.

[2] This remark does not apply to an interpretation given by the International Court of Justice or other bodies which may be authorized to give a binding interpretation.

[3] This solution is foreshadowed in the above-mentioned report at the San Francisco Conference.

[4] This danger is also foreshadowed in the above-mentioned report. The danger actually did materialize in the first part of the First Session of the General Assembly concerning the interpretation of the Statute of the Court relating to the election of judges.

[5] This happened during the above-mentioned controversy concerning the Statute of the Court. The President of the Assembly did not accept the interpretation offered by the Secretariat (Doc. A/25) and the Assembly upheld the President by 24 votes against 11 with 3 abstentions. *Journal of the General Assembly* (1946), p. 442.

5. It might at this point be useful to relate in some detail the first experience of the Organization in connexion with the interpretation of the Charter. The first occasion on which both the General Assembly and the Security Council had to adopt a definite attitude as to the interpretation of an Article in regard to which conflicting interpretations had been put forward, was during the election of the Judges of the International Court of Justice on 6 February 1946. The question in doubt was the meaning of the word 'meeting' in Article 11 and in the first paragraph of Article 12 of the Statute of the Court.[1] The procedure to be followed had been laid down by the Secretariat in Document A/25.[2] According to the interpretation implicitly adopted by this document, the word 'meeting' meant a reunion of the Assembly or the Council continuing until all the vacancies were filled, irrespective of the number of ballots required. If one ballot was enough, so much the better; but if numerous ballots were required, the meeting must nevertheless continue until the list was completed. However, the President of the Assembly, M. Spaak, put forward another interpretation of the relevant Articles: he suggested that a 'meeting' meant the same as a 'ballot'—in other words that after a single ballot the meeting was terminated. This interpretation, he considered, was calculated to save time. The President of the Permanent Court of International Justice, His Excellency Dr. J. G. Guerrero, who was present as representative of the Republic of El Salvador, was opposed to M. Spaak's interpretation and upheld the interpretation given by the Secretariat.[3] But M. Spaak, holding that the Assembly at its first session was not bound by any precedent,[4] demanded

[1] Statute, Article 11. 'If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.'

Statute, Article 12. '1. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council, may be formed at any time at the request of either the General Assembly or the Security Council, for the purpose of choosing by the vote of an absolute majority one name for each seat still vacant, to submit to the General Assembly and the Security Council for their respective acceptance.'

[2] The chief of the Legal Section, which prepared this document, was at that time Dr. Edvard Hambro, who was later appointed Registrar of the International Court of Justice. It may be presumed that the document was read and approved by Professor Jules Basdevant, who was at the time Legal Adviser to the General Assembly and who is now Vice-President of the International Court of Justice. It would also probably not be wrong to suggest that this document was prepared on the basis of past experience. It may perhaps be permissible to mention that the 1943 edition of Judge Manley Hudson's book on the Permanent Court of International Justice was constantly referred to both by the Secretariat and by the members of the Legal Committee. This book contains on p. 241 and the following pages detailed descriptions of the manner in which these elections were held in the past.

[3] President Guerrero was later elected President of the International Court of Justice. He also based his interpretation on the experience of the past. It might, however, be contended that his interpretation lends itself to misunderstanding, since it might be thought that he considered a meeting to be equivalent to a day's session instead of being the period of time required for the number of ballots necessary to fill the vacancies (cf. *Journal of the General Assembly* (1946), pp. 441–2).

[4] Cf. *Journal of the General Assembly* (1946), p. 442.

a vote on his interpretation, with the result that the Assembly, by twenty-four votes to eleven (with three abstentions) upheld the President's interpretation.[1] After this vote was taken, the representatives of France, Great Britain, and Salvador proposed that the Assembly should request an advisory opinion from the International Court of Justice, a proposal which encountered no opposition.[2] The discussion in the Security Council was considerably longer drawn out and, singularly enough, the President of the Assembly was called in to give his opinion,[3] in spite of the fact that it is provided in Article 8 of the Statute that 'the General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court'. The actual participation of the President of one body at the meeting of the other is hardly calculated to assure the independence of the elections stipulated for in Article 8. The discussion in the Security Council took place on the basis of the above-mentioned Document A/25.[4] The Chinese delegate, Mr. Wellington Koo, expressed the opinion that the Security Council was not bound by the interpretation adopted by the General Assembly but was free to adopt its own interpretation of the relevant articles.[5] The British representative, Mr. Noel-Baker, very strongly upheld the interpretation adopted in Document A/25. He said, *inter alia*, 'It seems to me perfectly plain that the system envisaged by the Secretariat was that which had been previously laid down as the meaning of the Statute and which I venture to think it is very difficult for us to upset.'[6] In spite of this, the Security Council in fact adopted the same interpretation as the General Assembly,[7] and it was likewise considered in the Security Council that an Advisory Opinion on the point should be requested.[8]

The upshot of these discussions would seem to have been highly unsatisfactory. On the basis of the facts it would seem that the interpretation given by the Secretariat, based upon the experience of the League of Nations, was the only correct one. Since the Statute of the International Court of Justice is based upon the Statute of the Permanent Court of International Justice, it stands to reason that the word 'meeting' in the new Statute must have the same meaning as the same word in the old Statute, and it is respectfully submitted that the meaning of the word 'meeting' cannot be correctly construed without regard to the history of the application of these articles under the system of the League of Nations. It can,

[1] Ibid., p. 442. [2] Ibid., p. 443.

[3] *Journal of the Security Council* (1946), pp. 156–7.

[4] The Soviet delegate, M. Vyshinsky, did not accept this document as a basis, but the discussion still centred on that document (ibid. ,p. 162).

[5] Ibid., p. 158.

[6] Ibid., p. 160.

[7] Ibid., p. 164.

[8] Ibid., p. 167.

moreover, be stated without fear of contradiction that the General Assembly of the United Nations adopted the interpretation suggested by the President of the Assembly, not for any legal reasons, but simply because it hoped thereby to gain time. It also seems clear that the Security Council provisionally adopted the same procedure as the Assembly for two reasons: first, in order not to be in conflict with the General Assembly and, secondly, so as to gain time. Furthermore, it seems obvious that both the General Assembly and the Security Council feel uneasy about this interpretation. It was far from gaining unanimous support and there was a general consensus of opinion in favour of obtaining an advisory opinion from the International Court of Justice. This general opinion did not, however, take shape in a formal request to the International Court of Justice, for reasons which cannot be found in the official records. At the second half of the First Session of the General Assembly in the autumn of 1946 the Assembly adopted a provisional ruling, subject to the concurrence of the Security Council, in the following terms: 'Any meeting of the General Assembly held in pursuance of the Statute of the International Court of Justice for the purpose of the election of members of the Court shall continue until as many candidates as are required for all the seats to be filled have obtained in one or more ballots an absolute majority of votes.'[1]

6. It is quite clear that questions relating to procedure must be treated separately and individually by the particular organ of the United Nations concerned. The whole machinery of international organization might be blocked if each controversial question of procedure had to be referred for settlement by some other procedure. It has, indeed, often created a bad impression that the Organization has been too exclusively concerned with matters of procedure. On the other hand, it must be admitted that, very often, extremely important matters of substance may be prejudiced by a procedural decision and that it is very often extremely difficult to decide whether a question is one of substance or of procedure.[2]

Several Articles of the Charter have already been dealt with in this manner by the Security Council, although the questions at issue have not always been definitely solved. Article 29 was discussed in connexion with the Indonesian question.[3] Article 31 has been dealt with fairly often and was applied with regard to Canada during the consideration of rules of procedure for the Atomic Commission.[4] The same Article was applied

[1] See *U.N. General Assembly Journal*, no. 75: Supplement A–64, Add. 1. Resolutions adopted on the Report of the Sixth Committee, p. 932. U.N. Document A/191, of 15 November 1946.)

[2] More will be said about this in the section on the power of veto in this article.

[3] See Meeting of Security Council, 12 February 1946, *Journal of the Security Council*, p. 238.

[4] See *Security Council Records*, First Year, Second Series, no. 1, 50th Meeting.

in regard to Greece,[1] Iran,[2] and in regard to the Ukraine[3] in the Indonesian question. Article 32 has been applied very often in connexion with Article 31.[4]

More important than these questions was that concerning the removal from, or retention on, the agenda of the Iranian question. At one point, both the Government of the Soviet Union[5] and the Government of Iran[6] demanded that this question should be removed from the agenda, since the two Powers in question had come to terms. The Secretary-General submitted a Memorandum to the Security Council wherein he suggested that the matter should be automatically removed from the agenda when the two parties had reached agreement.[7] This matter was referred by the Security Council to a Committee of Experts which, however, did not succeed in reaching a unanimous conclusion.[8]

Mr. van Kleffens, the delegate for the Netherlands, stated:

'Reduced to its simplest terms, the issue seems to me to be this. Who is master of the Council's agenda; the Council or the States who are parties to a dispute or a situation?

'Simple logic, it seems to me, is enough to give the answer. It could only be the Council who determines what is and what is not on the agenda. Not the parties, but the Council admits a question to the agenda; not the parties, but the Council alone can strike it off.'

The majority of the Security Council agreed with this statement and the result was that the delegate of the Soviet Union left the Council Meeting

[1] Meeting of the Security Council, 1 February 1946, *Journal of Security Council*, p. 87.
[2] Meeting of the Security Council, 30 January 1946, *Journal*, p. 87.
[3] Meeting of the Security Council, 19 February 1946, *Journal*, pp. 223–30.
[4] This was the case in the above-mentioned questions concerning Greece and Iran.
[5] *Journal of the Security Council* (1946), pp. 489–90 and 498.
[6] Ibid., p. 498.
[7] The Secretary-General said, among other things, in this letter:

'It is therefore arguable that, following withdrawal by the Iranian representative, the question is automatically removed from the agenda unless:

(*a*) the Security Council votes investigation under article 34, or,
(*b*) a member brings it up as a situation or a dispute under article 35, or,
(*c*) the Council proceeds under article 36, paragraph 1, which would appear to require a preliminary finding that a dispute exists under article 33, or that there is a "situation of like nature".

'An argument which may be made against the view of automatic removal from the agenda is that once a matter is brought to the attention of the Council, it is no longer a matter solely between the original parties, but one in which the Council collectively has an interest, as representing the whole of the United Nations. This may well be true; but it would appear that the only way in which, under the Charter, the Council can exercise that interest is under article 34, or under article 36, paragraph 1.

'Since the Council has not chosen to invoke Article 34 in the only way in which it can be invoked, i.e. through voting an investigation, and has not chosen to invoke article 36, paragraph 1, by deciding that a dispute exists under article 33 or that there is a situation of like nature, it may well be that there is no way in which it can remain seized of the matter.' (*Journal of the Security Council*, p. 523.)

[8] See Document S. 42, United Nations, 18 April 1946.

and refused to be present during the continued discussion of this question.[1] The effect of the absence of one of the permanent Members of the Security Council was discussed by the Council and the general feeling seemed to be that it was quite possible to continue to discuss the matter in the absence of one of these states, although it would not be possible to make any decision.[2]

7. A third possible solution is that the General Assembly, being the one organ where all the Members can meet and discuss constitutional matters, should endeavour to settle problems by a so-called authoritative interpretation, adopted by a vote of the Assembly. This course was, in fact, frequently adopted under the League of Nations, particularly with regard to the application of Article 16,[3] and has been proposed again by the Australian delegate in the Security Council.[4] The first drawback to this procedure is that the other organs of the United Nations might object strongly to the General Assembly's assuming a position of superiority to the other organs. The General Assembly and the other organs of the United Nations do not form an organizational hierarchy. They are simply placed in juxtaposition. There are also grave legal objections to such a practice.

It seems quite clear that any such interpretation will either amount to an amendment of the Charter, or else be void of any legal effect whatsoever. If it is meant as an amendment, it must be adopted in the form of an amendment, that is, by a two-thirds majority vote of the General Assembly and with the subsequent ratification by two-thirds of the Members, including all the states with a permanent seat on the Council.[5] If it is not intended to have the effect of an amendment, it seems quite clear that any subsequent Session of the General Assembly will be able to modify the Resolution by the same procedure. It is a safe rule of international law that any decision can be revoked or modified by the same procedure as that by which it has been adopted.[6] It may confidently be assumed that a high international tribunal, or any political organ, will accept an interpretation to which all the parties agree.[7] Equally, it is quite clear that 'it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it'[8]—and, it may be submitted, that this should be

[1] This happened at the 36th Meeting of the Security Council, 15 April 1946. See *Journal of the Security Council* (1946), p. 597.

[2] Ibid., pp. 636–8.

[3] See Schücking and Wehberg, op. cit.

[4] This point was included in the Agenda of the Second Part of the first Session of the General Assembly, and is treated in section 18 of this article.

[5] This was also envisaged in the above-mentioned report from the San Francisco Conference.

[6] See Rousseau, op. cit., paragraph 399.

[7] Hudson, op. cit., p. 643.

[8] *P.C.I.J.*, Ser. B, no. 8, p. 37. See pp. 36–8 of this Advisory Opinion.

done in the same form and following the same procedure. The opinion given by the Permanent Court of International Justice in the question of the European Commission of the Danube shows that that high tribunal made it a very strict rule not to accept as authoritative any interpretation given in another manner or by a limited number only of the signatories to the provision interpreted.[1]

Interpretative resolutions adopted by the organs of the United Nations should not be confused with any other resolutions adopted during the elaboration of the Charter, prior to its adoption. Such resolutions will be examined in connexion with the problem of the importance to be attached to preparatory work and historical sources. The scope and character of resolutions adopted at the San Francisco Conference are in many ways identical with those of subsequent resolutions. Most of the considerations put forward in sections 17 to 19 apply with equal force to this section.

8. Yet another method, which was resorted to from time to time under the League of Nations, particularly at the time of the Corfu incident, is to appoint a committee of jurists to determine the correct interpretation.[2] It may, however, be observed that the real purpose of appointing such a committee is usually quite other than to obtain a legally correct interpretation. It would seem to be rather to provide a legal cloak for whatever solution may appear politically desirable. This, of course, may be quite justifiable in certain political circumstances. Furthermore, such solutions suggested by *ad hoc* committees will in all cases require subsequent ratification by the organ of the United Nations which has appointed the committee. Accordingly, this method is in reality merely one cog in the machinery by which authoritative interpretations are formulated.

All the solutions so far mentioned may be regarded as approaching the problem from a political standpoint and, it may be said in parenthesis, many states will prefer this political approach, because they feel that only they themselves, through their duly accredited representatives, are able and should have competence to make far-reaching decisions concerning the application of the Constitution of a World Society. They may feel that the political atmosphere of the United Nations is more suitable for the evolution of politically feasible or acceptable solutions than the rarefied legal atmosphere of a tribunal created to apply international law. They may, rightly or wrongly, be of the opinion that the Court—it is submitted that judicial interpretations would normally be effected through the Inter-

[1] *P.C.I.J.*, Ser. B, no. 14, pp. 34–5.

[2] The results achieved by the committee of jurists appointed at the time of the Corfu incident are hardly encouraging. This might, however, be due more to the question put than to failings of the committee. See Hambro, *Exécution des Sentences* (1936), chapter x, pp. 91 ff. and the literature quoted there.

national Court of Justice—would not be able to take political motives into consideration to a sufficient degree. This, as we shall see later, is not always the case.[1]

9. Another method of dealing with problems of interpretation may be called the 'judicial interpretation' method. This, in the case of the Charter, may take many forms. In the first place, it is possible, if two states disagree on a point involving the interpretation of the Charter, that they will refer the matter to the International Court of Justice for decision. They may, conceivably, ask for such an interpretation even if there is no actual dispute.[2] Such a decision will, of course, only be binding on the two states in question, unless the other Members of the United Nations elect to intervene in accordance with Article 63 of the Statute of the Court.[3] However, it is perhaps somewhat unlikely that questions concerning the interpretation of the Charter will be brought before the Court in this direct way. It is much more likely that the Court will have incidentally to decide a point of interpretation in connexion with some dispute.[4] For instance, a state might claim reparation for the breach of an international obligation that might have arisen under the Charter of the United Nations.

10. On the basis of the history of the League of Nations it is more likely that the International Court of Justice will be asked to give an Advisory Opinion on a question concerning the interpretation of the Charter, and here again there are two possible ways in which this may be done. In the first place the United Nations may make a direct request for the interpretation of an Article of the Charter. This was not done in the case of the League of Nations. The Members of the League always showed particular reluctance to use the Court for such purposes[5] except in cases where

[1] See particularly the statement by the Permanent Court of International Justice in the Advisory Opinion concerning the Frontier between Turkey and Iraq, p. 29, in Ser. B, no. 12.

[2] The Permanent Court declared in the case of German interests in Polish Upper Silesia (*P.C.I.J.*, Ser. A, no. 7, p. 18): 'There seems to be no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty; rather it would appear that this is one of the most important functions which it can fulfil. It has in fact already had occasion to do so in Judgment No. 3.'

[3] Statute, Article 63. '1. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith.

'2. Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.'

It is, of course, quite possible to institute a rule whereby the interpretation of a treaty is binding on all the signatories, even on the signatories who have not formally intervened in the proceedings before the Court. This rule would not imply any undue hardship, as all the signatories could intervene if they wished to do so.

[4] This possibility was recognized in the report above. Such questions have come before the Permanent Court for advisory opinion, particularly in the Tunis and Morocco nationality decree dispute between France and Great Britain. (*P.C.I.J.*, Ser. B, no. 4.)

[5] See Fisher, *Les Rapports entre l'Organisation Internationale du Travail et la Cour Permanente de Justice Internationale* (1946), pp. 36 and 44.

a point of interpretation had to be settled as part of an actual dispute between Members.[1]

There seemed little doubt at San Francisco that the same reluctance existed among the greater number of delegations. This is clearly borne out by the above-quoted extract from the report of Committee IV/2. On the other hand, it cannot be denied that there seemed to be a general desire among delegations to ask for an Advisory Opinion concerning the interpretation of Article 12 of the Statute of the Court,[2] even though, for other reasons, no resolution to that effect was actually adopted.[3] It must also not be forgotten that the International Labour Office frequently presented direct requests for opinions to the Permanent Court.[4] A similar procedure is foreshadowed in the Constitutions of certain of the new International Organizations. The agreements between the United Nations on the one hand, and the International Labour Organization and the United Nations Educational, Scientific and Cultural Organization on the other, contain the provision that these organizations may have direct recourse to the International Court of Justice.[5] The same applies to the Economic and Social Council.[6]

11. The history of the League indicates, on the other hand, that it is very probable indeed that the Court may, in connexion with other questions, be called upon to give an interpretation of the Charter. This frequently occurred under the League of Nations. The Court, for instance, had to interpret paragraph 8 of Article 15 of the Covenant in the question of the Nationality Decrees in Tunis and Morocco.[7] It had to interpret Article 5 in the question of the frontier between Turkey and Iraq;[8] Article 17 in the question of the Status of Eastern Carelia;[9] and Article 23 in the question concerning railway traffic between Lithuania and Poland.[10]

[1] A case in point is that of the Morocco and Tunis Nationality Decrees. (*P.C.I.J.* Ser. B, no. 4.)

[2] The reason for this seeming unanimity may have been that the problem was not considered important enough to warrant any great discussion. It may, however, easily lead to a subsequent and most important practice. See the *Journals* of the General Assembly and Security Council, 6 and 7 February 1946.

[3] See section 5 above.

[4] See Fisher, op. cit., *passim.* An interesting study on this problem is included in the International Labour Office *Report of the Conference Delegation on Constitutional Questions on the work of its First Session, 21 Jan.–15 Feb., 1946*, see particularly paragraph 69, p. 54 (1946).

[5] See the following documents of the Second Part of the First Session of the General Assembly: A. 72, A. 77, A. 77 corr. 1, A. 77 corr. 2, A. 78, A. 106, A. 106 corr. 1, A. 242.

[6] See A. 201.

[7] *P.C.I.J.*, Ser. B, no. 4. See Hudson, *World Court Reports*, vol. i, p. 143. No definite action was taken by the Council of the League of Nations to ensure that the opinion of the Court should lead to an agreement between the French and British Governments.

[8] *P.C.I.J.*, Ser. B, no. 12. See Hudson, op. cit., vol. i, p. 720. The parties concerned succeeded, by means of a compromise, in adjusting the situation in a satisfactory manner.

[9] *P.C.I.J.*, Ser. B, no. 5. See Hudson, op. cit., vol. i, p. 190.

[10] *P.C.I.J.*, Ser. A/B, no. 42. See also Hudson, op. cit., vol. ii, p. 749.

The Organization will, of course, not be bound to accept such advisory opinions, but there seems little reason to suppose that it will not do so. In any case, there is no instance in which the League of Nations failed to apply an opinion duly rendered by the Court.

One possible objection to obtaining an interpretation from the Court might be that the procedure would take too long. For that reason it has been proposed that such interpretations should be rendered by a Chamber of the Court. An interpretation by a Chamber might not, however, carry the necessary weight. Accordingly, it might nevertheless be better to obtain advisory opinions on questions of interpretation from the full Court. This, moreover, is the method provided for by the Court's Statute; there is no provision for the rendering of advisory opinions by a Chamber even in the new Rules of Court.[1] Again, the Permanent Court always gave these opinions very expeditiously, and the new Rules also contain, in Article 82, a special provision on this point.[2]

On the subject of judicial interpretation, it may be said in conclusion that the solutions given to problems of interpretation by a judicial body will be the soundest from the standpoint of law.

The history of the Permanent Court of International Justice seems also clearly to show that such a tribunal is eminently suited to undertake the legal function known as interpretation.

On the other hand, it should not be forgotten that certain disputes, although they may be definitely 'legal', 'judicial', or 'justiciable' in character, may be so embittered and have such wide implications that a court of law will be unable to settle them with any hope of finality. Instances occur both in individual states and in the international community. In such cases it may be dangerous to the authority and to the very existence of a court to subject it to the test of having to pass upon a question which is regarded by a strong group of states as unsuitable for settlement in this way. The decision whether or not this is the case is a highly delicate matter of political judgment.

12. Whichever method is adopted for the interpretation of the Charter, certain rules of interpretation will apply. The one basic rule of interpretation is that effect must be given to the principle *pacta sunt servanda*. The so-called rules of interpretation are not, of course, formal rules; international law does not recognize any kind of formalism in this respect. The

[1] It might be noted in passing that the Permanent Court has discussed the problem of giving this competence to the Chambers. See Hudson, op. cit., p. 503. It might, therefore, be assumed that the International Court has not left the question unanswered through an oversight.

[2] Rules of the Court, Article 82, paragraph 2: 'If the Court is of the opinion that a request for an advisory opinion necessitates an early answer, it shall take the necessary steps to accelerate the procedure.'

so-called rules of interpretation[1] are much more in the nature of rules of evidence.

It may, of course, not be altogether easy to answer the question of what the evidence is supposed to prove. It does not seem very helpful to state that 'the ordinary methods of interpretation'[2] shall be used in order to determine the 'clear'[3] meaning, 'the plain terms',[4] the 'natural',[5] 'grammatical',[6] 'logical',[7] 'categorical',[8] or 'ordinary'[9] meaning of one or more words. These terms beg the question for two reasons. In the first place, there may be words which have no such fixed meaning,[10] and secondly, words may be used in a sense quite different from the usual one.[11] Moreover, the foregoing expressions are not really at all informative. In practice they usually veil the process whereby a person, a court, or another body reaches a certain conclusion which inclines them to regard a particular meaning as the natural and plain meaning of a given word.[12]

It is equally clear that it is not enough to give the meaning of a term out of its context. It is certain that a term must be read in connexion either with a part[13] or with the whole of the treaty[14] in which it occurs. Against this background it may be possible to obtain a clearer idea of its meaning. It will then be necessary to look for the 'aim and scope'[15] of the treaty. One must study the 'entire framework'[16] of an instrument in order to ascertain its 'role',[17] 'scope',[18] 'tenor',[19] or 'spirit'.[20] A court will naturally look for the 'main preoccupation'[21] of the drafters, search for the 'scheme'[22] of the agreement, and interpret it in the light of its 'general plan',[23] 'underlying idea',[24] and 'purpose'.[25] All these different expressions used by the Permanent Court in interpreting a treaty are of precisely the same nature as the

[1] The following quotations are all from the decisions of the Permanent Court of International Justice. They represent, therefore, aspects of judicial interpretations. It is, however, assumed that the same guiding principles on the whole apply to all interpretation.

[2] *P.C.I.J.*, Ser. B, no. 11, p. 39.
[3] *P.C.I.J.*, Ser. B, no. 7, p. 20.
[4] *P.C.I.J.*, Ser. A, no. 1, p. 25.
[5] *P.C.I.J.*, Ser. A/B, no. 50, p. 373.
[6] *P.C.I.J.*, Ser. B, no. 12, p. 23.
[7] *P.C.I.J.*, Ser. B, no. 12, p. 23.
[8] *P.C.I.J.*, Ser. A, no. 1, p. 22.
[9] *P.C.I.J.*, Ser. B, no. 11, p. 37.

[10] This is typically the case with the expression 'call upon' used in Articles 33 and 40 of the Charter.

[11] 'Sovereign equality', as used in the Charter, is a case in point. It seems neither 'plain', 'clear', or 'natural' to use such an expression. It would—it is respectfully submitted—not only be naïve, but also show gross ignorance, to draw the conclusion that the Members are either equal or sovereign. The very purpose of the Organization is to limit the sovereignty of the Members. The inequality of states is perpetuated in the composition of the Security Council. The term presumably means only that states are equal and sovereign—enjoy 'sovereign equality'—in so far as nothing else follows from international law, particularly as embodied in the Charter.

[12] See Hudson, op. cit., p. 643.
[13] *P.C.I.J.*, Ser. A/B, no. 64, p. 18.
[14] *P.C.I.J.*, Ser. B, no. 2, p. 35.
[15] *P.C.I.J.*, Ser. B, no. 13, p. 18.
[16] *P.C.I.J.*, Ser. B, no. 13, p. 18.
[17] *P.C.I.J.*, Ser. B, no. 12, p. 23.
[18] *P.C.I.J.*, Ser. B, no. 10, p. 17.
[19] *P.C.I.J.*, Ser. B, no. 14, p. 52.
[20] *P.C.I.J.*, Ser. A, no. 1, p. 23.
[21] *P.C.I.J.*, Ser. A/B, no. 50, p. 374.
[22] *P.C.I.J.*, Ser. A/B, no. 49, p. 317.
[23] *P.C.I.J.*, Ser. A/B, no. 70, p. 32.
[24] *P.C.I.J.*, Ser. A/B, no. 64, p. 17.
[25] *P.C.I.J.*, Ser. A, no. 15, p. 33.

adjectives used with reference to the meaning of particular terms. They are not—it is believed—legal terms of art with an invariable meaning. If they were one might suppose that a body of the competence of the Permanent Court would have sought to establish a greater uniformity in the terms used by it.

13. The next question, then, is what the court has really tried to find out about the treaty. The first answer that occurs to one is that the court—like any other interpreting organ—will attach great importance to the intention of the parties when concluding the treaty. It would, however, oversimplify the problem to say that the evidence should be evidence of the intention of the parties. The parties may have had conflicting intentions;[1] and their intentions at the time of the conclusion of the treaty may not be determinant for a subsequent interpretation at a date when the treaty has been applied for some time. A court will in most cases be very reluctant to rely on the intention of the parties when their intention is not expressed in some way in the instrument itself[2] or is not quite clear.[3] It will likewise as far as possible ignore the ostensible intention of the parties if this intention was of such a character as to nullify the treaty or materially destroy its efficacy.[4] There are also other difficulties in connexion with the adoption of the intention of the parties as a basis for interpretation. The parties are often in disagreement. Often, they do not foresee certain of the consequences of their action[5] and, very often, they intentionally give the treaty an ambiguous form because, although they are unable to agree, they are obliged to conclude a treaty of some sort.[6] It is nevertheless clear that any organ undertaking the interpretation of a treaty will first try to ascertain the sense of the stipulation in question on the basis of the 'natural' meaning of the words as it appears to it. It is also clear that some importance will be attributed to the intention of the parties.

14. The fundamental problem, however, still remains: What is the real purpose of interpretation? In the eyes of most people the answer would be that the aim of interpretation is to give effect to the instrument;

[1] Permanent Court in the *Lighthouse* case, *P.C.I.J.*, Ser. A/B, no. 62, p. 17.

[2] Permanent Court in the Opinion concerning Polish war vessels in Danzig, *P.C.I.J.*, Ser. A/B, no. 43, p. 144. [3] Opinion concerning the work of the employer, *P.C.I.J.*, Ser. B, no. 13, p. 19.

[4] *European Commission of the 'Danube' case*, *P.C.I.J.*, Ser. B, no. 14, p. 27.

[5] The Permanent Court in its Advisory Opinion concerning the Convention on Night Work for Women said: 'The mere fact that, at the time when the Convention on Night Work for Women was concluded, certain facts or situations which the terms of the Convention, in their ordinary meaning, are wide enough to cover, were not thought of, does not justify interpreting those of its provisions which are general in scope otherwise than in accordance with their terms': *P.C.I.J.*, Ser. A/B, no. 50, p. 377.

[6] In the Opinion concerning the European Commission of the Danube, the Permanent Court found it quite reasonable to have settled a disputed point on the basis of the *status quo*, even though that *status quo* was far from clear. Such a solution, stated the Court (*P.C.I.J.*, Ser. B, no. 14, p. 27), 'might easily have appeared to be the best possible solution of the difficulty'.

to give it an interpretation which, on the whole, will render it most effective and useful.[1] This might very well be called 'functional interpretation'.[2] This idea has very often been expressed by the Permanent Court of International Justice. The interpretation must not 'lead to something unreasonable or absurd'.[3] The Court 'must look to its practical effects rather than to the dominating motive that may be conjectured to have inspired it'.[4] There may be strong doubts concerning the scope, the character, and the aim of the instrument. The parties may have very divergent views concerning its efficacy. What might ensure its efficacy for one might render it useless for the other. This is particularly so in the case of a treaty like the Charter of the United Nations. In the first place, the Charter is a political document, which means that political considerations must be given full scope in the process of interpretation. This, of course, is to a greater or less extent the case in the application of all law. Law cannot be applied in a social vacuum, but must always have a certain relation to the circumstances in which it is going to be applied.[5] This is particularly true in the case of a political treaty like the Charter. That is one reason why the states have shown great reluctance to entrust the interpretation of such instruments to a court, although it has been proved many times that international courts give due weight to political considerations when such considerations are a necessary part of the interpretation. In particular, the Permanent Court of International Justice has always done so in regard to questions concerning the unanimity rule in the Covenant.[6] And it might also be pointed out that a political method of interpretation might be particularly dangerous in the case of the Charter, because such interpretation might far too readily lead to political compromises which would undermine the very foundation of the United Nations.[7]

15. An additional difficulty in the interpretation of the Charter is that

[1] See the most instructive Chapter IV in Lauterpacht, op. cit.

[2] Word used by Schwarzenberger, op. cit., p. 204.

[3] Postal service in Danzig, *P.C.I.J.*, Ser. B, no. 11, p. 39.

[4] Personal work of the employer, *P.C.I.J.*, Ser. B, no. 13, p. 19. See also *Chorzów* case, Ser. A, no. 9, p. 26; *Iraq border* case, Ser. B, no. 12, p. 20; and German settlers in Poland, Ser. B, no. 6, p. 25.

[5] Hudson, op. cit., p. 656.

[6] The Permanent Court said in the Advisory Opinion concerning the Iraq Border (*P.C.I.J.*, Ser. B, no. 12, p. 29): '. . . the very prestige of the League might be imperilled if it were admitted, in the absence of an express provision to that effect, that decisions on important questions could be taken by a majority. Moreover, it is hardly conceivable that resolutions affecting the peace of the world could be adopted against the will of those amongst the Members of the Council who, although in a minority, would, by reason of their political position, have to bear the larger share of the responsibilities and consequences ensuing therefrom.'

[7] The danger of political interpretations has been well stated by Lauterpacht (op. cit., p. 69): 'There is, in general, an ever-present danger in the relations of States that in the absence of adequate canons of interpretation the treaties concluded by them may become political instruments embodying principles safeguarding freedom of action instead of being a source of legal obligations.'

it is a multilateral treaty.[1] This makes it still more difficult to ascertain the intention of the parties. Fifty nations participated in the drafting of the Charter, and it is obvious that many of them may have had conflicting interests in view when voting a particular article. The way in which the Charter was drafted, and the decidedly *esprit de congé* atmosphere which prevailed in the final stages of the San Francisco Conference, did not make for very careful drafting.[2] Certain new expressions are used without any precise or established legal meaning.[3] Other terms are used somewhat loosely[4] and, in a considerable number of cases, different terms are used with the same meaning.[5] In these cases, or most of them, careful study will show the meaning of the terms, although it will not always be easy to find a really satisfactory reason for the terminology employed; the probable explanation is that even the most accomplished draftsmen are apt to lapse into inaccuracies under the pressure of overwork and haste.

The fact that the Charter is a political treaty,[6] that it is multilateral and that it may be indifferently drafted, increases the difficulties of interpretation. It does not, however, affect the nature of the task to be undertaken, which is to endow the Charter with the maximum of effect on the basis of the actual text and of the material which can be brought to bear with a view to the elucidation of the actual intentions of the drafters at the time of drafting.[7] It is a good and safe rule that all relevant material may be used for the interpretation of a treaty. The Permanent Court stated this rule very clearly in the Advisory Opinion concerning the Treatment of Polish Nationals in Danzig: 'The duty of the Court is to interpret the text as it stands taking into consideration all the material at the Court's disposal.'[8] This general rule has been repeatedly applied by the Court.[9] It might indeed be said that the only two canons for interpretation which can be deduced from the Court's practice are (1) that the interpreting authority has a completely free hand in the evaluation of evidence, and (2) that the aim must be to endow international conventions with the maximum of effect.[10]

[1] The additional difficulties offered by the fact that the Charter—and presumably subsequent documents—is adopted and signed in five official languages, will be considered later.

[2] Goodrich and Hambro, op. cit., p. 16.

[3] This is, e.g., the case with the expression 'call upon' used in Article 33, second paragraph, as well as in Articles 40 and 41. See Goodrich and Hambro, op. cit., pp. 145, 159, and 161.

[4] This might be said to be the case of words like 'state', 'nation', and 'people'.

[5] This will be so in the case of words like 'peaceful' and 'pacific' or 'international peace and security' or 'universal peace'. It is even more strongly seen in expressions like 'act of aggression' in Article 39, 'armed attack' in Article 51, and 'aggressive policy' in Article 53.

[6] In the experience of the author of the present article there is no great utility in dividing treaties into 'contract' treaties and 'law-making' treaties.

[7] It will be seen later that in some cases even history, prior to the preparatory work, can be used as a source of interpretation. So can the subsequent practice of the signatories.

[8] *P.C.I.J.*, Ser. A/B, no. 44, p. 40.

[9] It actually seems to follow from all the decisions of the Court concerning the interpretation of treaties.

[10] These two principles taken together might very easily be called 'rules of liberal interpretation'.

16. If the text itself is not quite clear, most international lawyers consult the records of the preparatory work. The question of the extent to which it is permissible to use such material must be considered. This question is of particular importance with regard to the interpretation of the Charter. Probably no great international instrument has been drawn up in such a blaze of publicity. Here, indeed, we have the outstanding example of an 'open covenant openly arrived at'. All debates, proposals, and amendments have already been made available to the public. This means, of course, that recourse to the *travaux préparatoires*[1] will be easier than before.[2] It is a point of mere academic interest to ask whether it is permissible to use this preparatory work for interpretation. Experience shows that all parties to a conflict concerning a treaty almost invariably quote the preparatory work. It might, however, usefully be considered whether there are limits to the use of this kind of evidence. It has been stated by the Permanent Court of International Justice on several occasions that it is not permissible to have recourse to preparatory work if the text itself is sufficiently clear.[3] The Permanent Court has also stated that preparatory work should not be adduced to change the plain meaning of a text.[4] Such statements are, of course, purely platonic. It is very seldom that a text is so absolutely clear that its interpretation gives rise to no discussion whatever.[5] It may, therefore, be supposed that the pronouncements of this kind made by the Permanent Court are merely theoretical statements of principle, recorded as a matter of form before the Court proceeds to make use of the preparatory work, since both parties almost invariably refer to the preparatory work.

It is also of interest to note that the Permanent Court, on several occasions, has very emphatically expressed the opinion that the records of preparatory work may be used. For instance, on one occasion it said: 'This text not

There is, however, not much purpose in attaching labels to such rules. All the old canons of interpretation or construction would—in the light of the jurisprudence of the Permanent Court—seem to be so obsolete that it should not even be necessary (in an article of this kind) to consider them at all. See, *inter alia*, Brierly, *International Law* (3rd ed., 1942), p. 199.

[1] See particularly Spencer, op. cit.

[2] The documents of the Dumbarton Oaks Conference have not been published. The only material available on that subject is the official commentaries. See the English Commentary, Miscellaneous no. 6 (1944), Cmd. 6571.

[3] This was said in *The Lotus* case: 'The Court must recall in this connection what it has said in some of its preceding judgments and opinions, namely, that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself' (*P.C.I.J.*, Ser. A, no. 10, p. 16).

[4] This was clearly expressed by the Court in the Advisory Opinion concerning the European Commission of the Danube (*P.C.I.J.*, Ser. B, no. 14, p. 31).

[5] Such statements must not be taken too literally. The expression 'sovereign equality' has already been referred to. It might also be mentioned that the word 'intervention', as used in Article 2, paragraph 7, may not perhaps bear its usual meaning. This is not the place to examine in detail the notion of 'intervention' but only to mention that 'intervention' under the Charter might very well be of a special kind and should be interpreted not according to the doctrine and practice concerning 'intervention', but in the light of the Charter. See Goodrich and Hambro, op. cit., p. 75.

being absolutely clear, it might be useful, in order to ascertain its precise meaning, to recall here somewhat in detail the various drafts which existed prior to the adoption of the text now in force.'[1] On the other hand, we find the following: 'The Court cannot take into account declarations, admissions or proposals which the parties may have made during direct negotiations between themselves when such negotiations have not led to a complete agreement.'[2] Clearly there are also other kinds of preparatory work which a court, or any other interpreting authority, would refuse to take into account. This might apply to certain confidential exchanges of notes, as has in fact been stated by the Permanent Court.[3] On the other hand, it is hardly likely that an international court would uphold the view that preparatory work could not be adduced in argument against states which have subsequently adhered to an international treaty although they did not participate in its drafting.[4] It should be quite obvious that a state which accedes to a Convention or to an Organization accepts it as it stands, and therefore also accepts any interpretation thereof that may be given on the basis of the records of the preparatory work when such records have already been made public. It is hard to see how a state, on being elected to membership of the United Nations, could claim to disregard the preparatory work which was fully accessible to it before it applied for membership.

17. A particular point arising in relation to preparatory work is the question of the interpretations adopted by the United Nations Conference at San Francisco. The general principle must, of course, be that the Charter, and only the Charter, is binding. Resolutions may be of great symptomatic interest and might easily be adduced in support of one or other points of view, but they can always be revoked or modified by the same procedure as that by which they were adopted. It is, however, equally clear that these resolutions are not all of equal value.

It might be argued that the resolution concerning withdrawal from the Organization stands in a class by itself. The following text was inserted in the report of Committee I/2:[5]

[1] *P.C.I.J.*, Ser. A/B, no. 44, p. 33. Compare *P.C.I.J.*, Ser. A/B, no. 62, p. 13.

[2] This was expressed in the *Factory at Chorzów* case, *P.C.I.J.*, Ser. A, no. 17, p. 51.

[3] The Court said in the Advisory Opinion concerning the European Commission of the Danube that: 'The record of the work preparatory to the adoption of these articles being confidential and not having been placed before the Court by, or with the consent of, the competent authority, the Court is not called upon to consider to what extent it might have been possible for it to take this preparatory work into account' (*P.C.I.J.*, Ser. B, no. 14, p. 32).

[4] Such an opinion seems indeed to be the basis of the following statement in the *Oder* case (*P.C.I.J.*, Ser. A, no. 23, p. 42): 'Whereas three of the Parties concerned in the present case did not take part in the work of the Conference which prepared the Treaty of Versailles; as accordingly the record of this work cannot be used to determine, in so far as they are concerned, the import of the Treaty . . . .'

[5] U.N.C.I.O. Doc. 1178, 1/2/76(2). Printed edition, vol. vii, p. 328. See also other references in first footnote on p. 88 in Goodrich and Hambro, op. cit.

'The Committee adopts the view that the Charter should not make express provision either to permit or to prohibit withdrawal from the Organization. The Committee deems that the highest duty of the nations which will become Members is to continue their cooperation within the Organization for the preservation of international peace and security. If, however, a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other Members, it is not the purpose of the Organization to compel that Member to continue its cooperation in the Organization.

'It is obvious, however, that withdrawal or some other forms of dissolution of the Organization would become inevitable if, deceiving the hopes of humanity, the Organization was revealed to be unable to maintain peace or could do so only at the expense of law and justice.

'Nor would it be the purpose of the Organization to compel a Member to remain in the Organization if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept, or if an amendment duly accepted by the necessary majority in the Assembly or in a general conference fails to secure the ratification necessary to bring such amendment into effect.

'It is for these considerations that the Committee has decided to abstain from recommending insertion in the Charter of a formal clause specifically forbidding or permitting withdrawal.'

The declaration was adopted after very heated and very thorough debate. It was also adopted in such a way as to make it quite clear that many states would not have felt able to ratify the Charter if provision had not been made for this possibility of withdrawal.[1] The fact that the right of withdrawal was not included in the Charter was due to ideological motives and not because there was at that moment any doubt that Members would be entitled to withdraw. It would therefore be quite correct to say that the right of withdrawal, although it only has the sanction of a resolution, in reality has the same force as the Charter itself.[2] The right of withdrawal may be considered either as a multilateral reservation known to all the signatories before the exchange of ratifications, or as one of the additional protocols which are often attached to international treaties, with the same binding force as the treaty itself.[3]

18. There are other Resolutions of the San Francisco Conference which carry special weight, namely, the Resolutions which form the background of the decisions taken by the Conference.[4] It may be of some interest to examine certain of these resolutions and see what weight they are likely to

[1] See the commentary by Goodrich and Hambro, op. cit., pp. 86 ff.

[2] See particularly the discussion in the hearings before the Foreign Relations Committee of the United States Senate, 9 and 10 July 1945.

[3] The question of the form, character, and binding force of reservations to multilateral treaties is too complicated to be treated here. See particularly Podesta Costa in *Revue de Droit international* (1938); and Hackworth, *Digest*, vol. v, pp. 101 ff.

[4] It is not the intention to reproduce them all here, but only to examine some of them so as to establish certain principles.

carry in the subsequent constitutional development of the Organization. It was clearly stated in one or two cases that these resolutions constituted an integral part of the understanding between the signatories.

Of less importance *stricto jure*, but of the most far-reaching political significance, is the interpretation given by the Five Great Powers concerning the right of veto in the Security Council.[1] The interpretation given by the Great Powers was not submitted to the vote of the Conference and cannot therefore be legally binding on the other Members. No such interpretation by a limited group of Members could possibly be binding upon all the Members.[2] On the other hand, to pretend that this interpretation will not, in fact, be binding on everyone would be to ignore political realities, since any Great Power, by exercising the veto, could presumably prevent any modification of this interpretation.

It might even be said that this particular point is of the essence of the whole application of the Charter. Good faith, *uberrima fides*, must be the cornerstone of all the constitutional life of the Organization. It should be clearly realized that the principles embodied in this interpretation represented the very maximum that certain states were prepared to accept by way of limitation of their sovereignty. Consequently, these states could maintain that this interpretation of the right of veto was their *conditio sine qua non* for ratification of the Charter. On the other hand, other states might say that, from their standpoint, this interpretation represents the utmost extent to which they are prepared to sacrifice the principle of the equality of states. Any departure from this interpretation, without the unanimous consent of the Members with a permanent seat on the Security Council and overwhelming support from the other Members, might, therefore, be fraught with the utmost danger. Probably this 'political' interpretation is in effect more binding than any legally impeccable interpretation. On the other hand, the Great Powers could limit their right to exercise the veto by the same method, i.e. by a resolution concurred in by themselves only, and not submitted either to the Security Council or to the General Assembly.

The right of veto has, however, been discussed at considerable length at several meetings of the Security Council. It would be altogether outside the scope of this article to enter into a general discussion of the dispute concerning the veto in the United Nations. This will certainly form the

[1] See U.N.C.I.O., Doc. 852, III/I/37 (2), Printed edition, vol. ii, pp. 710 ff. See also Hambro and Goodrich, op. cit., pp. 124 ff.

[2] See *P.C.I.J.*, Ser. B, no. 8, p. 37. The Court also stated, in the Advisory Opinion concerning the Greco-Turkish agreement of 1 December 1926 (*P.C.I.J.*, Ser. B, no. 16, p. 25): '. . . for to accord to individual members of an organization constituted as a corporate body any right to take action of any kind outside the sphere of proceedings within that organization would be clearly contrary to an accepted principle of law.'

subject of very many articles,[1] and it is known that the problem has been put on the agenda of the second part of the First Session of the General Assembly. There are, nevertheless, two aspects of the question which may be mentioned here because they fundamentally affect the whole trend of the observations set out in this article.

One of these aspects is the increasing tendency on the part of the Soviet Union to enlarge the scope of the veto and thereby considerably to overstep the agreement reached at San Francisco. In the first instance, the Soviet Government, in a letter on the question of Iran, seems to have indicated that it should be possible to veto even the discussion of an item in the Security Council.[2] This, however, appears to be contrary to the agreement reached at San Francisco, where the Great Powers' answer to the questionnaire concerning the scope of the power of veto stated very clearly that 'no individual member of the Council can alone prevent consideration and discussion by the Council of a dispute or situation'.[3] Furthermore, the Soviet Government desired to use its power of veto to prevent the Council from inviting Canada to participate in the discussions of the Rules of Procedure of the Atomic Commission in the Security Council.[4] Mr. Gromyko said on that occasion: 'I consider that questions such as invitations to participate in the meetings of the Security Council are not procedural ones, but questions of substance.' This statement seems to be in contradiction to the above-mentioned answer given by the sponsoring Powers at San Francisco.[5]

On the other hand, it seems equally clear that the action of the majority of the Security Council in seeking to adopt resolutions, even on questions of substance, against the vote of one of the Great Powers, is contrary to the spirit of the veto regulation and to the agreement reached at the San Francisco Conference. The Security Council has adopted a very peculiar procedure in order to achieve this. The President of the Council stated at the 47th Meeting of the Council, on 25 June 1946, with regard to a certain resolution, that the recommendations were 'adopted, but as there is the vote of one of the permanent Members against, it is not carried'.[6] It seems, at the least, extremely doubtful whether it is possible to speak of anything being 'adopted without being carried'. Moreover, if the phrase had been inverted and it had been said that the recommendations had been 'carried but not adopted', the meaning—whatever it may be—would

[1] See Balazs, 'Das Vetorecht auf der ersten Session des Sicherheitsrates', in *Die Friedens-Warte*, 46 (1946), no. 4, pp. 222–7.

[2] See *Journal of Security Council* (1946), p. 19.

[3] *Documents, San Francisco Conference*, vol. xi, p. 712.

[4] See *Security Council, Official Journal*, 1st year, 2nd series, no. 1, particularly p. 4.

[5] See *Documents*, vol. xi, p. 711.

[6] See *Journal of Security Council* (1946), p. 795.

appear to be precisely the same.[1] Should this procedure be followed in the future, the scope of the veto power would be much more restricted than was originally intended.

The result of all the votes so far taken has been that the Security Council does not arrive at any decision whatsoever, does not pass resolutions, and does not adopt recommendations. This means that in spite of any veto matters will be discussed openly, the sense of the Security Council will be taken, and certain good effects may come of it. It has also been stated that the absence of one member, that is, one of the permanent Members of the Security Council, does not prevent a continuation of the discussion but does prevent any decision being taken.[2] There are obvious objections to any such practice.

19. Other resolutions or proposed resolutions merit slighter consideration. A proposal was sometimes withdrawn without being put to the vote. In such cases, the virtual defeat of the proposal was often disguised by a mention of the substance of the proposal in the report. The very fact that such polite subterfuges were adopted without a vote shows how small is the value of such draft resolutions. It is clear that they are without legal force.

A case that appears particularly relevant is that of the interpretation of the term 'Enemy States'.[3] This interpretation is clearly not binding since —like certain other interpretations[4]—it was put forward by one delegation only.[5] This applies with even greater force[6] to the draft resolution to the effect that former enemy states should not have the right of recourse to the Organization.[7] There are also several other resolutions of the same kind.[8]

[1] And see below, p. 80, on further developments during the Second Part of the First Session of the General Assembly.

[2] See *Journal of Security Council* (1946), pp. 636–8.

[3] '1. Enemy States are those which, on the day of the signature of the Charter, are still at war with any one of the United Nations.

'2. The present war is to be understood as a series of wars which began on or before September 3, 1939, and which are still in progress.

'3. "Action taken or authorized." It would be impossible to limit this action, as proposed by the Australian Delegate, to that decided upon in an armistice, a peace treaty, or a joint declaration like the Declaration of Moscow, because responsibility as envisaged in paragraph 2 could fall upon a State which is party to none of these acts.

'As to the exact meaning of the expression "action taken or authorized", the Delegate of the United Kingdom declared that, in his opinion, the distinction is made between "positive" and "negative" action; that is to say, between action with respect to enemy States by the governments responsible for this action, and the action which the responsible governments had authorized other governments to take' (U.N.C.I.O., Report of Committee 3 to Commission III on Chapter XII, Doc. 1095, III/3/50, p. 4. Printed edition, vol. xii, p. 560). See also Goodrich and Hambro, op. cit., pp. 289–90.

[4] See, e.g., explanations on certain questions concerning trusteeship matters. See U.N.C.I.O., Doc. 1115, II/4/44 (1) (*a*), pp. 14/15. Printed edition, vol. x, pp. 620–1.

[5] See here Goodrich and Hambro, op. cit., pp. 289–90.

[6] Ibid., pp. 148–9.

[7] U.N.C.I.O. Doc. 1095, III/3/50. Printed edition, vol. xii, p. 560.

[8] E.g., one on certain matters concerning military sanctions. See U.N.C.I.O. Doc. 881,

Still farther down in the scale of values we find the Conference Resolution aimed particularly at the exclusion of Spain from the Organization.[1] This is a purely political declaration and can be revoked or modified at will by any subsequent Session of the General Assembly of the United Nations. Due account will be taken of all such resolutions or draft resolutions in interpreting the Charter. Greater weight should obviously be attached to some than to others. This question may depend on the subject-matter; or it may depend on the vote recorded, if any; or on other circumstances. It will often be a question of fact rather than of law. It will depend on a just and accurate appreciation of all the relevant circumstances. It should be remembered that the Permanent Court had occasion during the examination of the question of the European Commission of the Danube to discuss this problem thoroughly. The conclusions reached by the Court[2] might well discourage those inclined to attach great importance to interpretative resolutions.[3]

20. The use of preparatory work is often confused with that of past history as an aid to interpretation. It may often be useful to apply historical examples and historical analogies in order to throw light upon a treaty.[4] Past history may explain terms used in old treaties and old usages, or even modern customs, which may have changed since the time in question. The Permanent Court of International Justice has made very free use of historical sources in the work of treaty interpretation. In the *Wimbledon* case the Court drew an analogy with the Suez Canal and the Panama Canal to throw light on the régime of the Kiel Canal.[5] In the Advisory Opinion

III/3/46, p. 7. Printed edition, vol. xii, pp. 502 ff.; Goodrich and Hambro, op. cit., pp. 162–3. Another on domestic jurisdiction. See U.N.C.I.O. Doc. 861, II/3/55 (1), pp. 3–4. Printed edition, vol. x, pp. 271–2; Goodrich and Hambro, op. cit., p. 191.

[1] See U.N.C.I.O. Doc. 1210, P/20, pp. 4–5. Printed edition, vol. i, p. 615.

[2] The fact that the circumstances in this case were somewhat special does not detract from the pronouncement of the Court. Circumstances have a tendency to be special. The statement obviously has the widest implications.

[3] 'The so-called interpretative protocol is not an international agreement between the Parties to the Definitive Statute; it is not annexed thereto, whilst many interpretations of the article of the Statute were inserted in the Final Protocol which has the same validity and duration as the convention to which it refers. The Interpretative Protocol is not even mentioned in the Statute, which Roumania signed without any reservations, and can in no sense be considered as a part of it.

'Neither is it possible to consider the Interpretative Protocol as a decision of the European Commission by which the terms of the Definitive Statute were modified. It has been already said that the Commission was asked to attend the Danube Conference in an advisory or expert capacity. But even if the document were to be regarded as a decision of the European Commission, the Commission had no power to decide to abandon the functions with which it was entrusted under existing international treaties.

'The Court, therefore, can only consider the Interpretative Protocol as a part of the preparatory work. Whatever may be its importance from this point of view—and in this respect the Court refers to what it has already stated above—it is certain that it cannot prevail against the Definitive Statute' (*P.C.I.J.*, Ser. B, no. 14, pp. 34–5).

[4] Stressed by Brierly, *International Law* (3rd ed., 1942), p. 199.

[5] *P.C.I.J.*, Ser. A, no. 1, pp. 25 ff.

concerning the European Commission of the Danube the Court drew analogies with the Act of the Rhine of 1831[1] and, in the opinion concerning the Washington Convention of 1919 concerning the employment of women at night,[2] the Court used the Berne Convention of 1906 as a source of analogy. It seems reasonable to believe that any organ which is called upon to interpret a treaty will feel the same necessity to use historical sources.

21. Finally, it may be of interest to consider to what extent subsequent practice may be used as a source of interpretation. This important question has also at times been discussed by the Permanent Court of International Justice. The Court has more than once, for instance, in the Advisory Opinion concerning the competence of the International Labour Organization in regard to Agriculture and Labour[3] and in the *Jaworzina* case,[4] clearly expressed the idea that subsequent practice can be adduced as evidence of the intention of the parties and of their conception of the treaty in question.[5] Even if such practice should not in itself be in conformity with the actual terms of the treaty as concluded, it is quite clear that it can lay the foundations of a subsequent development which may acquire an importance far in excess of its actual legal value at the time of adoption. This remark applies equally, of course, to all the examples from the practice of the Organization which have been mentioned in this article. It may be useful at this point to cite yet one more important example, namely, the interpretation of the expression 'domestic jurisdiction' in Article 2, paragraph 7, of the Charter, as applied in connexion with the Spanish problem.[6] Certain proposals for resolutions concerning the Spanish problem were put forward, but these need not be considered in this article.[7] The Security Council debated in some detail whether it was within its competence to discuss the present régime in Spain. It was quite clear, both from the initial letter by which the matter was brought to the attention of the Security Council[8] and also from the intervention of the delegate for Mexico, that the proposed action was directed against the very existence of the Franco régime in Spain. On the other hand, the delegate from the Netherlands very clearly stated:[9]

[1] *P.C.I.J.*, Ser. B, no. 14, pp. 57–8.
[2] *P.C.I.J.*, Ser. A/B, no. 50, p. 377.
[3] *P.C.I.J.*, Ser. B, no. 2, pp. 38–40.
[4] *P.C.I.J.*, Ser. B, no. 8, p. 38.
[5] It is true that the same result might at times be reached by application of the notion of estoppel.
[6] The question of domestic jurisdiction was also brought up in connexion with the Indonesian question, but no decision was reached in regard to it. The tendency, however, was the same as was later shown in the Spanish issue. (See *Journal of the Security Council* (1946), particularly pp. 197, 199, 207, and 242. See also pp. 5–7 of the Secretary-General's First Annual Report.)
[7] See *Journal of the Security Council* (1946), pp. 549, 581, 602, 628, 799, 804, 822, and 853.
[8] '. . . existence and activities of the Fascist Franco régime in Spain' (*Journal of the Security Council*, 1946, p. 538).
[9] See *Journal of the Security Council* (1946), p. 557.

'So long as there is no evidence that the Franco régime really threatens international peace and security, and I do not think there is such evidence, the question as to whether it should or should not be continued, therefore, rests solely with the Spanish people. I can come to no other conclusion.'

And later on in his speech he added:

'. . . We may not like the Franco régime, and we may not admit Spain as a Member of the United Nations as long as the Franco régime is in power there, but that does not mean that we must, or are entitled to, take positive action against that régime.'

The delegate of the Soviet Union at that time expressed very clearly what must be considered as the opinion of the Council in the following statement:[1]

'The Charter does in fact contain a provision, which refers to the non-intervention of the United Nations Organization in the internal affairs of a State. However, it is clear from the Charter that the intervention of the Organization in the internal affairs of a State must not take place in normal conditions, that is, when the internal situation in any country does not constitute a threat to international peace and security.'

It seems clear from this discussion that the Security Council was willing to discuss even the form of government in a given country if that form of government could possibly be considered a danger to the peace of the world. This interpretation, of course, does substantially minimize the importance of the domestic jurisdiction clause in the Charter.[2]

22. The last difficulty presented by the Charter is due to the fact that it is adopted in five different versions which officially have the same binding force. Sooner or later, it will be discovered that the five versions are not identical. The question will then be to decide which version should be accepted as the authentic version. The Permanent Court of International Justice has on one occasion expressed the view that the least extensive interpretation should be adopted, that is to say, the one which is certainly covered by all the texts.[3] This, however, does not appear very satisfactory with regard to the Charter. It may be said, with all due respect to the five versions, that, English and French being the working languages, the versions in those languages carry more weight than the remaining three. It should therefore be clear that any interpretation ought to stress particularly the French and English texts, and if there should be any variance between these two texts, the safest guiding rule would be, to base the interpretation not on the text which is most restrictive, but on that in the language in which the particular point in question was drafted.[4] This method has also,

[1] See *Journal of the Security Council* (1946), p. 570.

[2] See articles by Pollux in *Acta Scandinavica Juris Gentium* (1947), and Kelsen in *Yale Law Review*, 55 (1946).

[3] *P.C.I.J.*, Ser. A, no. 2, p. 19.

[4] Chang seems to have drawn the right conclusion when he states (op. cit., p. 148): 'From the cases just discussed it seems that where two authoritative languages used in a treaty appeared to

in one case, received the indirect sanction of the Permanent Court of International Justice.[1] It must, however, be admitted that this method of solution is far from perfect. It does, in fact, disregard the equality of the five official versions. On the other hand, any other method seems either ineffective or liable to pervert the true meaning of a text. Here, also, the canons of efficacy and good faith are determinant.

NOTE

It may be useful to draw attention to some developments which have taken place since this article went to press.

Section 18. During the second part of the first session of the General Assembly, certain states made proposals with a view to the abrogation or amendment of the rules for voting in the Security Council. The discussions both in the plenary meetings and in the First Committee showed that a considerable number of states were concerned on account of the so-called veto and particularly of the way in which it had been used by certain states in the Security Council. It seemed clear from the discussion that the Soviet Union was more strongly in favour of maintaining the present rule than any other state with a permanent seat on the Security Council.[2] The other Members of the Security Council were not in favour of various proposed alternative courses such as trying to modify the use of the veto rule either by means of agreement among the states themselves,[3] or by a definite clarification of the interpretation given to the veto at San Francisco,[4] or by a more sparing resort to formal votes in the Security Council.[5]

Ultimately, the following proposal was put to the vote:[6]

The General Assembly.

Mindful of the purposes and principles of the Charter of the United Nations, and having taken notice of the divergencies which have arisen in regard to the application and interpretation of Article 27 of the Charter;

Earnestly requests the permanent Members of the Security Council to make every effort, in consultation with one another and with fellow members of the Security Council, to ensure that the use of the special voting privilege of its permanent members does not impede the Security Council in reaching decisions promptly;

Recommends to the Security Council the early adoption of practices and procedures,

be slightly at variance with each other, the Permanent Court of International Justice frequently resorted to internal or external evidence with a view to finding out the real design of the contracting parties in regard to the matter in dispute. Where such specific evidence was lacking, the Court said that it was bound to adopt the one interpretation which was more limited in meaning or scope than the other and which could be made to harmonize with both versions. In one case, however, by adopting the wider meaning of the more restricted version, the Court succeeded in minimizing the differences to such an extent as almost to equalize the potential differences of the two languages.'

[1] This is the case particularly in *P.C.I.J.*, Ser. A/B, no. 50, p. 379. In reality the same idea is pursued also in the *Mavrommatis* case. (*P.C.I.J.*, Ser. A, no. 2, p. 20.)

[2] See, for instance, *Journal of the General Assembly*, no. 61, Supplement A/P.V. 60, pp. 583 ff.

[3] See for instance, the observations of Senator Conally (U.S.A.) in *Journal*, no. 35, Supplement 1 A/C. 1/54, p. 73.

[4] Senator Conally as quoted above and M. Wellington Koo (China), *Journal*, no. 35, Supplement 1 A/C. 1/55, p. 87.

[5] M. Parodi (France), *Journal*, no. 35, Supplement 1 A/C. 1/55, p. 90, and Mr. Noel-Baker (United Kingdom) in *Journal*, no. 36, Supplement 1 A/C. 1/56, p. 97.

[6] See *U.N. General Assembly, Journal*, no. 75, Supplement A–64, Add. 1. (Resolutions adopted on the reports of the First Committee, p. 826.)

consistent with the Charter, to assist in reducing the difficulties in the application of Article 27 and to ensure the prompt and effective exercise by the Security Council of its functions;

Further recommends that, in developing such practices and procedures, the Security Council take into consideration the views expressed by Members of the United Nations during the second part of the First Session of the General Assembly.[1]

This proposal was adopted on 13 December, 1946, by 36 votes to 6, with 9 abstentions.[2]

Section 21. The view that questions of 'domestic jurisdiction' may become subject of discussion before the United Nations whenever such questions involve a danger to international peace was emphasized in the General Assembly during the discussion concerning the treatment of Indians in the Union of South Africa. The discussions, both in the Joint First and Sixth Committees and in the plenary meetings of the General Assembly, were mainly concerned with the question of the competence of the General Assembly in this matter. It was maintained by the South African delegation that in their view this was a question which fell within the domestic jurisdiction of the Government of the Union of South Africa. In spite of this, however, the following resolution was adopted by the plenary Assembly by 32 votes to 15, with 7 abstentions:[3]

The General Assembly,

Taking note of the application made by the Government of India regarding the treatment of Indians in the Union of South Africa, and having considered the matter:

1. *States* that, because of that treatment, friendly relations between the two Member States have been impaired, and, unless a satisfactory settlement is reached, these relations are likely to be further impaired;

2. *Is of the opinion* that the treatment of Indians in the Union should be in conformity with the international obligations under the agreements concluded between the two Governments and the relevant provisions of the Charter;

3. *Therefore requests* the two Governments to report at the next session of the General Assembly the measures adopted to this effect.[4]

The South African delegation asked to have the matter referred to the International Court of Justice for an Advisory Opinion. The relevant part of the suggested Resolution was as follows:

'The General Assembly having taken note of the applications made by the Government of India regarding the treatment of Indians in the Union of South Africa and having considered the matter, is of the opinion that, since the jurisdiction of the General Assembly to deal with the matter is in doubt and since the questions involved are consequently of a legal as well as of a factual nature, a decision based on authoritatively declared juridical foundations is the one most likely to promote realization of those purposes of the Charter to the fulfilment of which all Members of the Organization are pledged as well as to secure a lasting and mutually acceptable solution of the complaints which have been made,

The Assembly therefore resolves that

'The International Court of Justice is requested to give an advisory opinion on the

[1] Forty-ninth Plenary Meeting, 19 November 1946.
[2] See *U.N. Journal*, no. 61 (1946), Supplement A/P.V. 61, p. 614.
[3] See *General Assembly Journal*, no. 75; Supplement A–64, Add. 1, p. 831.
[4] Fifty-second Plenary Meeting, 8 December 1946.

question whether the matters referred to in the Indian application are, under Article 2, paragraph 7 of the Charter, essentially within the domestic jurisdiction of the Union.'[1]

This request was rejected by 31 votes to 21, with one abstention.[2]

The same tendency in the General Assembly was apparent in the discussions concerning the relations between the United Nations and Spain. The result of the debate was the adoption of the following resolution:[3]

The General Assembly,

Convinced that the Franco Fascist Government of Spain, which was imposed by force upon the Spanish people with the aid of the Axis Powers and which gave material assistance to the Axis Powers in the war, does not represent the Spanish people, and by its continued control of Spain is making impossible the participation of the Spanish people with the peoples of the United Nations in international affairs;

Recommends that the Franco Government of Spain be debarred from membership in the international agencies established by or brought into relationship with the United Nations, and from participation in conference or other activities which may be arranged by the United Nations or by these agencies, until a new and acceptable government is formed in Spain.

Further desiring to secure the participation of all peace-loving peoples, including the people of Spain, in the community of nations,

Recommends that if, within a reasonable time, there is not established a government which derives its authority from the consent of the governed, committed to respect freedom of speech, religion and assembly and to the prompt holding of an election in which the Spanish people, free from force and intimidation and regardless of party, may express their will, the Security Council consider the adequate measures to be taken in order to remedy the situation;

Recommends that all Members of the United Nations immediately recall from Madrid their Ambassadors and Ministers plenipotentiary accredited there.

The General Assembly further recommends that the States Members of the Organization report to the Secretary-General and to the next session of the Assembly what action they have taken in accordance with this recommendation'.[4]

This resolution was adopted on 12 December 1946, by 34 votes to 6, with 13 abstentions.[5]

[1] Assembly Document A/205/Add. 1 of 5 December 1946. The proposal was made already during the first meeting of the Joint Committee (see *General Assembly, Journal of the United Nations* (1946), no. 40, Supplements nos. 1 and 6—A/C. 1 and 6/1, p. 4).

[2] See *Journal of the United Nations* (1946), no. 55, Supplement A—A/P.V./52, p. 404.

[3] See *Journal of the United Nations* (1946), no. 75, Supplement A–64, Add. pp. 825–6.

[4] Fifty-ninth Plenary Meeting, 12 December 1946.

[5] Cf. *U.N. General Assembly Journal*, no. 60, Supplement A—A/P.V./59, p. 568.

THE COVENANT AND THE CHARTER[1]

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IN these early days of the United Nations there is a risk that a comparison between the Covenant and the Charter may not be altogether fair. We know now most of what we shall ever know about the Covenant, because the history of the League is now a closed chapter, and it tells us how the Covenant worked in practice. But in a sense we do not yet know much about the Charter, because the text of a document is never a very safe guide to an understanding of the institution to which it relates. Constitutions always have to be interpreted and applied, and in the process they are overlaid with precedents and conventions which change them after a time into something very different from what anyone, with only the original text before him, could possibly have foreseen. The Covenant underwent a process of this kind, and we must expect the Charter to do the same. Apart from the text of the Charter itself we have a few months' rather confused and inconclusive experience of its working to go on. Most of us feel, I know, that that experience has so far been disappointing and even alarming, but it is too early yet to be discouraged. Even if the start has been unpropitious we must never forget that for the time being, and probably for a long time to come, our only hope of a better international order is somehow to make the Charter work in its present form. Criticism of it therefore should be tentative and provisional, and it should try to be constructive.

It would be impossible in a single lecture to examine in any detail the points of similarity and of difference in the Covenant and the Charter. The similarities were inevitable, because the purposes of the League and of the United Nations are fundamentally the same. The Covenant stated the purposes of the League with its usual economy of words as being 'to promote international co-operation and to achieve international peace and security'; and the Charter says much the same at greater length. The draftsmen had no real choice, for these are the two great purposes to which any general international organization whatsoever is bound to be directed. But the differences are very numerous too. The Charter makes an obvious and rather childish attempt to get away from the associations of the Covenant even in small points of terminology, such as the substitution of the Security Council for the Council, of the General Assembly for the Assembly, and of the Trusteeship system for the system of Mandates.

[1] The Henry Sidgwick Memorial Lecture delivered at Newnham College, Cambridge, on 30 November 1946. (The Editorial Committee wish to acknowledge their indebtedness to the Cambridge University Press for permission to reprint this lecture. H. L.)

I intend, however, in this lecture to confine myself to differences which seem to me to be based on important differences of principle. I shall have very little to say, therefore, about the social and economic side of the two organizations. It is generally recognized that in this field the League had a large measure of success, and that the methods that it used were not open to serious criticism. It is evidently intended that in the main the United Nations should carry on the work with perhaps some improvements of organization, such as the establishment of the Economic and Social Council, but without any change of principle.

The important innovations which the Charter has introduced begin to appear as soon as we remind ourselves of the reasons which were thought to make it necessary to create a new organization instead of reviving and continuing the League. I know that there were political causes which would have made that difficult in any case, but there was also a general feeling that the League had failed because it was not strong enough for its task. It was to correct the supposed weakness of the League as a system of security that a new and stronger body had to be created, and in a sense the feeling was justified. The League had not been strong enough to deal with the aggressions, first of Japan, then of Italy, and finally of Germany. But most of the critics did not inquire very deeply into the causes of the League's weakness, though they were not far to seek. When a great experiment has failed it is easy to salve our consciences by attributing the failure to some defect in the original design for which others, and not we, were responsible, rather than to the manner in which we ourselves have carried out our obligations to make it succeed. I think that is what the critics did. For there is no need to look for an explanation beyond the plain fact that of the seven Great Powers upon whose support the League necessarily depended for success one stood aside from the first, one was in a state of chaos and was left out in the cold, three repudiated everything for which the League stood, and the other two, whose burden had thus been made unexpectedly heavy, were, not without some excuse, never more than half-hearted in the support which they gave to it. That the League failed to deal with the aggressions of the inter-war period cannot, therefore, fairly be held to prove anything one way or the other about the merits of the Covenant, for, if the circumstances had been the same, it would have failed just as certainly if the Covenant had been the most perfect document ever drafted.

But of course that only proves that as events turned out it was not any weakness in the Covenant that led to the failure. It may still be true, as the founders of the United Nations evidently thought, that the League was based on a wrong principle which would have made it fail even if the circumstances had been more favourable. The principle of the Covenant is very simple. It was intended that it should create a system of co-operation

between States, which were to retain their sovereignty but to agree to do and not to do certain things in the exercise of their sovereign rights. The Covenant did not contain even the beginnings of a system of international government in the proper sense of the word 'government'. I remember in the early days of the League meeting a Member of Parliament who had just returned from a first visit to Geneva. He said he had discovered that the League was not 'it' but 'they', and he was perfectly right. As a corporate body there was hardly anything that the League could do; in fact, there is, I think, only one Article in the Covenant which envisages action by the League as such at all, and I suspect that this provision was a mere slip of drafting. Article XI does say that in the event of war or any threat of war 'the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations', but elsewhere throughout the Covenant it is normally 'the members of the League' who undertake to act in some particular way in a certain event, and so far as I know the departure from the usual terminology in Article XI had no special significance in the practice of the League.

Now it is clear that an association, whether of individuals or of states, which is nothing but a name for the members collectively, cannot, as an association, be otherwise than weak. It may be effective for its purposes, but that will depend on the conduct of the members individually, upon their ability and willingness to honour the obligations they may have undertaken; they cannot be made to act together, and a majority of them cannot decide or act for the whole body. Hence, if we want an association to be strong, it is a right instinct which urges us to exchange the co-operative basis of the association for one that is organic. But that cannot be done merely by giving the association a new constitution, just as you cannot turn a nation into a democracy merely by giving it democratic institutions to work. In both cases you need also certain other conditions which cannot be hastily improvised, and the most vital question which the Charter seems to me to raise is whether we yet have in the international field the conditions which are needed in order to make an organic international institution work. I do not think we have.

If you compare the Preamble of the Covenant with the 'Purposes' of the United Nations in Article I of the Charter, you will see how the Charter has taken a first step, a rather hesitating first step it is true, away from the purely co-operative basis of international organization. All the emphasis in the Covenant is on what the High Contracting Parties, that is to say the Members of the League, are to do; they are to accept obligations not to resort to war, to follow prescriptions of open, just, and honourable relations between nations, to respect treaty obligations, and so on. In the Charter on the other hand the 'Purposes' are those of the United Nations, and the

context shows that this means the Organization as a whole and not its Members severally. The same contrast runs all through the two documents. It is, I think, one of the reasons why the Charter had to be a much longer document than the Covenant—it has 111 Articles against the Covenant's 26—though the greater length is also partly due to mere prolixity. The Covenant did not need to cramp the future activities of its organs by minute definitions of their respective functions; it could say quite generally that either the Assembly or the Council was to be able to 'deal with any matter within the sphere of action of the League or affecting the peace of the world', and leave them to adjust their relations with one another, as they did, as experience accumulated. Thus for the organization as a body it contained the mere outlines of a constitution, and its prescriptions only became precise and detailed when it proceeded to define the obligations which the members were undertaking. The scheme of the Charter had to be exactly the reverse of this. It strictly defines the respective spheres of the Security Council and of the General Assembly, for there had to be no overlapping, and it makes the distinction turn on the separation of matters relating to security from those relating to social and economic problems. That, unfortunately, disregards the important fact that these problems are often the causes of international friction and so are not really separable from questions of security, and it also makes it more difficult than it need have been for the Security Council, with little or no work of a constructive character to do, to develop that corporate spirit which was found so valuable in the League. The obligations of the Members on the other hand are stated in very general terms. They are merely to observe the 'Principles' which are contained in Article II; to fulfil their obligations in good faith, to settle their disputes peacefully, to refrain from the threat or use of force, and so on. The Members, in fact, are given little more than a string of platitudes to guide their conduct.

The contrast is especially striking and, I think, unfortunate in the Articles which deal with the settlement of disputes and with enforcement action. Articles XII–XV of the Covenant prescribe clearly and in detail the procedures which the Members of the League are to follow in order to reach a peaceful settlement, and they contain a valuable safeguard against any attempt by the Council to sacrifice the just claims of a weak power to political expediency by requiring it to publish a statement of the facts and the terms of the settlement if one is reached, or its recommendations if one is not. Chapter VI of the Charter merely says that the parties are to seek a solution by some peaceful means of their own choice, and then goes on to specify in detail what the Security Council is to do in different events. So again in Article XVI of the Covenant the event upon which sanctions are to become applicable is precisely defined—resort to war by a member state

in disregard of its covenants—and so are the obligations which then fall due from the other members. Whether in any particular case the event has occurred, and therefore whether the obligation has fallen due, is left to each Member to decide for itself, and it is this provision, perhaps more than any other, which has been thought to point to the weakness of the whole Covenant plan of security. Certainly it does involve the risk that the members may not all decide alike, but since sanctions would never be seriously contemplated except in a very clear case it is practically certain provided only that states act honestly, that their decisions would be the same. Of course, if they refuse to honour their obligations the case would be different, but then in that case no system would work. At any rate on the only occasion in the League's history when the sanctions Article was applied, all the Members except a few small states which were entirely under the influence of Italy did reach identical decisions, and the failure to enforce the Covenant had nothing whatever to do with the fact that the League Council had no power to make a decision on behalf of the League as a body. In Chapter VII of the Charter, on the other hand, the event upon which enforcement action is to be taken by the United Nations is left entirely undefined; the Security Council has only to determine that a threat to the peace or a breach of it exists or that an act of aggression has been committed, and it may then decide on behalf of the whole Organization what measures shall be taken to maintain or to restore the peace. It has been argued, I know, that it is unwise to define too clearly the occasion on which sanctions will be applied—Sir Austen Chamberlain once said that to define aggression was more likely to provide an intending aggressor with a signpost than with a warning—but the Covenant plan seems to me to avoid any such risk as that. It does not define aggression; what it does is to make a definition unnecessary by making the question turn simply upon the acceptance or the refusal of a prescribed procedure of peaceful settlement. There seems to me to be a very serious danger in leaving the matter wholly to the determination of the Security Council, as the Charter does, with nothing to ensure that the determination will be just except its general obligation to act in accordance with the Purposes and Principles of the United Nations. For it has been quite justly pointed out that there is nothing in the Charter to preclude the Security Council from deciding that a threat to the peace would most conveniently be met by another Hoare–Laval or Munich solution at the expense of a weak Power.

A necessary corollary of the co-operative principle on which the Covenant was founded was the so-called 'rule of unanimity', and many not always well-informed critics have seized on this as a capital instance of a weakness in the Covenant which it was essential to remove. Generally the argument has proceeded on *a priori* lines. Since Article V had declared

that 'except where otherwise provided . . . decisions at any meeting of the Assembly or of the Council shall require the agreement of all the members of the League represented at the meeting', this *must* have paralysed the League; therefore it did paralyse it. At San Francisco the Great Powers in a formal declaration even went so far as to claim that in this matter the Covenant was more stringent than the Charter, inasmuch as the Security Council, which was to be subject to the veto of only the Great Powers, would be less subject to obstruction than the League Council was with its requirement of complete unanimity. This was an astonishing statement, for the comparison was wholly fallacious, and I think it may help to an understanding of the real nature of the League and of the difference between the principles on which it and the United Nations are based, if we ask why it was that the rule of unanimity did not in fact paralyse the League.

There was more than one reason. In the first place there were important exceptions to its operation, especially the provision in Article XV that the votes of the parties were not to be counted for the purpose of unanimity when the Council made its report and recommendations on a dispute. Secondly, the practice of the League developed certain conventions which mitigated the operation of the rule in important respects. But the really fundamental reason was that the effectiveness of the League as a going concern did not depend upon its organs being able to reach decisions, but on the observance by the individual Members of their obligations under the Covenant. It is true that decisions of the Assembly or the Council did often lead to the Members taking joint action of various kinds, but no decision could alter or add to the obligations of a Member against that Member's will. The real effect of the rule was to prevent a Member being forced to accept some addition to the obligations by which it was already bound under the Covenant. There were very few cases in which it was used as a veto to hold up action. I think the only one of serious consequence was when Japan used the rule to block a resolution on her own conduct in Manchuria in 1931, and this was only possible because of an unexpected and doubtfully correct ruling by the lawyers that under Article XI there was nothing to exclude the vote of an interested party. If the ruling was correct it was almost certainly due to an error of drafting, and it would not have been acquiesced in if the Council had not been glad to be thus provided with an excuse for inaction.

But decisions under the Charter have a wholly different function from decisions under the Covenant; they are necessary in order to make the Security Council work at all. Hence it was absolutely necessary to provide against the possibility of deadlocks, and this could only be done by introducing some form of majority voting. That had become inevitable once it had been decided to abandon, as a weakening factor, the Covenant system

of states binding themselves individually to act in certain specified ways and instead to confer a power of directing how they should act upon an organ of the collective body. Thus the crucial Article is Article XXIV: 'In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.'

Now undoubtedly, so long as we are considering principles of political organization in the abstract and not the context in which a particular political organization will have to work, this change is the first and necessary step towards the formation of what the American Constitution calls 'a more perfect union'. If, indeed, a corporate body is to act, it is the only way, as the Charter says, 'to ensure prompt and effective action'. But for this advance there has been a price to pay, and the question is whether it has not been too heavy. The price is the veto of the Permanent Members of the Security Council.

In speaking of the veto I shall not dwell on the uses to which it has been put in the short experience that we have of the working of the United Nations. Most of us, I suppose, would say that it has been gravely abused by the Soviet Government on numerous occasions, but that is a matter which is not relevant to my argument. If we have patience we may eventually get an arrangement, such as that which Mr. Bevin recently proposed without success, which will prevent its use in a manner which violates both the spirit and the letter of the declaration which the Great Powers, including Soviet Russia, made at San Francisco. But the important question seems to me to be whether, even assuming an arrangement to limit the use of the veto, in accordance with the San Francisco declaration, to decisions which 'may have major political consequences and require enforcement measures', we shall not, even so, find that the price has been too high, and that the union which the Charter has given us is in the result even less perfect than that which we had under the Covenant.

It is certain and, I think, it is now generally understood, that the veto has made it impossible that enforcement measures should ever be taken against a Great Power. That means that in 1935, if the Covenant had contained a similar provision, Italy could, and of course would, have vetoed the taking of sanctions against herself, and she would have been free, so far as the Covenant was concerned, to proceed undisturbed with her aggression against Ethiopia. But to-day the only event which can seriously endanger the peace of the world is the aggression of a Great Power, and a system which solemnly declares, as the Charter does, that its purpose is 'to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression', and yet does not

propose to deal with aggression by a Great Power, is, I venture to say, not a system of collective security at all. Of course it may be that no system can deal with that case, and this seems to be the view taken by the official British Commentary on the Charter.

> 'It is imperative', it says, 'that the consent of the Great Powers should be necessary to action in cases in which they are not a party, since they will have the main responsibility for action. It is also clear that no enforcement action by the Organization can be taken against a Great Power itself without a major war. If such a situation arises the United Nations will have failed in its purpose and all members will have to act as seems best in the circumstances. . . . The creation of the United Nations is designed to prevent such a situation from arising by free acceptance by the Great Powers of restraints upon themselves.'

All that may be true. But if it is, it seems hardly fair that the Preamble of the Charter should declare that the peoples of the United Nations have 'determined to unite their strength to maintain international peace and security'. What they have done, according to the Commentary, is something quite different.

Perhaps after all, however, the explanation of the Commentary is an afterthought. For if there never was any idea that the procedure of the Charter might, if necessary, be used against a Great Power, why do we need all those elaborate provisions which are contained in Chapter VII on 'Action with Respect to Threats to the Peace'? It really does not make sense to suppose that all the Members are to make armed forces available to the Security Council on its call, that they are to hold air-force contingents immediately available for combined international action, that a Military Staff Committee is to advise the Security Council on all questions relating to its military requirements, and so on, if the only purpose of all these carefully thought out preparations is to deal with a Small Power when it misbehaves. Small Power aggression has never been, and cannot be, a serious problem if the Great Powers are agreed among themselves, and if they are not, then this machinery cannot be used.

Much the most probable explanation of the impasse at which we have arrived seems to me to be historical. I suspect it has resulted from the mood which prevailed at the moment when the Charter was made. Both the Covenant and the Charter reflect conditions which were existing at the time of their drafting; it was inevitable that they should, but the authors of the Covenant, by concentrating on the bare essentials, and leaving ample room for the League to grow, made this limitation of their outlook a less serious handicap than it is in the Charter. Still the weak points in both become more intelligible when we remember the contemporary circumstances. The Covenant was made after the First World War had ended, but when its lessons, or what then seemed to be its lessons, were still

vividly present to the minds of its authors. There was a case for thinking that in 1914 the world had stumbled into a war which no one had really desired or intended; most men everywhere were peacefully inclined, but there had been obstacles which had prevented their desires from finding expression, and if these could be removed peace might be made secure. Hence there should be open diplomacy and publicity for the engagements to which statesmen committed their nations; provision for delaying the outbreak of a threatened war in the belief that war delayed would probably be war averted; reduction of armaments because sooner or later the piling up of armaments must lead to their being used; and if war should come in spite of all these precautions, then it would probably be enough to rely on the economic weapon, whose decisive effects the recent war seemed to have proved, and the use of military sanctions might be relegated to the hazy background.

The Charter, on the other hand, was shaped at Dumbarton Oaks in the autumn of 1944, when the issue of the Second World War was still uncertain, and to outward appearance at least Germany and Japan still seemed immensely strong. It sought to forge a weapon which could be used against just such a danger as then existed if history should ever repeat itself, a security system of irresistible power, and ready, as the Allies in 1939 had not been, for immediate action, and every other consideration was subordinated to this overriding purpose. No one believed that we had merely stumbled into the War of 1939; it had obviously been deliberately planned, and against a planned war the palliatives of the Covenant seemed a puny defence. Unfortunately, the weapon which was fashioned has turned out to be a highly specialized instrument, useful only against a particular danger for which we now no longer need it, and only on the assumption that the war-time unity of purpose among the Great Powers would be a permanent feature of their relations. In the circumstances then it seems a little odd that the one danger which the Charter system does seem well fitted to deal with, a revival of aggressive tendencies in Germany or Japan, should have been excluded from the sphere of the Security Council and left, by Article LIII, to be dealt with by regional arrangements. Thus the desire for a system of security ready always for immediate action, which was the leading motive behind the substitution of the Charter for the Covenant, has resulted in a system that can be jammed by the opposition of a single Great Power. Under the Covenant the League might be unable to act as a League, but at least the Members of the League could act together if the occasion demanded joint action. The Members of the United Nations cannot even do that; a Great Power can forbid it. The Covenant scheme had weaknesses, as I have already admitted, and perhaps it might not have worked even if it had been given a fair trial; if so no doubt it is

better that we should know where we stand, as I think we do to-day. But we must realize that what we have done is to exchange a scheme which might or might not have worked for one which cannot work, and that instead of limiting the sovereignty of states we have actually extended the sovereignty of the Great Powers, the only states whose sovereignty is still a formidable reality in the modern world.

This is a depressing conclusion, and I do not want to end my comparison on a purely destructive note. For I think there is a moral to be drawn. It is common ground, I think, among all of us who recognize the urgency of a better international order that a condition of the stabilization of peace is some limitation of the sovereignty of states. We may not all use that phrase in quite the same sense, but at least there is a large measure of agreement about the ultimate aim. But there are differences amongst us as to methods, and I think the choice lies between the method of a frontal attack on sovereignty and what I may call the method of erosion. The Charter has tried to proceed by the former of these, and it has found the road barred. It insisted that to act effectively an international organization must have the power to make decisions, which means that a majority must be able to overrule a minority. But the Great Powers have refused to be outvoted. I know that the Charter has introduced majority voting into the General Assembly as well as into the Security Council, and that the Great Powers have not insisted on a veto over the decisions of the former. But this only reinforces the lesson which I think we have to learn. The General Assembly cannot act for all its Members as the Security Council can, and this makes all the difference. Its decisions are not directions issued by the Organization to the member states to tell them what they are to do. Apart from its control of the Budget, all that the General Assembly can do is to discuss and recommend and initiate studies and consider reports from other bodies. In principle its functions are similar to those of the Assembly of the League; it must rely on co-operation among the Members and not on power, for it has no powers. Hence the rule allowing it to take its decisions by majority voting was no very serious innovation in international organization. The case is entirely different when it has been decided that an international body shall exercise power, as the Security Council is to do. Then you are departing from the co-operative principle which has hitherto been the basis of international institutions; you are introducing a genuinely governmental element into them, converting the organization from a 'they' into an 'it'. To my mind the moral of the veto is that it teaches us that before international institutions can be raised from the co-operative to the organic type, which in itself is a desirable aim for which we have to work, we need a society far more closely integrated than the society of states is to-day; we need a society whose members have the same sort of confidence

in one another's intentions and policies and the same absence of fundamental diversity of interests that the states of a federation must have if their union is to endure. I do not myself feel that in present world conditions the insistence of the Great Powers on their veto, however much we may deplore it, is altogether unreasonable, and I do not think that any system of weighted majority voting will induce them, or at any rate induce all of them, to change their attitude. I think we have been led into a cul-de-sac by the over-hasty pursuit of a perfectionist policy, and by a too shallow diagnosis of the causes of failure of the League. By insisting that only an institution which has power to decide can act effectively we have created one that can neither decide nor act.

What I have called the method of attacking sovereignty by erosion is less spectacular, but, I think, more likely to give results. It means doing everything we can to make it easy for states to work together and so gradually develop a sense of community which will make it psychologically more difficult to press the claims of sovereignty in ways that are anti-social. This was the method of the League, and for a time at least it did seem to be leading to results. The Charter has made it more difficult by making the sessions of the Security Council continuous and excluding all but questions of security from its sphere. Many of the causes of embitterment of recent months would never have been raised if the Security Council had not provided a too tempting sounding board for ideological invective; to raise them in diplomatic notes would not have been worth while. For our hopes for the United Nations we must look, I think, to the General Assembly, and more especially to the Economic and Social Council which in effect is one of its committees.

More obviously to-day, though not more certainly, than ever before, peace depends on the ability of the Great Powers to work together. In a sense I think we have returned, as I have seen it somewhere suggested, to the idea which underlay the Concert of Europe in the nineteenth century. We have failed to institutionalize the preservation of peace, and perhaps we have to recognize that that cannot be done. But it is something that we should face the future, as I think we now do, with a fairly general realization of where we stand. A generation ago the number of those who both believed that the League was tremendously important and also saw that the difficulties in its way were immensely formidable was not very large; too many of those who thought it important underrated the difficulties, and too many of those who saw the difficulties had no particular wish to see it make good. I think the present attitude of public opinion is more healthy. There is no disposition to look upon the United Nations as a beneficent power which will usher in the millennium without any effort on our part, and the pseudo-realism of those who thought that we had had to

accept the League in order to humour President Wilson has also disappeared. It is true, as Lord Cecil has somewhere pointed out, that whereas the League was imposed on the governments from the outside, the United Nations is the work of the governments themselves. The only realist to-day is the man who knows that somehow we have got to use it to create a more civilized international order, and that probably we may not have very long in which to do it.

THE VETO AND THE SECURITY PROVISIONS OF THE CHARTER

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I

THE first purpose of the United Nations is 'to maintain international peace and security',[1] and the Security Council is the body primarily responsible on behalf of member nations for this vital task[2] under the United Nations Charter, a binding multilateral treaty. But the obligation not to break the peace by an act of aggression goes deeper even than treaty obligation. Under the conception of international law, unanimously and, in the writer's view, correctly expounded by the judges appointed by the four Great Powers at Nuremberg, a breach of the international peace by the initiation of a war of aggression is 'the supreme international crime',[3] and one for which those who control the destinies of aggressor states are personally and individually liable, quite apart from any liability which may be imposed upon the resources of the aggressor state itself, as a result of losing the war of aggression. Membership of the United Nations involves special rights and duties in connexion with the United Nations' machinery for peace-keeping.[4] This machinery substitutes a qualified majority vote for the unanimity of sovereign Powers customary in international conferences.[5] In the words of Mr. Jenks,[6] 'voting in the Security Council is governed by special rules, but while . . . the concurrence of all the Permanent Members of the Council is required for certain decisions, unanimity is not necessary in any circumstances'. The object of this article is to consider voting in the Council, and particularly to see how far, and in what circumstances, the concurrence of permanent Members of the Council is necessary in its vital work of keeping the peace. Because the unanimity of the whole Security

[1] United Nations Charter, Art. 1, *A Commentary on the Charter of the United Nations*, Cmd 6666 (1945), p. 22, and p. 6 for comment.

[2] Ibid., Art. 24, Cmd. 6666 (1945), p. 34, and p. 15, para. 83, for comment.

[3] *Judgment of the International Military Tribunal for the Trial of German War Criminals* Cmd. 6964 (1946), at p. 13.

[4] See Cmd. 6666 (1945), p. 7: 'It is particularly satisfactory that articles 24, 25 and 43, by which members accept specific obligations to assist in the maintenance of international peace and security should have been generally accepted without any substantial alteration. These obligations are much more specific than those under the Covenant of the League of Nations, and the readiness to accept them is indicative of a general disposition to recognise the paramount necessity of all states co-operating together to maintain the peace of the world.'

[5] See the Joint Statement by the Delegations of the four Sponsoring Governments on voting procedure in the Security Council, 7 June 1945: U.N.C.I.O., Doc. 852 (English), III/1/37 (1), reproduced in *United Nations Documents*, Royal Institute of International Affairs (1946), pp. 269-71, paras. 6–8.

[6] This *Year Book*, 22 (1945), p. 36.

Council is never necessary under the Charter, we prefer to speak of the power of veto possessed by Members of the Council eligible to vote in matters requiring their concurrence, rather than of the 'principle of unanimity in the adoption of decisions by permanent members'.[1] After all, as we shall see, there are some occasions when even a permanent Member is not eligible to vote in the Security Council.

II

The rules about voting in the Security Council look deceptively simple when they are read in Article 27 of the Charter,[2] but it should not be forgotten that 'they were still under consideration'[3] when the Dumbarton Oaks proposals were drawn up, and they were not agreed to by all the Great Powers simultaneously. Indeed, the voting formula was first settled at Yalta by the U.S.S.R., the United Kingdom, and the United States on 11 February 1945.[4] Later the assent of China and France was obtained,[5] and the San Francisco Conference accepted Article 27 after much argument and criticism of the interpretative Joint Statement of the four Sponsoring Governments on voting procedure in the Security Council,[6] which had been produced in answer to a list of twenty-three questions submitted by representatives of the other delegations to the Sponsoring delegations.[7]

However imperfect the Joint Statement may be, no discussion about voting in the Security Council can ignore it, and indeed it has regularly been appealed to in the proceedings of the Council. Kelsen[8] remarks that the statement is not 'an authentic interpretation of article 27'. Certainly the views of the delegates of the five permanent Members are not 'an authentic interpretation' of the Charter binding on Members in the way that a decision of the International Court of Justice would be:[9] but the

[1] Mr. Vyshinsky at the Plenary Session of the General Assembly of the United Nations on 13 December 1946: *Soviet News*, 17 December 1946.

[2] i.e.: '1. Each member of the Security Council shall have one vote.

'2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members.

'3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.'

Chapter VI relates to the pacific settlement of disputes, and Article 52 (3) relates to the regional pacific settlement of local disputes. There are eleven Members, of whom five are permanent: see Article 23 of the Charter.

[3] *Commentary on the Charter of the United Nations*, Cmd. 6666 (1945), at p. 35.

[4] Ibid., p. 3; and see *U.N. Documents*, op. cit., p. 144, for para. IV of the Report of the Conference.

[5] Cmd. 6666 (1945), at p. 3.

[6] Already referred to *ante*, p. 95, note 5.

[7] Goodrich and Hambro, *The Charter of the United Nations, Commentary and Documents* (1946), pp. 125–34.

[8] 'Organization and Procedure of the Security Council of the United Nations', in *Harvard Law Review*, 59 (1946), pp. 1085 ff., at pp. 1097 and 1103.

[9] See United Nations Charter, Arts. 93 and 94.

Joint Statement must be treated with respect, since it was published at San Francisco before the Charter was signed or ratified by any of the signatories, and none made any reservations in respect of any of the Charter provisions. The Joint Statement must, however, be used with care, since its references are to the Dumbarton Oaks Draft[1] and not to the Charter in its final form.

Any resolution on procedure in the Security Council may be carried by any seven affirmative votes in the Council,[2] and any such resolution may be defeated or vetoed by any five of the eleven Members. The absence of the vote of a permanent Member will not affect the passing of a procedural resolution. This became plain after Russia had withdrawn from the Council during the discussion on Persia and Mr. Byrne's resolution of 4 April 1946 to postpone discussion of that case was declared adopted by nine votes, presumably, according to Sir Alexander Cadogan,[3] as a procedural matter.

The Joint Statement, though unduly optimistic, recognized that the question of classifying a matter as substance or procedure might arise:

'1. In the opinion of the delegations of the sponsoring Governments, the draft Charter itself contains an indication of the application of the voting procedures to the various functions of the Council.

'2. In this case, *it will be unlikely that there will arise in the future any matters of great importance on which a decision will have to be made as to whether a procedural vote would apply*. Should, however, such a matter arise, the decision regarding the preliminary question as to whether or not such a matter is procedural must be taken by a vote of seven members of the Security Council, including the concurring votes of the permanent members.'[4]

In the debate on Greece at the first Security Council Mr. Vyshinsky referred to this part of the Joint Statement as 'a rule'[5] when arguing that

[1] Cmd. 6560 (1944). For example, according to the Joint Statement: (1) 'A procedural vote will govern the decisions made under the entire Section D of Chapter VI' [i.e. of the Dumbarton Oaks Draft, now replaced by Arts. 28–32 of the Charter, headed 'Procedure']. The Statement (paragraph 2) paraphrasing, though not completely, Arts. 28–32, continues: 'The Council will, by a vote of *any seven* of its members,

(1) adopt or alter its rules of procedure;
(2) determine the method of selecting its President;
(3) organize itself in such a way as to be able to function continuously;
(4) select the times and places of its regular and special meetings;
(5) establish such bodies or agencies as it may deem necessary for the performance of its functions;
(6) invite a member of the organization not represented on the Council to participate in its discussions when that member's interests are specially affected;
(7) and invite any state when it is a party to a dispute being considered by the Council to participate in the discussion relating to that dispute.'

[2] Art. 27 (2).

[3] *Journal of the Security Council* (1946), p. 504.

[4] *U.N. Documents*, op. cit., p. 271; italics ours.

[5] *Journal of the Security Council* (1946), p. 134.

a decision (as to whether or not an Egyptian proposal[1] to close the debate was one of substance or of procedure) was itself subject to veto, though he did not then want to have the matter decided by vote.[2] The matter, however, was finally voted on at the Council meeting in New York, and it was admitted there that the question as to whether a matter is one of substance or one of procedure is itself a substantive matter subject to veto.[3]

Mr. Vyshinsky had taken a similar view in the Lebanese and Syrian debates, in which he referred to the same part of the Joint Statement as 'a decision',[4] the Egyptian motion then before the Council being:[5] 'That the decision of the Council as to whether any question is a dispute or a situation is a procedural matter.' This motion was not pressed to a vote, since eight delegates voted, presumably on a procedural basis, 'that no vote shall be taken at this [the opening] stage in the proceedings of the Council upon the proposal that has been made by the delegate for Egypt'.[6]

The Joint Statement is, then, a quotable if not binding authority in the Security Council: like the twenty-three questions it attempts to answer, it is part of the *travaux préparatoires* of the Charter, the plain words of which it cannot of course overrule.[7]

The shadow of the veto hovers over all voting in the Security Council. By sustaining that a question is one of substance and not of procedure, the delegate of any permanent Member can make it plain that he regards a matter as subject to veto if pressed to a division. This is what Mr. Gromyko did during the Council debate on Spain.[8] Indeed, when a division takes place, as it did in that debate, two permanent Members can by their veto decide that a matter is one of substance and not of procedure against the opinion of eight other Members.[9] Similarly, it would seem that a permanent Member could regard a motion in the Council to request the opinion of the International Court on his contention, under Article 96 of the Charter, as a substantive matter. Only if the permanent Member opposing such a reference were a party to a dispute would he be disqualified from voting thereon, since, by Article 27 (3), a party to a dispute cannot vote thereon in a matter of peaceful settlement, and peaceful settlement includes judicial settlement.[10] But so long as the Council had not found

[1] Ibid., p. 129.

[2] Ibid., pp. 135–6. At the same time, Mr. Vyshinsky also gave some indication of his view of procedural matters, saying: 'Procedure means order, order of decisions, order of vote, order of method . . . the Egyptian proposal deals with the very substance of the proposal.'

[3] Ibid., p. 841.

[4] Ibid., p. 273.

[5] Ibid., p. 268.

[6] Ibid., p. 273 *ad fin.*

[7] See Oppenheim, *International Law*, vol. i (1947, 6th ed. by Lauterpacht), p. 862.

[8] *Journal of the Security Council* (1946), p. 794. In the course of this debate, Dr. Evatt, with characteristic forthrightness, remarked: 'The veto will be exercised and is to be exercised until the only proposal left is the proposal that Mr. Gromyko supports.'

[9] Ibid., p. 841.

[10] United Nations Charter, Art. 33.

that a dispute existed to which the delegate's state was a party, he might argue that he was not debarred from exercising the veto on the reference to the Court of the legal problem of interpretation. Indeed, a permanent Member may always claim to veto a motion to find the existence of such a dispute, and in such a case the matter of interpretation can only be brought before the International Court, if at all, by the General Assembly which, by Article 96, has concurrent powers of reference with the Council; the only exception to this concurrent power of reference is when the Security Council, under Article 12, 'is exercising in respect of any dispute or situation the functions assigned to it in the present Charter . . . '.

III

Members of the United Nations are bound under the Charter to settle their disputes peaceably, and the Organization is bound to ensure that non-member states do the same.[1] In view of the terms of Article 2 (3), which refer to 'international disputes' without further qualification, we cannot accept the statement by Eagleton,[2] following Goodrich and Hambro, that 'the only type of dispute which the parties are obligated to settle . . . is one the continuance of which is likely to endanger the maintenance of international peace and security'. If the parties are Members of the United Nations, they are under a duty or obligation to settle all *international disputes* peacefully, as Goodrich and Hambro themselves admit,[3] that is, to settle matters which they, *subjectively*, consider to be international disputes, even before the Security Council has formally decided that a dispute exists between the parties, or that there exists a situation 'which might lead to international friction or give rise to a dispute'.[4]

Experience in the Security Council has shown that the allegation by a state of the existence of a dispute of whatever sort, or of a situation likely to lead to a dispute, does not tie the hands of the Security Council when it comes to a consideration and discussion of the allegation; this does not *prove* that there is a situation or dispute on which the Council is bound to take further action, but if made in due form it will lead to at least some consideration and discussion in the Council. And the veto cannot prevent the discussion of an issue. '. . . There was considerable discussion at San

[1] United Nations Charter, Art. 2 (3): 'All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.' The words 'and justice' were added at San Francisco, according to Goodrich and Hambro (op. cit., p. 67), 'to prevent a recurrence of appeasement at the expense of smaller nations'. By Art. 2 (6), 'The Organization shall ensure that States which are not members of the United Nations act in accordance with these principles [i.e. including that just quoted] so far as may be necessary for the maintenance of international peace and security.'

[2] 'The Jurisdiction of the Security Council over Disputes', in *American Journal of International Law*, 40 (1946), at p. 518.

[3] Op. cit., p. 67.

[4] See Art. 34 of the Charter.

Francisco[1] of the exact method by which the Security Council should take jurisdiction of a dispute and subject it to examination and discussion.'[2] The Joint Statement on this matter is precise:[3] 'Further, no individual member of the Council can alone prevent *consideration and discussion* by the Council of a dispute or situation brought to its attention under paragraph 2, section A, Chapter VIII of Dumbarton Oaks' (i.e. *pacific* settlement under what is now Article 35 of the Charter).

The United States' Delegation's Report to the Senate takes the same view as the British Commentary.[4] If the consideration and discussion even of a dispute or situation which 'might lead to international friction or give rise to a dispute' is not subject to veto, then *a fortiori*, discussion of an *alleged* and unproved dispute or situation of that character is not subject to veto either.[5] The Joint Statement only refers to a *dispute or situation alleged by a Member* of the United Nations under Article 35 (1), or a *dispute alleged by a non-Member* under Article 35 (2). (The difference, incidentally, between a 'dispute' and a 'situation' would appear to be that there are *defined parties* to a dispute, whereas a situation does not necessarily present itself as an issue between defined states.) The Council may, in fact, also become seised of an alleged situation or a dispute on the initiative of the Secretary-General under Article 99 of the Charter, which enables him 'to bring to the attention of the Security Council *any matter* which in his opinion may threaten the maintenance of international peace and security'.[6] Kelsen excludes from the veto on discussion, cases brought under Article 35. He says:[7]

'The decision on whether to discuss or consider a dispute or situation brought before the Security Council on its own initiative under Articles 33, 34, or 36, or by the parties under Articles 37 and 38 [i.e. after an attempt of the parties to settle under Article 33], or by the General Assembly under Article 11 (3), would require a qualified majority of seven members including the concurring votes of the permanent members. Thus, *the discussion and consideration of such disputes or situations could be blocked by the veto of one permanent member.*'

Even accepting Kelsen's view, the veto on discussion may still be avoided provided some state alleges that the facts constitute a dispute or situation under Article 34 and brings those facts to the attention of the Council under

[1] *Report of the Canadian Delegation to San Francisco* (1945), p. 34.

[2] Cmd. 6666 (1945), p. 8.

[3] *U.N. Documents*, op. cit., p. 268, for para. III of the Report of the Conference.

[4] *Hearings before the Committee on Foreign Relations on the Charter of the United Nations* [U.S. Senate], 1945, p. 85.

[5] Art. 31 of the Charter of the United Nations indicates that the Council may have a 'question' before it—an even wider term than 'dispute' or 'situation'.

[6] See *Redrafted Provisional Rules of Procedure* (1946), H.M.S.O., rule 3, p. 5.

[7] Loc. cit., p. 1105. See also the Secretary-General's view in *Journal of the Security Council* (1946), p. 523, where he states that the Council may be seised of a dispute under Art. 35 by a state, under Art. 34 by the Council itself, and under Art. 99 by the Secretary-General.

Article 35. Moreover, the Joint Statement continues:[1] 'Nor can parties to such disputes [i.e. presumably those alleged under Article 35] be prevented by these means [i.e. veto procedures] from being heard by the Council.' When discussing a dispute or alleged dispute, with a view to pacific settlement whatever the ultimate decision, the rules of natural justice apply in the hearing of this quasi-judicial procedure as they would in a ministerial inquiry under English law.[2] Two rules of natural justice are provided for in the Charter.

First, *no party shall be condemned unheard*, because provision is made for hearing before the Security Council of a Member whenever the Security Council considers that the interests of a Member of the United Nations, who is not a Member of the Security Council, are specially affected in the discussion *of any question* before it.[3] The matter came up in an acute form on 10 July 1946 in relation to the invitation to the representative of Canada to attend the Council's discussion on atomic energy. It was there decided that Mr. Gromyko could not veto the invitation, which was a procedural matter under Article 31. Dr. Evatt neatly quoted the Joint Statement on this point, observing that the Russian delegation was a party to it. The procedure of permitting member nations not on the Council to be heard on questions concerning them was adopted in the cases of Persia, Greece, Syria, and Lebanon at the London session of the Council. At the meeting in New York, as a result of an Egyptian motion passed by eight votes, Persia was again heard, in spite of Russian opposition. Members of the United Nations can claim to be heard on any question before the Council which affects their interests. Non-Members of the United Nations are to be heard only on disputes to which they are parties: there was, of course, no such dispute or alleged dispute, to which Spain was a party, when the Spanish question came up in the Council.

When the Persian question came up at New York, Mr. Gromyko contended that as he had not taken part in the discussion of the renewed Persian submission, the decision of 4 April 1946, taken after he had withdrawn, to postpone consideration of the Persian case was a violation of the Charter. Mr. Gromyko said he had withdrawn 'because there were no grounds for discussion in view of the direct negotiations which were taking place'.[4] (He had informed the Council, by letter of 6 April 1946, that 'the Soviet Government insists that the Iranian question should be removed from the agenda'.[5]) Commenting upon this interpretation of the rule that

[1] Para. III: *U.N. Documents*, op. cit., p. 268; words in brackets supplied by author.

[2] *Committee on Ministers' Powers, Report*, Cmd. 4060 (1932).

[3] Art. 31: 'Any Member of the United Nations which is not a member of the Security Council *may* participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.'

[4] *Journal of the Security Council* (1946), p. 499.

[5] Ibid., p. 491.

parties must be heard, Mr. Van Kleffens summed up the matter in these words:

'The essence of the matter seems to be that both parties should be given every opportunity to be heard. If, as in this case, a party does not avail himself of the opportunity to be heard this does not prevent the Council from taking a decision in matters where the vote of the member in question is not absolutely required. The veto right of the great powers is a limited right and therefore cannot be extended beyond the terms of the Charter by the great power which is a party to the question before the Council simply absenting itself from the Council's deliberations.'[1]

This view, which was supported by Sir Alexander Cadogan,[2] seems the right one. Russia was a party to an alleged dispute, and could not create a new form of veto by failing to use the opportunity of being heard therein. The matter would have been different if there had been a refusal to hear the Russian delegate: there was no such failure to observe the rule of natural justice provided for in the Charter in this instance.

The second rule of natural justice applies when a state is a party to a *dispute* which the Council is attempting to settle pacifically, that is, by negotiation, inquiry, mediation, conciliation, arbitration, or judicial settlement.[3] In such circumstances, as we have seen, a *party to a dispute shall not be a judge of its own cause* and *shall* abstain from voting.[4] That salutary rule—a principle of natural justice—is clearly desirable wherever there is an attempt to settle a dispute by quasi-judicial means. The quasi-judicial character of discussions before the Security Council explains the Council's insistence on retaining control of its own agenda. We are inclined to agree with Mr. Van Kleffens in connexion with the Council's claim to retain the Persian question on its agenda, even after the Persian Government had withdrawn its request to the Council.[5] He observed:

'It is my duty to point out how dangerous is the opinion in its implications that the parties are sole judges as to whether or not a matter stays or does not stay on the agenda. I am afraid that if that interpretation were accepted, the door would henceforth be wide open to abuse, for in cases between Great Powers, cases between smaller powers, and especially in matters dividing greater and smaller powers, there would then be every incentive to bring diplomatic pressure to bear, in order that the question placed before the Council be withdrawn from the agenda by the parties who requested it to be placed on the agenda. Surely that is not the spirit of the Charter? It may be argued that such pressure can just as well be brought to bear in a previous phase, the phase before a matter comes before the Security Council, in order to prevent it being submitted to the Council. That may be so, although I am positive that it is generally held that no unfriendly act may ever be implied in the submission of a matter to the Council.'

Experience has now shown that preliminary hearings and discussions

[1] Ibid., p. 499.
[2] Ibid., p. 504.
[3] Art. 33.
[4] Art. 27 (3).
[5] *Journal of the Security Council* (1946), pp. 526–7.

in the Council can remain free, even if the veto prevents executive action from being taken as a result of them. Such free discussions may well result (*a*) in a Presidential declaration, as in the *First Greek* case, or (*b*) in a resolution, such as that in the *First Persian* case, not intended to lead to any action on the part of the Council but aimed at bringing parties together, or (*c*) in the nations charged accepting a majority vote, in spite of a veto, as Great Britain and France did in the *Syro-Lebanese* case,[1] or (*d*) as in the case of Spain, in a full ventilation of an alleged situation. The position is on the whole as forecast by Dr. Evatt:

'The words "consideration and discussion" are used in the joint statement in a much narrower sense than they ordinarily bear. In ordinary speech "consideration" of a dispute would include calling for reports, hearing witnesses, or even the appointment of a commission of investigation. The joint statement, however, treats that veto as applicable to a decision to use any of these procedures. It is only "consideration and discussion" of a very preliminary and restricted character that is to be free of the veto. It may be said that, without veto, the Council can only discuss whether a dispute can be discussed, and can only investigate whether it should be investigated.

'The importance of the fact that such consideration and discussion is free of the veto must not be underestimated, and the joint statement represents a substantial advance over a blanket veto. On the other hand, a system for the peaceful settlement of disputes in which everything except preliminary consideration and discussion of this limited character is to be subject to the veto is not an effective method of conciliation.'[2]

Dr. Evatt was perhaps too pessimistic when he continued: 'It may be said that, without veto, the Council can only discuss whether a dispute can be discussed. . . .' It can do more than that; it can hear the statements of the parties, and such evidence as they care to adduce. But Dr. Evatt was right when he said that the Council 'can only investigate whether it [a dispute] should be investigated', i.e. take executive action by sending out a commission of investigation, without risking a veto. This is perhaps not as unfortunate as it seems. Experience of the first year of the Council's work has shown that the Security Council will require a strong prima facie case before interfering in matters of domestic jurisdiction[3] by sending out fact-finding bodies. The possibility of Mr. Vyshinsky's thesis, that even matters formally comprised in the domestic jurisdiction of a given state[4] might conceivably threaten the peace, is not denied; it cannot be, since the evidence revealed at Nuremberg: but, we repeat, it will take a strong case even to call for an investigation of domestic affairs by the Security Council.[5] Like the Judicial Committee of the Privy Council, the Security Council does not unnecessarily interfere with domestic matters.

[1] *Journal of the Security Council* (1946), p. 347.

[2] *Australian Report on the San Francisco Conference* (1945), p. 89, Annex O.

[3] Safeguarded by Art. 2 (7) of the Charter and the ordinary international law. And see *Hearings before the Committee on Foreign Relations*, op. cit., p. 58.

[4] *Journal of the Security Council* (1946), p. 208.

[5] See Van Kleffens, ibid., p. 557.

In the words of the Joint Statement:[1]

'. . . *decisions and actions* by the Security Council may well have *major political* consequences and *may even initiate a chain of events* which might, in the end, require the Council under its responsibilities to invoke measures of enforcement. . . . This *chain of events* begins when the Council *decides to make an investigation*, or determines that the time has come to *call upon states* to settle their differences, *or makes recommendations* to the parties. It is to such decisions and actions that unanimity of the permanent members applies, with the important proviso, referred to above, for abstention from voting by parties to a dispute. . . .'[2]

We are not likely to have many decisions declaring that any matter in which a permanent member is likely to be involved is a dispute 'likely to disturb the peace'; such a declaration would require the concurrence of the very power in danger of being labelled a potential peace-breaker and would thereby exclude it from any decision in relation to the settlement. Such matters are more likely to be characterized, if possible, as 'situations', if, indeed, they are admitted to be anything. It will be recalled, for instance, that Mr. Vyshinsky denied that there was any situation or dispute likely to affect the peace of the world[3] in the *First Persian* case; so did Mr. Bevin in the *Greek* case,[4] Mr. Van Kleffens in the *Indonesian* case,[5] and M. Bidault in the *Syro-Lebanese* case[6]—to take a few examples of official reactions. In the last-mentioned case Mr. Vyshinsky urged that there was a dispute[7] and voted against the United States' motion that France and Great Britain should inform the Council of the results of the negotiations to withdraw their troops from Syria and the Lebanon: Great Britain and France, however, abstained from voting, 'without prejudice to the question of procedure', and voluntarily accepted the obligation in accordance with the vote of seven Members of the Council.[8] The existence of a dispute likely to affect the peace was not therefore conclusively ascertained.

When, however, the existence of such a dispute has been found by a Council decision under Article 34,[9] then it seems clear that parties to that

[1] Para. 4: *U.N. Documents*, op. cit., p. 269; italics ours.
[2] Ibid., p. 269. Italics are the writer's.
[3] *U.N. Documents*, op. cit., p. 57. See also Mr. Gromyko in the *Persian* case (ibid., p. 376).
[4] Ibid., p. 99.
[5] Ibid., p. 189.
[6] Ibid., p. 284.
[7] Ibid., p. 342.
[8] Ibid., pp. 344, 347.
[9] Such a preliminary decision would itself be subject to veto (except by the parties to the dispute), since the term 'dispute' in Art. 27 (3) is not confined to disputes affecting the peace. Nevertheless, Eagleton (op. cit., p. 518) suggests that such a decision must be made before the Council 'is enabled to make any recommendations concerning either procedures or terms of settlement', that is, of pacific settlement. This view appears to have been taken by the Secretary-General in his note on the Persian case when he said: 'Since the Council has not chosen to invoke Article 34 in the only way it can be invoked, i.e. through voting an investigation, and has not chosen to invoke Article 36, para. 1, by deciding that a dispute exists [*sc.* likely to affect peace and security] under Article 33, or that there is a situation of a like nature, it may well be that there is no way in which it can remain seised of the matter' (*Journal of the Security Council* (1946), pp. 523–4).

But we have already pointed out that a failure to find the existence of a situation or a dispute

dispute cannot vote on or veto pacific means of settlement, for example, recommendations under Articles 33 (2), 36, 37 (2), or 38.

It will be plain from the foregoing that although parties to a dispute cannot vote in its peaceful settlement, there is nothing, apart from the fear of world opinion, which can stop a permanent Member, or a combination of five non-permanent Members not parties to the dispute, from vetoing pacific means of settlement of a dispute or situation likely to lead to a breach of the world's peace. Hence the danger felt in some quarters that states involved in controversies will find it more important to secure the support of one of the permanent Members with the power of veto than to present an objective case for objective settlement. The danger of the growth of this patron-and-client attitude is a real one (especially when by race, language, sentiment, tradition, or political or other interest there is already a close connexion between a permanent Member and another state), since at present it is only the hearing of a controversy which must be conducted with due regard to the canons of judicial procedure. The ultimate decision of the Security Council, like the decision of a ministerial tribunal in England but unlike a decision of the International Court, need not be made judicially. The danger of the failure of the Security Council to come to a decision of any kind is also a distinct possibility in view of the veto power. When, for whatever reason, the failure of pacific settlement becomes apparent, a disappointed state may well fall back on forcible methods which may lead to a breach of the peace. This brings us to a consideration of the veto in relation to forcible counter-action to preserve the peace.

IV

Enforcement action is always subject to veto by a permanent Member of the Security Council, whether a party to a dispute or not. Such action is executory and not quasi-judicial. It would seem to include two classes of action: first, recommendations to the General Assembly, under Article 5, to suspend a Member, or, under Article 6, to expel a Member; and second, decisions made under Chapter VII of the Charter relating to 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression', or under Chapter VIII relating to 'Regional Arrangements'.

Of the first class, Article 5 calls for comment. To quote Kelsen:

'The question whether suspension from the exercise of the rights and privileges of "membership" under Article 5 includes the suspension of the right to sit as a permanent or elected non-permanent member of the Security Council. This question is of

likely to affect the peace cannot prevent the discussion of an alleged situation or dispute, and did not prevent the Council from keeping such a matter on its agenda when it decided to do so, even *in invitum* of the parties. The obligation of members to settle every kind of international dispute pacifically seems to us to justify the retention on the Council's agenda of even alleged or potential disputes.

practical significance only with respect to the right of the elected non-permanent members, since *the veto right of permanent members applies to the measure of suspension.* If . . . the right to sit . . . as an elected member . . . is a corollary of the right of membership in the organization . . . the question must be answered in the affirmative.'[1]

Goodrich and Hambro[2] say—rightly, in our view—that the representatives of a suspended state cannot attend meetings of the Security Council. But we may, of course, assume that it will be open to the Security Council to recommend modifications and limitations of these normal incidents of suspension.

The second class needs to be dealt with rather more fully. Under Article 39, subject to veto, immediate action may be taken against a wrongdoer[3] to restore peace and security. Kelsen[4] says:

'If the decision of the Security Council is made under Article 39 the ordinary members of the Security Council as well as the permanent members would be permitted to vote. A state of inequality would then exist between the ordinary members and the temporary member invited for pacific settlement under Article 32. Thus a perplexing situation is presented in the case of a dispute between a permanent or non-permanent member of the Security Council and a temporary member invited to participate under Article 32 without a vote in the discussion relating to a dispute under consideration by the Security Council.'

We see no real difficulty here. The onus of keeping the peace is upon the Members of the Security Council and it is, in our view, right that they should decide upon the *executive action* they have to initiate. Such an inequality would not affect any *ultimate decision* for pacific settlement after the restoration of the peace between the disputants, since in such a settlement the parties to a dispute could not vote. We cannot therefore accept the statement made by Kelsen[5] that 'one of the most [*sic*] fundamental principles of legal procedure—that no one should be a judge in his own cause —can easily be eluded by choosing the procedure provided by Article 39 instead of a procedure provided by an article of Chapter VI'. Executive action under Article 39 should only lead up to and not eliminate pacific means of settlement under Chapter VI.

The Drafting Committee at San Francisco included in its report a statement that '. . . in the case of *flagrant aggression* imperilling the existence of a member of the Organization, enforcement measures should be taken without delay, and to the full extent required by circumstances, except that the Council should at the same time endeavour to persuade the aggressor

[1] Loc. cit., p. 1089; a recommendation to admit or to refuse to admit a member under art. 4 (2) is also subject to veto.

[2] Op. cit., p. 83.

[3] It was proposed by Poland, though not carried, that action should be taken under this Article against Spain (17 April 1946): *Journal of the Security Council* (1946), p. 349.

[4] Loc. cit., p. 1095.

[5] Loc. cit., p. 1109.

to abandon its venture. . . .'[1] Or, in the words of Goodrich and Hambro: 'Only presumably in case of *actual violation of the peace or an act of aggression will enforcement measures be taken*',[2] that is, either (*a*) measures not involving armed force under Article 41, or (*b*) other measures involving such force.[3] As regards enforcement action by armed force, it has been said that:

'The voting procedure of the Security Council is expressive of the actualities of the possession and the exercise of power in the modern world. The five principal military powers of our time are permanent members of the Council. . . . Furthermore, in order that their possession of power and their use of power may be made to serve the purpose of peace, it is provided that they shall exercise their power only in agreement with each other and not in disagreement.'[4]

The unanimous vote of the Great Powers, which is necessary for enforcement action, also requires the concurrence of two other Members of the Council. Without this concurrence of wills enforcement action will never be possible by the *Security Council.* But at present no enforcement action *by armed forces under the control of the Security Council* is possible.

The Security Council was constituted on 12 January 1946. Since then it has done a good deal of public debating. It has had its teething troubles, but it has not yet acquired its teeth. It will not have any teeth *of its own* to maintain peace and security until the provisions of Article 43 have been implemented.

Article 106 of the Charter, entitled 'Transitional Security Arrangements', provides:

'Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, 30th October, 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organisation as may be necessary for the purpose of maintaining international peace and security.'

Paragraph 5 of the Moscow Declaration reads:

'That for the purpose of *maintaining international peace* and security pending the re-establishment of *law and order* and the inauguration of a system of general security they will consult with each other and, as occasion requires, with other members of the United Nations *with a view to joint action* on behalf of the community of nations.'

Thus for practical purposes, pending the military agreements, only the five permanent Members are likely to have the duty of maintaining peace by the use of armed force. For this purpose their unanimity is presumably necessary.

[1] Goodrich and Hambro, op. cit., p. 158.
[2] Op. cit., pp. 158–9.
[3] Chapters VII and VIII.
[4] *Report to United States Senate*, &c., op. cit., p. 41.

No definite time is fixed for agreements under Article 43 for the use of armed force or for facilities, including the unneutral right of passage[1] which Grotius himself had stressed as being properly extendable to a state resisting aggression. Since the Charter was drafted we have passed into the Atomic Age, and it is more than difficult to evaluate the effectiveness in quality and quantity of modern 'armed forces'.

Article 43 (2) merely provides in general terms that:

'2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.'

The initiative must come from the Security Council since, by Article 43 (3):

'3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.'

These agreements, it will be observed, are really treaties, and will require ratification as such: they are to be made between the Security Council as a legal entity and the states affected, and not between the states themselves. As the United States Report on the Charter states (p. 93): 'Member states, by the very act of signing the Charter, collectively recognize the legal capacity of the Security Council to conclude agreements with them.' To settle the content of the military agreements will not be an easy task. No doubt the Security Council will take the advice of the Military Staff Committee on these matters, provided for by Article 47, but it would seem that any proposed military agreements are subject to veto either by the Council or in effect by any member of the United Nations refusing to sign the treaty embodying the Council's proposals. We should point out, however, that once the military agreements are completed and ratified, and occasion arises under Article 44 for the employment by the Security Council of the forces of a state not a Member of the Security Council, that state may participate as of right in Security Council decisions concerning the employment of its contingents. Kelsen suggests[2] that if Article 31 does not apply (and we are inclined to think that it does not since it relates to pacific settlement), then Article 44 gives a state which is not an elected Member of the Security Council a right to vote in the *decision* taken. We agree. What else can 'participate in decisions' mean? However, once the military agreements have been completed and ratified, a Member state cannot do more than vote on a motion in the Security Council to use its forces. Its

[1] The United States Report says: 'In specifically naming rights of passage (in Article 43), the Conference nevertheless made it clear that this phrase should not be construed restrictively' (op. cit., at p. 92).

[2] Loc. cit., pp. 1093, 1099.

additional vote might make the veto of the non-permanent Members possible, but it cannot alone veto the employment of its forces unless it is a permanent Member. Nor can it withdraw its forces without breaking a fundamental provision of the Charter. This was brought out by Dr. Evatt in the Australian Parliamentary debate on 'The Charter of the United Nations Bill 1945'.[1]

Further, by Article 107:

> 'Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorised as a result of that war by the Governments having responsibility for such action.'

Action within this section cannot therefore be impeded by veto. But a permanent Member can veto the use of enforcement action *under the Charter* against itself, and this cannot be remedied by amending the Charter since any amendment is also subject to the permanent Member's veto.[2] Failure of the Charter to provide enforcement action for cases of aggression, because of the use of the veto, would not necessarily mean that action could not be taken to stop aggression. It would merely mean that *such action could not appropriately be taken through the Organization of the United Nations*, though it could be taken by states acting together to put down aggression under the general international law of the world laid down and accepted by the Four Great Powers at Nuremberg. Legal action outside the Charter would require the unanimity of those taking it, and would mean the end of the United Nations' experiment in the majority principle.

It is not surprising, therefore, that at the second meeting of the Assembly of the United Nations in 1946, the possibility of the abuse of the veto[3] was in everybody's mind in connexion with the problem of controlling the use and manufacture of the atomic bomb, the potentialities of which were not generally realized when the Charter was drafted. To discuss the control of this new weapon would require another article. We may content ourselves by observing that, in our view, there is no theoretical reason why Members of the United Nations—for example, the five permanent Members of the Security Council—should not enter into treaties with each other, or with the Security Council itself,[4] limiting in advance the right to use the individual veto in defined circumstances. Such a treaty would need to be

[1] *Parliamentary Debates, Commonwealth of Australia*, 3rd Session, 1945, at p. 5019.

[2] See United Nations Charter, Arts. 108 and 109, and Durbin, House of Commons, *Hansard*, 413 (1945), col. 707.

[3] See 'The Veto at Lake Success', in *The World To-day* (February 1947), pp. 82–99.

[4] Art. 43 of the Charter, in the words of Goodrich and Hambro (op. cit., p. 167), '. . . assumes that the Security Council has a capacity for entering into international commitments apart from that of its members'. Even on a restrictive interpretation of that capacity, which would limit the Council's treaty-making powers to the matters mentioned in Art. 43, we think the kind of treaty we have mentioned would be *intra vires*.

registered,[1] and to be consistent with the purposes of the Charter,[2] in order to be valid. *If made with the Security Council* the treaty would be subject not only to the veto of a permanent Member, but also to that of five of the non-permanent Members.

V

The following are some of the conclusions tentatively arrived at in this article, though it must be emphasized that finality of procedure is not likely to be attained quickly in a new organ such as the Security Council, concerned with momentous issues of war and peace.

1. Preliminary discussion of any question in the Security Council raised by a party to an alleged dispute is free from veto.

2. No party to a dispute or alleged dispute can vote on, or veto, its settlement by pacific means.

3. Every party to a dispute or alleged dispute is entitled to be heard thereon by the Security Council when the matter is being settled pacifically.

4. If any reference to the International Court of Justice becomes necessary concerning a disputed point of law or interpretation, no party to that dispute can vote on or veto a reference to the Court where this is part of the procedure for pacific settlement.

5. If a state, not a party to an alleged dispute, vetoes a reference on a point of interpretation to the International Court, the matter can be raised in and referred by the General Assembly to the Court, (*a*) when the Security Council has found that no dispute exists, or, possibly, has refused to deal with a matter, or (*b*) has found a dispute to exist and dealt with it.

6. All executive action is subject to veto, even of the party against whom it is proposed.

7. If a permanent Member commits an act of aggression the veto may render impossible any action under the Charter, but action will still be possible under the ordinary international law, since the Charter merely attempts to implement and not to stultify international obligations.

8. There is nothing to prevent states Members of the United Nations from entering into treaties designed to limit the right of veto otherwise exercisable by them, provided that the treaty is consistent with the purposes of the United Nations set forth in the Charter, the first object of which is to preserve the peace of the world.

9. The military agreements to give the Security Council means of enforcement action are subject to veto. None has yet been made between any Member of the United Nations and the Security Council. Until it has

[1] Art. 102.

[2] Art. 103. A treaty limiting the veto was proposed, though not finally adopted, in the Draft First Report of the Atomic Energy Commission of the Security Council dated 31 December 1946, A.E.C./18/Rev. 1, 3 January 1947, pp. 22–4.

ratified such an agreement, each state remains free to refuse to do so: that is, to veto the military agreement proposed. Any state refusing to ratify an agreement might, of course, be expelled from the United Nations—subject to the veto being exercised in its favour.

10. Pending the conclusion of the military agreements, the burden of taking executive action to keep world peace will fall on the five permanent Members, to whom the individual unanimity rule will apply, or with the consent of the Security Council upon a regional agency. The use of a regional agency is subject to the ordinary veto.

11. The veto may be used either (i) by one permanent Member of the Security Council, or (ii) by five Members in combination, though this latter type does not apply to the amendments of the Charter.

GOVERNMENT IN COMMISSION

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THIS article is an attempt to assess the juridical basis of the occupation and government of Germany by the four Allied Powers—the United Kingdom, the United States, the Union of Socialist Soviet Republics, and France—and to consider the effects of that occupation on the status of Germany in international law. While the régime established by the occupation is in its nature provisional and liable to continual changes, it has nevertheless given rise to problems which are of general interest for international law and which merit examination. However, before turning to the law it will be convenient briefly to describe the facts of the occupation and to examine the provisions of the main documents involved.

I. *The establishment of the machinery of occupation and control*

By the beginning of May 1945 it was apparent that the German forces were incapable of offering further resistance to the Allied offensive. On Monday, 7 May, an unconditional surrender of the German armed forces was signed at Rheims by General Jodl, and on the following day von Krosigk, the Foreign Minister of Admiral Dönitz's government, broadcast the news of the surrender to the German people. On 9 May a document similar to the one signed by General Jodl was signed at Berlin by Field-Marshal Keitel, Admiral Flensburg, and Air Colonel General Stumpf, in the presence of Air Chief Marshal Tedder, General Spaatz, Marshal Zhukov, and General de Lattre de Tassigny. This document, called the Final Act of Unconditional Surrender, states *inter alia* that the signatories are 'acting by authority of the German High Command' and that 'this act of military surrender is without prejudice to, and will be superseded by, any general instrument of surrender imposed by or on behalf of the United Nations and applicable to Germany and the German armed forces as a whole'.[1] It contains no reference to Admiral Dönitz's government. This

[1] See *The Times* newspaper, 11 May 1945. The full text of the *Final Act of Unconditional Surrender* is as follows:

'1. We the undersigned, acting by authority of the German High Command, hereby surrender unconditionally to the Supreme Commander, Allied Expeditionary Force, and simultaneously to the Supreme High Command of the Red Army, all forces on land, at sea, and in the air who are at this date under German control.

'2. The German High Command will at once issue orders to all German military, naval, and air authorities and to all forces under German control to cease active operations at 23.01 hours, Central European Time, on May 8, 1945, to remain in the positions occupied at that time and to disarm completely, handing over their weapons and equipment to the local allied commanders or officers designated by representatives of the Allied Supreme Commands. No ship, vessel, or aircraft is to be scuttled, or any damage done to their hulls, machinery, or equipment, nor to

government was never recognized in any way by the Allies; indeed, on 24 May it was announced from the Headquarters of 21st Army Group that all the members of this self-styled acting government, as well as members of the German High Command, had been taken into custody as prisoners of war.[1]

Already in February 1945, at the Crimea Conference, Mr. Winston Churchill, President Roosevelt, and Marshal Stalin had agreed on 'common policies and plans for enforcing the unconditional surrender terms which we shall impose together on Nazi Germany after German armed resistance has been finally crushed'.[2] The unconditional surrender of Germany now having been accomplished, the agreed plans were put into operation by the Berlin Declaration of 5 June, and three Statements of the same date dealing respectively with the zones of occupation in Germany, the control machinery in Germany, and consultation with governments of other United Nations.[3]

The Berlin Declaration, signed by Field-Marshal Montgomery, General Eisenhower, Marshal Zhukov, and General de Lattre de Tassigny, consists of a statement of the principles governing the Allied assumption of authority in Germany, followed by fifteen Articles setting forth the immediate requirements with which Germany is to comply. The statement of principles must be cited in full:

DECLARATION REGARDING THE DEFEAT OF GERMANY AND THE ASSUMPTION OF SUPREME AUTHORITY WITH RESPECT TO GERMANY BY THE GOVERNMENTS OF THE UNITED KINGDOM, THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS, AND THE PROVISIONAL GOVERNMENT OF THE FRENCH REPUBLIC

The German armed forces on land, at sea and in the air have been completely defeated and have surrendered unconditionally and Germany, which bears responsibility for the war, is no longer capable of resisting the will of the victorious Powers.

machines of all kinds, armament, apparatus, and all the technical means of prosecution of war in general.

'3. The German High Command will at once issue to the appropriate commanders, and ensure the carrying out of, any further orders issued by the Supreme Commander, Allied Expeditionary Force, and by the Supreme Commander of the Red Army.

'4. This act of military surrender is without prejudice to, and will be superseded by, any general instrument of surrender imposed by or on behalf of the United Nations and applicable to Germany and the German armed forces as a whole.

'5. In the event of the German High Command or any of the forces under their control failing to act in accordance with this act of surrender, the Supreme Commander, Allied Expeditionary Force, and the Supreme High Command of the Red Army, will take such punitive or other action as they deem appropriate.

'6. This act is drawn up in the English, Russian, and German languages. The English and Russian are the only authentic texts.'

[1] *The Times* newspaper, 24 May 1945.

[2] *The Times* newspaper, 13 February 1945.

[3] The Declaration and the three Statements are published by H.M. Stationery Office as Cmd. 6648.

The unconditional surrender of Germany has thereby been effected, and Germany has become subject to such requirements as may now or hereafter be imposed upon her.

There is no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers.

It is in these circumstances necessary, without prejudice to any subsequent decisions that may be taken respecting Germany, to make provision for the cessation of any further hostilities on the part of the German armed forces, for the maintenance of order in Germany and for the administration of the country, and to announce the immediate requirements with which Germany must comply.

The Representatives of the Supreme Commands of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics and the French Republic, hereinafter called the 'Allied Representatives', acting by authority of their respective Governments and in the interests of the United Nations, accordingly make the following Declaration:

> The Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany.
>
> The Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic, will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory.

The actual machinery of government by which the supreme authority assumed in the Declaration is exercised is outlined in the three Statements. The decision to divide Germany into occupation zones had already been made known in the official announcement made after the Crimea Conference.[1] This decision is carried into effect in the first of the three Statements, by which Germany within her frontiers as they were on 31 December 1937 is 'for the purposes of occupation' divided into four zones: an eastern zone to the Union of Socialist Soviet Republics; a north-western zone to the United Kingdom; a south-western zone to the United States; and a western zone to France. The occupying forces in each zone are placed under a Commander-in-Chief designated by the responsible Power. The area of Greater Berlin, however, constitutes a special area occupied by forces

[1] See *The Times* newspaper, 13 February 1945. The official announcement states *inter alia*:

'Under the agreed plans the forces of the three Powers will each occupy a separate zone of Germany. Coordinated administration and control have been provided for under the plan through a Central Control Commission consisting of the Supreme Commanders of the three Powers with headquarters in Berlin.

'It has been agreed that France should be invited by the three Powers, if she should so desire, to take a zone of occupation, and to participate as fourth member of the Control Commission. The limits of the French zone will be agreed by the four Governments concerned through their representatives on the European Advisory Commission.'

of each of the four Powers and governed by an Inter-Allied Governing Authority (known also by its Russian name of *Kommandatura*) consisting of four Commandants appointed by their respective Commanders-in-Chief who are to 'direct jointly its administration' and who serve in rotation as Chief Commandant.

That the zones are fundamental to the whole Allied government and administration is shown by the Statement on Control Machinery in Germany, which establishes a Control Council for the government of Germany as a whole and formulates its relationship to the government of the zones in the following terms:

'In the period when Germany is carrying out the basic requirements of unconditional surrender, supreme authority in Germany will be exercised, on instructions from their Governments, by the British, United States, Soviet and French Commanders-in-Chief, each in his own zone of occupation, and also jointly in matters affecting Germany as a whole. The four Commanders-in-Chief will together constitute the Control Council. Each Commander-in-Chief will be assisted by a Political Adviser.[1]

'2. The Control Council, whose decisions shall be unanimous, will ensure appropriate uniformity of action by the Commanders-in-Chief in their respective zones of occupation and will reach agreed decisions on the chief questions affecting Germany as a whole.'

Under the Control Council is a hierarchy of committees and departments which together provide a machinery of central government known collectively as the Control Authority. Immediately subordinate to the Control Council there is a permanent Co-ordinating Committee composed of the Deputies of the Commanders-in-Chief. Its function is to advise the Control Council and to administer the carrying out of the Control Council's decisions. In practice the Co-ordinating Committee tends to be the more important body, for it is here that the main work of hammering out a common policy takes place. Both the Control Council and the Co-ordinating Committee are served by an Allied Secretariat (A.S.E.C.). Subordinate to the Co-ordinating Committee are the Directorates, which correspond to the usual departments of a central government.[2] The outstanding feature of the whole organization of the Control Authority is the provision at all stages for the equal representation of the four Allied Powers and the requirement at all stages that decisions shall be unanimous. The require-

[1] This formula is repeated in slightly different language in the Potsdam Declaration of 2 August 1945: '1. In accordance with the agreement on control machinery in Germany, supreme authority in Germany is exercised, on instructions from their respective Governments, by the commanders-in-chief of the armed forces of the United States of America, the United Kingdom, the Union of Socialist Soviet Republics, and the French Republic, each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole, in their capacity as members of the Control Council.'

[2] The Allied Statement on *Control Machinery in Germany* (Cmd. 6648) lays down the following divisions 'subject to adjustment in the light of experience': Military; Naval; Air; Transport; Political; Economic; Finance; Reparation; Deliveries and Restitution; Internal Affairs and Communications; Legal; Prisoners of War and Displaced Persons; Man-power.

ment of unanimity is not confined to the Control Council but operates at all levels of the Control Authority. Thus, before a draft measure can be adopted it must secure unanimous approval in Sub-committee, Directorate, Co-ordinating Committee, and in the Control Council itself.

The relationship between the Allied Governments, the Control Council, and the Zone Commanders is not free from difficulty. It is nowhere precisely defined in the instruments; nevertheless, there are certain necessary implications which give some indication of the true position. By the Berlin Declaration, supreme authority over the whole of Germany is assumed by the four Allied Governments. This can only mean that the supreme authority over the whole of Germany was thereby vested in the four Governments jointly. There could be no question of each of those Governments having an original authority in its own zone, for the zones themselves were only subsequently established by an exercise of that joint authority. By the Allied Statement on *Control Machinery in Germany*, the *exercise* of this supreme authority was, as we have seen, devolved through two channels: first, the Zone Commanders, acting on instructions from their Governments, are to exercise supreme authority each in his own zone; secondly, the Control Council, by agreed decisions, is to exercise supreme authority in the chief questions affecting Germany as a whole. This machinery, it will be noticed, does not create a simple hierarchy of authority, with the Zone Commands subordinated to the Control Council and the Control Council in turn subordinated to the Allied Governments. It creates two distinct areas of authority: first, the authority exercised by each Zone Commander in his own zone, and secondly, an overriding authority in the Control Council in matters, affecting Germany as a whole, on which the Control Council is able to reach an agreed decision. But whether exercising authority in their own zones, or through the Control Council for Germany as a whole, the Commanders-in-Chief are the instrumentalities not of their own Governments, but of the four Allied Governments jointly. The undivided supreme authority continues to reside in the four Governments jointly, as provided in the Berlin Declaration; it is merely the *exercise* of that authority that is devolved on a zonal basis by the Statement on Control Machinery. Thus, the jurisdiction of the Control Council in Germany as a whole, is not produced by a coalescence of four separate authorities but is delegated to it directly by the four Governments acting together. However, the strictly consensual basis of the Control Council's procedure tends to make it in practice little more than a machinery for the auto-limitation of the Zone Commanders' authority; for the unanimity rule, coupled with the fact that the Control Council is composed of the Zone Commanders themselves, means in effect that the Control Council is powerless to legislate when the Commander-in-Chief of any particular

zone refuses to agree. The Commanders-in-Chief, whether acting as Zone Commanders or as members of the Control Council, act on instructions from their respective Governments. Consequently, the extent to which the Control Council is able to provide an effective central organ of government for Germany as a whole depends directly on the extent to which the four Allied Governments can agree among themselves on a common policy to be followed in the exercise of the supreme authority which they have jointly assumed. An attempt to formulate the broad lines of such a common policy was made in the Potsdam Declaration of 2 August 1945.[1] The interpretation of parts of this Declaration has notoriously been a matter of acute controversy. Nevertheless, it does provide the essential basis for the successful working of the control machinery. The Control Council legislation already promulgated shows that substantial co-operation has been found possible in practice, and uniform legislation has been achieved on a number of important topics.[2]

The first formal meeting of the Control Council was held under the chairmanship of General Eisenhower on 30 July 1945. At the conclusion of this meeting an official communiqué was issued stating that future sessions of the Council would be held regularly on the 10th, 20th, and 30th of each month, and at any other time at the request of any member of the Council. After its fourth meeting on 30 August a Proclamation was issued and broadcast to the German people; it announced that in virtue of the supreme authority and powers assumed by the four Allied Governments in their Declaration of 5 June, the Control Council had now been established and that supreme authority in matters affecting Germany as a whole had been conferred upon the Control Council, but all military laws, orders, and decrees issued by the Commanders-in-Chief for the adminstration of their respective zones would continue in force in those zones.[3] This Proclamation of course in no way altered the law or machinery of government; it is

[1] See *The Times* newspaper, 3 August 1945.

[2] Control Council legislation is published in the *Official Gazette of the Control Council for Germany* (hereafter called *Official Gazette*) published by the Allied Secretariat in Berlin. It may also be consulted in the *Military Government Gazette, Germany, British Zone of Control*, published by H.M. Stationery Office.

By Control Council Directive no. 10, dated 22 September 1945, it was decided that all legislative action by the Control Council should be in one of the following forms:

'(*a*) *Proclamations*: to be issued to announce matters or acts of especial importance to the occupying powers or to the German people, or to both.

'(*b*) *Laws*: to be enacted on matters of general application, unless they expressly provide otherwise.

'(*c*) *Orders*: to be issued in other cases when the Control Council has requirements to impose on Germany and when laws are not used.

'(*d*) *Directives*: to be issued to communicate policy or administrative decisions of the Control Council.

'(*e*) *Instructions*: to be issued in cases when the Control Council wishes to impose requirements direct upon a particular authority.'

[3] See *Official Gazette*, p. 4.

simply a formal publication of the existing state of affairs to the German people.

The picture of the machinery of central government would be incomplete without mention of two provisions which will be of considerable importance in attempting to assess the juridical nature of the Allied régime. The first is the formal statement that these arrangements for the government of Germany are purely temporary, being intended to 'operate during the period of occupation following the German surrender, when Germany is carrying out the basic requirements of unconditional surrender', and that 'arrangements for the subsequent period will be the subject of a separate agreement'.[1] The second is the announcement of the Allied Governments that in the exercise of the supreme authority assumed in the Berlin Declaration it is their intention to consult with the Governments of other United Nations.[2]

Such in outline is the Allied machinery for the government of the occupation zones and of Germany as a whole. It will be remembered, however, that the supreme authority assumed in the Berlin Declaration includes not only the powers of central government but also all powers of local government. The inter-Allied arrangements do not provide any uniform method for the exercise of local governmental powers;[3] no doubt there would necessarily be much improvisation in the early stages of the occupation, and there would probably be considerable divergence between local governmental machinery in the different zones. The general policy has been, as far as possible, to reconstitute the general pattern of local government as it existed in the Weimar Republic. This policy was carried out in the British zone either by the deployment of detachments of Military Government, or by personnel of the Control Commission. The weakness of this system of military or Control Commission administration at all levels was of course that it failed to provide for the re-education of the German people in democratic responsibility and to lay the necessary foundations for the gradual return to some form of self-government. The second stage therefore in the development of local government has been to encourage Germans with sound political records to take part in it. Little could be done in this direction until Nazi sympathizers had been identified; but once this process was under way, Germans who were known to have been loyal

[1] See para. 8 of the Statement on *Control Machinery in Germany*, Cmd. 6648.

[2] See Statement of the Allied Governments on *Consultation with Governments of other United Nations*, Cmd. 6648.

[3] However, the general policy to be followed is laid down in the Potsdam Declaration of 2 August 1945: '9. The administration of affairs in Germany should be directed towards the decentralization of the political structure and the development of local responsibility. To this end (i) local self-government shall be restored throughout Germany on democratic principles, and in particular through elective councils, as rapidly as is consistent with military security and the purposes of military occupation. . . .'

supporters of the former Republic began to be appointed, even to important administrative posts. In pursuance of the same policy, some of the more important towns were given consultative committees to serve as links between the administration and the people. There is no doubt, of course, that the early revival of some of the more important German administrative units was dictated by the necessities of the situation as much as the result of a conscious policy of re-education. Thus, in the British zone, the urgent task of repairing damaged highways and bridges had to be met by reopening the Frankfurt office of the Reichsautoamt; similarly for railways, the Reichsbahndirektionen of Essen and Münster were early functioning under Allied supervision. Thus the outlines of the machinery of local government are tolerably clear: it is a system of indirect government carried on through local institutions modelled in the main on those of the Weimar Republic,[1] in which Germans with sound political records play increasingly important roles. Of course, all these local institutions, whether staffed by Military Government or by Germans, are in every way completely under the authority of the Zone Commanders-in-Chief and the Control Commission; there has never been any question of a division of ultimate responsibility.

II. *The meaning and effect of the assumption of supreme authority*

We must now consider the nature and extent of the rights which the Allied Powers have assumed over Germany and the consequent modification of the status of Germany in international law. The effect of the Allied Declaration of 5 June 1945 has been considered by the English courts in the case of *Rex* v. *Bottrill, ex parte Kuechenmeister*.[2] Kuechenmeister, a German national, had permanently resided in the United Kingdom since 1931, during which year he had married an Englishwoman. During the war he was interned as an enemy alien and it was now proposed to deport him. He applied to the court for a writ of habeas corpus. Counsel for the applicant accepted the proposition that the court will not issue habeas corpus on the application of an enemy alien;[3] but he argued that Kuechenmeister was no longer an enemy alien because the effect of the Allied Declaration of 5 June was to destroy the existence of Germany as a sovereign state, from which conclusion it also followed that there could no longer be a state of war between Great Britain and Germany, and, further, that there was no longer a status of German nationality in international law. In answer to this argument the Attorney-General, opposing

[1] A few of the institutions established by the Nazi Government were preserved, e.g. the Landwirtschaftsämter and the Landesbauernschaften.

[2] Proceedings in the King's Bench are reported in All E.R., [1946] i. 635; for the decision of the Court of Appeal see L.R. [1947] K.B. 41.

[3] *R.* v. *Vine Street Police Station Superintendent, ex parte Liebmann*, [1916] 1 K.B. 268.

the application, put before the court a certificate signed by Mr. Ernest Bevin, Secretary of State for Foreign Affairs, in the following terms:

'(1) That under paragraph 5 of the Preamble to the Declaration dated June 5, 1945, of the unconditional surrender of Germany, the Governments of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics, and France assumed supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command, and any State, municipal, or local government or authority. The assumption for the purposes stated above does not effect the annexation of Germany.

'(2) That in consequence of this declaration, Germany still exists as a State and German nationality as a nationality, but that the Allied Control Commission are the agency through which the Government of Germany is carried on.

'(3) No treaty of peace or declaration by the Allied Powers having been made terminating the state of war with Germany, His Majesty is still in a state of war with Germany, although, as provided in the declaration of surrender, all active hostilities have ceased.'[1]

The Court of Appeal upheld a decision of the Divisional Court refusing the application. It was held that the certificate of the Secretary of State was conclusive on the Court for the facts alleged in it, and in any case the action of the Executive taken in the interests of the safety of the state must be above challenge by habeas corpus. 'In our municipal law,' said Lord Justice Scott in the Court of Appeal, 'whether or not it differed in that respect from international law, a state of war could continue with a State in spite of the fact that that State no longer had any independent central government.'[2] The actual decision of the Court rests, of course, on doctrines of English constitutional law; for the international lawyer the interest of the case lies in the propositions enunciated in the certificate of the Secretary of State. Although the certificate is conclusive of such matters in English law, it is not of itself conclusive in international law, and it will be convenient to consider the several propositions *seriatim*, together with certain other aspects of the operation of the Berlin Declaration not touched on in this case.

The continued existence of the German state

The Berlin Declaration states that the Allies have assumed 'supreme authority' over Germany, but that this does not effect the annexation of Germany. It has been argued that this is an assumption of sovereignty over Germany and that consequently Germany, lacking the prerequisite of an independent government, can no longer be said to exist as a state in the

[1] See *The Times* newspaper, 4 April 1946.

[2] In *Netz* v. *Ede*, [1946] Ch. 224, it was likewise argued for the plaintiff that, Germany being 'merely a certain geographical area governed by the Allied Control Commission', the United Kingdom was no longer at war with Germany. Wynn-Parry J. did not find it necessary to decide this question as he held himself bound by the Statement of Claim, which did not plead that the plaintiff had ceased to be an alien enemy.

sense of international law.[1] On the other hand, it is evident from *Rex* v. *Bottrill* that the British Government, at any rate, relies on the continued existence of Germany as a state. Which of these two contradictory views of the effect of the Berlin Declaration is correct?

The view that the German state has ceased to exist rests very largely on the—it is submitted mistaken—assumption that the Allies have in fact vested themselves with full sovereignty over Germany in the ordinary sense of that term. The Berlin Declaration is obviously a carefully drafted document and it is significant that, far from declaring that the occupying Powers have assumed the sovereignty over Germany, it studiously avoids any reference to sovereignty. It speaks only of an assumption of 'supreme authority' (*l'autorité suprême: oberste Regierungsgewalt*), which is not necessarily the same thing. For the 'supreme authority' assumed by the occupying Powers is not without qualification: it is assumed for certain stated purposes;[2] it is 'without prejudice to any subsequent decisions that may be taken respecting Germany'; it is a provisional régime to provide for 'the period when Germany is carrying out the basic requirements of unconditional surrender';[3] furthermore, it is specifically stated that 'the assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany'. Admittedly, sovereignty is not a term with a very precise legal connotation; nevertheless, it is quite clear that the powers assumed by the Allies fall something short of what is generally understood by sovereignty, and the content and legal effect of those powers must be established by an analysis of the Berlin Declaration, and not by an analysis of the general concept of sovereignty.[4]

[1] See Professor Kelsen's lucid article in *American Journal of International Law*, 39 (1945), p. 518; also the argument of learned counsel for the applicant in *Rex* v. *Bottrill, ex parte Kuechenmeister*, loc. cit.

[2] See paragraphs 2 and 3 of the preamble to the Berlin Declaration, *supra*, p. 114.

[3] See the Statement by the four Allied Governments on *Control Machinery in Germany*, Cmd. 6648.

[4] An instructive analogy is provided by the machinery employed at the end of the First World War for the transference of certain former German territories to the Mandatory Powers. By Article 119 of the Treaty of Versailles, Germany renounced in favour of the Principal Allied and Associated Powers all rights and titles over her overseas possessions. Construing this clause in *Rex* v. *Jacobus Christian, S.A.L.R.*, [1924] App. Div. 101, the Supreme Court of South Africa said: 'The expression "renounce in favour of" is sometimes used in the Treaty as equivalent to "cede to".... Not so with the overseas possessions; or at any rate such of them as fall within the operation of Article 22. They were not by Article 119 ceded to all or any of the Principal Powers, any more than the City of Danzig was ceded to them under Article 110. The animus essential to a legal cession was not present on either side. For the signatories must have intended that such possessions should be dealt with as provided in part 1 of the Treaty; they were placed at the disposal of the Principal Powers merely that the latter might take all necessary steps for their administration on a mandatory basis. The intention of the signatories seems to have been to place certain overseas possessions relinquished by Germany upon a basis new to international law, and regulated primarily by Article 22 of the Treaty.'

Similarly, in Germany, the Allies have assumed supreme authority in order to impose upon Germany a special and temporary régime, also new to international law, and without prejudice to the ultimate disposal of German territory and German government.

If, indeed, the correct view is that the German state has ceased to exist, it would seem to follow that there has been a state succession, and that certain of the rights and duties of the former German state have passed by succession to the Allied states; for example, it would then be arguable that parts of the German debts are now chargeable on the public funds of the Allied states. It cannot be supposed that such a result was within the intention of the Allied Powers in making the Berlin Declaration. On the contrary, the expressed intention is that the assumption of supreme authority over Germany is not to effect the annexation of Germany, and this qualification of the rights assumed is an essential part of the instrument which must, if possible, be interpreted in such a way as to give undoubted effect to the qualification. If the qualification that Germany is not annexed is to be given any substantial content it can only be interpreted to mean that the Allied régime stops short of creating any sort of identity between the German state and the Allied states. In so far as there is any succession, it must be a succession of governments and not of states; or to put it another way, it means that in so far as the Control Authority is acting as 'the agency through which the Government of Germany is carried on', its acts are in law attributable not to the Allied states but to the state of Germany, which is accordingly deliberately maintained in being as a legal person.

Thus to draw a distinction between government and state and to assume plenary powers of government unaccompanied by annexation of the state is admittedly unprecedented, and the question remains how far such a result is possible in law. There is, indeed, nothing novel in the idea that the persons who control one legal entity may also control a distinct legal entity. If the controlling shareholders of company X are also the controlling shareholders of company Y, the common lawyer finds no difficulty in still regarding company X and company Y as distinct legal persons; and there is no logical difficulty in applying the same reasoning to the artificial legal persons we call states. However, this does not dispose of the substantial objection that a state must nevertheless have an *independent* government if it is to qualify as a state in the sense of international as opposed to municipal law. It may very well be that Germany still exists as a legal person properly called a state but that, having no independent government, that legal personality is reduced to the sphere of constitutional law and has no validity in international law; just as Virginia is unquestionably a legal entity properly called a state in American constitutional law but, nevertheless, has no separate legal personality in international law. The criterion of statehood in international law must be the enjoyment of a sufficient degree of independent government, and the rule is fundamental to the international system: a state obviously could not be permitted to multiply itself by the

creation of subsidiary states on the analogy of the subsidiary companies of company law and to claim for those subsidiary states legal personality in international law, including for example the right of separate representation on international assemblies. But in considering the relevance of this rule to the present status of Germany, the decisive factor is the purely temporary nature of the régime set up in the Berlin Declaration. For this is a question not of the emergence of a new state but of the continued existence of an old state with a long history of independence. The presumption is therefore of her continued existence as a state,[1] and a merely provisional arrangement for carrying on her government through an agency set up by the four occupying Powers does not upset that presumption. It is of course true that the Allies have not yet finally committed themselves on the future of Germany, but their present intention is clearly that after a period of control and re-education in democratic responsibilities, Germany may be granted a new government which it is hoped will prove itself fitted eventually to resume the powers of the government of the German state.[2]

Continuance of the state of war

The certificate of the British Secretary of State declares that, no treaty of peace or declaration of peace terminating the state of war with Germany having been made, His Majesty is still in a state of war with Germany. Presumably this is also the attitude of the other occupying Powers. The technical possibility of the continuance of the state of war clearly depends upon the continued existence of the German state, for there could be no relationship of war with a state which no longer exists: that indeed is why the books usually cite subjugation as a mode of terminating the state of war, for they assume that subjugation includes annexation and in so far as annexation terminates the existence of the annexed state it must also terminate any relationship of war with that state. If, however, we are correct in saying that Germany not having been annexed the state of Germany continues to exist, it follows that a state of war between the occupying Powers and Germany remains technically possible. The fact that the Allies

[1] See Baty, *The Canons of International Law* (1930), p. 7. See also Halleck, *International Law* (Sir Sherston Baker's ed., 1878), vol. ii, p. 470, where, discussing the nature of conquest, he says: 'The title of the original owner prior to the conquest is, by the very nature of the case, admitted to be valid. His rights are, therefore, suspended by force alone. If that force be overcome, and the original owner resumes his possession, his rights revive, and are deemed to have been uninterrupted.' If the original owner resumes at the will of the conqueror it is an *a fortiori* case.

[2] See Potsdam Declaration, reported in *The Times* newspaper, 3 August 1945: 'It is not the intention of the allies to destroy or enslave the German people. It is the intention of the allies that the German people be given the opportunity to prepare for the eventual reconstruction of their life on a democratic and peaceful basis. If their own efforts are steadily directed towards this end it will be possible for them in due course to take their place among the free and peaceful peoples of the world.'

have taken over the government of Germany does not alter this position, for war is a relationship between states, not between governments. The absence of any treaty of peace or declaration of peace is not in itself conclusive that the state of war persists, for it is well known that belligerents may drift into a state of peace on the simple cessation of hostilities.[1] The mere cessation of hostilities, however, does not of itself end war; there must also be a cessation of the *animus belligerandi*, and where, as in the case before us, a belligerent state issues a categorical assertion that the relationship of war persists between it and another state and acts on that assumption,[2] there does not seem to be any real room for doubt that there is a continuing state of war in the technical sense.

The continuance of the state of war with occupied Germany is admittedly a new departure in international law. In these peculiar circumstances the state of war has become so refined and technical as practically to alter the character of the concept; for it is no longer a part of the machinery for the conduct of hostilities but has become part of the machinery of control of an already conquered enemy. It is a two-edged weapon of control, for not only does it mean that Germany can herself be treated as an enemy state, but also that her foreign relations can be conducted in accordance with the Allies' own state of belligerency. Thus, for example, in providing for the representation of third states in Germany, the occupying Powers have drawn up a sharp distinction between members of the United Nations, neutral states, and states at war with any of the occupying Powers.[3] The prolongation of the state of war after the assumption of supreme authority over the whole territory of the enemy is indeed to claim the best of both worlds; the conqueror enjoys the rights conferred by his conquest yet stops short of permitting his conquest to resolve the state of war.

German nationality

Given the continued existence of the German state it follows that German nationality also continues to exist. This point need not be laboured. As Germany has not been annexed, the inhabitants do not acquire any other nationality, and to hold that they are all now stateless would be repugnant to both law and common sense. However, the position of German nationality law under the occupation régime does merit consideration. In accordance with the accepted doctrine of international law, the investitive

[1] See Oppenheim, *International Law* (6th ed. by Lauterpacht 1940), vol. ii, pp. 465 ff. See also McNair, *Legal Effects of War* (2nd ed. 1944), p. 6.

[2] As for example in the continued application of the British Trading with the Enemy legislation to Germany.

[3] The Statement on *Control Machinery in Germany* (Cmd. 6648) provides for liaison between the Control Council and 'other United Nations Governments chiefly interested' by means of military missions. For the position of representatives of countries at war with any of the four Powers and of neutral countries, see p. 126 note 2.

and divestitive facts of German nationality are governed not by international law but by German municipal law. The ruthless denationalization policy followed by the Nazi Government is notorious; and it was primarily the rule of international law that nationality is a matter governed exclusively by municipal law that made it peculiarly difficult to make an effective attack on the denationalization policy on legal grounds. In Germany to-day the gulf between international and municipal law has been bridged. The supreme authority assumed by the occupying Powers obviously includes competence to modify the German nationality laws by Control Council legislation, and the Control Council has not been slow to change those laws so as to bring them into conformity with the requirements of natural justice. Control Council Law No. 1 of 20 September 1945[1] repeals some twenty-seven 'laws of a political or discriminatory nature upon which the Nazi régime rested', including the Reich Citizenship Law (Reichsbürgergesetz) of 15 September 1935.[2] The effect of the repealed Nazi legislation and of the Decrees made under it was to provide for the denationalization of German citizens in two cases. Firstly it provided a discretionary power to denationalize Germans who, without the permission of the German Government, had accepted service with a foreign government, and who disobeyed an order of the German Government to return to Germany.[3] The second case was not discretionary but automatic: by Section 1 of the 11th Decree in connexion with Reich citizenship of 25 November 1941[4] all Jews living abroad at the time of the coming into force of the said Decree were thereby automatically deprived of their German nationality. The effect of Control Council Law No. 1 is to abolish these two categories of denationalization, but the abrogation has no retrospective effect, so that persons who had already been deprived of their German nationality in pursuance of the Nazi legislation do not now regain it.[5]

The foreign relations of Germany

Given the premiss that the German state still exists, it follows that Germany remains a subject of international law capable of relations with third

[1] See *Official Gazette*, p. 6.

[2] *R.G.Bl.I.* 1146.

[3] Action under this first category has caused great hardship, for many persons so liable to denationalization do not know whether they were in fact deprived of their nationality or not. The Office of the High Commissioner for Refugees has accordingly provided a service for searching the Reichsanzeiger to enable these unhappy people to discover whether or not they are still German nationals.

[4] *R.G.Bl.I.* 722.

[5] Persons who were thus deprived of their German nationality while resident in the United Kingdom have found themselves in an anomalous position owing to the decisions of the English courts (see *The King* v. *Home Secretary*, [1945] 1 K.B. 7) that the German Decree of 1941 was a war measure of the German Government and therefore its effect could not be recognized by the English courts, and that no government could in time of war validly denationalize its subjects resident in enemy territory. Thus these unfortunate persons are still regarded as German nationals by English law but are stateless according to German municipal law even as modified by the Control Council.

states, and continuing to bear rights and duties *vis-à-vis* third states; but as long as the Allies exercise supreme authority in Germany it also follows that the foreign relations of Germany are conducted on behalf of the German state by the Allied Representatives. These principles are set forth in Control Council Proclamation No. 2 of 20 September 1945, addressed to the German people and containing 'certain additional requirements arising from the complete defeat and unconditional surrender of Germany with which Germany must comply'.[1]

'The Allied Representatives will regulate all matters affecting Germany's relations with other countries. No foreign obligations, undertakings or commitments of any kind will be assumed or entered into by or on behalf of German authorities or nationals without the sanction of the Allied Representatives.'

Furthermore the Proclamation makes it clear that the foreign relations of Germany will be conducted by means of machinery provided by the Allied Government of Germany, that the machinery of the former German Government is to be liquidated and that the Allied Government of Germany assumes complete control over the diplomatic, consular, and commercial representatives of third states in Germany.[2] At the time of writing (October 1946), no diplomatic, consular, or commercial machinery of representation has yet been provided by the Allies to fill the gap created by the abolition of the machinery of the former German Government, but it is understood that the provision of some such machinery is under active consideration by the Allied Control Authority. In the meantime it would seem that German foreign relations must be regarded as being provisionally in a state of suspense.[3]

Had Germany been annexed by the Allies the position would of course have been simpler: the foreign relations of Germany would have become in law and in fact the foreign relations of the annexing Powers. There would

[1] *Official Gazette*, pp. 8–19.

[2] Section III, s. 7 of Proclamation No. 2 provides:

'7. (*a*) In virtue of the unconditional surrender of Germany, and as of the date of such surrender, the diplomatic, consular, commercial and other relations of the German State with other States have ceased to exist.

'(*b*) Diplomatic, consular, commercial and other officials and members of service missions in Germany of countries at war with any of the four Powers will be dealt with as the Allied Representatives may prescribe. The Allied Representatives may require the withdrawal from Germany of neutral diplomatic, consular, commercial and other officials and members of neutral service missions.

'(*c*) All German diplomatic, consular, commercial and other officials and members of German service missions abroad are hereby recalled. The control and disposal of the buildings, property and archives of all German diplomatic and other agencies abroad will be prescribed by the Allied Representatives.'

[3] As already mentioned, provision is made for the representation of certain of the United Nations in the Joint Statement on *Control Machinery in Germany*, section 5 of which provides that: 'Liaison with the other United Nations Governments chiefly interested will be established through the appointment by such Governments of military missions (which may include civilian members) to the Control Council. These missions will have access through the appropriate channels to the organs of control.'

have been a succession of states. But as Germany is not annexed and as the German state continues to exist there can be no question of a state succession. Liabilities incurred and rights acquired by the Allied Government of Germany as against third states will inhere in the German state and not in the Allied states; although of course the position is somewhat complicated by the fact that the Allied states necessarily also bear a measure of international responsibility for their conduct of the government of Germany, so that it may often be a nice question whether a third state's right of redress lies against the state of Germany or against one or all of the Allied states.

With regard to already existing treaty rights and obligations the Proclamation provides:

'6. The Allied Representatives will give directions concerning the abrogation, bringing into force, revival or application of any treaty, convention or other international agreements, or any part or provision thereof, to which Germany is or has been a party.'

This, on the face of it, does no more than announce that the Allied Representatives are henceforward responsible for the conduct of Germany's treaty relations. It remains, however, to consider how far the Allied Representatives are bound to observe the existing treaty obligations of Germany towards third states; or, to put the same question another way, how far there is a succession of obligations as well as of rights from the former German Government to the Allied Government of Germany. If the occupation were one of the normal varieties of military occupation there would be no succession, for the legitimate government would itself remain liable, even though the possibility of fulfilling those obligations might temporarily be in suspense. Where, however, as in the present case, the former government is entirely replaced by the Allied Representatives, the position is different. According to the ordinary principles of governmental succession and the continuity of states it would seem that the Allied Government in Germany inherits the treaty relations of the former German Government intact, including both rights and obligations; except of course political treaties and the like which, being personal to the Nazi Government, have obviously been rendered obsolete by the changed circumstances, and also treaties which are abrogated or suspended by Germany's belligerency. It is apparent, however, that there is a certain reluctance to admit that the Control Authority is in the full sense of the word the Government of Germany for international purposes. It is referred to merely as the agency through which the government of Germany is for the time being carried on.[1] It may be that in thus defining the Control Authority as a provisional

[1] The following answers were given to questions in the House of Commons on 20 March 1946 (Hansard, *Parliamentary Debates*, vol. 420, p. 1856):

'*Mr. John Foster* asked the Secretary of State for Foreign Affairs whether the Allied Control Council is for international purposes the recognized Government of Germany.

'*Mr. Bevin*: The Allied Control Council is the agency through which the government of

device for the interim administration of the country and the carrying into effect of certain specific policies, the Allies seek to avoid responsibility for treaty commitments of the former German Government, and this interpretation of the position would explain the very consensual language of paragraph 6 of the Proclamation quoted above, which seems to assume that the Allied Representatives have a discretion to determine which of the treaties entered into by the former German Government shall once more be put into operation. Nevertheless, as regards third states, there would seem to be no valid reason why the occupying Powers should assume all the rights of government without incurring the corresponding liabilities. In any case, there should be no room for doubt that treaties which secure rights of third states against German property or territory will be binding on the Allied Representatives on the ordinary principles of *res transit cum suo onere*.

The control and disposal of property

The Allied Control Council has assumed extensive powers of disposal over property, mainly as a necessary preliminary step in implementing the policy of the Potsdam Declaration of breaking the concentration of German economic power in cartels and other monopolistic concerns and the removal as reparations of productive power surplus to the requirements of a peaceful economy. The details of the Control Council's property legislation are not relevant to this paper, but it will be necessary to refer briefly to some of the main provisions in so far as they raise questions of general principle.

Control Council Proclamation No. 2[1] places an embargo on the unauthorized disposal of certain kinds of property subject to the jurisdiction of the Control Council. It forbids the disposal in any way whatever without the sanction of the Allied Representatives of three kinds of property: (i) German public property whether situated inside or outside Germany; (ii) property situated outside German territory of any person resident or carrying on business in Germany; (iii) the property, whether situated inside or outside Germany, of such companies, associations, and concerns as may be designated by the Allied Representatives.[2] These provisions are not, how-

Germany is carried on, but its position and that of Germany itself are without precedent. The foreign relations of Germany as a State are in abeyance, and the status and functions of the Control Council for international purposes must, therefore, develop according to circumstances.

'*Mr. Foster*: Which is the recognized Government of Germany?

'*Mr. Bevin*: The Allied Control Council is absolutely responsible, but there are many other things such as pre-war debts and obligations, which have not yet been definitely transferred.'

[1] See *Official Gazette*, pp. 8–19.

[2] Proclamation No. 2 of 20 September 1945, Section V: '14. (*a*) The property, assets, rights, titles and interests (whether situated inside or outside Germany) of the German State, its political subdivisions, the German Central Bank, State or semi-State, provincial, municipal or local authorities or Nazi organizations, and those situated outside Germany of any person resident or carrying on business in Germany, will not be disposed of in any way whatever without the sanction of the Allied Representatives. The property, assets, rights, titles and interests (whether situated inside

ever, to be deemed to prevent sales or transfers to persons resident in Germany for the purpose of maintaining or carrying on the day-to-day national life, economy, and administration.[1] The German authorities are also to furnish the Allied Representatives with full information concerning property, assets, and the titles thereto, including information concerning and documents of title to German property and assets situated in the territories of any of the United Nations.[2] Property, assets, rights, titles, and interests situated inside Germany may not be removed outside Germany or transferred to any person resident or carrying on business outside Germany without the sanction of the Allied Representatives.[3] All gold and silver in coin or bullion situated in Germany, all foreign currency held by Germans, and all money tokens issued or prepared for issue by Germany in the territories formerly occupied by her or elsewhere are to be handed over in full to the Allied Representatives.[4]

For the administration of the vesting and marshalling of German external assets, Control Council Law No. 5 establishes a *German External Property Commission*, composed of representatives of the four occupying Powers and constituted as 'an inter-governmental agency of the Control Council vested with all necessary powers and authority'.[5] The preamble states that the reason for the establishment of the Commission is the determination of the Control Council 'to assume control of all German assets abroad and to divest the said assets of their German ownership with the intention thereby of promoting international peace and collective security by the elimination of German war potentials'.[6] By Articles II and III certain kinds of property are automatically vested in the Commission.

'All rights, titles and interests in respect of any property outside Germany which is owned or controlled by any person of German nationality inside Germany are hereby vested in the Commission.'

'All rights, titles and interests in respect of any property outside Germany which is owned or controlled by any person of German nationality outside Germany or by any branch of any business or corporation or other legal entity organised under the laws of Germany or having its principal place of business in Germany are hereby vested in the Commission.'[7]

or outside Germany), of such private companies, corporations, trusts, cartels, firms, partnerships and associations as may be designated by the Allied Representatives will not be disposed of in any way whatever without the sanction of the Allied Representatives.'

[1] Proclamation No. 2, Section V, sub-section 14 (*d*).

[2] Proclamation No. 2, Section V, sub-section 14 (*b*).

[3] Proclamation No. 2, Section V, sub-section 14 (*c*).

[4] Proclamation No. 2, Section V, sub-section 15.

[5] Control Council Law No. 5 of 30 October 1945 is published in the *Official Gazette*, pp. 27–31.

[6] See also the Potsdam Declaration: '18. Appropriate steps shall be taken by the Control Council to exercise control and the power of disposition over German-owned external assets not already under the control of the United Nations which have taken part in the war against Germany.'

[7] Article III defines 'any person of German nationality outside Germany' as applying 'only

The question of compensation to the original owners of titles thereby vested in the Commission is left to be 'decided at such time and in such manner as the Control Council may in the future determine'.[1] The Commission is to dispose of the property or the proceeds of its realization 'pursuant to such further directives as the Control Council may issue from time to time'.[2] Article IX contains the proviso that Articles II and III 'shall not apply to assets subject to the jurisdiction of the United Kingdom, British Dominions, India, Colonies and Possessions, the Union of Soviet Socialist Republics, the United States, France and any other United Nations determined by the Control Council'.

Law No. 9 of 30 November 1945[3] is more radical, in providing for the actual seizure of property owned by the I.G. Farbenindustrie, 'in order to ensure that Germany will never again threaten her neighbours or the peace of the world, and taking into consideration that I.G. Farbenindustrie knowingly and prominently engaged in building up and maintaining the German war potential'. Accordingly it is provided that all properties and assets of any nature which were, on or after 8 May 1945, owned or controlled by I.G. Farbenindustrie A.G., are seized by and the legal title therefor vested in the Control Council, and the seized plants and properties are to be controlled by a Committee consisting of four Control Officers appointed by the respective Zone Commanders. The ultimate disposal of the plant and properties is to be made in accordance with a programme of destruction, dispersal, and making available for reparation.[4]

For the legal basis of the Control Council's competence thus to dispose of German property it is not necessary to go beyond the supreme authority wielded by the Council in the government of Germany, which obviously must include power of disposal over all German property and assets, both public and private, and whether situated within German territory or not. The familiar distinction between public and private property drawn by the laws of war finds no place here, for the power involved is not a belligerent right but a right of government. Moreover, by virtue of the supreme authority the power of disposal includes the competence to pass a good title.

Complications are introduced, however, when the subject-matter is not

to a person who has enjoyed full rights of German citizenship under Reich Law at any time since 1 September 1939 and who has at any time since 1 September 1939 been within any territory then under the control of the Reich Government but shall not apply to any country annexed or claimed to have been annexed by Germany since 31 December 1937'.

[1] Article V. [2] Article VI.

[3] See *Official Gazette*, pp. 34–5.

[4] A four-power Agreement on the destruction of German war and industrial potential is reported in *The Times* newspaper, 3 October 1946. The ownership of certain basic German industries situated in the British zone is being vested in the Commander-in-Chief with a view to their eventual nationalization. See the speech of Mr. Bevin, British Foreign Secretary, in the House of Commons on 22 October 1946 (reported in *The Times* newspaper, 23 October 1946) where he says, 'the exact form of this public ownership and control is now being worked out'.

German but foreign property. There is no difficulty indeed where the rights annexed are existing German rights over foreign property, as, for example, in the seizure of charter-party rights over foreign shipping:[1] for this is no more than a compulsory assignment of contractual rights and is not inconsistent with the foreign ownership of the property. Different considerations apply if rights of disposal are claimed inconsistent with foreign ownership in property. Proclamation No. 2 of the Control Council provides that all property in Germany belonging to or held for countries, or nationals of countries, or persons resident in or carrying on business in countries, 'against which any of the United Nations is carrying on hostilities', is to be 'taken under control and will be preserved pending further instructions'. Further, that all property in Germany held for or belonging to private individuals, private enterprises, and companies of countries (other than the above countries and Germany) which have at any time since 1 September 1939 been at war with any of the United Nations will likewise be 'taken under control and will be preserved pending further instructions'.[2] These requirements do not, of course, amount to an assertion of title or power of disposal of such property by the occupying Powers; they merely provide for the safe custody of such property without prejudice to its ultimate disposal, and at the time of writing the policy of the occupying Powers in regard to such property has not yet become apparent. Nevertheless, an important question of principle is raised. The right to deal with such property other than in accordance with the rights of the owners might be asserted by the occupying Powers either as a war right or as a consequence of the conquest of the country involved, and it is important to note that in exercising such a right the Control Council must be regarded as the agent of the Allied Powers themselves and not of the German state; in short, that their action would be attributable in law to the Allied states and not to the German state. For in their capacity as the government of the German state the occupying Powers could not assert rights based on the existence of a state of war, or on the consequences of successfully waged war, between themselves and another country which country has never been in a state of war with Germany. The states which bear the rights exercised must also bear the corresponding responsibilities. Thus, the

[1] Control Council Proclamation No. 2, Section VII, provides *inter alia:*

'23. (*c*) Foreign merchant shipping in German service or under German control will likewise be made available to the Allied Representatives for such use and on such terms as they may prescribe. In the case of such foreign merchant vessels which are of neutral registration, the German authorities will take all such steps as may be required by the Allied Representatives to transfer or cause to be transferred to the Allied Representatives all rights relative thereto.

'24. Any existing options to repurchase or reacquire or to resume control of vessels sold or otherwise transferred or chartered by Germany during the war will be exercised as directed by the Allied Representatives. Such vessels will be made available for use by the Allied Representatives in the same manner as the vessels covered by sub-paragraphs 23 (*b*) and (*c*) above.'

[2] Proclamation No. 2 of 20 September 1945, Section V, sub-section 16.

German state cannot be held responsible for any claims arising out of the exercise of such rights by the Allied Government of Germany. In considering questions of responsibility towards third states it will constantly be important to bear in mind this duality of function of the Allied Representatives in Germany and to ask whether any particular act of government called in question is attributable to the German state or to one or all of the Allied states.

Judicial reform

It will be evident from the nature of the Allied occupation that the law in force in Germany remains the German municipal law, although of course the Control Council, being the Government of Germany, is fully competent to change or modify this law in any way. This situation would require no further comment were it not for the fact that so much of the German municipal law under the Nazis was a denial of the most elementary principles of natural law and justice, with the consequence that the Control Council is not merely competent to modify those laws but is under a plain duty to do so.[1] The abrogation of the Nazi denationalization laws has already been noticed,[2] and this is not the place to enter upon a detailed examination of the many reforms of the private law that have already been accomplished. Mention must be made, however, of the reform of the judicial system. The abolition of the Nazi system of justice and the re-establishing of the rule of law was urgently necessary not only on grounds of general principle but also as part of the programme of destroying the totalitarian state; for the substantial reason behind the introduction of the Führer-Prinzip and such-like notions into the legal system was still further to enhance the power of the executive and to free it from checks by the judiciary. Control Council's Proclamation No. 3[3] lays down the fundamental principles of a 'new democratic judicial system based on the achievements of democracy, civilization and justice'. The first need was clearly to abolish discriminatory practices based on racial theories: the first article of the Proclamation therefore provides,

'All persons are equal before the law. No person, whatever his race, nationality or religion, shall be deprived of his legal rights.'

Next the Proclamation guarantees certain fundamental rights to accused persons. No person is to be deprived of life, liberty, or property without due process of law. Crime is limited to offences defined by the law, and conviction by 'analogy' and so-called 'sound popular instinct' (*gesundes*

[1] Indeed it could hardly be argued that even a mere belligerent occupant is required by Article 43 of The Hague Regulations to respect the laws in force in the country to the extent of respecting laws which are contrary to natural justice.

[2] See above at p. 125.

[3] See *Official Gazette*, p. 22.

Volksempfinden) is prohibited. In any criminal prosecution the accused is to have 'the rights recognized by democratic law', viz. speedy and public trial, the right to be informed of the nature and cause of the accusation, the right to be confronted with witnesses against him, process for obtaining witnesses in his favour, and the right to assistance by counsel. All sentences on persons convicted under the Hitler régime on political, racial, or religious grounds are quashed. Finally, after abolishing the extraordinary Hitler courts, the Proclamation lays down the fundamental principles of judicial independence from the executive, and opens judicial office to 'all who accept democratic principles without account of their race, social origin or religion', their promotion to be based solely on merit and legal qualifications.

The machinery of the new justice is constituted by the Control Council's Law No. 4 of 30 October 1945.[1] It is a reversion to the structure of courts of the Weimar Republic, re-establishing the threefold system of Amtsgerichte, Landsgerichte, and Oberlandsgerichte. Their jurisdiction is to be as laid down by the law in force on 30 January 1933, with a few minor changes, except that certain offences affecting Allied forces or subjects are reserved to the Allied military courts.

III. *The Allied occupation and international law*

There remains the question, What is the legal basis and justification of the rights assumed by the occupying Powers? The importance of the question is obvious, and it must be answered by the application of general principles of international law. It will be appreciated at once that the Berlin Declaration of 5 June creates a situation that does not fit easily, if it fits at all, into orthodox legal categories. Nevertheless, it is not sufficient merely to describe the Allied occupation as *sui generis*, for to do so is to beg the question of the basis and limits of its legality. It must be assumed that behind the orthodox categories of situations there are general principles of law applicable to new situations.

The main principles of the law governing military occupations of territory are well established. A clear distinction is drawn between mere belligerent occupation and other forms of occupation, the reason being that belligerent occupation is regarded as a purely provisional status in which the occupant's rights are limited by the laws of war, particularly as they are defined in Articles 42 to 56 of The Hague Regulations, by which the belligerent occupant's rights are in general limited to those necessary either for the prosecution of the war or for the day-to-day administration of the territory. He does not in any sense enjoy sovereignty, for until the con-

[1] *Official Gazette*, pp. 26–7.

quest is completed the sovereignty is still vested in the legitimate government of the territory. The position is put very clearly by Halleck, who writes with great authority on these matters:

'The term *conquest*, as it is ordinarily used, is applicable to conquered territory the moment it is taken from the enemy; but, in its more limited and technical meaning, it includes only the real property to which the conqueror has acquired a *complete title*. Until the ownership of such property so taken is confirmed or made complete, it is held by the right of *military occupation* (*occupatio bellica*), which, by the usage of nations and the laws of war, differs from, and falls far short of, the right of *complete conquest* (*debellatio, ultima victoria*).'[1]

The practical basis of this doctrine is that although the acquisition of title to territory by force of arms is a concession to the rule of might that must be allowed by a comparatively undeveloped system of law, the law is nevertheless strong enough to insist that in order to confer title the conquest shall in fact be complete; it is not complete so long as the final issue of the conflict remains in any doubt, and as long as the final issue of the arbitrament of force is in doubt an occupation of enemy territory is at most a belligerent occupation and cannot legitimately be enlarged. In Hall's phrase, the occupier is a mere belligerent occupier so long as 'the intention or proved ability to appropriate his enemy's territory is still wanting'.[2]

However, when considering the implications of the classic statements of the law it must be borne in mind that the writers are naturally assuming as a fact that a war will follow the ordinary sequence of events followed by all the wars with which they were familiar; namely, that the final victory of one side (*ultima victoria*) results, if not in treaty arrangements, then in the annexation of the defeated state and the consequent ending of the state of war,[3] so that *ultima victoria* and *debellatio* are always thought of as being, if not the same thing, at any rate necessarily coincidental. We must be careful not to mistake these assumptions of fact for assumptions of law, for this has led to the canvassing of two heresies: (i) that belligerent occupation and annexation constitute a sort of legal dichotomy so that anything short of complete annexation must be at most belligerent occupation; and (ii) that there cannot be more than belligerent occupation so long as a state of technical war continues to exist,[4] even though hostilities have ceased in the complete defeat of one of the belligerents.

The fallacy of this too literal interpretation of the older formulations of

[1] *International Law* (Sir Sherston Baker's ed. 1878), vol. ii, p. 444. Halleck here uses the term 'military occupation' as equivalent to what we have called 'belligerent occupation'.

[2] *International Law* (8th ed. 1924), p. 553.

[3] For by annexation the annexed state ceases to exist and there can be no war with a state which no longer exists.

[4] See, e.g., a learned comment in this *Year Book*, 19 (1938), p. 237, on *Bank of Ethiopia* v. *National Bank of Egypt*, [1937] 1 Ch. 513, by an anonymous contributor who says, *inter alia*: 'The test [of belligerent occupation] is whether the war is over or not, and for the court whether the government have recognized that it is over.'

the law becomes apparent when we consider the present position of the occupying Powers in Germany, for here the events have not at all followed the normal sequence assumed by the commentators. The Allies have enjoyed a final victory as decisive as any in the history of warfare: not only is the whole of German territory under Allied occupation, not only have her fighting services surrendered unconditionally, but her former legitimate government has been completely destroyed. But this supreme example of what Halleck calls *ultima victoria* has resulted, as we have seen, neither in the annexation of the defeated state nor in the termination of the technical state of war. Far from the *ultima victoria* and *debellatio* being coincidental, the Allied régime which we have to consider is a régime interposed between *ultima victoria* and *debellatio*. Into which category then does this novel régime fall? Is the crucial test the *ultima victoria* or the *debellatio*? It is submitted first that the Allied occupation is certainly not a belligerent occupation, and secondly that on the contrary the Allies enjoy a good title to supreme authority, by subjugation.

A brief consideration of the position in Germany to-day will suffice to demonstrate that a final victory which results in the destruction of the government of the occupied territory and the cessation of all hostilities is of itself sufficient to end the status of belligerent occupation whether or not it be accompanied by the ending of a purely technical state of war.[1] The law of belligerent occupation is designed to serve two purposes. First, it is intended to protect the sovereign rights of the legitimate government of the occupied territory, and the denial of sovereignty to the occupant is therefore accompanied by the corollary that the sovereignty still resides in the legitimate government. In Germany there is no longer in existence any German government in which the sovereignty could be said to reside. In these circumstances it must be not only lawful for the occupant to assume powers over and above those necessary for the day-to-day administration of the territory: it is his duty to do so, because being in sole control of the territory he must assume responsibility for carrying on all aspects of government. To insist that the Allied occupation should conform to the limits of The Hague Regulations would be to insist on the maintenance of a governmental vacuum; it is inconceivable that that is the law. Secondly, the law of belligerent occupation is designed to protect the inhabitants of the occupied territory from being exploited for the prosecution of the occupant's war in ways which are forbidden by the ordinary rules of war. Clearly this principle again can have no application in a war which is a

[1] This is not to say, of course, that *ultima victoria* is invariably the proper criterion of belligerent occupation, for there may be *debellatio* without *ultima victoria* as when indecisive fighting is brought to an end by a treaty between the belligerents; such a treaty of peace would end all possibility of belligerent occupancy as plainly as *ultima victoria* unaccompanied by *debellatio* does in the case before us.

purely technical status in which all possibility of active hostilities has ceased. Thus the whole *raison d'être* of the law of belligerent occupation is absent in the circumstances of the Allied occupation of Germany, and to attempt to apply it would be a manifest anachronism.

However, the legal basis of the Berlin Declaration of 5 June cannot be established merely by demonstrating the inapplicability of The Hague Regulations to the case. The assumption of supreme authority must be supported by a demonstration of positive title, and this brings us to our second submission that the Allies enjoy a good title by subjugation. A successful belligerent may acquire title to his enemy's *imperium* either by treaty of cession or by subjugation. The former German Government having ceased to exist, there can be no question of a transfer of title by treaty, so the question resolves itself into whether or not the occupying Powers can claim title to supreme authority as a result of subjugation.

Among the writers there is general agreement on the essentials of subjugation or conquest.[1] Bouvier defines conquest as 'the acquisition of the sovereignty of a country by force of arms, exercised by an independent power which reduces the vanquished to the submission of its empire'.[2] 'There is subjugation', says Rivier, 'when a war is terminated by the complete defeat of one of the belligerents, so that all his territory is taken, the authority of his government suppressed, and he ceases in consequence to exist as a State.'[3] In an illuminating discussion of the law Halleck says, 'By the term *conquest* we understand the *forcible* acquisition of territory admitted to belong to the enemy. It expresses not a *right*, but a *fact* from which rights are derived. Until the fact of conquest occurs there can be no rights of conquest.'[4] Oppenheim defines subjugation as 'extermination in war of one belligerent by another through annexation of the former's territory after conquest, the enemy forces having been annihilated'.[5] It will be seen that all these definitions have this in common: they all expressly or impliedly postulate the extinction of the vanquished state by annexation to the conquering state as an essential ingredient of subjugation.[6] Now it is, of course, true that the mere fact of final victory over the enemy is not of itself sufficient to confer any sort of title on the victor, for this in itself does not produce legal results; there must also be an assumption and exercise

[1] The terms 'subjugation' and what some of the older writers call 'conquest in its technical sense' are, of course, synonymous.

[2] *Law Dictionary* (1856), see under 'conquest'.

[3] *Droit des Gens* (1896), vol. ii, p. 436.

[4] Op. cit., p. 470.

[5] *International Law* (6th ed. by Lauterpacht, 1940), vol. ii, p. 467.

[6] See also Westlake, *International Law* (1910), pt. i, p. 64: 'The extinction of a State by conquest will take place when the conquering power has declared its will to annex it, and has established its authority throughout the territory, any opposition still made being on the scale of brigandage rather than of war, and no corner remains in which the ordinary functions of government are carried on in the name of the old State.'

of the rights to which title is claimed by virtue of the conquest.[1] But must the rights assumed amount to complete annexation of the state in order to confer a good title? The writers speak only of annexation because they assume that a victor who does not reinstate the legitimate government and make a treaty with it will always annex. The Berlin Declaration shows that there is a third possible course which had not occurred to the writers; that is, to draw a distinction between the government and the state, and to assume all the powers of the former while stopping short of annexing and therefore extinguishing the latter. If, after the German surrender, the Allies had indeed annexed the German state there could have been no doubt about the nature of their right in law to do so; the circumstances would have fitted neatly and unquestionably into the familiar category of subjugation. But if as a result of the Allied victory and the German unconditional surrender Germany was so completely at the disposal of the Allies as to justify them in law in annexing the German state, it would seem to follow that they are by the same token entitled to assume the rights of supreme authority unaccompanied by annexation; for the rights assumed by the Allies are coextensive with the rights comprised in annexation, the difference being only in the mode, purpose, and duration of their exercise, the declared purpose of the occupying Powers being to govern the territory not as an integral part of their own territories but in the name of a continuing German state. It is not suggested, of course, that an assumption of anything less than supreme authority could be justified in law by subjugation; if the Allies had chosen only to assume rights over Germany which left even the German Government in existence there could have been no question of title by subjugation because such rights would in law remain vested in the legitimate government unless and until they were ceded by treaty. Where, however, the former government is completely extinguished, the whole of its authority being assumed by the conqueror, there must be a good title to those rights by virtue of subjugation. The fact that the conqueror chooses to exercise those rights as the government of the still existing though conquered state—in short, to take its government into commission—cannot vitiate his entitlement to those rights, any more than a finder in English law would forfeit his legal title to the thing he finds by immediately declaring a trust of it.

It remains to consider the Final Act of Unconditional Surrender.[2] This

[1] For, as Oppenheim points out, 'a belligerent, although he has annihilated the forces and conquered the whole of the territory of his adversary, and thereby brought the armed contention to an end, may nevertheless not choose to exterminate the enemy State by annexing the conquered territory, but may conclude a treaty of peace with the expelled or imprisoned head of the defeated State, re-establish its Government, and hand back to it the whole or part of the conquered territory. Subjugation takes place when a belligerent, after having annihilated the forces and conquered the territory of his adversary, destroys his existence by annexing the conquered territory' (op. cit., vol. ii, p. 467).

[2] See above at p. 112, note 1.

document was executed by representatives of the German High Command. It is generally accepted law that an instrument of surrender executed by military authorities is a purely military instrument and cannot do more than regulate the surrender of the military forces, unless, indeed, it be afterwards ratified by the political authorities.[1] It may be said that when the representatives of the German High Command executed this instrument there were no longer any German political or other authorities, and that, the High Command being the only German organization capable of exercising any authority in respect of Germany, the High Command must therefore be regarded as having been competent to act not only on behalf of the armed forces but also for Germany as a whole. It is not necessary to decide this question, for the Final Act of Unconditional Surrender does not purport to do more than to effect the surrender of the armed forces. It does, however, state that it is without prejudice to, and will be superseded by, any general instrument of surrender imposed by, or on behalf of, the United Nations and applicable to Germany and the German armed forces as a whole.[2] This imposed general instrument of surrender is the Berlin Declaration of 5 June 1945 which begins by reciting the fact of the 'unconditional surrender of Germany'.[3] This Declaration is not executed by any of the former German authorities, political or otherwise; it is executed by the occupying Powers by virtue of an authority over Germany which they already possess, and the mere fact of its unilateral imposition is evidence of the accomplished fact of the unconditional surrender of Germany as a whole. What is the relevance of this fact of unconditional surrender to the title of the occupying Powers to supreme authority in Germany? International law knows no title by surrender; where there is a surrender by the political authorities of a state the title is either conferred by cession or is acquired by subjugation. The Final Act of Unconditional Surrender of Germany is not a treaty executed by the former Government of Germany whereby that Government has abdicated its authority to the Allies; if it were, it would have conferred a title derived from the authority of that former Government. On the contrary, the former German Government had already ceased to exist; Admiral Dönitz's self-styled government was never recognized, was not in fact capable of exercising authority, was of doubtful legitimacy even in German municipal law, and in any case never executed the instrument of surrender. Obviously, therefore, the title of the occupying Powers is an original title by subjugation, and the juridical significance of the instrument of unconditional surrender is that it provides the best possible evidence of the complete conquest which is an essential ingredient of title by subjugation.[4]

[1] See Oppenheim, op. cit., p. 430. [2] Para. 4. [3] See above at p. 113.
[4] On the *original* nature of title by subjugation see Halleck, op. cit., at p. 470, where he dis-

Thus far we have considered the Allied occupation of Germany only in relation to what may be called the ordinary law of nations, and that relation is of obvious importance. Nevertheless, it would be a grave error to permit the consideration of the ordinary rules governing military occupations to obscure the fact that in the Allied occupation of Germany there are involved higher and much more important principles of international law and government. The rules of the ordinary law, formulated in the late nineteenth and early twentieth centuries, before the Covenant of the League of Nations, the Briand–Kellogg Pact, and the Charter of the United Nations, belong to a stage of international law which took aggressive war for granted and had temporarily abandoned the attempt to distinguish between just and unjust wars. This is not to say that these rules are obsolete; but it is certain that they are of themselves totally inadequate to meet contemporary needs. To hold that when a state wages aggressive total war contrary to its most solemn covenants, its occupation and control thereafter by members of the United Nations is in the last resort to be judged and limited by the ordinary laws of military occupation, would be to admit an anachronism of the most damaging kind.[1] Municipal law does not deal with a criminal by applying the individualistic concepts of the law of property.

It is not suggested, of course, that there are already formulated and accepted rules of this higher law; the most that can be claimed is that the situation in Germany provides an occasion appropriate for the development of a new legal technique and that this aspect of the situation should be recognized when considering the legality of the occupation and of the acts of the occupying Powers. It is possible, however, to lay down certain general principles by which the occupation ought to be judged and to which it ought to conform. First, if the occupying Powers are to claim rights under an international constitutional law, those rights must be exercised for constitutional purposes; that is to say, not for the individual benefit or aggrandizement of the occupying Powers (apart from the enforcement of just reparation) but in the interest and for the benefit of the

cusses the nature of 'conquest', using the term in the sense of completed conquest or subjugation: 'The rights of conquest are derived from *force* alone. They begin with possession, and end with the loss of possession. The possession is acquired by force, either from its actual exercise, or from the intimidation which it produces. There can be no antecedent claim or title, from which any *right* of possession is derived: for if so, it would not be a *conquest*. The assertion and enforcement of a *right* to possess a particular territory do not constitute a *conquest* of that territory.'

[1] See the Judgment of the International Military Tribunal at Nuremberg, *The Times* newspaper, 1 October 1946: 'In the opinion of the Tribunal the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the pact.'

community of nations at large. Such a programme, indeed, the main item of which must be the effective control and re-education of a recalcitrant member of that community, the occupying Powers have laid down for themselves in the Potsdam Declaration of 2 August 1945.[1] Secondly, the occupation can no longer be considered the concern only of the occupying Powers themselves, but becomes the common concern of all the United Nations. If the government of Germany is to be carried on in the name of the United Nations, the ultimate responsibility of the occupying Powers must also inhere in the United Nations, who must, moreover, be allowed more than a nominal part in the determination of the policy to be followed. This principle again has been clearly recognized by the occupying Powers in their own declaration and Statements.[2]

IV. *Summary of conclusions*

The main propositions submitted in this article may be summarized as follows:

1. Supreme authority in Germany has been assumed by, and is vested in, the four Allied Governments jointly.

2. The exercise of that authority has been devolved upon the Commanders-in-Chief, each in his own zone, and jointly in the chief matters affecting Germany as a whole, thus providing a machinery through which the government of Germany can be carried on pending a final settlement. In exercising that authority, the Commanders-in-Chief are the agents of the four Allied Governments jointly, from whom their authority is derived.

3. Meanwhile, the German state still exists, having been deliberately kept in being by the Berlin Declaration of 5 June 1945.

4. A state of technical war continues to exist between the United Kingdom and the state of Germany.

5. The Allied occupation is not a belligerent occupation within the meaning of Articles 42–56 of The Hague Regulations.

6. The title of the Allied Governments to the rights they have assumed is founded in a form of completed conquest or subjugation; for although subjugation in its ordinary meaning is a conquest coupled with annexation of the enemy state, the same legal principles apply to a conquest coupled

[1] See *The Times* newspaper, 3 August 1945.

[2] See, for example, the Statement of the four occupying Governments of 5 June 1945: 'By the Declaration regarding the defeat of Germany issued at Berlin on the 5th June, 1945, the Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic have assumed supreme authority with respect to Germany. The Governments of the four Powers hereby announce that it is their intention to consult with the Governments of other United Nations in connection with the exercise of this authority.'

See also the Berlin Declaration (p. 113 above) stated to be made by the Allied Representatives 'acting by authority of their respective Governments and in the interests of the United Nations'. Also para. 4 of the Final Act of Unconditional Surrender, quoted above in note 1, pp. 112–13.

with an assumption of the enemy's governmental powers, always provided the former enemy Government has ceased to exist. This new departure, which uses conquest to provide a machinery of international control instead of a machinery of aggrandizement, is a sublimation of the old law of conquest which may prove to be an important advance in international law.

7. The foreign relations of the German state are generally in a state of suspense, but the Allied Representatives may act on behalf of the German state in that regard and, in so far as they do so, the rights acquired and the obligations incurred will attach to the German state.

8. How far the Allied Representatives are bound to bring into renewed operation still-existing German treaties with third states entered into by the former German Government is a matter of some doubt. Those treaties clearly still bind the German state, but their operation might be regarded as being suspended pending the formation of a new German Government. There can be no doubt, however, that in so far as the Allied Representatives exercise rights under these treaties, or acquire control of German property to which they attach, the Allied Representatives are bound by the corresponding obligations. It must be noted, however, that such obligations would attach to the Allied Representatives, not to the Allied states; there is no succession of states, the question being only how far there is a succession of governments.

It is scarcely necessary to add that conclusions drawn little more than twelve months after the inception of the experiment in Germany are necessarily tentative. It would be foolish at this stage[1] to attempt any final assessment. The success or failure of the experiment is a matter which still lies in the future. Events are moving rapidly and there may be radical changes both in the structure and in the policy of the occupation. This much may be said, however: if properly used, this novel machinery of taking the government of a state into commission may add a powerful new instrument of control to the vocabulary of international law.

[1] October 1946.

SOME LEGAL PROBLEMS OF THE U.N.R.R.A.

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OF the many international organizations created as the result of the war, the United Nations Relief and Rehabilitation Administration, popularly known as U.N.R.R.A., was the first to get going. A year after the conclusion of hostilities in Europe, the United Nations Organization, the Food and Agriculture Organization, the United Nations Educational, Scientific, and Cultural Organization, the International Bank, the International Monetary Fund, and other agencies set up during and after the war were all very much in their infancy. By that time U.N.R.R.A. had a staff of nearly twelve thousand international officials, of forty-seven nationalities, working in forty-one different countries; it had shipped over ten million tons of relief and rehabilitation supplies to fifteen countries devastated by the war; it had spent nearly three billion dollars; and it was caring for nearly a million 'displaced persons' in camps which it was administering in Germany, Austria, Italy, the Middle East, East Africa, and Shanghai. It may therefore be of interest to international lawyers, and perhaps of some use to other international organizations, to have a brief description of some of the problems which have confronted the legal staff of U.N.R.R.A.[1]

1. *The Constitution of U.N.R.R.A.*

U.N.R.R.A. was created by an international agreement concluded in Washington on 9 November 1943.[2] This Agreement was signed by the representatives of the forty-four United and Associated Nations whose Governments constituted the original members of the Administration. Four other countries were subsequently admitted to membership.[3] The U.N.R.R.A. Agreement established the existence of the Administration and conferred on it the 'power to acquire, hold and convey property, to enter into contracts and undertake obligations . . . and in general to perform any legal act appropriate to its objects and purposes'.[4] The principal function

[1] The narrative which follows is a purely personal account compiled by a member of the legal staff of U.N.R.R.A. Any opinions expressed are the author's own. The article carries no official stamp whatever. It is, however, based on the experience obtained in over two years' work for U.N.R.R.A. in Albania, Austria, France, Germany, Italy, the United Kingdom, and the United States.

[2] Treaty Series, No. 3 (1943), Cmd. 6491.

[3] Denmark, Byelorussian S.S.R., and Ukrainian S.S.R. in August 1945 (Resolutions 62 and 63 of the U.N.R.R.A. Council); Turkey in March 1946 (Resolution 84).

[4] Article I (1).

of the Administration was defined as 'to plan, co-ordinate, administer or arrange for the administration of measures for the relief of victims of war in any area under the control of any of the United Nations . . . '.[1]

The constitution of U.N.R.R.A. was rather similar to that of the United States, at least in the separation of the legislative and executive powers. The policy-making functions were vested in a Council, consisting of all Member Governments and meeting at least twice a year;[2] the Council was served by an elaborate system of committees, to which further reference will be made below.[3] The executive authority was vested in a Director-General, who had 'full power and authority for carrying out relief operations . . . within the broad policies determined by the Council or its Central Committee',[4] and who controlled the activities of the U.N.R.R.A. staff throughout the world. Some measure of control by the Great Powers over general policies was inserted by the establishment of a Central Committee, in which was vested the power of making policy decisions of an emergency nature between sessions of the full Council.[5] The Central Committee also had the powers of nominating members of various committees between Sessions of the Council,[6] of convening the Council,[7] and of nominating the Director-General for appointment by the Council.[8] In addition, certain articles of the Agreement could only be modified with the unanimous approval of the Central Committee.[9] In August 1945 the powers of the Central Committee were further enlarged by requiring its approval for the Director-General's programmes of operations.[10] The Central Committee consisted originally of the representatives of the four Great Powers[11] with the Director-General presiding without vote. The influence of the Great Powers was subsequently somewhat modified by the addition of five other members.[12]

The Administration having been created by the signature of the U.N.R.R.A. Agreement, the Council proceeded immediately to hold its First Session at Atlantic City and to lay down the policies which would govern its work. Some of these policies were no more than amplifications of the principles already established in the original Agreement. A few of them call for mention here. The first was a principle which governed all U.N.R.R.A.'s work, namely, that the Administration would not operate in any area except with the consent of the government or recog-

[1] Article I (2) (*a*).
[2] Article III.
[3] See Section 9.
[4] Article IV.
[5] Article III (3).
[6] Article III and Resolutions 18–26.
[7] Article III (2).
[8] Article IV (1).
[9] Article VIII (*b*).
[10] Resolution 80.
[11] China, U.S.S.R., U.K., U.S.A. (Article III (3)).
[12] Canada and France (added by Resolution 77 in August 1945); Australia, Brazil, and Yugoslavia (added by Resolution 83 in March 1946).

nized national authority or military command concerned.[1] The second was the principle of non-discrimination: that relief and rehabilitation shall be distributed or dispensed fairly on the basis of the relative needs of the population, and without discrimination on account of race, creed, or political belief.[2] The third was the financial plan of the Administration: that all Member Governments should contribute to the administrative expenditure of the organization, but that only those governments whose territory was not occupied by the enemy were asked to contribute to the operating expenses; further, that relief and rehabilitation supplies and services were only furnished without payment to those countries which were formally determined, on the advice of a special committee, to be unable to pay with suitable means of foreign exchange.[3] This means, broadly speaking, that the Member Governments of U.N.R.R.A. fell into three categories: those which contributed but received nothing (for example, the United Kingdom and the United States of America); those which neither contributed nor received (for example, the Western European countries); and those which received but did not contribute (for example, China, Greece, Yugoslavia).[4] The fourth principle which should be mentioned is that the Administration was not authorized to operate in ex-enemy territory except with the express and specific approval of the Council for the operations contemplated.[5] In the fifth place the chief function which the Administration was intended to fulfil, apart from the provision of relief for the United Nations countries which could not afford to pay, was the repatriation of persons displaced from their homes by reason of the war.[6]

Subsequent to the First Session of the U.N.R.R.A. Council at Atlantic City in November 1943, later Sessions were held in Montreal in September 1944, London in August 1945, and again in Atlantic City in March 1946. At the time of writing the Fifth Session is planned for Geneva in August of 1946. The first four Sessions of the Council adopted ninety-two separate Resolutions, which constitute the legislation governing the

[1] Resolution 1 (1).

[2] Resolution 2 (2).

[3] Resolution 14. The special committee is provided for in Resolution 23.

[4] Though the second and third categories do contribute to the comparatively small administrative expenditure of the Administration. It should be added that some governments in the second and third categories made operating contributions even though under no obligation to do so. For example, France and Norway (in the second category) made cash contributions; Czechoslovakia and Poland (in the third category) contributed respectively sugar and coal. Further, all governments receiving relief without payment did meet the administrative expenses incurred by U.N.R.R.A. in their own countries and agreed to devote to relief and rehabilitation purposes the local currency derived from the sale of U.N.R.R.A. supplies. It should also be mentioned that certain countries which were not members of U.N.R.R.A. have contributed to the U.N.R.R.A. relief programmes, e.g. Argentina and Portugal.

[5] Article I (1) (3).

[6] Resolution I (II) (2).

activities of the Administration (as the Director-General and his staff were commonly called).[1]

2. *Functions of the U.N.R.R.A. Legal Staff*

The Governments of the United States and the United Kingdom having been principally responsible for the creation of U.N.R.R.A., and being by far the largest contributors to its expenditure,[2] the greater part of the staff was of American and British nationality.[3] The Headquarters of U.N.R.R.A. was set up in Washington immediately after the First Council Session, and a European Regional Office, which became the Headquarters for Europe, was opened shortly thereafter.[4] The greater proportion of the staff of the Washington office was, perhaps naturally, American, and of the London office British. As a result, there was a tendency to follow American methods of administration and organization in Washington, and British methods in London; though in the two years which intervened each was leavened with a considerable admixture of the other. This development has had an interesting effect on the legal staff and their activities.

At the very outset a General Counsel was appointed as one of the senior members of the Headquarters staff in Washington, with a small staff of lawyers working under his direction. From the outset he and his office played an important part in the activities of U.N.R.R.A. Headquarters, in the formulation of policies, and the direction of U.N.R.R.A. operations throughout the world. The work of the General Counsel was not purely legal. He was also the guide, counsellor, and friend of the person in charge who was called upon to make the big decisions; he was also, of course, responsible for such legal work as did occur; in addition, he contributed largely to many activities which would only constructively be considered as of a legal nature. This broad conception of the functions of the General

[1] The Resolutions of the U.N.R.R.A. Council have been published by the Stationery Office as follows: First Session, Cmd. 6497 (1943); Second Session, Cmd. 6566 (1944); Third Session, Cmd. 6682 (1945); Fourth Session, Cmd. 6815 (1946).

[2] The U.S.A. actually contributed about 73 per cent. of the total operational expenditure and the U.K. 16 per cent. Nearly all contributing governments followed the recommendation of the U.N.R.R.A. Council by contributing approximately 1 per cent. of their national income for the year ending 30 June 1943. A second 1 per cent. contribution was called for at the Third Session of the Council in August 1945, and the majority of the governments, including the principal contributors, responded to this appeal.

[3] Out of a total staff on 31 March 1946 of 11,577, the following were the principal elements by nationality: Australia 212, Belgium 619, Canada 402, Czechoslovakia 129, Denmark 132, France 1,042, Netherlands 541, New Zealand 53, Norway 78, Poland 226, South Africa 56, U.K. 3,704, U.S.A. 3,734, U.S.S.R. 44.

[4] By Article III (5) of the U.N.R.R.A. Agreement the Committee of the Council for Europe took over the functions of the Inter-Allied Committee on Post-War Relief established in London at the St. James's Palace Conference on 24 September 1941. The European Regional Office of U.N.R.R.A. similarly took over a large part of the staff of the Allied Post-War Requirements Bureau, which was in the service of the Inter-Allied Committee.

Counsel was subsequently adopted in the European Regional Office in London.

There was, of course, a danger in this. The role of the General Counsel as the general policy adviser meant that he was liable to become involved in almost all the activities of the Organization. The extension of his functions therefore was to be matched by the cultivation of his tact, and he was to be very careful not to become a busybody interfering in other people's business. So long as he acts with discretion and bears this danger in mind, the General Counsel in an international organization can play an unusually useful and important role. A newly created agency inevitably faces peculiar difficulties by reason of its newness. There is no tradition of administration by which the various members of the organization know their part in the composite whole and by which the delicate questions of jurisdiction and delegation of authority are often solved by instinct, if by no other rule. Assemble your new Administration from forty nationalities, and scatter it all round the globe, and these difficulties are multiplied a hundredfold. It is not suggested that the General Counsel, or even an archangel, could overcome these difficulties alone; it is believed, however, that in a large organization consisting principally of specialists in different fields, the General Counsel and his staff, by knowing a little about most things that the organization is doing, can help more than others to weld together the heterogeneous elements and provide a consistent thread of common policy throughout the variegated whole. This sounds somewhat general. To make it clearer, let us imagine an American, an Englishman, and a Russian all occupying senior positions in the same international organization and each carrying on negotiations with a different government about the same problem. Even if they have identical instructions, the results of the negotiations, given the different outlook of the negotiators and the different viewpoints of the three governments with which they are dealing, are liable to be widely divergent. But one person of ability, familiar with the general policy and with some knowledge of the countries in question, to assist in these negotiations, has a much better chance of achieving some consistency of policy and of method of operations. It may be objected that this person does not need to be a lawyer. This is so. Yet it seems to work out in practice that the lawyers are, more often than not, the persons best qualified for this particular type of job. They also perform the same function in the more routine but more frequent problems of co-ordinating into one consistent policy the divergent views of many specialists with different technical and national backgrounds.

What qualifications are required for this work? First, to be a good lawyer without being legalistic. The legal point of view should be a means to an end, and not an end in itself. The legal adviser who confines himself

to rendering opinions that something is, or is not, permissible, from the legal point of view, is of little use, and tends to be regarded as obstructive from the number of occasions when he has to say 'no'. He is much more useful if he can participate in the formulation of policies and in the development of ideas and influence them in such a way that it is never necessary to exercise a legal veto. Secondly, a knowledge of international law, or of diplomatic practice, is highly desirable. The second of these is really more important than the first. An operating international agency is confronted with comparatively few problems of the type which are discussed in Grotius or in Oppenheim or by the Permanent Court; on the other hand, it is constantly negotiating with governments for agreements, both formal and informal, on a great variety of subjects. The chancellery therefore affords a better training than the schoolroom. Thirdly, administrative experience, preferably in government work, is almost essential. The legal adviser unfortunately cannot exercise his learning in a secluded library and a leisurely style. If he is to make his influence felt, he must discharge administrative responsibilities at the heart of a busy office, where he will always have too much to do and be constantly pressed to keep up with the flow of work. Experience of government departments as they are, particularly in war-time (and not as they are popularly supposed to be), would seem as good a qualification for the hurly-burly of this life as any other. Lastly, it is highly desirable that he should be travelled and have some knowledge of other peoples and of their points of view. A committee with representatives of a dozen different countries is enough of a trial in the best of circumstances. How much more so to the individual in whose eyes all foreigners are strangers!

3. *Agreements with Governments*

Probably the most important function which the U.N.R.R.A. legal staff had to undertake was the drafting and negotiation of the agreements with the various governments and other authorities defining the basis of U.N.R.R.A. operations in the various parts of the world. Broadly speaking these agreements fell into two main types: agreements with governments about relief operations and agreements with military authorities about assistance to displaced persons.

The relief agreements were based on a prototype which was prepared in the Washington Headquarters office during the early days of planning and before the war had advanced far enough to permit the shipment of relief supplies. It is a tribute to those who produced the original model draft that it was used successfully in all countries where U.N.R.R.A. was operating a relief programme with very few modifications; these were due to the individual requirements of particular countries or to subsequent

developments in policy. The standard U.N.R.R.A. Agreement provided for the furnishing by the Administration of relief and rehabilitation[1] supplies and services without requiring payment in foreign exchange; for the transfer of these supplies to the government of the country at the port of unloading or at the frontier; for the distribution of the supplies by the government in accordance with the policies of the U.N.R.R.A. Council (distribution according to need and non-discrimination); for the utilization of the proceeds of sale of the supplies that are sold for further relief and rehabilitation purposes within the country; for the establishment of an U.N.R.R.A. Mission to observe the distribution of supplies and discharge the Administration's other functions in implementation of the Agreement; for the granting to U.N.R.R.A. and U.N.R.R.A. personnel the facilities, privileges, and immunities recommended in the Resolutions of the Council;[2] for the exchange of information, and for termination of the agreement.

The first agreement on these lines was concluded with the Government of Czechoslovakia in February 1945.[3] Similar agreements were concluded subsequently with the Governments of Greece (March 1945), Yugoslavia (March 1945), Albania (August 1945), the Dodecanese[4] (August 1945), Poland (September 1945), China (November 1945), the Byelorussian S.S.R. (December 1945), the Ukrainian S.S.R. (December 1945), Italy[5] (January 1946), Austria[6] (April 1946), and Ethiopia (July 1946). Informal

[1] 'Rehabilitation', as used by U.N.R.R.A., means assistance necessary to enable a recipient country to produce and transport relief supplies for its own and other liberated countries; it includes 'the rehabilitation of public utilities and services, so far as they can be repaired and restored to meet immediate basic needs: such essentials as light and water, power, transportation and communication. These needs include rehabilitation of essential relief industries, such as those which provide food, shelter, clothing, medical supplies' (Resolution 12 (1)). 'The task of rehabilitation must not be considered as the beginning of reconstruction—it is coterminous with relief' (Resolution 12 (11)). See also Resolution 53.

[2] Resolutions 32, 34, 36.

[3] Six supplementary agreements were subsequently concluded with the Government of Czechoslovakia in April 1945, relating to the expenditure of the proceeds of sale of U.N.R.R.A. supplies on the following relief and rehabilitation projects: health services, welfare service, agricultural rehabilitation, rehabilitation of industry and public utilities, assistance to Czechoslovak displaced persons after their repatriation, assistance to non-Czechoslovak persons displaced in Czechoslovakia.

[4] Assistance to the Dodecanese (an ex-enemy area) was specially authorized by the U.N.R.R.A. Council in Resolution 59; the Dodecanese being without a government, the Agreement was concluded with the British Military Administration, which was the 'authority (military or civil) exercising administrative authority in the area concerned' (Resolution 1).

[5] An earlier agreement with Italy in March 1945 provided only for a limited programme of health and welfare services and assistance to displaced persons, which the Administration was authorized to undertake by a special Resolution of the Council (Resolution 58), Italy being ex-enemy territory. A similar agreement for limited assistance was concluded with San Marino in July 1945. Subsequently, in August 1945, the Council authorized a full programme of assistance to Italy (Resolution 73), and after U.N.R.R.A. had been furnished with further funds in December 1945 a general relief agreement with Italy in the standard form was concluded in January 1946.

[6] Austria, being ex-enemy territory, a special Resolution of the Council was necessary to permit relief operations there, and was adopted at the Third Session of the Council in London

agreements embodying the same general principles were concluded by exchange of letters with the Governments of Finland (December 1945) and Hungary (February 1946), in which countries, being ex-enemy territory, limited emergency programmes were specially authorized by the Central Committee.[1]

There were two of these agreements which involved points of special interest to international lawyers. The first of these was the agreement with Albania. Under the first Resolution of the Council, the Administration is authorized to operate in liberated areas 'by agreement with the Government or recognized national authority concerned'. When the negotiations for the U.N.R.R.A. programme in Albania were undertaken in June 1945 with the Administration of General Hoxha, that Administration had not been recognized as the Government of Albania by any of the forty-four Member Governments of U.N.R.R.A., with the exception of the Government of the U.S.S.R. In these circumstances, was it proper for U.N.R.R.A. to conclude a formal agreement with the Hoxha Administration as a 'Government or recognized national authority'? Apart from the technical question of the U.N.R.R.A. Resolutions, could U.N.R.R.A., as the agent of forty-four nations, treat with the Hoxha Administration as 'the Government of Albania' when forty-three of them did not so recognize it? If so, what would be the political effect of such 'recognition' by U.N.R.R.A.?

An attempt was made to resolve, or rather avoid, this difficulty by following the precedent set in a previous agreement under which the Anglo-American military authorities had brought relief supplies into Albania. This agreement had been concluded between the Supreme Allied Commander, Mediterranean Theatre, and the Commander-in-Chief of the Albanian National Army of Liberation. It was suggested that the U.N.R.R.A. Agreement should similarly be concluded with the Albanian Commander-in-Chief. This suggestion, however, was not accepted, on the ground that the earlier agreement had been concluded between two military commanders and that therefore military titles had been used on both sides; in the case of the U.N.R.R.A. Agreement, however, one party was a purely civilian agency and the other party was asked in the agreement to assume obligations which only a government could discharge. This proposal having been rejected, U.N.R.R.A. was therefore in the position of having to decide whether it could conclude the agreement with 'the Government of Albania'. Now U.N.R.R.A. was not a political

in August 1945 (Resolution 74). After U.N.R.R.A. had been voted further funds in December 1945, the rather protracted negotiations began in January 1946 and the Agreement was finally signed on 5 April.

[1] Central Committee Resolutions of 29 November 1945 (Finland) and 5 February 1946 (Hungary).

organization; it was supposed, and earnestly endeavoured, to have nothing to do with politics. Further, the Hoxha Administration was undoubtedly a government *de facto*, even if not recognized as a government *de jure*. U.N.R.R.A.'s 'recognition' of it as a government, therefore, could not reasonably be construed as having any political significance or as carrying any implication of recognition in international law. As for the requirements of the U.N.R.R.A. Resolutions, Resolution 1 contained provisions relating to operations by agreement with 'the Government or authority (military or civil) exercising administrative authority in the area concerned'. It was felt that this principle covered the present case, as the Hoxha Administration clearly exercised administrative authority in Albania. An agreement between U.N.R.R.A. and 'the Government of Albania' was accordingly signed on 1 August 1945, and the relief programme was enabled to go ahead. Undoubtedly an important element in this decision was a sensible desire not to allow a legal technicality to hold up the humanitarian work of bringing relief to a population which had suffered severely on account of the war.

The U.N.R.R.A. Agreement with Austria presented quite special problems of its own on account of the fact that the sovereign power in Austria at that time resided not in the Austrian Government or people, but in the Allied Council, consisting of the Commanders-in-Chief of the four Allied armies of occupation. This body exercised a very wide measure of control over the Austrian Government, which could do little in the domestic sphere and nothing in the field of foreign relations without its approval.[1] The Resolution of the U.N.R.R.A. Council authorizing the provision of relief to Austria (Resolution 74) made that conditional on the receipt of an invitation from the 'appropriate administrative authority in Austria'. The invitation came in fact from the Allied Council, and it was natural to suppose that this body would be the other party to the agreement regulating the U.N.R.R.A. programme for Austria. The Allied Council, however, requested that U.N.R.R.A. should conclude the agreement with the Austrian Government 'subject to the approval of the Allied Council'.

U.N.R.R.A., little knowing the implication of those words, agreed. It soon became apparent, however, that what the Allied Council intended to exercise was not a general supervision, involving approval of the agreement whose implementation within the limits thus approved would be left to U.N.R.R.A. and the Austrian Government; it intended to exercise a detailed administrative control.[2] The Allied Council had an elaborate

[1] Since the above was written a new Control Agreement for Austria has been announced under which, apart from certain reserved subjects, the actions of the Austrian Government are automatically assumed to have the consent of the Allied Council unless a unanimous veto of all four participants is recorded within thirty-one days.

[2] It is interesting to contrast the position in Italy in February 1945, when the original agree-

system of committees, all quadripartite and working in three languages, which controlled nearly every phase of political and economic activity in the country. At best, the machinery was cumbersome and the results were slow; at worst, the situation corresponded to the simile attributed to the Austrian President, who was said to have likened his Government to an oarsman ferrying a small boat across a rough stream with four elephants as passengers.

When it became known that the Allied Council proposed to exercise detailed control over the activities of the Austrian Government in the operation of the relief programme, it was a question for serious consideration whether U.N.R.R.A. should continue to negotiate with the Government at all. U.N.R.R.A. was in a position somewhat similar to that of a man making a contract with a minor, knowing that the other party has not the legal power to carry out his obligations. As the Government was, in conformity with general U.N.R.R.A. practice, to be responsible for the distribution of U.N.R.R.A. supplies, many details had to be worked out between the Government and the U.N.R.R.A. Mission; but the Government's proposals or decisions were always liable to be overruled by the Allied Council. This was, of course, unsatisfactory from the point of view both of U.N.R.R.A. and of the Government. The U.N.R.R.A. Mission therefore proposed joint consultative machinery, with the Government, the Mission, and the Allied Council all represented on one committee where joint decisions could be taken. The Allied Council, however, declined to agree to this.

In these circumstances, from the point of view of U.N.R.R.A., it would probably have been better to have negotiated the agreement and implemented the relief programme by arrangement with the Allied Council without undertaking further negotiations with the Austrian Government. From the point of view of the latter, however, it was, of course, preferable that the Government should be included in the arrangements, at least as a junior partner, rather than be left out altogether. Though it was not yet allowed to exercise the proper functions of a government, it would win that right by degrees; the U.N.R.R.A. programme would give it certain opportunities to move in the right direction. In particular, the U.N.R.R.A. programme was predicated on the assumption, which had been accepted by the Allied Council, that Austria would be treated as an economic unit, and that supplies would be able to move freely from one zone of occupation to another. The participation of the Government in these arrangements, therefore, would naturally assist it in working for the

ment between U.N.R.R.A. and Italy was negotiated. The Chief Commissioner of the Allied Commission for Italy wrote to the Chief of the U.N.R.R.A. Mission on 16 February 1945, 'the responsibility for concluding an agreement with U.N.R.R.A. rests solely with the Italian Government'.

economic restoration of the country. U.N.R.R.A. accordingly continued with the plan of negotiating the agreement and the detailed arrangements thereunder with the Austrian Government.

At the same time detailed negotiations were also undertaken with the Allied Council and many of its quadripartite committees, and collateral undertakings obtained from the Allied Council to assist in those matters necessary for the implementation of the U.N.R.R.A. programme which fell outside the competence of the Austrian Government. The arrangements thus made were far from perfect, but they probably went as far as was possible, having regard to the complicated control machinery existing in Austria, in reconciling the conflicting interests of the occupying Powers, U.N.R.R.A., and the Government.

4. *Agreements with Military Authorities*

The bulk of U.N.R.R.A.'s work for the care and repatriation of displaced persons took place in ex-enemy territory subject to military administration. As in the case of liberated territory, U.N.R.R.A. was only able to work in such areas subject to the agreement of the administrative authorities, and various agreements were concluded with the military for this purpose.

The first of these was the Agreement of 25 November 1944 between the Director-General of U.N.R.R.A. and the Supreme Commander, Allied Expeditionary Force, commonly known as the U.N.R.R.A./S.C.A.E.F. Agreement. This was brief and to the point, and said little more than that the Supreme Commander was satisfied that the assistance of U.N.R.R.A. was desired by the various European governments in the handling of their displaced persons, that S.C.A.E.F. and U.N.R.R.A. would co-operate in this task, that U.N.R.R.A. personnel would be called forward to assist the military in its performance, and that such U.N.R.R.A. personnel would be civilians accompanying the armed forces, under military command, and subject to military law. Certain aspects of this Agreement are of interest from the point of view of international administration. It is believed—though it is admitted that the point is arguable—that the Agreement put the Administration in a somewhat subservient position *vis-à-vis* the military, as the result of which the Administration's operations suffered for the period which followed.[1] It was, of course, inevitable, particularly while the fighting still continued, that the military authorities tended to

[1] It is noteworthy that the U.N.R.R.A./S.C.A.E.F. Agreement provided that 'U.N.R.R.A. personnel will . . . act in all matters under the orders of the Supreme Commander and through military channels', whereas the Cairo Agreement contained a clause to the effect that 'U.N.R.R.A. will be responsible for the immediate administrative supervision and control of civilian personnel. . . .' The Cairo Agreement was signed on 3 April 1944 between U.N.R.R.A. and the Anglo-American military authorities in the Middle East. It related principally to relief activities in the Balkans.

regard themselves as supreme in their sphere and to deal with other agencies not as equals, but as subordinates. It was very easy for a civilian who was constantly dealing with the military to come to accept this attitude. But it tended to lead to a definition of relationships which was hardly compatible with the status and prestige of an international organization which was representative of many sovereign governments. There were many who believed that U.N.R.R.A.'s work was severely handicapped on this account, during and immediately after the end of hostilities. It was frequently necessary, especially at the beginning, to remind the soldiers that U.N.R.R.A. was not merely there to accept their orders, but that it had its own principles to observe and its own responsibilities to discharge to the governments which created it. He who sups with a soldier often needs a stiff neck and a thick hide, if not a long spoon.

The most important illustration of the need for establishing the independence of an international organization working in areas of military occupation was in the matter of command and control of its own staff. In the early days of U.N.R.R.A.'s displaced persons operations in Germany, U.N.R.R.A. staff were, in effect, seconded to the armies and under military command. As a result, they were moved around on military orders and the U.N.R.R.A. headquarters staff frequently did not even know where the U.N.R.R.A. field personnel were to be found. It happened that U.N.R.R.A. teams which had worked very hard in organizing an assembly centre for displaced persons, and in making the place orderly and attractive, had no sooner done so than they and the displaced persons were ordered off to some other very inferior accommodation because the army wanted for its own purposes the premises which U.N.R.R.A.'s team had made habitable for the displaced persons. This had, of course, a bad effect on morale. When the original U.N.R.R.A./S.C.A.E.F. Agreement was replaced, after the dissolution of S.H.A.E.F., by individual agreements with the American, British, and French armies,[1] it was made quite clear in the new agreements for the British and French Zones of Germany that U.N.R.R.A. would have command and control of its own personnel. This was not expressly stated in the new agreement with the American army (which was the first of the three to be drafted), though this principle was implicit in the whole arrangement. Any new organization taking over U.N.R.R.A.'s functions in the occupied territories would be well advised to obtain a clear understanding on this point right from the beginning.

Various other agreements were concluded with the military authorities about displaced persons operations in Austria and Italy, but there is no

[1] These new agreements were the following: Agreement of 27 November 1945 with the Commander-in-Chief, British Army of the Rhine; Agreement of 18 February 1946 with the General Commandant-en-Chef of the French Occupation Zone in Germany; Agreement of 19 February 1946 with the Commanding General, U.S. Forces, European Theatre.

need to refer to them in detail here.[1] It should be added, lest what has been written above should create a false impression, that the military authorities have, on the whole, been very co-operative with U.N.R.R.A. It is clear, however, that the soldier who is accustomed to command his subordinates must be carefully coaxed to accept someone else as his equal.

5. *Other International Agreements*

Apart from the Agreements described above, defining U.N.R.R.A.'s relations with governments and other authorities, the Administration was vitally concerned with two international conventions and learnt a lesson from the attempts to produce others.

It has been mentioned above that the U.N.R.R.A. Council (consisting of all the Member Governments) was served by quite an elaborate system of committees which will be further discussed below.[2] A number of these were technical committees, dealing with such specialized subjects as health and welfare with which the Administration is concerned; there were also regional committees for Europe and the Far East. In addition to the technical committees which advised the Council, there were technical sub-committees to advise the Regional Committees for Europe and the Far East. The Standing Technical Sub-Committee on Health for Europe did some notable work in the summer of 1944 considering the problems which were likely to affect the health of Europe as the result of the end of the war, with particular reference to the large movements of population which were then likely to take place. The Committee was of opinion that the existing International Sanitary Conventions of 1926, 1933, and 1938 needed modification and revision in relation to the notification of epidemic diseases and the application of quarantine regulations; it therefore set about preparing two new international conventions modifying the International Sanitary Convention of 1926 and the International Sanitary Convention for Aerial Navigation of 1933. These new draft conventions brought up to date, in the light of modern scientific knowledge, various provisions of the earlier conventions, and vested temporarily in the Health Organization of U.N.R.R.A. functions which, under the old conventions, had been entrusted to the International Office of Public Health in Paris. (Paris, at the time, was still under German occupation.)

[1] These other agreements were the following: For Italy: Allied Forces Headquarters Administrative Memorandum No. 6 of 10 February 1945 (issued by agreement with U.N.R.R.A.); Agreement of 15 July 1946 with the Supreme Allied Commander, Mediterranean Theatre. Article III of the Relief Agreement with the Italian Government of 8 March 1945 also relates to displaced persons operations in Italy. For Austria: Agreements of 16 and 24 August 1945 with the French and British armies in Austria; Administrative Order of 29 June of 2nd Corps, U.S. Army (issued by agreement with U.N.R.R.A.); Article IV of the Relief Agreement with the Austrian Government of 5 April 1946 also relates to displaced persons operations in Austria.

[2] See Section 9.

The new draft conventions were approved in principle by the U.N.R.R.A. Council at its Second Session at Montreal in September 1944,[1] and, after a final revision by the Health Committee of U.N.R.R.A., were opened for signature in December of the same year. The new Conventions[2] entered into force in January 1945, since when U.N.R.R.A. began to discharge the functions in the field of public health conferred on it thereby. These Conventions were intended as temporary measures until the International Office of Public Health could resume its former functions; they were limited to a life of eighteen months. However, by March 1946 the United Nations had agreed in principle to set up a new World Health Organization as a specialized agency associated with the United Nations. It was contemplated that this would take over the former functions of the International Office of Public Health. It was evident, however, that the new organization would not be ready to operate by July 1946, when the Sanitary Conventions of 1944 would expire. Accordingly, protocols extending their life and also extending the authority of the Administration to discharge its functions thereunder were approved by the U.N.R.R.A. Council at its Fourth Session at Atlantic City in March 1946.[3] It was anticipated that U.N.R.R.A.'s functions under the International Sanitary Conventions would be transferred to the new World Health Organization when that should come into being.

Other attempts to produce international agreements relating to other aspects of U.N.R.R.A.'s work, however, were less successful. At the same time as the Standing Technical Sub-Committee on Health for Europe was producing the new International Sanitary Conventions, the Standing Technical Sub-Committee on Displaced Persons for Europe drafted a Multilateral Agreement for the Care and Repatriation of Displaced Persons, and by action of the two Sub-Committees a draft Multilateral Agreement relating to the Health Problems of Displaced Persons was also produced. The first of these was intended to secure international agreement on the measures to be taken by each government for the benefit of displaced persons of the other United Nations who might be found within its borders; the second related to the measures to be taken to protect the health of displaced persons before, during, and after repatriation. Unfortunately, the governments showed much less readiness to subscribe to these draft agreements, largely, no doubt, because the Big Three set the fashion of bilateral agreements concerning prisoners of war and displaced persons at Yalta, and this example was followed by many other Powers; in addition, the military

[1] Resolution 52.

[2] Cmd. 6637 and 6638 (1945). The Sanitary Conventions of 1926 and 1933 as amended by the new Conventions of 1944 were published by U.N.R.R.A. Headquarters, Washington, D.C., 1945.

[3] Resolution 85.

authorities were so successful in the speedy repatriation of displaced persons that the importance of the problem quickly diminished. To some extent, too, political issues and questions of reciprocity entered into the picture. Finally, after months of patient work, and in spite of the fact that the draft agreements had been produced in the first place by the representatives of the governments themselves (and not by the Administration staff) the project of their signature was abandoned.

About the same time another technical Sub-Committee, that on Agriculture, came forward with a proposal for the preparation of an International Veterinary Convention. The Administration staff, with the experience of the draft Multilateral Agreements on Displaced Persons fresh in their minds, did their best to discourage the development of this idea, not because it was not sound in itself, but because they felt that, if it did become possible to get agreement on a Veterinary Convention, it would take so long that the document would be signed about the time of the dissolution of U.N.R.R.A. The lesson which was learnt from the handling of these various agreements or proposals for agreements was that a purely technical convention with no political implications is likely to take nearly a year from the date of conception to the date of signature; international agreements raising wider issues are not a feasible proposition in an organization like U.N.R.R.A. which has an emergency task to perform and a very limited life within which to do it.

6. *Interpretation of the U.N.R.R.A. Resolutions*

It was mentioned above that the constitution of U.N.R.R.A. followed the doctrine of separation of powers in having a legislature, which is the Council, and an executive, the Director-General and his staff.[1] There was, however, no provision for a judiciary. This gap was filled by the legal staff of the Administration. One of their most important functions was the interpretation of the Resolutions of the Council, which constituted the legislation of U.N.R.R.A.[2] The most important policies set out in these Resolutions have been briefly summarized above. In addition to those policies the Resolutions covered such matters as relations with other governmental and non-governmental organizations, the creation of a complicated system of committees, the principles to be followed in the distribution of supplies and in the utilization of the financial resources of the Administration, the

[1] The separation, however, was not complete because the Council can appoint and remove the Director-General and control his activities in certain other respects.

[2] It is interesting to note that the draft constitution of the new International Refugee Organization (as adopted by the Economic and Social Council in June 1946) provided that 'some system of semi-judicial machinery should be created, with appropriate constitution, procedure and terms of reference' for the purpose of ensuring 'the impartial and equitable application' of the principles and definitions of refugees and displaced persons contained therein.

displaced persons whom U.N.R.R.A. should assist, the areas in which it should operate, the privileges and immunities which the Administration and its personnel should receive, and the rules of procedure of the Council and of its committees. It is obvious that numerous and complicated questions of interpretation must arise out of so many Resolutions. They have indeed been a fertile source of disputes. These disputes were due in part to the fact that—as at many international gatherings—compromise had to be effected between conflicting points of view, and it is politically more important to find a text on which agreement can be reached than it is to make that text acceptable to a parliamentary draftsman. A compromise formula which is vague enough to obtain the adherence of rival protagonists (who are often in fundamental disagreement but nevertheless wish to conceal the fact) will also be too vague to be capable of exact interpretation. When the compromises are often reached at midnight conferences or in the course of a hasty recess from a stormy debate, and then often altered again by amendments from another quarter, it is hardly surprising that obscurities and inconsistencies result. Indeed, in some cases, as with Dr. Johnson's performing dog, the wonder is not so much that the thing is done badly, as that it is done at all.

Though it was the function of the U.N.R.R.A. legal staff to interpret the Council Resolutions, the ultimate authority to do so lay with the Council itself. So far as is known, no interpretation that was made by the legal staff was questioned or overruled by the Council.[1] But in at least one case where a major question of policy turned on the interpretation of two apparently conflicting Resolutions, it was felt advisable to refer the conflict for the Council itself to resolve.

This problem was the following. Resolution 57 authorized the Administration '. . . to carry out operations in enemy or ex-enemy areas for the care and repatriation or return of displaced persons as contemplated by Resolution 10, in agreement with the Government of the country of which they are nationals. . . .' When the Administration was acting on this authority one of its Member Governments stated that it did not agree to U.N.R.R.A. caring for certain of its nationals who were then in ex-enemy territory and had refused an opportunity of repatriation. It was contended that the passage from Resolution 57 quoted above only authorized the care of such persons 'in agreement with the Government of the country of which they are nationals', that the Government did not agree, and that therefore no authority existed for the Administration to continue to care for them. On the other side, it was argued that Resolution 1 (2), in defining the range of

[1] Though there was an occasion at the Fourth Session of the Council when the Committee on Policy declined to follow the recommendation of the Council, as interpreted by the General Counsel, on a point of procedure in handling its business.

services which the Administration will provide, requires governmental consent only for the repatriation or return of the displaced persons and not for their care pending repatriation; in further support of this argument reference was made to Resolution 2, which lays down a policy of non-discrimination which would be contravened if certain nationals of a particular country were cared for by U.N.R.R.A. while others were excluded.[1] The question whether particular governments should have the right to prevent U.N.R.R.A. from assisting certain of their nationals in ex-enemy territory by the exercise of a veto, in which case, of course, an added burden would be placed on the occupying powers, was so charged with political dynamite that the Director-General decided to refer the matter for the Council itself to decide. The issue was hotly debated at the Third Session of the U.N.R.R.A. Council in London in August 1945, where it proved impossible to reach agreement and the issue had to be settled by a majority vote. The decision was in favour of granting U.N.R.R.A. assistance to the displaced persons in question, and the relevant part of Resolution 57 was revised to read as follows: '. . . the Administration shall be authorized . . . to carry out operations in enemy or ex-enemy areas for the care and, in agreement with the Government of the country of which they are nationals, the repatriation or return of displaced persons as contemplated by Resolution 10. . . .' This authority, however, was made subject to review at the end of six months. It was extended for a further period by the Fourth Session of the Council at Atlantic City in March 1946, but was due for review again at the next Session of the Council in August 1946. And the story will not end there, because this has already become a highly contentious issue before the Economic and Social Council of the United Nations and its Special Committee, which have prepared a draft constitution for an International Refugee Organization which will take over this work on the demise of U.N.R.R.A.

Another interesting problem of interpretation of the U.N.R.R.A. Resolutions relates to the group of persons who came to be known as 'post-hostilities refugees'. Since the surrender of Germany, considerable numbers of persons left their countries in Eastern Europe and the Balkans, usually for political or racial reasons, and applied for admission to U.N.R.R.A. camps in Germany, Austria, and Italy. Was it U.N.R.R.A.'s function to look after them? The Administration's authority to look after displaced persons was based primarily on two passages in the Resolutions. The first of these related to 'those nationals of the United Nations who have been obliged to leave their homes by reason of the war and are found in liberated or conquered territory' (Resolution 10, referring to a sub-committee report); the second related to '. . . other persons who have been obliged to leave

[1] Council III, Document 4.

their country or place of origin or former residence or who have been deported therefrom, by action of the enemy, because of race, religion, or activities in favour of the United Nations' (Resolution 57). Does either of these provisions cover persons who have left their countries voluntarily, though, as they feel, under pressure of circumstances, after the end of hostilities?

On the one hand, it could be argued that, in law, the war had not yet ended and that people who left their countries as the result of the present political upheavals after the end of hostilities 'have been obliged to leave their homes by reason of the war'. Further, a considerable number of them were physically driven or removed from their homes during the German occupation of their countries; had that removal taken them across a national frontier there was no doubt that they would have been eligible for U.N.R.R.A. assistance. Was it fair that they should be declared ineligible if they only crossed the frontier after V.E. day, when others in similar plight who crossed a little sooner were now being cared for in U.N.R.R.A. camps? Others again were 'obliged to leave their country or place of origin or former residence by action of the enemy . . . because of race or religion' and would seem to have been eligible on that ground. Is that eligibility to be forfeited by reason of a subsequent voluntary displacement believed to be under pressure of circumstances?

While these considerations tended to the conclusion that U.N.R.R.A. should assist post-hostilities refugees, there were arguments of some force on the other side. In the first place, the normal meaning of the words 'obliged to leave their homes by reason of the war' would hardly seem to include those who left after the end of hostilities, even though the war was still not legally over. In the second place, a number of the post-hostilities refugees were political refugees who had left their countries because they were opponents of the existing governments, and those governments were Member Governments of U.N.R.R.A.; was it proper for U.N.R.R.A. to give shelter to those who had left their countries because they were opponents of its own Member Governments? Thirdly, while a number of the post-hostilities refugees had been internally displaced before the end of hostilities, there was frequently no connexion between this displacement and the subsequent displacement across national frontiers as a result of which the refugees became applicants for U.N.R.R.A. assistance.

It seemed that this question could be argued indefinitely on either side, so long as one concentrated on the legal aspect of the interpretation of the U.N.R.R.A. Resolutions. The wiser course seemed to be to focus one's attention rather on the practical and humanitarian aspects. As soon as one did so, the issue presented itself much more clearly. A large proportion of the post-hostilities refugees were individuals who had been persecuted by

the Germans on account of race, religion, or political belief—for the most part, Jews. They came clearly within the authority granted by Resolution 57, quoted above, which did not postulate displacement 'by reason of the war'. This then was a large group of people who were deserving and whom U.N.R.R.A. could assist; further, political objections were unlikely to be made. As for the remainder of the post-hostilities refugees, it seemed probable that U.N.R.R.A. had authority to assist them if they had been internally displaced before the end of hostilities; the problem of determining whether this had occurred, however, would be one of very great practical difficulty. Moreover, in the countries where this problem arose, namely, Germany, Austria, and Italy, the military authorities were caring for displaced persons who were ineligible for U.N.R.R.A. assistance. It was therefore decided, as an administrative matter, that U.N.R.R.A. would assist the persecuted groups and not assist the others, who would therefore remain a military responsibility. This administrative decision was reported to the U.N.R.R.A. Council at its Fourth Session.[1] The Council having refrained from expressing any disagreement with this policy, the Administration continued to act accordingly.

7. *Problems of Nationality*

During the course of U.N.R.R.A.'s work there arose a number of nationality problems of some complexity. Unfortunately, it is not possible to say that all the answers have been found. It may be of interest, however, to note what these problems have been and to give some indication of the way in which they have been handled.

They arose chiefly in connexion with the handling of displaced persons. U.N.R.R.A. was authorized to care for and repatriate displaced persons of United Nations nationality, stateless persons, and others 'who have been displaced from their homes by action of the enemy on account of race, religion or activities in favour of the United Nations'. The last named were commonly referred to as 'the persecuted groups', or, more briefly, by the etymologically unattractive term of 'persecutees'. One of the first tasks was to classify the displaced persons receiving U.N.R.R.A. care according to their nationality. This information was required not only for statistical purposes but also as the first essential for repatriation. Many problems quickly arose. Many of the 'persecutees' were formerly of German and Austrian nationality, but had been deprived of their nationality under the Nuremberg laws or other discriminatory legislation of the German Reich. The Allied armies of occupation had annulled all discriminatory legislation in force in Germany and Austria. Had the original nationality of the 'perse-

[1] Council IV, Document 89.

cutees' then revived? The largest group of displaced persons remaining in Germany and Austria were Poles. Large areas of Poland have been transferred under post-war boundary settlements to the U.S.S.R. Certain rights of option are believed to have been established for those Poles whose homes were in the areas thus transferred, but these normally depend on a decision of the individual as to where he intends to make his home in the future. Many of the Poles have not decided whether they wish to be repatriated at all. If their former homes were in the areas which have been transferred to the Soviet Union, what was their nationality now?

Another large element of displaced persons consisted of former nationals of the Republics of Latvia, Lithuania, and Estonia. These republics have been incorporated in the Soviet Union, but that incorporation has not been recognized by many of the United Nations Governments. What was the nationality of the displaced persons coming from those areas to Germany? If, generally speaking, they were nationals of the U.S.S.R., what was the position of those German settlers in the Baltic countries who were unacceptable to the present Governments and were or have to be resettled in Germany? A similar problem was presented by persons of German stock who were settled, sometimes for generations, in other countries, particularly Czechoslovakia and Yugoslavia. These persons, though *Volksdeutsche*, were prima-facie nationals of the United Nations; were they therefore eligible for assistance from U.N.R.R.A., when it was the expressed intention of the Governments concerned to get rid of them and deprive them of their nationality? A number of Governments expressed their intention of taking steps, or actually took steps, to deprive of their nationality displaced persons who refused repatriation. What was the effect of this on eligibility for U.N.R.R.A. care? A problem somewhat similar to that of Poles from east of the Curzon Line arose in connexion with Ukrainians. Parts of Poland, Czechoslovakia, and Hungary have been incorporated in the Ukrainian Soviet Socialist Republic (whose Government became a member of U.N.R.R.A. in August 1945); but it was believed that the right of option, if any, for persons living in the areas thus transferred was different from that accorded to Poles whose homes had been transferred to a new sovereignty. What was the nationality of a Pole or a Czechoslovak who came from the areas of those countries now incorporated in the Ukrainian S.S.R.?

The problems thus posed were further complicated by the fact that at Yalta the Governments of Great Britain, the United States of America, and the U.S.S.R. agreed to certain arrangements for the repatriation of each others' nationals liberated by their respective forces, which arrangements had the effect of excluding from U.N.R.R.A.'s jurisdiction in Germany and Austria the nationals of the U.S.S.R. (The complementary case did not

arise because U.N.R.R.A. has not been asked to undertake operations for the care of displaced persons in the Soviet Zones of occupation.) Therefore the determination whether an individual was or was not a national of the U.S.S.R. was one of great importance.

It is not pretended that U.N.R.R.A. had an answer to all these questions. Some of them were, at that time, probably unanswerable. At least, it was difficult to obtain answers from the governments concerned. Fortunately for U.N.R.R.A., the Administration was not called upon to make any definite determinations of nationality. It had not the authority to do so. When individual displaced persons claimed some nationality, the U.N.R.R.A. officials entered the claim into the records without being in a position to confirm or deny the accuracy of the claim. There were accredited to the occupying forces in Germany and Austria Allied Liaison Officers who worked with U.N.R.R.A. in arranging the repatriation of their nationals. When a given individual claimed a certain nationality, his claim was referred to the appropriate Allied Liaison Officer, whose business it was to determine whether his Government would recognize the individual as one of its nationals and accept him for repatriation.

This was the procedure by which routine questions of nationality were settled. It did not, of course, solve the question of the nationality of the former inhabitants of the Baltic states. The practical question whether or not these persons should be regarded as eligible for U.N.R.R.A. assistance was decided in the affirmative. In U.N.R.R.A.'s view they were either nationals of the U.S.S.R. or stateless; in either event they would be eligible for U.N.R.R.A. care.

8. *The Legal Position of U.N.R.R.A. Staff in Occupied Territory*

The Agreement of 8 November 1944 with the Supreme Commander of the Allied Expeditionary Forces and the directive which implemented the Agreement provided that U.N.R.R.A. staff were followers of the armed forces and subject to military law. Similar provision was made in the original arrangements for U.N.R.R.A. operations in Italy and Austria. This was, of course, the only feasible basis for civilian personnel to operate with the armies in military areas while hostilities continued. It meant, however, that U.N.R.R.A. personnel were subject to military command and control, though it carried the benefit of protection for U.N.R.R.A. personnel as prisoners of war if captured.[1]

By the spring of 1946, however, the position had changed. U.N.R.R.A. personnel were still working with the military in the administration of

[1] Article 81 of the Geneva Prisoners of War Convention of 1929. Certain personnel were also protected by Article 10 of the Geneva Convention for the Amelioration of the Conditions of the Wounded and the Sick of the Armies in the Field.

camps for displaced persons in Germany, Austria, and Italy, but under different conditions. Whereas in the early days they had really been in the position of civilians performing tasks, under military orders, which would otherwise have had to be done by the troops, they were now more nearly in the position of independent contractors, having administrative responsibility for the operation of assembly centres for displaced persons (and for other functions as well) within the framework of policies agreed with the military authorities; for the most part they were operating in accordance with detailed agreements defining the respective responsibilities of the parties.[1] In addition, U.N.R.R.A. was operating in Italy a relief programme which was entirely independent of military control; in Austria the position was generally similar, though the relief programme was subject to the overall supervision of the Allied Control Council. The legal position of U.N.R.R.A. personnel in these countries therefore called for review.

As far as U.N.R.R.A. policy was concerned, it seemed desirable, if possible, to establish the principle that U.N.R.R.A. personnel were no longer followers of the armed forces and subject to military law. The principal reasons for this were the following: First, to enable U.N.R.R.A. to operate effectively it was necessary that the Administration should have command and control of its own personnel; for the most part this had already been arranged in fact, though in some cases the principle had not been established formally. Secondly, U.N.R.R.A. was a civilian organization and an independent international agency representing forty-eight sovereign governments. It was therefore inappropriate that it should be too closely identified with national military forces. Thirdly, the Resolutions of the U.N.R.R.A. Council recommended that U.N.R.R.A. personnel should enjoy certain privileges and immunities in the course of their official business, including immunity from suit. These immunities were granted to U.N.R.R.A. in the various agreements signed with each country in receipt of relief from the Administration. While it was recognized that the situation was in some respects different in areas of military occupation, it was, nevertheless, desirable that in this respect it should be as nearly similar as possible. Fourthly, while it was necessary that U.N.R.R.A. personnel should be subject to some jurisdiction for matters not falling within their official duties, it was preferable that this should be the jurisdiction of courts dealing with civilian cases and not that of courts-martial. However, the question whether individuals are followers of the armed forces is not merely a matter for negotiation and settlement by agreement between the interested parties; it is in the last resort a question of law to be settled by the courts. Final determination therefore could not be reached by negotiation, though expert opinions could be obtained. The question, however, was further

[1] See p. 154, n. 1.

complicated by the fact that the U.N.R.R.A. personnel concerned were not all in comparable positions. For example, to take the case of Austria, certain members of the U.N.R.R.A. staff in Vienna working on the relief programme for Austria had very little, if anything, to do with the military, and it would be hard to claim that they were followers of the armed forces. At the other extreme, some of the staff working on the administration of assembly centres were working very closely with the military authorities, and the case was much more arguable. In the middle might be found many gradations of intermediate cases.

In accordance with the policy considerations outlined above, the Administration tried to establish the principle that its personnel operating in areas under military control were not followers of the armed forces and not subject to military law. Opinions in accordance with this view were expressed by the appropriate departments of the British Army in relation to U.N.R.R.A. personnel in the British Zones of Germany and Austria and in Italy. The American authorities seemed inclined to accept the same view, though they reserved the right to consider individual cases on their merits. It is believed that the French authorities also subscribed to this view, though their considered opinion was not known at the time of writing. While the position, therefore, was not altogether clarified, it would seem that the principle of civilian status of U.N.R.R.A. personnel in military areas was becoming generally recognized.

9. *International Administration by Committees*

Though this subject is not strictly a legal one, it is of very real importance at the moment in view of the plans being made for the creation of various 'specialized agencies' related to the United Nations Organization. It may therefore be of interest to record something of the experience of U.N.R.R.A. in this connexion and examine what lessons can be learnt from that experience.

The problem is simple to state but difficult to answer. What part should committees of governmental representatives play in international administration? As mentioned above, the original constitution of U.N.R.R.A., as defined by the Agreement signed in November 1943 and by the Resolutions of the First Session of the Council, included an elaborate system of committees. The Council itself had three committees: on supplies, on financial control, and on the ability of recipient countries to pay for relief. It also had two regional committees, one for Europe and one for the Far East. Apart from these, it had for a time five technical committees, dealing with five of the principal activities of the Administration: health, welfare, displaced persons, agriculture, and industrial rehabilitation. In addition,

the regional committees had technical sub-committees corresponding to the five technical committees just listed. It is important to note that all these various committees and sub-committees were offshoots of the U.N.R.R.A. Council. This had three important results. First, they were concerned with making policy; secondly, they reported to the Council, and had no authority to issue instructions to the Administration (meaning the Director-General and his staff), which the Council alone could do; thirdly, they all consisted of representatives of governments, and not of the Administration's international staff. In other words, the various committees and sub-committees had no authority to interfere in the day-by-day administration of relief, and they never attempted to do so. Their function was to make recommendations to the Director-General and the Council, but only the Council itself (or the Central Committee between sessions of the Council) could give the Director-General instructions. In other words, he was free to get on with his work, within the limits of the general policies laid down by the Council, and was not subject to any day-by-day control of his operations by any committee of governmental representatives. At one time it was suggested that the Administration's operations for displaced persons in ex-enemy territory should be subject to detailed approval by the Council, but the Director-General stated emphatically that he could not operate under such conditions, and the proposal was dropped.

On this advisory basis, the technical committees, or at least some of them, performed useful functions. Mention has already been made of the International Sanitary Conventions, which were prepared originally by the Standing Technical Sub-Committee on Health for Europe and finally revised by the Committee on Health. Two things, however, were always evident: that any attempt to control the Administration's operating functions by subordinating them to the authority of the committees would inevitably have produced infinite delays in an administrative mechanism which was already sufficiently—if not excessively—cumbersome; secondly, that while the committees were a very useful part of the whole organization when they were handling technical matters, such as epidemic control or financial resources, as soon as anything in the nature of a lively political issue was on the agenda they were liable to be more of an embarrassment than an asset. After more than eighteen months of experience of the committee structure created at its First Session, the Council decided in August 1945 that the majority of the technical committees and sub-committees should be dissolved, but be summoned to meet again if and when there was any specific technical problem of importance to refer to them.[1] At the

[1] Resolution 75 dissolved the technical committees on agriculture and welfare and all the technical sub-committees. There were special reasons for retaining the technical committees on health, displaced persons, and industrial rehabilitation.

same time another decision of importance was taken; to vest in the Central Committee (which, as stated above, is limited to nine members, including the five Great Powers) the duty of approving the operating programmes of the Administration and thus of deciding how much money should be allocated to each recipient country. Hitherto the Director-General had had the sole responsibility for deciding how much relief each country should receive. This was a very heavy responsibility, and whatever decision he took, and however fair it was, some countries at least were likely to be dissatisfied. When the responsibility was vested in the Central Committee, the Director-General was protected from criticism and the principal Member Governments of U.N.R.R.A. were made a party to any decisions that were taken.

In accordance with this same policy of sharing responsibility with the principal governmental representatives, the Director-General made it a practice to refer to the Central Committee any decisions of major policy which he was called upon to make; if the matter was urgent, he took the decision first, and then informed the Central Committee, thus giving it the opportunity to overrule him if it did not agree with him. In fact, in every case (so far as the author is aware) the Director-General obtained its approval, and therefore shared with the Committee the responsibility for the action he had decided to take.

What lessons can be learnt, in this respect, from the experience of U.N.R.R.A. which may be useful for other international organizations? It is believed that the following are the reasonable conclusions to be drawn:

1. That no international organization which has administrative or operating functions involving decisions on day-to-day problems can work effectively if the power to take these decisions lies in a committee of governmental representatives. This statement is deliberately limited in several respects. In the first place, it only relates to organizations with 'administrative or operating functions', such as U.N.R.R.A. is and the new International Refugee Organization is intended to be; the case may be very different with such bodies as the International Labour Organization, whose powers are limited to the task of making recommendations to governments on which it is for the governments to act. In the second place, this statement relates to 'day-to-day decisions'; as has already been explained, there are certain decisions of major policy the responsibility for which it is preferable to share with committees. In the third place, reference has been made to 'a committee of governmental representatives'. It may well be that an international organization will wish and be able to take day-to-day decisions on certain matters by means of an internal committee of its own international staff; some such committees have worked well in U.N.R.R.A. The kind of committee which, it is believed, cannot effectively take deci-

sions on current questions which require immediate settlement is a committee composed of members who represent their governments and therefore require instructions from their governments before they can decide anything of importance. Experience seems to show that it is not possible for such bodies to take quick decisions and exercise executive functions.

2. It is desirable to protect the executive head of an international organization by providing that decisions of major policy should be taken by a body representing the governments to which he is responsible; at the same time he must be left free to take the operating decisions within the limits of the determinations of major policy thus made. Further, he should be able to refer to such a body any decisions which he is called upon to make which he feels to be of such importance that the views of the governments should be ascertained. Such reference should be in his discretion, and the mechanism should be such that consultation can be effected speedily and at short notice.

3. Technical committees can be very useful, so long as they are limited to technical matters and so long as their powers are advisory and no more.

RECOGNITION OF AMERICAN DIVORCE AND NULLITY DECREES

By M. E. BATHURST

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PROFESSOR G. C. CHESHIRE[1] recently applied the great weight of his authority and scholarship in favour of a proposal for legislation for England which would provide in effect that:

'A decree of divorce granted to parties by a Court of the country where they are resident shall be recognised as valid in England, provided that the cause for which the decree was granted is sufficient by the personal law, and provided that both parties were personally subject to the jurisdiction of the Court.'[2]

The present article is not an attempt to improve upon the Vinerian Professor's arguments in favour of the proposal. It is merely an endeavour to supplement and support those arguments by some examples drawn from the writer's experience of the application of the English rules on recognition of foreign divorce and nullity decrees.

Numerous war-time problems in the field of private international law relating to matrimonial causes had their origin in the presence of American troops in the United Kingdom, the frequent, and sometimes prolonged, visits to the United States of British seamen whose ships were being refitted or built under Lend-Lease, and the presence in the United States of a large number of British officials. For example, difficulties can arise both for British subjects residing in the United States and for American citizens from the rule that English law recognizes a divorce decree granted in a foreign jurisdiction only when that jurisdiction is either (i) the place in which the husband was domiciled (in the sense understood by English law) at the time of the proceedings, or (ii) another jurisdiction whose decree will be recognized by the courts of the husband's domicil at that time.

A class of British subjects upon whom hardship falls by reason of this rule includes United Kingdom servicemen and officials domiciled in a part of the United Kingdom who, while temporarily stationed in the United States, married American women who, after their husbands left the United States on war duty, obtained divorces from them in an American jurisdiction. Such a divorce, of course, would not be recognized as valid by English law. However, it would be considered a valid divorce under United States law. The laws of most American states permit a wife to acquire during marriage a domicil of choice different from the domicil of her husband.

[1] 'The International Validity of Divorces', in *Law Quarterly Review*, 61 (1945), p. 353.
[2] At p. 372.

This is almost universally permitted where the wife has grounds for divorce or has been deserted by her husband, and there is a growing body of authority for allowing a wife to obtain a domicil separate from that of her husband in any circumstances provided the requisite intention accompanies the fact of residence.

In one case a seaman in the Royal Navy married an American girl in Boston in August 1941. He was awaiting the completion of a ship, which in fact sailed nineteen days after his marriage. He spent the next eighteen months in the Mediterranean and during his absence he learned that his wife had instituted suit in the State of Massachusetts for a divorce from him on the ground of cruelty. He was returned to the United States on compassionate grounds only to find that a decree nisi had been awarded to his wife and that this decree had already become absolute. He therefore was confronted with a situation in which his wife was recognized as divorced from him under the laws of most, if not all, states of the Union, but under English law he remained married to her and would commit bigamy if he married again.

A similar case concerned another seaman in the Navy who married an American girl while in New York in February 1944. When her husband had returned to sea, the wife obtained an annulment of the marriage in the State of New York on the ground that her husband had stated that he would always attempt to prevent the birth of any children of the marriage. The question whether English law would recognize this nullity decree is a difficult one.

Recent cases[1] have corrected the previously held view that residence as a source of jurisdiction in nullity suits had disappeared from English law. The English courts originally had no jurisdiction to dissolve marriages but had jurisdiction to make decrees of nullity, and they did so when the respondent was resident within the jurisdiction of the court. Dissolution of marriage could be obtained only by means of a private Act of Parliament and the proceedings before Parliament were somewhat judicial in character and were confined to cases where the respondent was resident in the United Kingdom. When the courts obtained jurisdiction to dissolve marriages they decided, after some hesitation, that the basis of jurisdiction in divorce was domicil and not residence.

Prior to the recent cases mentioned above it was thought likely that domicil had also been substituted for residence as a basis for jurisdiction in nullity suits, except where jurisdiction is based upon the place of the celebration of the marriage. A jurisdictional distinction made between marriages which are void (for example, bigamous marriages) and those

[1] *Easterbrook* v. *Easterbrook*, [1944] P. 10; *Hutter* v. *Hutter* (*otherwise Perry*), [1944] P. 95; *Mason* v. *Mason*, [1944] N.I. 134.

which are voidable also appeared sound in principle, since a voidable marriage has full legal effect unless and until one of the parties chooses to go to court to test the validity of the marriage; only the parties themselves are able to question its validity and any change in their status should be made only under their personal law, the *lex domicilii*.

The law, as presently declared, appears to be that English courts exercise jurisdiction to make decrees of nullity (i) where the domicil of both parties is in England, and perhaps also if the domicil of only one of the parties is in England and the marriage is void; (ii) where the marriage is celebrated in England, and is void, and probably if it is voidable; and (iii) where the respondent is resident in England, whether the marriage is voidable or void.

Recognition of foreign nullity decrees will not necessarily follow the same pattern. There is no doubt that a foreign nullity decree will be recognized where both parties were domiciled within the jurisdiction of the foreign court making the decree. There appears to be no reported decision in which a foreign decree has been recognized where only one of the parties was domiciled within the jurisdiction of the foreign court. Nor is it certain whether the English courts will recognize that a foreign court has power to decree an annulment in cases where the parties reside or the marriage was celebrated within its jurisdiction. It appears probable, however, that the nullity decree granted in the New York case mentioned above would be recognized by the English courts.

It is less certain that recognition would be accorded by the English courts to the nullity decree in the case of a British subject domiciled in England who married, in the State of Missouri, an American girl domiciled there, and later obtained a decree of nullity from a court of the District of Columbia (on the ground of the wife's fraud inducing the marriage). In this case the District of Columbia was the place of residence of both the petitioner and the respondent when the decree was granted, though not the place of celebration of the marriage or the domicil of either party. If such a nullity decree were recognizable by English law a further question might arise—whether the American woman acquired by the marriage the British nationality which at the time of the marriage she believed she was acquiring. It is clear that a divorce decree dissolving a marriage between a British subject and an American woman does not deprive the latter of the British nationality which she acquired on marriage. It also is clear that, as a nullity decree granted with respect to a void marriage declares that there never was a marriage, British nationality could not have been acquired by the supposed wife. But a nullity decree granted in respect of a voidable marriage raises a different question. There existed a marriage until one of the parties chose to seek from a court a decree avoiding it. This decree,

however, is generally considered to relate back to the time of marriage,[1] and, indeed, the form of nullity decree granted by the English courts in respect of a voidable marriage uses the same language as that for a void marriage; it orders that the marriage solemnized between the parties 'be pronounced and declared to have been and to be absolutely null and void to all intents and purposes in the law whatsoever'. There is much to be said for equating, in this context, a nullity decree in respect of a voidable marriage with a decree of divorce. The marriage is good and subsists unless and until one party to it applies to have it nullified. Nevertheless, the decree is retroactive, and the present writer inclines to the view that the effect of such a nullity decree is to deprive the American woman of the British nationality which she would have been recognized as having if the marriage had continued.[2]

In connexion with the recognition of American divorce decrees, the question arises whether English law recognizes the possibility that a member of the United Kingdom armed forces temporarily stationed in the United States (for example, a British officer posted to the British Army Staff at Washington) or a United Kingdom based civilian official could acquire a domicil of choice in the United States. These persons were admitted to the United States 'for duration of status', i.e. under a government official's visa valid under the United States immigration laws for the duration of the holder's official duties in the United States. Nevertheless, some of these persons determined to remain in the United States, if possible, to make their homes there after the war. In the case of a British soldier stationed in the United States, such a determination involved his assuming that he would not be transferred elsewhere before he became entitled to demobilization, that the British military authorities and the appropriate United States authorities would consent to his being demobilized in the United States, and that he would then be able to obtain (from a United States Consulate somewhere outside the United States) an Immigration Visa for re-entry for permanent residence in the United States. It is not possible for an applicant to obtain such a visa in the United States; the granting of it is entirely within the discretion of the United States Consular Officer to whom application is made. A civilian official sent from the United Kingdom to serve temporarily in the United States (or recruited while temporarily visiting the United States and remaining under permission from the United States authorities granted for the

[1] See *Mason* v. *Mason*, [1944] N.I. 134; Morris, 'Nullity Jurisdiction and Remarriage during Voidable Marriage', in *Law Quarterly Review*, 61 (1945), pp. 344–6.

[2] The contrary view is that currently acted upon by the Foreign Office. Similar is the opinion that where a certificate of naturalization in a foreign country (which caused loss of British nationality) is revoked *ab initio* on the ground of fraud, the former British nationality of the holder is not revived.

duration of his official status) similarly had to assume, in determining to make the United States his home, that he would not be ordered to serve elsewhere and that, having been released from the government service, he would be able to obtain a United States Immigration Visa after applying for it in some adjacent country.

It does not seem likely in the present state of the law[1] that the English courts would hold that such a person could acquire a domicil of choice in the United States. Nevertheless, a number of such persons in the circumstances described did obtain divorces in the United States and have remarried in the belief that they had in fact acquired a domicil of choice in one of the states. It should be added in this connexion that domicil within the jurisdiction is not infrequently inferred by state courts from the fact of mere residence, in whatever circumstances, within the state for the period of (e.g.) one or two years which the state statutes impose as a residential requirement upon divorce petitioners. The courts generally assume from compliance with such residential requirements the fact that the petitioner is also domiciled within the jurisdiction, a requirement which all common-law states nominally consider essential to jurisdiction in divorce proceedings.

Another category of problem affected by the English rules of private international law on divorce jurisdiction concerns girls domiciled in England who married American soldiers in the United Kingdom, were transported to the United States, and then formed a desire to end the marriage and return to the United Kingdom. If the parties have 'at any time resided together' in any part of the United States since the celebration of the marriage, then the Matrimonial Causes (War Marriages) Act, 1944, does not apply[2] to permit the wife to seek a divorce in the English courts.

As stated above, most of the states allow a wife having grounds for divorce to obtain a separate domicil different from that of her husband, and in most cases a divorce obtained by a wife in any one of the states in which she had become domiciled would be recognized in other states, including that of the husband's domicil. But there have been cases in which the English wife did not desire to remain in the United States to complete the residence requirement for petitioning for divorce in the state in which she would otherwise have brought her suit. Economic and other circumstances may compel the girl to return to the United Kingdom as soon as possible without waiting to take divorce proceedings in the United States. The husband will probably not be supporting her, and the Exchange Control regulations

[1] Compare Cheshire, *Private International Law* (2nd ed. 1938), pp. 182–3; *Sellars* v. *Sellars*, [1942] S.C. 206; *May* v. *May and Lehmann*, [1943] 2 All E.R. 146; *Cruh* v. *Cruh*, [1945] 2 All E.R. 45.

[2] 7 & 8 Geo. VI, c. 43, section 1 (2), proviso.

or the poverty of her parents may preclude her from receiving immediate support from the United Kingdom.

It may be noted in passing that a question of construction of the proviso to Section 1 (2) of the Matrimonial Causes (War Marriages) Act, 1944, arises in this connexion. The whole of the United States is treated as one country for the purpose of that proviso, which states that the section shall not apply if, since the celebration of the marriage, the 'parties thereto have at any time resided together in the country in which the husband was domiciled at the time of the residence'. It is clear that the proviso applies if the parties cohabit as husband and wife anywhere in the United States before they discover that the marriage is unsuccessful. The proviso would not apply if the wife were to travel to the United States alone while her husband remained in Europe on active service and were to leave the United States and return to the United Kingdom before her husband returned to the United States.

In two cases known to the writer the question arose of the application of the proviso where the wife had travelled to the United States alone but was met on arrival by a refusal on the part of her husband to cohabit with her. The parties both resided in the United States simultaneously for a period of time before the wife was able to obtain transport back to the United Kingdom, but they did not ever live together in the United States as husband and wife. Can they be said to have 'resided *together*' in the United States? It is thought not, but the section is not clear on the point. This class of case, however, does not give rise to any great hardship where the girl has, or obtains through the courts, the financial resources necessary to enable her to remain in the United States and secure a divorce there.

The British wives of American servicemen who have been abandoned and deserted in the United Kingdom are able to bring divorce proceedings in the English courts under the Act of 1944 if the conditions required by the Act exist. But this Act does not liberalize the grounds for divorce in favour of such petitioners, and many of them feel that if they were able to get to the United States they might be able to effect a reconciliation with their husbands, or if they were unsuccessful in this, they would at least have the advantage of easier divorce laws. New Zealand has enacted legislation[1] reducing, for the purposes of dissolution of war-time marriages between New Zealand women and (e.g.) American servicemen, the period of desertion as a ground for divorce from three years to six months.

If a wife who had been deserted in the United Kingdom successfully brought proceedings in an English court under the Act of 1944, it is believed that the courts in most states of the Union would recognize such a decree because, as stated above, it is the law in most states that a wife having

[1] Matrimonial Causes (War Marriages) Emergency Regulations, 1946, section 6 (1).

grounds for divorce is able, during marriage, to acquire a separate domicil of choice or reacquire her domicil of origin. The Matrimonial Causes (War Marriages) Act, 1944, however, makes no provision for the recognition by the English courts of American divorce decrees granted to either of the parties in a jurisdiction in the United States. If that jurisdiction is neither the domicil of the husband nor a jurisdiction whose decree will certainly be recognized by the courts of the domicil of the husband, the status of the British wife under English law is in doubt.

The present writer has suggested that the Bill, which became the Act of 1944,[1] should contain some provision relating to the recognition of American decrees. This was not found possible. New Zealand has enacted legislation[2] to this effect. It is there provided in effect that divorce and nullity decrees 'made by any court of any State of the United States of America in relation to a marriage' celebrated between 3 September 1939 and 'the appointed day' where the husband was at the time of the marriage domiciled outside New Zealand and the wife was, immediately before the marriage, domiciled in New Zealand, 'shall be recognised in all New Zealand Courts notwithstanding that the husband may not have been, at the time of the commencement of the proceedings, domiciled in the State to which the court belongs, and that the validity of the decree or order may not be recognised in the courts of the State or country in which the husband was then domiciled'.

Some of the practices in the United States relating to substituted service might also well cause an English court to refuse to recognize an American divorce decree.[3] Service of process on a non-resident respondent may in many states be obtained by publication of an advertisement in a newspaper circulating in the vicinity of the court and by mailing a copy of the summons and complaint to the last-known address of the respondent. It is not unknown for a petitioner to give an address through which the papers so served will never in fact reach the respondent.

Difficulties arising from the English rules also occur in cases in which a United States citizen married to another United States citizen obtains a divorce in a state in circumstances in which the decree will not be recognized in the state of the husband's domicil. The problem arises when the divorcee marries a British subject and applies for a British passport on the ground of acquisition of British nationality by marriage. The application must be denied if English law regards the woman as incapable of marrying because English law will not recognize the divorce. In this connexion, it is noted that no discretion is vested in a consular officer or his advisers in the

[1] 7 & 8 Geo. VI, c. 43.
[2] Matrimonial Causes (War Marriages) Emergency Regulations, 1946, section 5 (1).
[3] Cf. *Rudd* v. *Rudd*, [1924] P. 72.

matter of granting a passport so far as the application is based upon a claim to British nationality. Consular officers may not assume the validity of a divorce decree (until a competent court has held otherwise) in the way that issuers of marriage licences do when considering applications from divorcees. The onus of proof is on the applicant, and this means that evidence must be produced to, and inquiry must be made by, the consular officer into a matter of foreign law involving two persons, neither of whom was a British subject at the time of the legal proceedings brought into question.

Such questions are difficult and complicated. For example, a marriage between two American citizens domiciled in Pennsylvania was dissolved, at the instance of the wife, by a court of Nevada, in which state the wife resided only for the required six weeks' residential period and for the further time necessary for the case to be heard and the decree made. She then married, in the District of Columbia, a British subject domiciled in England. As he was about to be transferred to the United Kingdom, and as she wished to accompany him, she applied for a British passport. Her claim to British nationality could be founded only upon a marriage recognized as valid by English law, and whether the marriage would be regarded as valid naturally depended, *inter alia*, upon whether her previous marriage was dissolved by a decree which would be recognized by English law. First, it was necessary to obtain confirmation that the husband was domiciled, in the sense understood by English law, in the state of Pennsylvania at the time of the divorce proceedings taken against him in Nevada. When this was confirmed, the remaining question was whether the Pennsylvania courts would recognize as valid this particular Nevada decree. The husband had entered an appearance in the divorce proceedings in Nevada, but had offered no defence. His entry of an appearance meant that the court had personal jurisdiction over him, and that under American law generally he would be estopped from denying in later proceedings that the Nevada court had jurisdiction. He therefore could never question that court's jurisdiction in later judicial proceedings in Nevada or in Pennsylvania. However, the claim to British nationality is, of course, unaffected by the impossibility that anyone could or would dispute the validity of the decree; the only relevant inquiry is whether, if the matter were properly brought before a Pennsylvania court by a party not prevented by any procedural rule from raising the issue (for example, by the state in a prosecution for bigamy), the court in Pennsylvania would recognize the intrinsic validity of this particular decree.

The Constitution of the United States contains a provision,[1] known as 'the Full Faith and Credit Clause', which requires the states to recognize 'the Acts, Records, and Judicial Proceedings' of sister states. The Supreme

[1] Article IV, section 1.

Court has, however, held[1] that this provision does not require a state to recognize the divorce decree of another state if the former is satisfied that neither party to the suit was in fact domiciled within the latter state, with the result that its court never obtained jurisdiction over the subject-matter or *res*, even though it found as a fact that the petitioner was domiciled within its jurisdiction and even though the respondent entered an appearance in the suit.

The question, therefore, in the case here discussed was whether the courts of Pennsylvania would regard the petitioner as having acquired a *bona fide* domicil in the state of Nevada at the time of the proceedings. The petitioner had taken a return railway ticket to Nevada; she had lived there temporarily as a guest in a boarding-house; she stated that she did not really intend to make Nevada her permanent home but had gone there simply for the purpose of obtaining a divorce; and she left as soon as she obtained the decree. As the Pennsylvania courts exercise their privilege to hold that a petitioner in a divorce granted in another state at the time of the proceedings had not acquired a *bona fide* domicil in that state[2] and as all the facts indicated strongly that the Pennsylvania courts would almost certainly so find, the conclusion was reached that the decree would not be recognized in Pennsylvania, the domicil of the husband at the time of the Nevada proceedings. Therefore, English law could not recognize the marriage upon which the application for a British passport was founded.

It so happened in the case here discussed that the courts of Illinois and Pennsylvania would probably have held, if the question had been before them, that the wife had reacquired, at the time of her marriage to the British subject, her domicil of origin in Illinois. The courts of Illinois would probably have recognized the Nevada decree in question, because they took the view that a finding of fact by the Nevada court that the petitioner was domiciled in Nevada should not be questioned by the courts of Illinois.[3] If capacity to marry is governed by the law of each party at the time of marriage,[4] then under the law of Illinois the wife had capacity to marry. But capacity to marry cannot be considered as comprehending the fact of freedom from a former marriage. Thus, the only question was whether the woman was still married to her first husband despite the divorce, and there was no escape from the fact that by English law that question must be decided by the *lex domicilii* of the husband at the time of the divorce proceedings.

[1] *Williams* v. *North Carolina* (No. 2) (1945), 325 U.S. 226.

[2] *Esenwein* v. *Commonwealth, ex rel. Esenwein* (1945), 325 U.S. 279.

[3] *Stephens* v. *Stephens*, 49 N.E. (*2d*) 560 (Appellate Court of Illinois, 1943). This view might not prevail in Illinois at the present time, in light of the decision of the Supreme Court of the United States in *Williams* v. *North Carolina* (No. 2) (1945), 325 U.S. 226.

[4] See Cheshire, op. cit., pp. 219 ff.

Nor was it possible to confine the inquiry to 'the latest legal event', namely, the marriage to the British subject, so that the only questions raised would be the capacity of the parties (governed respectively by the laws of England and Illinois) and the formalities of the marriage. It seemed inevitable to the writer that once it was disclosed that one of the parties was previously married and was later a party in divorce proceedings, English law would require an investigation of the validity of the decree. To one who has in this connexion observed the hardships and inequities ensuing from the rigid English rules on the subject of divorce jurisdiction, it seems clear that liberalizing legislation of the nature proposed by Professor Cheshire is highly desirable.

CRIMES AGAINST HUMANITY[1]

By EGON SCHWELB, DR.JUR. (PRAGUE), LL.B. (LONDON)

I. *Introductory*

ARTICLE 6 of the Charter of the International Military Tribunal, annexed to he Four-Power Agreement of 8 August 1945,[2] provides that the Tribunal stablished by the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis

shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, ommitted any of the following crimes:

(*a*) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(*b*) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(*c*) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war;[3] or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.'

The provision of sub-paragraph (*c*), referring to crimes against humanity, as, from the very beginning, caught the imagination of international awyers as laying down, prima facie, a set of novel principles of law. The rovisions relating to crimes against humanity have been acclaimed as 'a evolution in international criminal law'.[4] Others have described it as an nnovation inconsistent with international law.

The following three phrases appear to embody these startling and controversial changes: (1) 'before and during the war'; (2) 'against any civilian opulation'; (3) 'whether or not in violation of the domestic law of the

[1] The Editor proposes to include in the next issue of this *Year Book* an article devoted to a iscussion of the place of the Nuremberg trial, as a whole, in the field of international law.

[2] Misc. No. 10 (1945), Cmd. 6668; Treaty Series No. 27 (1946), Cmd. 6903.

[3] As to the replacement of this semi-colon in the English text by a comma and the alteration f the French text of Article 6 (*c*), see the Protocol signed at Berlin on 6 October 1945, U.S. epartment of State Publication 2461, Executive Agreement Series 472, U.S. Government rinting Office, Washington: 1946, pp. 45 ff.; and see below, p. 188.

[4] Albert de la Pradelle, *Nouvelle revue de droit international privé*, no. 2, 1946: 'Une Révolution dans le Droit Pénal International'.

country where perpetrated'. Ignoring for a moment the other parts of Article 6 (*c*), which, as will be explained in due course, contain quite considerable qualifications of the rules apparently expressed by the three phrases quoted, the following principles seem to have been laid down in the Charter:

The first, indicated by the words 'before or during the war', apparently implies that international law contains penal sanctions against individuals, applicable not only in time of war, but also in time of peace; this, in other words, means that there is in existence a system of international criminal law under which individuals are responsible to the community of nations for violations of rules of international criminal law, and that—in certain circumstances—inhumane acts constitute international crimes. The second principle, which appears to be deducible from the words 'against any civilian population', is to the effect that 'any civilian population' is under the protection of this system of international law, and this implies that civilian populations are protected against violations of international criminal law also in cases where the alleged crimes have been committed by sovereign states against their own subjects. The third principle expressed by the words 'whether or not in violation of the domestic law of the country where perpetrated', appears to establish the absolute supremacy of international law over municipal law.

If this prima facie impression, created by Article 6 (*c*) of the Charter, is correct, if the community of nations is entitled to intervene judicially against crimes committed against any civilian population, before or during the war, and if for this purpose it is irrelevant whether or not such crimes were committed in violation of the domestic law of the country where perpetrated, then certainly a radical inroad has been made into the sphere of the domestic jurisdiction of sovereign states. It is the purpose of this article to examine the question, in the light of the historical events preceding the Charter of 8 August 1945, of the proceedings and the judgment of the International Military Tribunal at Nuremberg and of state practice, centring on the problem of 'crimes against humanity'.

II. *The history of the concept of crimes against humanity*

1. *The Fourth Hague Convention of 1907*

In the London Charter of 8 August 1945, the term 'crimes against humanity' has a specific meaning. It connotes one of the three types of crimes over which the International Military Tribunal has jurisdiction and is in this way juxtaposed to 'crimes against peace' and to 'war crimes'. We shall see that under the Charter the notions of 'war crimes' and 'crimes against humanity' overlap and that most war crimes are also crimes against

humanity, while many crimes against humanity are simultaneously war crimes. In spite of this overlapping, the term 'crime against humanity', as used in the Charter, is a technical term, and as such distinguished from the term of art 'war crime'. In older international documents, however, the expressions 'humanity', 'laws of humanity', 'dictates of humanity' were used in a non-technical sense and certainly not with the intention of indicating a set of norms different from 'the laws and customs of war', the violations of which constitute war crimes within the meaning of Article 6 (*b*) of the Charter.

The Fourth Hague Convention of 1907 concerning the Laws and Customs of War on Land,[1] which is an instrument concerned with war crimes in the technical and narrower sense, recalls in paragraph 2 of the Preamble that the Contracting Parties are 'animated by the desire to serve', even in the case of war, 'the *interests of humanity* and the ever-progressive needs of civilization'. In the often-quoted eighth paragraph of the Preamble the Contracting Parties declare, *inter alia*, that 'the inhabitants and belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the *laws of humanity*, and from the dictates of the public conscience'. Here the 'interests of humanity' are conceived as the purpose which the laws and customs of war serve, and the 'laws of humanity' as one of the sources of the law of nations.

2. *The First World War*

In January 1919 the Preliminary Peace Conference decided to create a Commission of Fifteen Members for the purpose of inquiring into the responsibilities relating to the war. The Commission was instructed, *inter alia*, to inquire into and to report upon 'the facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their Allies, on land, on sea, and in the air during the present [*sc.* 1914–1919] war'.[2]

The report, dated 29 March 1919, stated, in Chapter II, that 'in spite of the explicit regulations, of established customs, and of the clear *dictates of humanity*, Germany and her allies have piled outrage upon outrage'. The majority of the Commission came to the conclusions that the First World War 'was carried on by the Central Empires together with their allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary *laws*

[1] Miscellaneous, No. 6 (1908), Cmd. 4175, p. 46.

[2] *Violation of the Laws and Customs ofWar.* Report of Majority and Dissenting Reports of American and Japanese Members of the Commission on Responsibilities, Conference of Paris, 1919. Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32.

of humanity', and that 'all persons belonging to enemy countries . . . who have been guilty of offences against the laws and customs of war or the *laws of humanity*, are liable to criminal prosecution'.

It is submitted that the distinction which was made in 1919 between violations of the laws and customs of war on the one hand and offences against the laws of humanity on the other corresponds roughly to the two categories of 'war crimes' and 'crimes against humanity' as they are now distinguished in Article 6 (*b*) and (*c*) of the London Charter. The report of the 1919 Commission contained an Annex I, 'Tableau sommaire des infractions commises par les autorités et les troupes des empires centraux et de leurs alliés en violation des lois et coutumes de la guerre et des lois de l'humanité'.[1] It is referred to in the Report as containing, by way of illustration, a certain number of examples which have been collected. This Annex I consists of a list of charges submitted by different Allied Governments, the overwhelming majority of which can be classified as charges of war crimes in the narrower sense. There appear, however, in the list also such crimes as were committed on the territory of Germany and her allies against nationals of, e.g., Turkey and Austria. We find there charges of murder and massacre, systematic terrorism, putting hostages to death, torture of civilians, rape, abduction of girls and women for the purpose of enforced prostitution, deportation of civilians, and pillage, committed by Turkish and German authorities against Turkish subjects. These charges refer mainly to the massacres of Armenians by the Turks and the massacres, persecutions, and expulsions of the Greek-speaking population of Turkey, both European and Asiatic. The Annex also contains a charge of pillage allegedly committed in 1915 by Austrian troops against the population of Gorizia, which, at the time, was an Austrian town. It may be added, in this connexion, that already on 28 May 1915 the Governments of France, Great Britain, and Russia made a declaration regarding the massacres of the Armenian population in Turkey, denouncing them as '*crimes against humanity and civilization* for which all the members of the Turkish Government will be held responsible together with its agents implicated in the massacres'.[2]

The Dissenting (Minority) Report of the American members (Mr. Robert Lansing and Mr. James Brown Scott) took objection to the use of the term 'laws of humanity', and their opposition was mainly directed against the majority report having 'improperly added' the words 'and the laws of humanity'.

'War was and is', the American Representatives pointed out, 'by its very

[1] Not reproduced in the publication mentioned in note 2.

[2] The Note is quoted in the Armenian Memorandum presented by the Greek delegation to the Commission of Fifteen on 14 March 1919.

nature inhuman, but acts consistent with the laws and customs of war, although these acts are inhuman, are nevertheless not the object of punishment by a court of justice. A judicial tribunal only deals with existing law and only administers existing law, leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity.' A further objection was based on the fact that there was no fixed and universal standard of humanity, and that it varied with time, place, and circumstance and, it may be, even according to the conscience of the individual judge.

The outcome was as follows: In the texts of the Peace Treaties of Versailles (Arts. 228–30), Saint-Germain-en-Laye (Arts. 173–6), Trianon (Arts. 157–9), and Neuilly-sur-Seine (Arts. 118–20) the phrase 'laws of humanity' does not appear; those Treaties dealt only with acts committed in violation of the laws and customs of war. The Treaty of Sèvres,[1] however, signed on 10 August 1920, contained in addition to the provisions of its Articles 226–8, which correspond to Articles 228–30 of the Treaty of Versailles, and to Article 229, which regulates the position in such territories as ceased to be parts of the Turkish Empire, a further provision (Art. 230), the relevant parts of which read as follows:

'The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on the 1st August, 1914.

'The Allied Powers reserve to themselves the right to designate the Tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognise such Tribunal.

'In the event of the League of Nations having created in sufficient time a Tribunal competent to deal with the said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before such Tribunal, and the Turkish Government undertakes equally to recognise such Tribunal.'

Here, in conformity with the Allied note of 1915, it was intended to bring to justice persons who, during the war, had committed on Turkish territory crimes against persons of Turkish citizenship though of Armenian or Greek race, a clear example of 'crimes against humanity' as understood in the 1945 Charter. The Treaty of Sèvres was, however, not ratified and did not come into force. It was replaced by the Treaty of Lausanne,[2] which not only did not contain provisions respecting the punishment of war crimes, but was accompanied by a 'Declaration of Amnesty' for all offences committed between 1914 and 1922 which were evidently connected with the political events; this covered any military or political action taken.

The provision of Article 227 of the Treaty of Versailles, under which the

[1] Treaty Series No. 11 (1920).
[2] Treaty Series No. 16 (1923), Cmd. 1929.

German Emperor was arraigned 'for a supreme offence against international morality and the sanctity of treaties', is the predecessor of Article 6 (*a*) of the London Charter, with the important distinction that the crimes against peace under Article 6 (*a*) are not considered to be merely contraventions of a moral code, but violations of legal provisions. The problem of crimes against peace is, however, outside the scope of this article.[1]

3. *The developments during the Second World War*

It is not difficult to show that the insertion in the Charter of the International Military Tribunal of the provisions regarding 'crimes against humanity' was due to the desire expressed over and over again during the Second World War, in discussions, in semi-official and official statements and proclamations, that the retributive action of the Allies should not be restricted to bringing to justice those who had committed war crimes in the narrower sense, i.e. violations of the laws and customs of war, perpetrated on Allied territory, or against Allied citizens, but that also such atrocities should be investigated, tried, and punished as have been committed on Axis territory against persons of other than Allied nationality. The writers, politicians, statesmen and organizations who advocated this had in mind the atrocities committed, e.g., by Germans in Italy and against Italians, both before and after the Italian surrender, the persecutions by the Nazi Government of its political opponents inside Germany (trade unions, Social-Democrats, Communists, the Churches), and, of course, the persecution of the Jews, irrespective of their citizenship—cases which were not covered by the traditional notion of war crimes.

The declarations referring to this problem, made between 1942 and 1945, are legion. The following examples have been selected to illustrate the gradual development:[2]

On 17 December 1942 a declaration regarding the barbarous and inhuman treatment to which Jews were being subjected in German-occupied Europe was made on behalf of the Governments of Belgium, Czechoslovakia, Greece, Luxembourg, the Netherlands, Norway, Poland, the United States of America, the United Kingdom, the Union of Soviet Socialist Republics, Yugoslavia, and the French National Committee. It referred to numerous reports from Europe 'that the German authorities,

[1] An example of the use between the two wars of the expression 'dictates of humanity' in a non-technical sense is the Preamble of the Nyon Agreement for Collective Measures against Piratical Attacks in the Mediterranean by Submarines (Treaty Series No. 38 (1937), Cmd. 5568), where it is said of attacks committed by submarines against merchant ships, arising out of the Spanish conflict, that they are violations of the rules of international law *and* constitute acts contrary to the most elementary *dictates of humanity*, which should be justly treated as acts of piracy.

[2] For an analysis of some of the relevant statements see Eugène Aroneanu, 'Le Crime contre l'Humanité', *Nouvelle revue de droit international privé*, no. 2 (1946).

not content with denying to persons of Jewish race in all the territories over which their barbarous rule has been extended, the most elementary human rights, are now carrying into effect Hitler's oft repeated intention to exterminate the Jewish people in Europe'. The statement continued: 'From all the occupied countries Jews are being transported, in conditions of appalling horror and brutality, to Eastern Europe. . . . The above mentioned Governments and the French National Committee condemn in the strongest possible terms this bestial policy of cold-blooded extermination. They declare that such events can only strengthen the resolve of all freedom loving peoples to overthrow the barbarous Hitlerite tyranny. They reaffirm their solemn resolution that those responsible for these crimes shall not escape retribution and to press on with the necessary practical measures to this end.'[1]

It will be seen that this statement, in its careful wording, is restricted to crimes committed against persons of Jewish race in the territories over which the barbarous rule of Nazi Germany 'has been extended'. It speaks of Jews 'from all the occupied countries' and of crimes committed in Poland, i.e. on Allied territory. There is nothing in the declaration indicating that crimes committed against Jews of Axis nationality on Axis territory should be included in the retribution which the Allied Governments pledged themselves to ensure.

In 1943–4 the London International Assembly recommended that in defining the scope of the retributive action of the Allies, 'a comprehensive view should be taken, including not only the customary violations of the laws of war . . . but any other serious crime against the local law, committed in time of war, the perpetrator of which has not been visited by appropriate punishment'.[2] In respect of the extermination of Jews, it was recommended 'that punishment should be imposed not only when the victims were Allied Jews, but even when the crimes had been committed against stateless Jews or any other Jews in Germany or elsewhere'. This formulation indicated that the London International Assembly still felt some reluctance in committing itself to a proposition expressly applying the retribution to crimes against Jews of German nationality, although these are, no doubt, included in the term 'any other Jews'.

The United Nations War Crimes Commission, an inter-governmental agency established in 1943, at an early date recommended to the Allied Governments that the retributive action of the United Nations should not be restricted to what was traditionally considered a war crime in the tech-

[1] *Hansard, House of Commons*, vol. 385, col. 2083, 17 December 1942; see also the *United Nations Review* 3 (1943), no. i, p. 1; Raphael Lemkin, *Axis Rule in Occupied Europe* (1944), p. 89, note 45.

[2] *The Punishment of War Criminals. Recommendations of the L.I.A.* (London International Assembly). Report of Commission I, p. 7.

nical sense, namely, a violation of the laws and customs of war. The unprecedented record of crimes committed by the Nazi régime and the other Axis Powers, not only against Allied combatants but also against the civilian populations of the occupied countries and of the Axis countries themselves, made it necessary to provide that these crimes also should not go unpunished.[1]

The Instrument of Surrender of Italy (Additional Conditions signed on 29 September 1943 at Malta),[2] in Article 29, foreshadows an extension of the retributive action of the Allies beyond the perpetrators of war crimes in the traditional sense. It imposes on Italy the obligation to apprehend and surrender into the hands of the United Nations not only 'Benito Mussolini, his Chief Fascist Associates and all persons suspected of having committed war crimes', but also persons suspected of 'analogous offences', the latter expression roughly indicating what eventually has become known as crimes against humanity.

The expression 'war crimes or analogous offences' also occurs in Article 11 of the Berlin Declaration regarding the defeat of Germany dated 5 June 1945,[3] which was drawn up nearly two years later, and repeated in the Proclamation No. 2 to the people of Germany, respecting 'certain additional requirements imposed on Germany', dated 20 October 1945.[4] The armistices with Roumania,[5] Finland,[6] Bulgaria,[7] and Hungary,[8] on the other hand, speak only of persons accused of war crimes without expressly mentioning an extension to 'analogous offences'.[9] With regard to Austria, Article 11 of the Berlin Declaration of 5 June 1945 is applicable by virtue of Article 8 of the Four-Power Agreement on Control Machinery in Austria of 4 July 1945.[10] The later Agreement on the Machinery of Control in Austria, dated Vienna, 28 June 1946,[11] speaks, in Article 5, of persons wanted for war crimes and crimes against humanity. The Proclamation to the Japanese people made on 26 July 1945 at Potsdam,[12] and accepted by Japan,[13] mentioned among the Allied terms that 'stern justice will be meted

[1] *The Times* newspaper, 18 December 1946; see the Note on the United Nations War Crimes Commission, below, p. 363.

[2] Italy No. 1 (1945). *Documents relating to the Conditions of an Armistice with Italy*, Cmd. 6693, p. 8.

[3] Germany No. 1 (1945), Cmd. 6648, p. 5.

[4] *Official Gazette of the Control Council for Germany*, no. 1, p. 8; *Military Government Gazette, Germany, British Zone of Control*, no. 5, p. 27; Section x, paragraph 36.

[5] Miscellaneous No. 1 (1945), Cmd. 6585, Art. 14.

[6] Miscellaneous No. 2 (1945), Cmd. 6586, Art. 13.

[7] Miscellaneous No. 3 (1945), Cmd. 6587, Art. 6.

[8] *American Journal of International Law*, 39 (1945), Supplement, p. 97, Art. XIV.

[9] As to the provisions of the Draft Peace Treaties, see below, p. 212.

[10] Treaty Series No. 49 (1946), Cmd. 6958, p. 4.

[11] Ibid., p. 21.

[12] *U.S. Department of State Bulletin*, vol. xiii, no. 318 (29 July 1945), p. 137.

[13] Instrument of Surrender, dated 1 September 1945 (*American Journal of International Law*, 39 (1945), Supplement, p. 264).

out to war criminals, including those who have visited cruelties upon our prisoners'.[1]

The United States Under-Secretary of State, Mr. Grew, said on 1 February 1945 that the State Department plan calls 'for the punishment . . . for the whole broad criminal enterprise, including offences wherever committed against . . . minority elements, Jewish and other groups, and individuals'.[2] In the House of Commons on 4 October 1944, in reply to a question asking that the names of those responsible for crimes against German democrats and anti-Nazis, such as the murder of 7,000 internees of Buchenwald Concentration Camp, should be added to the list of war criminals, the then Foreign Secretary stated: 'Crimes committed by Germans against Germans, however reprehensible, are in a different category from war crimes and cannot be dealt with under the same procedure. His Majesty's Government have this matter under consideration, but I am not in a position to make any further statement at present.'[3] In reply to a further question as to whether the murder of anti-Nazi Germans in Germany was not just as criminal as the murder of other anti-Nazis elsewhere, Mr. Eden said: 'I was not trying to measure the degree of the reprehensible in any of these deeds; all I was saying was that it was not a war crime in the sense of other crimes that are being committed, and other means would have to be found for dealing with it.'

In the House of Commons on 31 January 1945,[4] the then Minister of State, Mr. Richard Law, said in reply to a question:

> 'Crimes committed by Germans against Germans are in a different category from war crimes and cannot be dealt with under the same procedure. But in spite of this, I can assure my hon. Friend that His Majesty's Government will do their utmost to ensure that these crimes do not go unpunished. It is the desire of His Majesty's Government that the authorities in post-war Germany shall mete out to the perpetrators of these crimes the punishments which they deserve.
>
> 'The authorities to which I refer are the authorities who will be in control in Germany when the war comes to an end. I think I can leave it to my hon. and learned Friend to imagine who those authorities will be.'

On 2 May 1945 the President of the United States made an Executive Order,[5] providing for representation of the United States in preparing and prosecuting charges of atrocities and war crimes against the leaders of the

[1] In the trial of the persons accused as the major Japanese war criminals, it was submitted by the defence that the term 'war criminals' used in the Potsdam Declaration did not comprise 'crimes against peace' and 'crimes against humanity' and that the International Military Tribunal for the Far East lacked jurisdiction to try the latter crimes. The Tokyo trial was not concluded when the present paper was sent to press.

[2] Quoted by Judex (M. de Baer); *The Treatment of War Crimes and Crimes incidental to the War*, p. 12.

[3] *Hansard, House of Commons*, 4 October 1944, col. 906.

[4] *Hansard, House of Commons*, 31 January 1945.

[5] Executive Order 9547, later amended by Executive Order of 16 January 1946.

European Axis Powers and their principal agents and accessories. In this document the terms 'atrocities' and 'war crimes' are used, the former obviously comprising what later were called 'crimes against humanity'. In his report to the President dated 7 June 1945,[1] Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, outlined the legal charges against the top Nazi leaders and those voluntary associations such as the S.S. and the Gestapo, which he intended to make the subject of the proposed trial. In addition to 'atrocities and offences against persons or property, constituting violations of International Law, including the laws, rules, and customs of land warfare', which were eventually embodied as war crimes in the narrower sense in Article 6 (*b*) of the Charter, and 'invasions of other countries and initiation of war aggression in violation of International Law or treaties', which were eventually called 'crimes against peace' and dealt with in Article 6 (*a*) of the Charter, he characterized what has eventually been given the name of crimes against humanity in the following words:

'(*b*) Atrocities and offences, including atrocities and persecutions on racial or religious grounds, committed since 1933. This is only to recognize the principles of criminal law as they are generally observed in civilized states. These principles have been assimilated as a part of International Law at least since 1907. The Fourth Hague Convention provided that inhabitants and belligerents shall remain under the protection and the rule of "the principles of the law of nations, as they result from the usage established among civilized peoples, from the laws of humanity and the dictates of the public conscience".'

The Potsdam Conference of July–August 1945, which was held while negotiations on the American proposals outlined in the Jackson report were already in progress, and which took note of these discussions, dealt with war crimes and related subjects in the agreement regarding 'The Political and Economic Principles to Govern the Treatment of Germany in the Initial Control Period', paragraph 5. It was provided there that 'war criminals and those who have participated in planning or carrying out Nazi enterprises involving or resulting in atrocities or war crimes shall be arrested and brought to judgment'.[2] 'Nazi enterprises involving or resulting in atrocities' as distinguished from those involving or resulting in war crimes correspond to crimes against humanity as distinguished from violations of the laws and customs of war.

4. *The Berlin Protocol of 6 October 1945*

Before embarking upon an analysis of the London Charter of 8 August 1945 it is necessary to mention a document which, in point of time, is of

[1] *American Journal of International Law*, 39 (1945), Supplement, p. 178.
[2] *The Times* newspaper, 3 August 1945.

more recent date than the Charter, but which is relevant to the interpretation of those of its provisions which form the main subject of this article. The four Governments who had concluded the Agreement of 8 August 1945 drew up in Berlin on 6 October 1945 a Protocol[1] in the Preamble of which it was stated that a discrepancy had been found to exist between the originals of Article 6, paragraph (*c*) of the Charter of 8 August 1945, in the Russian language on the one hand, and the originals in the English and French languages on the other. It should be mentioned that the London Agreement was executed in triplicate, in English, French, and Russian, each text to have equal authenticity (Art. 7). The discrepancy which was found to exist was this: in the English and French texts, Article 6 (*c*) was divided into two parts by a semicolon between the words 'war' and 'or persecutions'. In the Russian text, however, which was equally authentic, there was no semicolon dividing the paragraph, but a comma had been placed between what corresponds to the words 'war' and 'or persecutions' in Russian.

In the Berlin Protocol, the Contracting Parties declared that the meaning and intention of the Agreement and Charter required that the semicolon in the English and French texts should be changed into a comma. In the French text some additional alterations have been made which will be discussed in greater detail later. The correction made by the Berlin Protocol is, as will be seen, of considerable importance, *inter alia*, because it entails that the qualification contained in the second part of the paragraph, and expressed by the words 'in execution of or in connection with any crime within the jurisdiction of the tribunal', refers to the whole text of Article 6 (*c*).

III. *Analysis of the text of Article 6 (c) of the Charter*

(*a*) From the words 'against *any* civilian population', it follows that a crime against humanity can be committed both against the civilian population of territory which is under belligerent occupation and against the civilian population of other territories, irrespective of whether they are under some other type of occupation or whether they are under no occupation at all. The civilian population protected by the provision may therefore also include the civilian population of a country which was occupied without resort to war, e.g. Austria and parts of Czechoslovakia in 1938–9. It may be the civilian population of territories where armed forces of one belligerent were stationed without effecting an occupation, which was the case, e.g., with German forces in Italy at some stages of the Second World War. The civilian population protected by the provision may also be the

[1] Not published in this country. U.S. Department of State Publication 2461, Executive Agreement Series No. 472, p. 45.

civilian population of countries neighbouring on a certain belligerent, e.g. Germany, without German armed forces being permanently stationed there. The population protected may finally be the civilian population of the respective belligerent itself, e.g. the German civilian population in its relations with the German authorities and military and para-military organizations, or the Italian population either of Italian or, e.g., Slovene racial origin, which may have become the victim of outrages by Italian military and fascist formations.

(*b*) Crimes against humanity can be committed against a civilian population both of territories to which the provisions of Section 3 of The Hague Regulations annexed to the Fourth Hague Convention of 1907 respecting military authority over the territory of the hostile state apply, and of such territories to which they do not apply. This means that a crime against humanity under Article 6 (*c*) of the Charter may or may not simultaneously be a violation of the laws and customs of war and therefore a war crime in the narrower sense, coming under Article 6 (*b*) of the Charter. It follows that the terms 'crimes against humanity' on the one hand, and 'war crimes' or 'violations of the laws and customs of war' on the other, overlap. Many crimes against humanity are also violations of the laws and customs of war; many, though not all, war crimes are simultaneously crimes against humanity. 'In so far as these crimes (viz. crimes against humanity) constitute violations of the laws of war there is no juristic problem because they are merely the same crimes as those set forth in Count Three[1] under a different name, but novel considerations arise when the acts charged cannot be brought within this category.'[2]

The Indictment against the Major German War Criminals[3] presented to the International Military Tribunal, in stating the offences coming under Count Four,[4] accordingly submits that 'the prosecution will rely upon the facts pleaded under Count Three[1] as also constituting crimes against humanity'.[5] The Judgment of the International Military Tribunal delivered at Nuremberg on 30 September and 1 October 1946,[6] which will be analysed in greater detail below, also proceeded on the assumption that the terms 'war crime' and 'crimes against humanity' overlap, but that, as Professor Goodhart has stated, where they overlap, no independent legal

[1] Violations of the laws and customs of war.

[2] Goodhart, 'The Legality of the Nuremberg Trials', *The Juridical Review*, 85 (April 1946), at p. 15.

[3] Indictment presented to the International Military Tribunal on 18 October 1945, Cmd. 6696. The Indictment is also reproduced in *The Trial of German Major War Criminals. Proceedings*. Published under the authority of H.M. Attorney-General by H.M. Stationery Office, Part I, pp. 2 ff.

[4] Crimes against humanity.

[5] P. 30.

[6] The Judgment will be quoted throughout this article on the basis of the United Kingdom White Paper, Misc. No. 12 (1946), Cmd. 6964.

problems arise. It is natural that the notion of crimes against humanity had to be examined by the International Military Tribunal particularly in such cases where it was alleged that facts which did not simultaneously constitute violations of the laws of war constituted crimes against humanity.[1]

(*c*) The Charter speaks of 'any *civilian* population'. This appears to indicate that the term 'crime against humanity' is restricted to inhumane acts committed against civilian populations as distinguished from members of the armed forces. This restriction applies at least to those acts constituting crimes against humanity which are enumerated in the passage of Article 6 (*c*) preceding the words 'against any civilian population', i.e. to murder, extermination, enslavement, deportation, and other inhumane acts. In interpreting the text, doubts may arise as to whether this restriction to the civilian population applies also to such acts constituting crimes against humanity as do not fall under any of these enumerated categories of the murder type. On the face of it, it would appear that 'persecutions on political, racial, or religious grounds' are such acts. It could therefore be maintained that persecutions, as distinguished from crimes of the murder type, may be committed by acts directed against members of the armed forces. It is, however, doubtful whether this division of crimes against humanity into crimes of the murder type on the one hand, and mere persecutions on political, racial, or religious grounds on the other, can be maintained in view of the Berlin Protocol of 6 October 1945.

An interpretation distinguishing between crimes of the murder type and persecutions would in respect of this particular phrase not lead to satisfactory results for the following reasons: Crimes of the murder type, to which the words 'any *civilian* population' undoubtedly pertain, are certainly graver offences than 'persecutions on political, racial, or religious grounds', if we restrict the latter to persecutions which do not go as far as murder, extermination, enslavement, and deportation. It would be difficult to understand the *rationale* of a provision under which the number of persons afforded protection against a less serious crime (persecution) would be larger than that of potential victims protected against the graver offences of the murder type.

In respect of the armed forces of those countries with which Germany was at war, the question is academic because persecutions of their members by the German authorities on political, racial, or religious grounds obviously constitute also violations of the laws and customs of war, particularly of the conventional provisions respecting the treatment of prisoners of war. The practical problem of interpretation would, therefore, boil down to the question whether persecutions of Axis soldiers by the Axis authorities or by Axis nationals in general on political, racial, or religious grounds consti-

[1] See particularly p. 65 of the Judgment.

tute crimes against humanity. It is not suggested that acts which could be viewed from this angle have not been committed. There is, however, little probability that persons accused of such conduct have been or will be tried under the law laid down by the Charter. Acts possibly coming under such a heading would be persecutions of, say, Italian soldiers of Jewish or Slovene origin, by the authorities of the Italian army, or of anti-Nazi members of the German armed forces.

(*d*) The Charter speaks of 'any civilian *population*'. This indicates that a larger body of victims is visualized and that single or isolated acts committed against individuals are outside its scope.

(*e*) The bearing which the words 'in execution of or in connection with any crime within the jurisdiction of the Tribunal' have on the interpretation of the expression '*any* civilian population' will be discussed presently.

(*f*) The acts enumerated in Article 6 (*c*) as crimes against humanity are similar to, but not identical with, those which are mentioned as war crimes in Article 6 (*b*).

The provision dealing with war crimes expressly states that its enumeration is not exhaustive: 'Such violations shall include, but not be limited to . . . .' No such statement expressly pointing out the exemplative character of the list is to be found in Article 6 (*c*). The wide scope of the term 'other inhumane acts' indicates, however, that the enumeration of Article 6 (*c*) is exhaustive in form only, but not in substance.

If the English rule of interpretation, known as the *eiusdem generis* rule, could be applied to Article 6 (*c*) the words 'other inhumane acts' would cover only serious crimes of a character similar to murder, extermination, enslavement, and deportation. Then, offences against property would be outside the scope of the notion of crimes against humanity. But even quite apart from the *eiusdem generis* rule, this view appears to be supported by the fact that, while the exemplative enumeration of Article 6 (*b*) contains such items as 'plunder of public or private property', 'wanton destruction of cities, towns, or villages, or devastation not justified by military necessity', there is no indication in the text that similar offences against property were in the minds of the Powers when agreeing on Article 6 (*c*).

It is, however, doubtful whether this is a sound interpretation. As Professor Lauterpacht has said, 'it is not helpful to establish a rigid distinction between offences against life and limb, and those against property. Pillage, plunder, and arbitrary destruction of public and private property may, in their effects, be no less cruel and deserving of punishment than acts of personal violence. There may, in effect, be little difference between executing a person and condemning him to a slow death of starvation and exposure by depriving him of shelter and means of sustenance.'[1]

[1] This *Year Book*, 21 (1944), p. 79.

(*g*) Murder is included both in the list contained in Article 6 (*b*) and in the list contained in Article 6 (*c*). Extermination, mentioned in Article 6 (*c*) only, is apparently to be interpreted as murder on a large scale.

The inclusion of 'extermination', in addition to 'murder', may be taken to indicate that it was intended to bring the earlier stages in the organization of a policy of extermination under the action of the law, and that steps which are too remote from an individual act of homicide to constitute complicity in that act may be punishable as complicity in the crime of extermination.

(*h*) Whether there is a difference between 'deportation to slave labour or for any other purpose', as mentioned under (*b*), and the two separate items 'enslavement' and 'deportation', contained in paragraph (*c*), it is difficult to decide. It might be held that 'deportation to slave labour' (*la déportation pour des travaux forcés*) is a less grave offence than 'enslavement' (*la réduction en esclavage*), the criminality of the former consisting, apart from the element of a forced change of residence, mainly in the fact that men are compelled to do certain work under bad conditions and for inadequate remuneration, though otherwise remaining free, while in the case of the latter a *capitis deminutio* takes place, the victim's status in its entirety is affected, a free man is transformed into an outlawed inmate of a concentration camp. If this assumption is correct, deportation is a crime only if inflicted upon the civilian population of, or in, occupied territory; a belligerent Power is, however, not prevented from deporting its own nationals to forced labour; under this interpretation, only reducing them to the actual state of slavery is a crime against humanity.

(*i*) That there was a tendency to make the list of war crimes proper more comprehensive than the list of crimes against humanity is further shown by the omission, in paragraph (*c*), of the word 'ill-treatment', which is contained under (*b*). Whether or not ill-treatment falls under 'other inhumane acts' depends on the general interpretation of the latter expression, particularly in connexion with the four grave offences the enumeration of which precedes it.

(*j*) The Charter provides that it is irrelevant whether an offence alleged to be a crime against humanity was or was not committed in violation of the domestic law of the country where perpetrated.

Under the original English and French texts, which contained the division of paragraph 6 (*c*) by a semicolon, it could be said that this provision applied only to the words following the semicolon, i.e. to persecutions on political, racial, or religious grounds. This interpretation would have led to somewhat absurd results. Through the Berlin Protocol of 6 October 1945, and its replacement of the semicolon by a comma, it seems to be quite clear that the principle of the irrelevancy of the *lex loci* applies to

both kinds of crimes against humanity and that it is no defence that the act alleged to be a crime against humanity was lawful under the domestic law of the country where it was perpetrated. This is made particularly clear by the new French text of Article 6 (*c*), which expressly says 'if such *acts or persecutions*, whether they have or have not constituted a violation of the internal law of the country where they were perpetrated, were committed . . .' ('lorsque ces *actes ou persécutions*, qu'ils aient constitué ou non une violation du droit interne du pays où ils ont été perpétrés'). The exclusion of this plea is closely connected with the provisions of the Charter (Art. 8) regarding the defence of superior orders. Just as a defendant cannot free himself from responsibility because he acted pursuant to order of his government or of a superior, in the same way it avails him nothing that the inhumane act was lawful under municipal law. The close connexion between these two provisions emerges particularly clearly if one realizes that the persons to be tried under the Charter were members of a very small circle in whom legislative powers were vested under the Nazi régime.

(*k*) The words 'in connection with or in execution of any crime within the jurisdiction of the Tribunal' are of particular importance for the problem here discussed. In the first instance it is necessary to determine whether these words relate only to the second part of paragraph (*c*) or to the whole of it, in other words, whether they qualify only 'persecutions' or both 'persecutions' and what has been called in this Article 'crimes of the murder type'. The first interpretation would mean that crimes of the murder type, committed against any civilian population at any time, are crimes against humanity subject to the Tribunal's jurisdiction, irrespective of whether or not they are connected with the crime against peace or a war crime proper, while persecutions on political, racial, or religious grounds come within the definition only if they are so connected. Under this interpretation, 'any crime within the jurisdiction of the Tribunal' would mean either a crime against peace, a war crime, or a crime against humanity of the murder type. The second interpretation would amount to the proposition that not only persecutions, but also crimes of the murder type, are outside the notion of crimes against humanity, unless it is established that they were connected with a crime against peace or a war crime. In order to arrive at an opinion on this vital question, it will be useful to recall the wording of the original English text of Article 6 (*c*), as it was quoted *supra*,[1] and to add the original French text which, in the Agreement dated 8 August 1945, read as follows:

'(*c*) LES CRIMES CONTRE L'HUMANITÉ: c'est-à-dire l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre

[1] p. 178.

toutes populations civiles, avant ou pendant la guerre; ou bien les persécutions pour des motifs politiques, raciaux ou religieux, commises à la suite de tout crime rentrant dans la compétence du Tribunal International ou s'y rattachant, que ces persécutions aient constitué ou non une violation du droit interne du pays où elles ont été perpétrées.'

The reader of the English text will, by simple grammatical interpretation, arrive at the conclusion that 'in execution of or in connection with any crime within the jurisdiction of the Tribunal' refers to 'persecutions' and to 'persecutions' only, and if the English text left any doubt, recourse to the equally authentic French text would show that 'commises à la suite de tout crime rentrant dans la compétence du Tribunal International ou s'y rattachant' determines 'les persécutions' and that, being the feminine form, it does not refer to the words from 'l'assassinat' to 'autre acte inhumain'.

By the Berlin Protocol of 6 October 1945 the semicolon dividing Article 6 (*c*) has been replaced by a comma in both the English and French texts. It is submitted that the change of punctuation marks in itself would not bring about a fundamental alteration in the law if regard were not had to the circumstances attending this alteration. If we consider, however, that the four Great Powers went out of their way to negotiate an international protocol and to have it drawn up and signed on behalf of their respective governments, it is quite clear that the intention must have been to alter the law such as it appeared to be laid down in the English and French texts of the Charter in a significant manner. Even quite apart from the obvious grammatical conclusions arising from the original French text, the comma, followed by 'or', would, in normal circumstances, have sufficed to divide the paragraph of the English text into two parts with the consequence that the words 'in execution of or in connection with any crime within the jurisdiction of the Tribunal' would have related only to persecutions and not to crimes of the murder type. In view of the Preamble and the operative text of the Protocol, however, it is obvious that it has been the intention of the Contracting Parties to remove a certain barrier which, in the original texts, appeared to exist between the first and second parts of the paragraph. Any possible doubt about the consequence of the Berlin Protocol has, however, been removed by the alteration made in the French text, which, by virtue of the Berlin Protocol, now reads as follows:

'(*c*) LES CRIMES CONTRE L'HUMANITÉ: c'est-à-dire l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre, ou bien les persécutions pour des motifs politiques, raciaux ou religieux, lorsque *ces actes ou persécutions*, qu'ils aient constitué ou non une violation du droit interne du pays où ils ont été perpétrés, ont été commis à la suite de tout crime rentrant dans la compétence du Tribunal, ou en liaison avec ce crime.'

Instead of containing the words 'commises à la suite de tout crime

rentrant dans la compétence du Tribunal International ou s'y rattachant', determining 'les persécutions' and severed from the preceding part of the paragraph by a semicolon, the new text, in addition to abolishing the semicolon, expressly speaks of 'ces actes ou persécutions', 'ces actes' being 'l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain', or, in other words, the crimes against humanity of the murder type. The new French wording of Article 6 (*c*) is the more important and decisive in view of the fact that it is contained not only in the French, but also in the English and Russian, texts of the Berlin Protocol, so that it is clear that all four Contracting Parties have agreed that the text, as it is declared in the amended French wording, correctly reproduces the meaning of the Agreement and the intention of all four Parties.

Having regard to the English and French texts as they now stand, and to the Russian text as it has read from the beginning, it is now beyond doubt that the qualification 'in execution of or in connection with any crime within the jurisdiction of the Tribunal' undoubtedly applies to the whole context of the paragraph and constitutes a very important restriction on the scope of the concept of crimes against humanity. This is the opinion which was hinted at in the Indictment,[1] which was extensively elaborated in the speeches of the Chief Prosecutors at the close of the case against the individual defendants,[2] and which was finally adopted by the Judgment of the International Military Tribunal.[3]

(*l*) The word 'humanity' (*l'humanité*) has at least two different meanings, the one connotating the human race or mankind as a whole, and the other, humaneness, i.e. a certain quality of behaviour. It is submitted that in the Charter, and in the other basic documents which will be discussed in this article, the word 'humanity' is used in the latter sense. It is, therefore, not necessary for a certain act, in order to come within the notion of crimes against humanity, to affect mankind as a whole. A crime against humanity is an offence against certain general principles of law which, in certain circumstances, become the concern of the international community, namely, if it has repercussions reaching across international frontiers, or if it passes 'in magnitude or savagery any limits of what is tolerable by modern civilisations'.[4]

The French text of the Briand–Kellogg Pact[5] provides an example of the use, in an international instrument, of the word *l'humanité* as meaning the

[1] Cmd. 6696, p. 30.

[2] Published under the authority of H.M. Attorney-General by H.M. Stationery Office, London, 1946, p. 4 (Mr. Justice Jackson) and p. 63 (Sir Hartley Shawcross).

[3] Cmd. 6964, p. 65.

[4] Mr. Justice Jackson in his opening speech at Nuremberg; *Opening Speeches of the Chief Prosecutors*, published under the authority of H.M. Attorney-General by H.M. Stationery Office, p. 25.

[5] Treaty Series No. 29 (1929), Cmd. 3410.

human race as a whole. In its Preamble the signatories declare themselves as 'ayant le sentiment profond du devoir solennel qui leur incombe de développer le *bien-être de l'humanité*', which in the equally authentic (Art. 3) English text is rendered: 'Deeply sensible of their solemn duty to promote *the welfare of mankind*.'

In his Report to the President of the United States on the Nuremberg trial, Mr. Francis Biddle, the American member of the International Military Tribunal, advocates the affirmation by the United Nations of the principles of the Nuremberg Charter 'in the context of a general codification of offences against *the peace and security of mankind*'.[1] The latter phrase has also been adopted in the Resolution of the United Nations Assembly of December 1946, directing the Committee on the Codification of International Law 'to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences *against the peace and security of mankind*, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal'.[2]

(*m*) Apart from the task of distinguishing crimes against humanity from acts which are legitimate and therefore do not come within the notion, it is also necessary to distinguish them from (1) crimes against peace, (2) war crimes in the narrower sense, and (3) simple or common crimes punishable under municipal criminal law.

In a certain general sense, nearly every crime is inhumane and therefore a crime against humanity. The planning, preparation, initiation, and waging of a war of aggression, if a crime, is also a crime against humanity in this non-technical sense. Moreover, what could be considered more inhumane than most violations of the laws and customs of war and particularly the type of violations enumerated in Article 6 (*b*) of the London Charter?

Reference has already been made to the Preamble of the Fourth Hague Convention, where it has been stated that the laws of humanity are the basis and source of the laws and customs of land warfare. The text of Article 6 (*c*) ('any civilian population') leaves no room for doubt that crimes committed against the civilian population of occupied territory are both violations of the laws and customs of war (Art. 6 (*b*)) and crimes against humanity (Art. 6 (*c*)). Where enemy combatants are the victims of a crime —irrespective of whether or no such crime is an inhumane act—we are faced with a war crime in the narrower sense not coming under the notion of a crime against humanity.

Most of the common crimes of the municipal law of civilized nations are

[1] *U.S. Department of State Bulletin* (24 November 1946), p. 957.
[2] Doc. A/236.

in some sense or other offences against 'humanity'. There can be no doubt that homicide (murder, manslaughter) is an offence against humanity in its non-technical meaning. The same applies to the causing of grievous bodily harm, assault, sexual offences, and the like. Also, among the common crimes against property there are such as may be considered inhuman, e.g. robbery, arson. More often than not, a crime against humanity is also a crime under municipal law, and, in many cases, also a war crime in the narrower sense. Only in exceptional cases is the position such that an inhuman act which is visited by punishment in civilized systems of law has been made expressly or impliedly 'legal' under provisions which have been enacted under such régimes as the German Nazi régime. In such cases the municipal enactment is to be disregarded under Article 6 (*c*).

(*n*) Lord Wright, writing in 1946,[1] dealt with the objection of the American members of the 1919 Commission[2] against the use of the term 'laws of humanity' and their implied allegation that, like equity in the Anglo-American system, 'the laws of humanity' were a roguish thing; equity, he replied, has established itself as a regular branch of the Anglo-American legal system. Taking another parallel from Anglo-American law, he added that it might equally be said that 'negligence is too indeterminate a concept as to constitute a legal head of liability, but we all know that in the Anglo-American law of tort it has become one of the widest and most comprehensive and most important categories of liability'. Under the 1945 Charter 'crime against humanity' is clearly a legal term. To come under the notion, a certain act must be universally recognized as a crime under the penal law of civilized nations. The Nuremberg Tribunal had, therefore, a more objective yardstick to use than the medieval Chancellor; the rules that the International Military Tribunal had to apply may be criticized from different angles; they certainly did not vary, however, as 'the length of the Chancellor's foot'.

IV. *Crimes against humanity in the Nuremberg Indictment*

The Tribunal in its decision[3] referred to the Indictment in laying down which inhumane acts, committed after the beginning of the war, constitute crimes against humanity. For this reason, and also because the Indictment throws considerable light on the way in which the Charter was interpreted by the Prosecution, it will be appropriate to deal at some length with the Nuremberg Indictment, although in assessing its relevance for the problems under consideration it must be kept in mind that its pronouncements were not made by the Committee of Prosecutors in any legislative capacity.

[1] *Law Quarterly Review*, 62 (1946), p. 9.
[2] See *supra*, p. 181.
[3] Cmd. 6964, p. 65.

The general theory on which the Indictment was based in respect of the charge of crimes against humanity was lucidly put forward by the British Chief Prosecutor, Sir Hartley Shawcross, in his closing speech delivered on 26 and 27 July 1946:[1]

'So the crime against the Jews, insofar as it is a Crime against Humanity and not a War Crime, is one which we indict because of its association with the Crime Against the Peace. That is, of course, a very important qualification, and is not always appreciated by those who have questioned the exercise of this jurisdiction. But, subject to that qualification, we have thought it right to deal with matters which the Criminal Law of all countries would normally stigmatise as crimes: murder, extermination, enslavement, persecution on political, racial or economic grounds. These things done against belligerent nationals, or, for that matter, done against German nationals in belligerent occupied territory, would be ordinary War Crimes, the prosecution of which would form no novelty. Done against others they would be crimes against Municipal Law except in so far as German law, departing from all the canons of civilised procedure, may have authorised them to be done by the State or by persons acting on behalf of the State. Although so to do does not in any way place those defendants in greater jeopardy than they would otherwise be, the nations adhering to the Charter of this Tribunal have felt it proper and necessary in the interest of civilisation to say that those things, even if done in accordance with the laws of the German State, as created and ruled by these men and their ringleader, were, when committed with the intention of affecting the international community—that is in connection with the other crimes charged—not mere matters of domestic concern but crimes against the Laws of Nations. I do not minimise the significance for the future of the political and jurisprudential doctrine which is here implied. Normally International Law concedes that it is for the State to decide how it shall treat its own nationals; it is a matter of domestic jurisdiction. And although the Social and Economic Council of the United Nations Organisation is seeking to formulate a Charter of the Rights of Man, the Covenant of the League of Nations and the Charter of the United Nations Organisation does recognise that general position. Yet International Law has in the past made some claim that there is a limit to the omnipotence of the State and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the State tramples upon his rights in a manner which outrages the conscience of mankind.'

After quoting Grotius, who affirmed, with reference to atrocities committed by tyrants against their subjects, that intervention is justified for 'the right of social connection is not cut off in such a case', and the expression of the same idea by John Westlake, Sir Hartley Shawcross went on to say:

'The same view was acted upon by the European Powers which in time past intervened in order to protect the Christian subjects of Turkey against cruel persecution. The fact is that the right of humanitarian intervention by war is not a novelty in International Law—can intervention by judicial process then be illegal? The Charter of this Tribunal embodies a beneficent principle—much more limited than some would

[1] *Speeches of the Chief Prosecutors at the close of the case against the individual defendants.* Published under the authority of H.M. Attorney-General by H.M. Stationery Office (Cmd. 6964), p. 63.

like it to be—and it gives warning for the future—I say, and repeat again, gives warning for the future, to dictators and tyrants masquerading as a State that if, in order to strengthen or further their crimes against the community of nations they debase the sanctity of man in their own countries, they act at their peril, for they affront the International Law of mankind.'[1]

V. *The Nuremberg Judgment on crimes against humanity*

(*a*) *The general attitude of the Tribunal to the law of the Charter*

The manner in which the Tribunal interpreted its function in relation to the provisions of the Charter is illustrated by the following two passages in its judgment:

'The law of the Charter is decisive and binding upon the Tribunal. The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.'[2]

'The Tribunal is, of course, bound by the Charter in the definition which it gives both of "war crimes" and "crimes against humanity".'[3]

The Tribunal conceived its task to be one of interpretation and application of the law as laid down in the Charter. It did not consider itself to be called upon to make new law on the one hand or to examine the legality or otherwise of its constituting Charter on the other, although it did express the opinion—respecting crimes against humanity, not with too much emphasis—that the law as laid down by the Charter was in accordance with the existing international law and in conformity with the law of all nations.

(*b*) *The crime against peace as the supreme war crime*

In dealing with Count 1 of the Indictment (Common Plan or Conspiracy) and Count 2 (Aggressive War; Crimes against Peace), the Tribunal stated:

'To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole. The first acts of aggression referred to in the Indictment are the seizure of Austria and Czechoslovakia; and the first war of aggression charged in the Indictment is the war against Poland begun on 1st September 1939.'[1]

The Tribunal further stated with regard to the aggression against Austria that: 'The facts plainly prove that the methods employed to achieve the

[1] Ibid., p. 64.
[2] Ibid., p. 38.
[3] Ibid., p. 64.
[4] Ibid., p. 13.

object were those of an aggressor.'[1] The Tribunal also accepted the proposition of the Prosecution as to the aggressive character of the seizure of Czechoslovakia.[2] And it stated: 'The Tribunal is fully satisfied by the evidence that the war initiated by Germany against Poland on 1st September 1939 was most plainly an aggressive war, which was to develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war, and against humanity.'[3]

The passage of the Judgment quoted here is interesting also from a terminological point of view. In describing the crime against peace as the supreme international crime, and saying that it differs from *other* war crimes in that it contains within itself the accumulated evil of the whole, the Tribunal uses the expression 'war crime' in a wider sense, comprising also the crime of aggression and, for that matter, also crimes against humanity. In doing so the Tribunal does not deviate from the terminology used in relevant international documents. The Four-Power Agreement of 8 August 1945 is called an 'Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis' and under its Article 1 there shall be established an International Military Tribunal for their trial. Throughout (in the Preamble and in Arts. 3, 4, and 6), the Agreement speaks of 'war criminals'. The same applies to Articles 1, 6 (para. 1), and 14 of the Charter annexed to the Agreement. In all these places the term is used in the wider sense and comprises not only violations of the laws and customs of war, but also crimes against peace and crimes against humanity. In Article 6 (*b*), however, the expression 'war crime' is used in a narrower sense.

The Italian and German Armistice Documents which were quoted above[4] use the term 'war crime' in the narrower sense; crimes against peace are covered by the reference to Mussolini's 'chief Fascist associates' and to the 'principal Nazi leaders'; crimes against humanity by the term 'analogous offences'. The Potsdam Declaration on Germany, too, distinguishes between war crimes in the narrower sense and 'atrocities'. The Armistices with Romania, Finland, Bulgaria, and Hungary[5] speak only of the apprehension and trial of persons accused of war crimes, and the Potsdam Declaration to the Japanese people[6] of 'war criminals'.

(*c*) *Rejection of the charges of conspiracy to commit war crimes and crimes against humanity*

In the statement of the law as to the common plan or conspiracy, the Tribunal said:

[1] Cmd. 6964, p. 19. [2] Ibid., pp. 19–22. [3] Ibid., p. 27.
[4] See p. 185, nn. 2, 3. [5] See p. 185, nn. 5, 6, 7, 8. [6] See p. 185, n. 13.

'Count One, however, charges not only the conspiracy to commit aggressive war, but also to commit war crimes and crimes against humanity. But the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war. Art. 6 of the Charter provides: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." In the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit war crimes and crimes against humanity, and will consider only the common plan to prepare, initiate and wage aggressive war.'[1]

The Tribunal, therefore, dismissed the indictment as far as it charged the defendants with having conspired to commit war crimes and crimes against humanity.

(d) Killing of 'useless eaters' as a crime against humanity

In the part of the Judgment which deals with war crimes and crimes against humanity generally, the Tribunal referred to the killing of insane and incurable people as follows:

'Reference should also be made to the policy which was in existence in Germany by the summer of 1940, under which all aged, insane, and incurable people, "useless eaters", were transferred to special institutions where they were killed, and their relatives informed that they had died from natural causes. The victims were not confined to German citizens, but included foreign labourers who were no longer able to work and were therefore useless to the German war machine. It has been estimated that at least some 275,000 people were killed in this manner in nursing homes, hospitals and asylums, which were under the jurisdiction of the defendant Frick, in his capacity as Minister of the Interior. How many foreign workers were included in this total it has been quite impossible to determine.'[2]

It will be noted that the Tribunal is careful to point out that the victims were not confined to German citizens, but included foreign labourers, and that it was quite impossible to determine how many foreign workers were included in the estimated total of people killed.

(e) The persecution of Jews as a crime against humanity

The Judgment states that the persecution of the Jews at the hands of the Nazi Government was proved in the greatest detail before the Tribunal. It was a record of consistent and systematic inhumanity on the greatest scale.[3] The Tribunal recalled the anti-Jewish policy as formulated in Point 4 of the Programme of the Nazi Party of 24 February 1920,[4] and examined, in great detail, acts committed long before 1939:

[1] Cmd. 6964, p. 44.
[2] p. 60.
[3] p. 60.
[4] pp. 60 and 64.

'The Nazi Party preached these doctrines throughout its history. "Der Stürmer" and other publications were allowed to disseminate hatred of the Jews, and in the speeches and public declarations of the Nazi leaders, the Jews were held up to public ridicule and contempt.

'With the seizure of power, the persecution of the Jews was intensified. A series of discriminatory laws were passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and their rights to citizenship. By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Pogroms were organised, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish business men. A collective fine of one billion marks was imposed on the Jews, the seizure of Jewish assets was authorized and the movement of Jews was restricted by regulations to certain specified districts and hours. The creation of ghettoes was carried out on an extensive scale, and by an order of the Security Police, Jews were compelled to wear a yellow star to be worn on the breast and back.

'It was contended for the Prosecution that certain aspects of this anti-Semitic policy were connected with the plans for aggressive war. The violent measures taken against the Jews in November 1938 were nominally in retaliation for the killing of an official of the German Embassy in Paris. But the decision to seize Austria and Czechoslovakia had been made a year before. The imposition of a fine of one billion marks was made, and the confiscation of the financial holdings of the Jews was decreed, at a time when German armament expenditure had put the German treasury in difficulties and when the reduction of expenditure on armaments was being considered. These steps were taken, moreover, with the approval of the defendant Goering, who had been given responsibility for economic matters of this kind, and who was the strongest advocate of an extensive rearmament programme notwithstanding the financial difficulties.

'It was further said that the connection of the anti-Semitic policy with aggressive war was not limited to economic matters.'[1]

The Court then referred to a German Foreign Office circular of 25 January 1939, entitled: 'The Jewish Question as a Factor in German Foreign Policy in the year 1938', and stated:

'The Nazi persecution of Jews in Germany before the war, severe and repressive as it was, cannot compare, however, with the policy pursued during the war in the occupied territories. Originally the policy was similar to that which had been in force inside Germany. Jews were required to register, were forced to live in ghettoes, to wear the yellow star, and were used as slave labourers. In the summer of 1941, however, plans were made for the "final solution" of the Jewish question in all of Europe. This "final solution" meant the extermination of the Jews, which early in 1939 Hitler had threatened would be one of the consequences of an outbreak of war, and a special section of the Gestapo under Adolf Eichmann, as head of Section B4 of the Gestapo, was formed to carry out the policy.'[2]

After describing the atrocities against Jews committed in occupied territories the Court stated the following:

'Special groups travelled through Europe to find Jews and subject them to the "final solution". German missions were sent to such satellite countries as Hungary and

[1] Cmd. 6964, p. 61.

[2] Ibid., p. 62.

Bulgaria, to arrange for the shipment of Jews to extermination camps, and it is known that by the end of 1944, 400,000 Jews from Hungary had been murdered at Auschwitz. Evidence has also been given of the evacuation of 110,000 Jews from part of Roumania for "liquidation".'[1]

(*f*) *War crimes and crimes against humanity in 'subjugated' territories*

In the chapter dealing with the law relating to war crimes and crimes against humanity, the Tribunal quoted the wording of Article 6 (*b*) and (*c*) of its Charter, and repeated that the Charter does not define as a separate crime any conspiracy except the one set out in Article 6 (*c*) dealing with crimes against peace.[2] The Tribunal further dealt with the plea based on the alleged complete subjugation of some of the occupied countries in the following way:

'A further submission was made that Germany was no longer bound by the rules of land warfare in many of the territories occupied during the war, because Germany had completely subjugated those countries and incorporated them into the German Reich, a fact which gave Germany authority to deal with the occupied countries as though they were part of Germany. In the view of the Tribunal it is unnecessary in this case to decide whether this doctrine of subjugation is the result of the crime of aggressive war. The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after the 1st September 1939. As to the war crimes committed in Bohemia and Moravia, it is a sufficient answer that these territories were never added to the Reich, but a mere protectorate was established over them.'[3]

(*g*) *General statement by the Court on the law as to crimes against humanity*

The Court gave its general opinion on the notion of crimes against humanity in the following words:

'With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale; and in many cases was organized and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal cannot, therefore, make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and in so far as the inhumane acts charged in the Indictment, and committed

[1] Ibid., p. 64. [2] Ibid. [3] Ibid., p. 65.

after the beginning of the war did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.'[1]

(h) The General statement analysed

From the statement, quoted verbatim, in the preceding paragraph the following can be seen:

(1) The International Military Tribunal, proceeding on the basis of the Berlin Protocol, which, however, is not quoted in the Judgment,[2] considers paragraph (*c*) of Article 6 of the Charter as one whole and, in accordance with the submission in the closing speeches of the prosecution, particularly in the closing speech of Sir Hartley Shawcross, applies the qualification 'in execution of or in connection with any crime within the jurisdiction of the Tribunal' to the whole provision, i.e. both to crimes of the murder type and to persecutions: in other words, the Tribunal does not distinguish between the two types of crimes against humanity. In the opinion of the Tribunal, all the crimes formulated in Article 6 (*c*) are crimes against humanity only if they were committed in execution of or in connexion with a crime against peace or a war crime.

(2) The scope of the phrase 'before or during the war' is therefore considerably narrowed as a consequence of the view that, although the time when a crime was committed is not alone decisive, the connexion with the war must be established in order to bring a certain set of facts under the notion of a crime against humanity within the meaning of Article 6 (*c*). As will be seen later, this statement does not imply that no crime committed before 1 September 1939 can be a crime against humanity. The Tribunal recognized some crimes committed prior to 1 September 1939 as crimes against humanity in cases where their connexion with the crime against peace was established. Although in theory it remains irrelevant whether a crime against humanity was committed before or during the war, in practice it is difficult to establish a connexion between what is alleged to be a crime against humanity and a crime within the jurisdiction of the Tribunal, if the act was committed before the war.

(3) On the other hand, if the commission of an inhumane act charged in the Indictment took place during the war, its connexion with the war was presumed by the Tribunal. Inhumane acts committed in Austria after the occupation by Germany are to be considered crimes against humanity because of their connexion with the occupation of Austria, which was an act of aggression and therefore a crime against peace. Inhumane acts committed on Czechoslovak territory after the occupation of the so-called

[1] Ibid., p. 65.

[2] The English text of the Judgment reproduces Article 6 (*c*) of the Charter on p. 64 with, and on p. 3 without, the semicolon.

Sudeten territory are, in the light of the Nuremberg Judgment, either crimes against humanity or war crimes in the narrower sense.

VI. *General observations on crimes against humanity in the Nuremberg Judgment*

(1) As pointed out, the International Military Tribunal, in interpreting the notion of crimes against humanity, lays particular stress on that provision of its Charter according to which an act, in order to come within the notion of a crime against humanity, must have been committed in execution of or in connexion with any crime within the jurisdiction of the Tribunal, which means that it must be closely connected either with a crime against peace or a war crime in the narrower sense. Therefore the Tribunal declined to make a general declaration that acts committed before 1939 were crimes against humanity within the meaning of the Charter. This represents, however, only the general view of the Tribunal and did not prevent it from treating as crimes against humanity acts committed by individual defendants against German nationals before 1 September 1939 if the particular circumstances of the case appeared to warrant this attitude. The verdict against the defendant Streicher is a case in point, but even in his case the *causal nexus* has been pointed out between his activities and the crimes committed on occupied Allied territory and against non-German nationals, and the most that can be said is that he was also found guilty of crimes against humanity committed before 1 September 1939 in Germany against German nationals. It cannot be said in the case of any of the defendants that he was convicted only of crimes committed in Germany against Germans before 1 September 1939.

The restrictive interpretation placed on the term 'crimes against humanity' was not so strictly applied by the Tribunal in the case of victims of other than German nationality. With respect to crimes committed before 1 September 1939 against Austrian nationals, the Tribunal established their connexion with the annexation of Austria, which is a crime against peace, and came, therefore, to the conclusion that they were within the terms of Article 6 (*c*) of the Charter. This consideration is particularly evident in the reasons concerning the case of Baldur von Schirach and, though expressed less precisely, in the case of the defendant Seyss-Inquart. The same applies *mutatis mutandis* to crimes committed in Czechoslovakia before 1 September 1939, as illustrated in the verdicts on the defendants Frick and von Neurath. With regard to the inhumane acts charged in the Indictment and committed after 1 September 1939, the Tribunal made the far-reaching statement that in so far as they did not constitute war crimes they were all committed in execution of, or in connexion with, aggressive war and therefore constituted crimes against humanity.

The case of Ribbentrop and his activities with respect to Axis satellites is particularly illustrative of this view.

(2) It will be seen that the Tribunal treats the notion of crimes against humanity as a kind of subsidiary provision to be applied whenever any particular area where a crime was committed is not governed by The Hague Rules of Land Warfare. Germanization is, therefore, considered as criminal under Article 6 (*b*) in the areas governed by The Hague Regulations and as a crime under Article 6 (*c*) as to all others. The crime against humanity, as defined in the London Charter, is not, therefore, the cornerstone of a system of international criminal law equally applicable in times of war and of peace, protecting the human rights of inhabitants of all countries, 'of any civilian population', against anybody, including their own states and governments. As interpreted in the Nuremberg Judgment, the term has a considerably narrower connotation. It is, as it were, a kind of by-product of war, applicable only in time of war or in connexion with war and destined primarily, if not exclusively, to protect the inhabitants of foreign countries against crimes committed, in connexion with an aggressive war, by the authorities and organs of the aggressor state. It serves to cover cases not covered by norms forming part of the traditional 'laws and customs of war'. It denotes a particular type of war crime, and is a kind of *clausula generalis*, the purpose of which is to make sure that inhumane acts violating general principles of the laws of all civilized nations committed in connexion with war should not go unpunished. As defined in the Nuremberg Judgment, the crime against humanity is an 'accompanying' or an 'accessory' crime to either crimes against peace or violations of the laws and customs of war.[1]

(3) Before the Nuremberg proceedings and the Judgment were made accessible, it was assumed by many that for the purpose of deciding whether a crime against humanity has been committed, not only the time (peace or war) was irrelevant, but also the territory and the nationality of the victims. Here, again, the proposition remains true in theory, but must, according to the view of the Nuremberg Tribunal, be considerably qualified with regard to acts committed by the German major war criminals before the war in Germany against German nationals. Even with regard to revolting and horrible crimes the connexion with aggression or with war crimes in the narrower sense must be proved, and where the proof is not satisfactory they are not considered by the International Military Tribunal as crimes against humanity within the meaning of the Charter.

(4) The present article is devoted to the examination of the question whether the propositions set forth in the introductory chapter, which assert a far-reaching and revolutionary nature of the notion of crimes against humanity, as embodied in the Charter, are borne out by the proceedings

[1] Jacob Robinson, 'The Nuremberg Judgment', *Congress Weekly*, vol. 13, no. 25, p. 6.

and by the result of the trial. Our conclusion, in the light of the analysis given above, is that all such far-reaching assumptions are subject to very considerable qualifications. Concerning the first principle, assumed to be implied in the Charter, according to which international law contains penal sanctions against individuals guilty of inhumane acts, which are applicable not only in time of war but also in time of peace, it is clear that what has been introduced by the Charter are not international criminal provisions of universal application, but provisions concerning a crime which may be described as subsidiary or accessory to the traditional types of war crimes. Nor can the second principle, according to which it should not make any difference where the crimes are committed and what the nationality of the victim is, be said to be part of the law laid down in the London Agreement and applied at Nuremberg. It is, on the contrary, subject to fundamental reservations.

The third principle ascribed to the Charter, namely, the sweeping away of national sovereignty as an obstacle to bringing to justice perpetrators of crimes against humanity, can hardly be deduced from the terms of that document. The one state sovereignty involved, namely, the sovereignty of the German Reich, has been swept away not by the Charter of the International Military Tribunal nor by the Nuremberg proceedings and Judgment, but by the temporary disappearance of Germany as a sovereign state.[1] As far as state sovereignty was concerned, both the draftsmen of the Charter and the Court were operating in a vacuum, as it were, the sovereignty of the German state as the obstacle barring the enforcement of justice having been destroyed by the historic events of May and June 1945. In view of this fact, it is doubly significant that the Charter and the Tribunal respected German sovereignty to the extent of subjecting to the Court's jurisdiction only such criminal activities as were connected with either crimes against peace or with violations of the laws and customs of war, i.e. only such acts as directly affected the interests of other states. It is by no means a novel principle in international law that the sovereignty of one state does not prevent the punishment of crimes committed against other states and their nationals. The laws and customs of war are not a restriction on state sovereignty. They regulate the relationship between one state and persons who are not subject to its sovereignty. The Hague Regulations, e.g., set the limits of what an occupant is permitted to do, and what is forbidden to him; the question of sovereignty is not involved. The Hague Regulations state, as it were, what is *intra vires* and what is *ultra vires* of an occupant *qua* occupant as distinguished from the sovereign. The

[1] The Berlin Declaration of 5 June 1945, Cmd. 6648; cf. Kelsen, 'The Legal Status of Germany according to the Declaration of Berlin', *American Journal of International Law*, 39 (1945), p. 518, *R.* v. *Bottrill, ex parte Küchenmeister*, [1946] 1 All E.R., p. 635, and note in *American Journal of International Law*, 40 (1946), p. 811.

Nuremberg Tribunal showed itself willing to extend the protection which the laws and customs of war on land afford to the population of territory under belligerent occupation to foreign territory other than under *occupatio bellica* (Austria, parts of Czechoslovakia in 1938), and, in time of war, to any population. As for the consistent extension of this principle so as to safeguard human rights also in time of peace against the victims' own national authorities, the Charter and the Tribunal proceeded with great caution and reserve.

This becomes still more apparent if we consider the views expressed by the International Tribunal as to its own status.

(5) To assess properly the importance of the Nuremberg Proceedings for the development of international law, it is necessary to examine in more detail the exact status of the International Military Tribunal. If the International Military Tribunal were an organ of the community of nations, then the fact that it was seised of a case and exercised jurisdiction against defendants accused, among other things, also of crimes committed against their own nationals, would in spite of all qualifications and restrictions amount to the establishment of a principle asserting the supremacy of international law over municipal law, and the overriding of national sovereignty by this organ of the international community.

An examination of the Charter of 8 August 1945 shows that it contains both such features as make the court established by it a judicial organ of the international community, and such as make it appear a tribunal of considerably lesser standing, hierarchically subject to the Control Council for Germany and therefore being, in substance, an occupation court for Germany.

The features which give to the International Military Tribunal the stature of a court of the international community of nations, such as, e.g., the Permanent Court of Arbitration or the International Court of Justice, or at least the character of a quasi-international court,[1] are:

(*a*) the name given to the court, The International Military Tribunal;

(*b*) the reference in the Preamble to the fact that the four Signatories are 'acting in the interests of all the United Nations';

(*c*) the provision of Article 5 of the Agreement giving any Government of the United Nations the right to adhere to the Agreement, a right of which the following 19 states have availed themselves: Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxemburg, Haiti, New Zealand, India, Venezuela, Uruguay, and Paraguay;[2]

(*d*) the provision of Article 6 of the Charter, according to which the jurisdiction of the Tribunal is not restricted to German major war

[1] Cf. Lauterpacht, op. cit., p. 82.

[2] Cmd. 6964, p. 1.

criminals, but, in theory at least, comprises also the right to try and punish the major war criminals of all other European Axis countries;

(*e*) the provision of Article 10 of the Charter providing for the binding character, in proceedings before courts of the signatory States, of a declaration by the Tribunal that a group or organization is criminal.

The following provisions of the Four-Power Agreement and the Charter may be adduced in support of the opposite opinion, namely, that the International Military Tribunal is a local occupation court for Germany:

(*a*) Article 1 of the Agreement provides for the establishment of an International Military Tribunal 'after consultation with the Control Council for Germany'.

This provision might, of course, also be explained by saying that such consultation with the Control Council for Germany has not been provided for because of the fact that the Tribunal will be an organ of the allied *condominium* of Germany, but that consultation with the Control Council is necessary because of the latter's capacity as the local sovereign of Germany, in the same way as, e.g., consultation with the Netherlands Government was necessary to establish on Dutch territory the Permanent Court of International Justice.

(*b*) Article 22 of the Charter provides, *inter alia*, that the first meetings of the members of the Tribunal and of the Chief Prosecutors shall be held at Berlin in a place to be designated by the Control Council for Germany.

Here a similar explanation as in the case of Article 1 is not possible because if the Control Council for Germany were nothing but the organ of the host country of the court, it could certainly not unilaterally designate a place for the court's meeting.

(*c*) Article 28 of the Charter lays down that the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.

(*d*) Article 29 of the Charter provides for the sentences to be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof. Under Article 29, the Control Council for Germany is also bound to report to the Committee of Prosecutors with a view to a re-trial of defendants on the discovery of fresh evidence.

This provision obviously vests in the Control Council part of such jurisdiction with regard to decisions of criminal courts as is very often reserved

to the sovereign. Here the subordination of the International Military Tribunal to the Control Council is expressed in rather clear terms.

(*e*) Under Article 30 of the Charter, the expenses of the Tribunal and of the trials shall be charged by the Signatories against the funds allotted for maintenance of the Control Council for Germany.

(6) The Tribunal itself adhered to the second of the two possible opinions. It has expressed the opinion that the making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world.[1]

The Tribunal further stated: 'The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.'[2]

The Tribunal therefore allots to itself the standing of an occupation court having jurisdiction over Germany and German nationals. It is certainly a novel and revolutionary step to subject to international jurisdiction matters 'which are essentially within the domestic jurisdiction' of the state concerned (Art. 2, para. 7 of the San Francisco Charter). It is by no means so, if the court in which this jurisdiction is vested is considered to be not a court of the international community, but a court to the jurisdiction of which the defendants are subject *ratione loci* and *ratione personae*, if the court is a court which, as a consequence of military events, has simply taken the place of the local courts to the jurisdiction of which the defendants would otherwise be subject.

(7) It is, however, submitted that a classification of the Tribunal as a local occupation court pure and simple does not sufficiently take into account those features which were indicated under (5) (*supra*), and which tend to give to the Tribunal the character of an international judicial body, exercising jurisdiction, not only on behalf of the local sovereign of Germany, but also on behalf of the international community, which at the relevant time was, and is now, represented for all practical purposes by the United Nations. If the Tribunal based the legislative powers of the signatories of the Charter on the unconditional surrender of Germany and the right to legislate for occupied territory, it did not exclude the construction that the Nuremberg proceedings had, in addition to this territorial basis, also a wider foundation in the provisions of international law and the Court the standing of an international judicial body.

[1] p. 38. [2] Ibid.

The London Charter of 8 August 1945 has been classified by American writers as an Executive Agreement.[1] It is, however, submitted that the description as an Executive Agreement refers to its classification in United States constitutional law and does not affect its character as an international legislative instrument. It is not relevant in this connexion whether and to what extent the London Agreement codified existing international law and to what extent it has created new law. That the London Agreement is more than a local enactment for Germany is also borne out by the Control Council Law No. 10,[2] which was issued for the purpose, *inter alia*, of embodying the London Charter in the local law applicable in Germany.

(8) The problem arises whether the attitude of the International Military Tribunal with regard to the notion of crimes against humanity (and for that matter its interpretation of the law in general) is binding for the decision in other cases to be tried either before the International Military Tribunal itself (if such trials should take place, which seems hardly probable at present), or by other courts, be it the International Military Tribunal for the Far East, or any municipal, occupation, or military tribunals of other United Nations or Axis Powers.

This question is closely connected with the problem dealt with in the preceding paragraph of this article. If it emanates from an occupation Tribunal for the territory of Germany, the judgment of the Tribunal certainly does not constitute a binding precedent in the technical sense for other countries and other courts, irrespective of whether or not the laws of the countries in question are based on the system of *stare decisis*. For other courts the decision is therefore only of persuasive authority, which means that any other court may follow the Nuremberg interpretation, if it considers it correct, and may disagree with it, if it considers it incorrect. The position is not different if the Tribunal is considered a court of the international community, as, e.g., the International Court of Justice under its San Francisco Statute. In Article 59 of the Statute of the International Court of Justice it is laid down (as it was in Art. 59 of the Statute of the Permanent Court of International Justice) that the decision of the Court has no binding force except between the parties in respect of that particular case. This general rule applies, of course, only to the extent to which there is no express provision to the contrary in the Charter. The latter is the case with respect to decisions of the Tribunal concerning criminal organizations; in such cases the criminal nature of the group or organization is, under Article 10 of the Charter, considered proved and shall not be questioned in national, military, or occupation courts of any Signatory (Great Britain,

[1] Professor Sheldon Glueck, 'The Nuernberg Trial and Aggressive War', *Harvard Law Review*, 59 (1946), no.3, p. 396.

[2] See below, p. 216.

France, the United States of America, and the U.S.S.R.). Apart from this particular aspect, the decision of the International Military Tribunal *ius facit inter partes* only. This is not to say that the decision of the Tribunal is not bound to influence any court throughout the world, which will be faced with similar facts. He would be a bold judge of any national, occupation, or military court who would decline to be guided by the reasoned judgment of a court composed of four eminent members of the legal profession of the four Great Powers, arrived at after a trial, unique in history, backed by the authority not only of the four Signatories, but also of nineteen 'adherent' states, always provided that the facts—and the law to be applied—are the same.

VII. *Crimes against humanity in the Draft Peace Treaties of 1946. Endorsement by the United Nations*

The Draft Peace Treaties, prepared by the Council of Foreign Ministers for consideration by the Peace Conference of Twenty-one Nations, which began in Paris on 29 July 1946, contain provisions regarding war criminals in the wider sense, including not only persons accused of war crimes and crimes against peace or humanity, but also traitors and collaborators. The Draft Peace Treaty with Italy[1] provides that Italy shall take the necessary steps to ensure the apprehension and surrender for trial of:

(*a*) Persons accused of having committed, ordered, or abetted war crimes and crimes against peace or humanity;

(*b*) Nationals of the Allied and Associated Powers accused of having violated their national law by treason or collaboration with the enemy during the war.

At the request of the United Nations Government concerned, Italy will likewise make available as witnesses persons within its jurisdiction whose evidence is required for the persons referred to under (*a*) and (*b*).

Similar provisions are also contained in the Draft Peace Treaties with Romania,[2] Hungary,[3] Bulgaria,[4] and Finland.[5] None of these Draft Peace Treaties contains a definition of the term 'crime against humanity' or, for that matter, of 'crime against peace' or 'war crime'. It is highly probable that the three expressions used in the Draft Peace Treaties have, in these Treaties, the same connotation as in the Four-Power Agreement of 8 August 1945.

[1] Italy, No. 1 (1946), Cmd. 6892, Part III: War Criminals, Art. 38.
[2] Romania, No. 1 (1946), Cmd. 6896, Art. 6.
[3] Hungary, No. 1 (1946), Cmd. 6894, Art. 5.
[4] Bulgaria, No. 1 (1946), Cmd. 6895, Art. 5.
[5] Finland, No. 1 (1946), Cmd. 6897, Art. 9.

The United Kingdom, the United States of America, the U.S.S.R., and France were Signatories of the Four-Power Agreement. The same four Powers were the members of the Council of Foreign Ministers which prepared the five Draft Peace Treaties. In interpreting the terms of Article 38 of the Italian Treaty (and the corresponding provisions of the four other Treaties) recourse may, therefore, be had to the explanation of the terms 'crimes against peace', 'war crimes', and 'crimes against humanity' contained in the London Charter.

The five Draft Treaties are a further step in making the notion of 'crime against humanity' (and 'crime against peace') part of the common law of nations. Originally, the law regarding these two types of crimes had been stated by the four Great Powers only. Eventually, the provisions of the London Agreement were endorsed by nineteen Allied states which adhered to it under its Article 5. On 13 February 1946 the General Assembly of the United Nations passed a Resolution regarding the surrender of war criminals,[1] in the Preamble of which it took note of the definition of war crimes, crimes against peace, and crimes against humanity contained in the Charter of the International Military Tribunal dated 8 August 1945. In December 1946, at a time when three states which had been neutral during the Second World War had joined the ranks of the United Nations (Sweden, Iceland, and Afghanistan), the General Assembly again took note 'of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946', and affirmed 'the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal'.[2]

Once the five Peace Treaties are signed and ratified and come into force, the notion of crimes against peace and crimes against humanity will also have been accepted by five former Axis and satellite countries.[3]

Further developments of the law, particularly concerning the concept of 'genocide' which, to a certain extent, covers the same ground as the notion of crimes against humanity,[4] are outside the scope of this article.

[1] Resolutions adopted by the General Assembly during the first part of its first session from 10 January to 14 February 1946 (Doc. A/64), p. 9.

[2] Resolution (9) passed in the 55th plenary meeting, 11 December 1946. *General Assembly Journal*, no. 75: Supplement A–64, Add. 1, p. 945.

[3] After this article had gone to press the final text of the Peace Treaties was published as Cmd. 7022 and the Treaties were subsequently signed on 10 February 1947. The provisions quoted in the text have undergone verbal amendments only. Art. 45 of the Italian Treaty corresponds to Art. 38 of the Draft.

[4] Resolution (10), ibid.

VIII. *Crimes against humanity in other documents*

It is useful to compare the law as laid down by the London Charter of 8 August 1945, and applied by the Nuremberg Judgment, with the law on which decisions of other courts, international, national, and occupation, will have to be based in similar circumstances, and an attempt will be made here to examine to what extent the conclusions reached by the Nuremberg Tribunal apply also under the provisions under which other courts than the Nuremberg Tribunal are called upon to interpret and to apply the concept of crimes against humanity.

1. *Crimes against humanity in the Charter of the International Military Tribunal for the Far East*

The International Military Tribunal for the Far East was established by Special Proclamation of the Supreme Commander for the Allied Powers (General Douglas McArthur) on 19 January 1946.[1] This Special Proclamation, to which the Charter of the International Military Tribunal for the Far East is annexed, is, as a matter of form, not based on an international agreement like the Charter of 8 August 1945, but emanates from the Allied Commander-in-Chief, who recalls in the Preamble that he has been designated by the Allied Powers as Supreme Commander to carry into effect the general surrender of the Japanese armed forces. The Preamble also recalls that by the Instrument of Surrender of Japan, executed on 2 September 1945, the terms set forth in the Declaration of Potsdam[2] were accepted by Japan, and that at the Moscow Conference held on 26 December 1945 the Governments of the United States, Great Britain, and Russia, with the concurrence of China, agreed that the Supreme Commander should issue all orders for the implementation of the terms of surrender. The legal basis of the International Military Tribunal for the Far East differs therefore from that of the Nuremberg Tribunal in that it is primarily a United States Military Tribunal, which, however, also includes among its members persons appointed by the Supreme Commander from the names submitted by the signatories of the Japanese terms of surrender (United States of America, China, United Kingdom, U.S.S.R., Australia, Canada, France, the Netherlands, New Zealand), and by India and the Philippines.

The provisions corresponding to Article 6 of the Charter of the (European) Tribunal are contained in Article 5 of the Charter of the International Military Tribunal for the Far East, which reads as follows:

[1] The Charter of the International Military Tribunal for the Far East, issued by General McArthur on 19 January 1946 (General Orders No. 1), as amended by General Orders of the same Supreme Commander, No. 20, dated 26 April 1946.

[2] See *supra*, p. 185, n. 12.

ARTICLE 5. Jurisdiction over Persons and Offences. The Tribunal shall have the power to try and punish Far Eastern War Criminals who as individuals or as members of organisations are charged with offences which include crimes against peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

a. Crimes against Peace: namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

b. Conventional War Crimes: namely, violations of the laws or customs of war;

c. Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers ,instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.[1]

If we compare the position according to the Far Eastern Charter with that under the Charter of the Nuremberg Tribunal, the following differences become apparent:

(*a*) The difference in the status of the Court. In one case there is the Four-Power Agreement, adhered to by nineteen other states in Europe; in the other the proclamations by the United States Commander-in-Chief in Japan. In one case the judges were appointed by the four Signatories; in the other by the Supreme Commander in Japan.

(*b*) No government of Germany existed either at the time of the London Agreement of 8 August 1945 or at the time of the Nuremberg Trial (November 1945–October 1946); there have been a Japanese Government and a Japanese state throughout.

(*c*) In theory, the inroad into the principle of sovereignty effected by subjecting to outside jurisdiction relations between the authorities of one state and its subjects is therefore much more pronounced in the Far Eastern case because, as has been submitted earlier in this article, the main obstacle to subjecting the internal affairs of the German state to international jurisdiction had been removed by the at least temporary abolition of a German Government. This difference is, however, only a theoretical one because the Indictment presented to the International Military Tribunal for the Far East on 29 April 1946 does not charge the major Japanese war criminals with crimes against humanity committed against Japanese subjects on Japanese territory, but is restricted to offences against foreign states and citizens. In the Japanese trial it is still more true to say that the term 'crimes against humanity' is merely another description of war crimes.

[1] See *supra*, p. 214, n. 1.

Where the persons arraigned as the major Japanese war criminals have been charged with crimes against humanity, the alleged crimes were always committed against persons other than Japanese nationals.

(*d*) The Far Eastern Charter, having been drafted and promulgated after the Berlin Protocol, which removed the discrepancy existing between the English and French and the Russian texts of the London Agreement of 8 August 1945, contains a text which is based on the London Charter as amended in Berlin and has therefore the comma in place of the original semicolon.

(*e*) The provision that the accused person must have been 'acting in the interests of the European Axis countries' is, of course, not included in the Far Eastern Charter. The latter speaks of 'Far Eastern war criminals'.

(*f*) The definition of crimes against peace differs in so far as the Far Eastern Charter speaks of the 'waging of declared or undeclared war of aggression', and adds international law, obviously international customary law, to international treaties, agreements, or assurances.

(*g*) War Crimes in the narrower sense are in the Far Eastern Charter called 'conventional war crimes', namely, violations of the laws and customs of war. The illustrations contained in Article 6 (*b*) of the European Charter are omitted.

(*h*) The definition in the Far Eastern Charter of crimes against humanity differs only in that religious grounds of persecution are omitted. Persecutions on political and racial grounds are crimes against humanity both under the London Charter and under its Far Eastern counterpart. Persecutions on religious grounds are punishable only under the European Charter. The latter is probably due to the fact that the draftsmen assumed that persecutions on religious grounds had actually not been committed on a larger scale in connexion with Japanese aggression and warfare.

2. *Crimes against humanity in the Control Council Law No. 10*

On 20 December 1945 the Control Council for Germany enacted a law regarding the punishment of persons guilty of war crimes, crimes against peace and against humanity which is generally known as 'Control Council Law No. 10'.[1] This law was passed 'in order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945 and the Charter issued pursuant thereto, and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal'.

[1] *Official Gazette of the Control Council for Germany*, no. 3, p. 22; *Military Government Gazette, Germany, British Zone of Control*, no. 5, p. 46; *Journal Officiel du Commandement en Chef Français en Allemagne*, no. 12 of 11 January 1946.

Article I of Law No. 10 provides, *inter alia*, that the London Agreement is made an integral part of the law. Article II provides that each of the following acts is recognized as a crime and enumerates under (*a*) crimes against peace, under (*b*) war crimes, under (*c*) crimes against humanity, and under (*d*) membership in a category of criminal groups or organizations declared criminal by the International Military Tribunal. The provision concerning crimes against humanity reads as follows:

'(*c*) Crimes against Humanity: Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated.'

If we compare the definition of crimes against humanity under Law No. 10 with the definition of crimes against humanity in the Charter of the International Military Tribunal, we find the following differences:

(1) The definition of Law No. 10 begins with the words 'Atrocities and offences, including but not limited to . . . '. These words are not contained in the Charter. This means that the enumeration in the Charter is exhaustive, in Law No. 10 exemplative. This difference, however, is not important, because the words used in the Charter, 'or other inhumane acts', are so wide that the enumeration is, in practice, also merely exemplative.

(2) Law No. 10 enumerates the following acts which are not contained in the Charter, namely, 'imprisonment, torture and rape'.

(3) The word 'and' before 'other inhumane acts' is replaced in Law No. 10 by the word 'or'. This again indicates that it was the intention of the makers of Law No. 10 to give it a wider scope, although the practical effect of this alteration should not be too great.

(4) The words 'before or during the war' are omitted in Law No. 10. It is submitted that this alteration has no practical importance because from other provisions of Law No. 10 it is quite clear that Law No. 10, too, applies to crimes committed both before and during the war. One of the provisions bearing this out is Article II (5) of Law No. 10 regarding the Statutes of Limitation. It provides: 'In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi régime be admitted as a bar to trial or punishment.'

The implication of this provision is, of course, that crimes committed before 30 January 1933 can be made the subject of criminal prosecution. In other words, even crimes committed during Hitler's 'struggle for power', i.e. before 1933, can be investigated and prosecuted. The words 'before or during the war' may have been omitted because the legislators

intended the provisions to cover not only acts committed before and during the war, but also acts committed after the war.

(5) Law No. 10 does not contain the words 'in execution of or in connection with any crime within the jurisdiction of the Tribunal'. This, of course, is the most fundamental and most striking difference between the Charter and Law No. 10, particularly in view of the great importance attributed by the Nuremberg Prosecution and by the International Military Tribunal to these very words. From this difference between the text of the Charter and the text of Law No. 10 it follows that this qualification of the term 'crime against humanity', as understood by the International Military Tribunal, is entirely inapplicable in proceedings under Law No. 10. Contrary to what was said by the International Military Tribunal with regard to the law to be applied by it, it is not necessary for an act to come under the notion of crime against humanity within the meaning of Law No. 10 to prove that it was committed in execution of, or in connexion with, a crime against peace or a war crime.

Owing to this difference between the Charter on the one hand and Law No. 10 on the other, the whole jurisprudence evolved in the Nuremberg proceedings with a view to restricting crimes against humanity to those closely connected with the war becomes irrelevant for the courts which are dealing or will be dealing with crimes against humanity under Law No. 10. At first sight it seems rather startling that the law applied to the major war criminals who were tried under the Charter should be less comprehensive and therefore less severe than the law applied to not-so-high-ranking perpetrators. In reply to this objection it may be said: (*a*) that the objection is a theoretical and doctrinal one only, because the major war criminals were certain to be caught in the net of the law in spite of the qualification contained in Article 6 (*c*) of the Charter; (*b*) that the striking difference in the texts of the Charter on the one hand, and of Law No. 10 on the other, does not permit of any other interpretation; (*c*) that the difference between the Charter and Law No. 10 probably reflects the difference both in the constitutional nature of the two documents and in the standing of the tribunals called upon to administer the law. As we have attempted to show, the International Military Tribunal is, in addition to being an occupation court for Germany, also—to a certain extent—an international judicial organ administering international law, and therefore its jurisdiction in domestic matters of Germany is cautiously circumscribed. The Allied and German courts, applying Law No. 10, are local courts, administering primarily local (municipal) law, which, of course, includes provisions emanating from the occupation authorities.

There remains one difficulty in the interpretation of Law No. 10. Article I makes the London Charter an integral part of that Law. Article II

contains, as shown, provisions respecting, *inter alia*, crimes against humanity which differ from the London Charter. Which provision is to prevail? It is submitted that Article II is the operative provision, the quoted part of Article I only incorporating the provisions regarding major war criminals in the local law of Germany. The question of the guilt or innocence of persons other than the major war criminals is, then, governed by Article II.

In the British Zone of Control in Germany, a special Ordinance concerning crimes against humanity has been made in accordance with Control Council Law No. 10,[1] which authorizes German ordinary courts to exercise jurisdiction in all cases of crimes against humanity committed by persons of German nationality against persons of German nationality or stateless persons. This Ordinance contains a provision pertaining to the relationship between the concept of crimes against humanity and offences under ordinary German law. Article II of the Ordinance provides that if in a given case the facts alleged, in addition to constituting a crime against humanity, also constitute offences under ordinary German law, the charge against the accused may be framed in the alternative and that the above-quoted provision of Law No. 10 regarding the statutes of limitation and the irrelevance of Hitler's amnesties apply *mutatis mutandis* to the offences under ordinary German law. In the United States Zone of Occupation, the Control Council Law No. 10 has been carried out by the Military Government Ordinance No. 7, which became effective on 18 October 1946.[2] In the French Zone of Occupation, Ordinances of 25 November 1945 and 8 March 1946 have been promulgated by the French Commander-in-Chief.[3] In the Instructions issued by the French Supreme Command in Germany, General Directorate of Justice, for the investigation, prosecution, and trial of war crimes, the term 'crime against humanity' is defined as follows: 'Crimes against humanity are crimes committed against any civilian population of whatever nationality including persecutions on political, racial or religious grounds.' It is added in the Instructions that where such crimes have been committed against nationals of Axis countries the prosecution and punishment of the offenders may involve considerations affecting the general policy of the Allies; investigations in regard to such matters should therefore only be undertaken in pursuance of instructions from higher quarters.[4]

[1] Ordinance No. 47, published in *Military Government Gazette, Germany, British Zone of Control*, no. 13, p. 306. [2] Military Government, Germany, Ordinance No. 7.

[3] *Journal Officiel du Commandement en Chef français en Allemagne. Ordonnance No. 20 du Commandant en Chef, relative à la répression des crimes de guerre* of 25 November 1945, and *Ordonnance No. 36 relative à la répression des crimes de guerre, contre la paix et l'humanité et de l'affiliation à des associations criminelles* of 25 February 1946.

[4] Commandement en Chef Français en Allemagne. Direction Générale de la Justice. Crimes de Guerre. Instructions sur la recherche, la poursuite et le jugement des crimes de guerre. 28 August 1946.

3. *Crimes against humanity in trials before American Military Commissions in the Far East*

The United States military authorities have issued different sets of Regulations for the United States Military Commissions in the Far Eastern and China Theatres of War, which also contain provisions regarding crimes against humanity, and which, in general, are based on the definition contained in the London Charter of 8 August 1945.[1] Under the Regulations which were issued by General Headquarters of the United States Armed Forces, Pacific, on 24 September 1945, the Military Commissions have jurisdiction to try all three types of crimes defined in Article 6 of the London Charter, namely, war crimes, crimes against peace, and crimes against humanity. Crimes against humanity are, though this term is not actually used, defined as follows: 'Murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, or persecution on political, racial, national or religious grounds, in execution of or connection with any offence within the jurisdiction of the Commission, whether or not in violation of the domestic law of the country where perpetrated.'

It will be seen that while the Regulations are, in general, based on Article 6 (*c*) of the London Charter, the following differences occur:

(*a*) While the London Charter speaks of persecutions on political, racial, or religious grounds, the Pacific Regulations add the concept of 'national grounds'. This is the more remarkable because, as was already stated, the Charter of the International Military Tribunal for the Far East speaks only of political or racial grounds, omitting one of the grounds contained in the European Charter, namely, religious grounds.

(*b*) The words 'before or during the war' are omitted in the Pacific Regulations of 24 September 1945.

Both these differences between the Pacific Regulations and the London Charter were removed when the Regulations of 24 September 1945 were replaced by similar Regulations of 5 December 1945, in which the definition of crimes against humanity is as follows: 'Murder, extermination, enslavement, deportation and other inhumane acts, committed against any civilian population before or during the war, or persecutions on political racial or religious grounds, in execution of, or in connection with, any crime defined herein, whether or not in violation of the domestic laws of the country where perpetrated.' The 'national' grounds have been omitted, and the expression 'before or during the war' has been added. The latter

[1] See *Law Reports of Trials of War Criminals*, selected and prepared by the United Nations War Crimes Commission, English ed., vol. i, Annex II, p. 111.

phrase has been extended by a further provision, which reads as follows: 'The offences need not have been committed after a particular date to render the responsible party or parties subject to arrest, but in general should have been committed since or in the period immediately preceding the Mukden incident of September 18, 1931.'

Provisions on the same lines as those contained in the Regulations for the Pacific Theatre, dated 24 September 1945, were made for the China Theatre on 21 January 1946. Under the Regulations issued for United States Military Commissions in Europe, their jurisdiction is restricted to war crimes in the narrower sense and does not include crimes against humanity.

4. *Regulations for British Military Courts*

The instrument under which the trials of persons charged with war crimes by British Military Courts are conducted is the Royal Warrant of 14 June 1945.[1] This instrument restricts the jurisdiction of the Military Courts to the trial of 'war crimes', and 'war crime' is defined as 'violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September 1939'. Acts committed before the war, and acts which are not violations of the rules of warfare, are, therefore, outside the jurisdiction of British War Crimes Courts. They cannot, therefore, try crimes against humanity, unless they are simultaneously violations of the laws and customs of war and have been committed after 2 September 1939. The Canadian Order in Council, the 'War Crimes Regulations (Canada)',[2] which came into force on 30 August 1945, and which has been re-enacted in statutory form with effect from 30 August 1945 by the War Crimes Act of 1946,[3] contains a definition based on the same principle:[4] ' "War crime" means a violation of the laws or usages of war committed during any war in which Canada has been or may be engaged at any time after the ninth day of September, 1939.' The Commonwealth of Australia War Crimes Act, 1945,[5] defines 'war crime' as meaning: (*a*) a violation of the laws and usages of war; (*b*) any war crime within the meaning of a previous instrument of appointment of a Board of Inquiry, committed in any place whatsoever, whether within or beyond Australia, during any war. The Instrument of Appoint-

[1] Army Order 81/1945; amended by Royal Warrants A.O. 127/1945, 8/1946, and 24/1946. Cf. *Law Reports of Trials of War Criminals*, selected and prepared by the United Nations War Crimes Commission, English ed., vol. i, Annex I, p. 105.

[2] P.C. 5831 of 30 August 1945, made by the Governor-General in Council under the authority of the War Measures Act of Canada.

[3] An Act, respecting War Crimes: 10 George VI, c. 73, assented to 31 August 1946.

[4] Regulation 2 (*f*).

[5] No. 48 of 1945, assented to 11 October 1945.

ment referred to in the Act[1] explains the term 'war crime' by adopting the list of thirty-two items drawn up in 1919, by the Commission of Fifteen, with a few modifications and additions, the most important among the latter being the crime against peace as defined in Article 6 (*a*) of the London Charter. There is, however, no item in the enlarged list corresponding to Article 6 (*c*) of the London Charter.

5. *Crimes against humanity in municipal legislation*

The legislative instruments so far discussed afford the basis for proceedings against alleged perpetrators of crimes against humanity, in military and occupation courts and in courts, such as the German courts, which derive their jurisdiction in this respect from Allied legislation. Where the ordinary municipal courts of a territory, be it Allied or former enemy, are trying similar offences, they do so, as a rule, under pre-existing positive penal law; it is therefore neither necessary nor has it happened frequently that the concept of crimes against humanity has expressly been made part of codified municipal criminal law. The French Ordinance of 28 August 1944,[2] which was passed at Algiers and forms the basis of the prosecution of war criminals by French courts, is a good illustration of the general attitude of the laws of continental countries to the problem of war crimes in the wider sense. The French Ordinance provides, *inter alia*, that enemy nationals or agents of other than French nationality who are, or have been, serving enemy administration or interests, and who are guilty of crimes or offences committed since the beginning of hostilities either in France or in territories under the authority of France, or against a French national, or a person under French protection, or a person serving or having served in the French armed forces, or a stateless person resident in French territory before 17 June 1940, or a refugee residing in French territory, or against the property of any natural person enumerated above, or against any French corporate bodies, shall be prosecuted by French Military Tribunals and shall be judged in accordance with the French laws in force and according to the provisions set out in the Ordinance, *where such offences*, even if committed at the time or under the pretext of an existing state of war, *are not justified by the laws and customs of war*. This French provision subjects perpetrators of war crimes (in the wider sense) to the provisions of internal penal law and exempts from their operation acts of legitimate warfare. Similarly, the Netherlands Royal Decree establishing a Commission for the Investigation of War Crimes[3] defines

[1] Instrument of Appointment of the Board of Inquiry of 3 September 1945, under the National Security (Inquiries) Regulations, Statutory Rules 1941, No. 35, as amended.

[2] *Codes français et lois usuelles*, (53rd ed., 1946), p. 1195. Cf. Professor Michel de Juglart, *Répertoire méthodique de la jurisprudence militaire* (1946), pp. 232 ff.

[3] Decree of 29 May 1946, no. F 85, Art. 1.

war crimes as 'facts which constitute crimes considered as such according to Dutch law and *which are forbidden by the laws and usages of war*'.

What, in the London Charter, are called war crimes and crimes against humanity are treated as violations of the pre-1938 provisions of municipal penal law in the Retribution Decree of Czechoslovakia.[1] This contains, *inter alia*, provisions relating to membership in criminal organizations (Sections 2 and 3 (2)), deportations for forced labour (Section 6), unjustified imprisonment (Section 7), and also refers to 'national, political or racial persecution' (Section 10). The following are examples of enactments in the passing of which the legislature has either referred, in a general way, to such conceptions as 'laws of humanity' or 'obligations of humanity' or has positively embodied the notion of 'crimes against humanity' in the respective system of internal penal law.

(*a*) In Belgium the Decree (*Arrêté*) of 13 December 1944, regarding the establishment of a Commission charged with the investigation of violations of international law and of the laws and customs of war,[2] in its Preamble recalls that 'numerous violations of the rules of International Law and of the obligations of humanity (*des devoirs d'humanité*) have been committed by the invaders'. The Commission is described as a commission of inquiry into the violations of the laws and customs of war and the obligations of humanity (Art. 1).

(*b*) Similarly, in Luxemburg the Grand Ducal Decree of 3 July 1945, establishing a National Office for the Investigation of War Crimes,[3] in its Preamble refers 'to the numerous violations of international law and of the obligations of humanity (*des devoirs de l'humanité*) which have been committed by the invader', and the National Office is charged, in particular, to collect evidence concerning violations of the rules of international law, of the laws and customs of war, of the obligations of humanity, and of all crimes and offences committed by the invader.

In both the Belgian and Luxemburg statutes the term 'obligations of humanity' (*des devoirs de l'humanité*) is hardly used in the technical sense in which the expression 'crimes against humanity' has been adopted in the (subsequent) London Charter to which both Belgium and Luxemburg eventually adhered.

(*c*) Vespasien V. Pella draws attention to the Romanian Decree-Law of April 1945, regarding the prosecution of war criminals and those responsible for the national disaster.[4] According to Pella, this law seems to anticipate the Charter annexed to the Four-Power Agreement of 8 August

[1] Decree of 19 June 1945, Collection of Laws and Decrees, no. 16.

[2] Arrêté du 13 décembre 1944. Commission d'enquête sur les violations des règles du droit des gens, des lois et des coutumes de la guerre.

[3] *Mémorial du Grand-Duché de Luxembourg*, no. 33, of 7 July 1945, p. 373.

[4] Vespasien V. Pella, *La Guerre-crime et les criminels de guerre* (1946), p. 71.

1945. It subjects to punishment, in addition to violators of the rules of warfare, *inter alia*, persons 'who have ordered or have committed acts of suppression either collective or individual, in accordance with a political or racial plan', or 'the removal and transportation of persons in order to exterminate them', or 'have imposed inhumane treatment upon those who were in their power', all of which are facts either covered by, or very akin to, crimes against humanity as defined in Article 6 (*c*) of the London Charter.

(*d*) The Austrian Constitutional Law of 26 July 1945, concerning war crimes and other National-Socialist misdeeds,[1] also enacted before the London Four-Power Agreement, distinctly juxtaposes war crimes and crimes against humanity in providing[2] that:

'Any person who, in the course of the war launched by the National Socialists, has intentionally committed or instigated an act repugnant to the natural principles of humanity or to the generally accepted rules of International Law or to the laws of war, against the members of the armed forces of an enemy or the civilian population of a state or country at war with the German Reich or occupied by German forces shall be punished as a war criminal.

'Any person who, in the course of this war, acting in the real or assumed interest of the German armed forces or of the National Socialist tyranny, has committed or instigated an act repugnant to the natural principles of humanity against any persons, whether in connection with warlike or military actions or the actions of militarily organised groups, shall be considered guilty of the same crime.'

(*e*) The Danish Act concerning the punishment of war crimes,[3] after stating that a foreigner who has infringed the rules or customs of international law regulating occupation and war and has performed, in Denmark or to the detriment of Danish interests, any deed punishable *per se* in Danish law, can be prosecuted in a Danish court, goes on to provide as follows:

'In addition to the instances cited in paragraph 1, persons having committed the following crimes shall be liable to prosecution under this Act: war crimes or crimes against humanity such as murder, ill-treatment of civilians, prisoners or seamen, the killing of hostages, looting of public or private property, requisitioning of money or other valuables, violation of the Constitution, imposition of collective punishments, destruction by explosives or otherwise, in so far as such actions were performed in violation of the rules of International Law governing Occupation and War. This Act shall further apply to deportation or other political, racial or religious persecution contrary to the principles of Danish law, and further to all actions which, though not specifically cited above, are covered by Article 6 of the Charter of the International Military Tribunal.'

Here Article 6 of the London Charter, including its provision concerning crimes against humanity, is expressly embodied in Danish domestic law.

[1] Staatsgesetzblatt No. 32, amended 18 October 1945, Staatsgesetzblatt No. 199.
[2] Section I (1) and (2).
[3] Of 12 July 1946, ch. i (1) and (2).

IX. *Conclusions*

'An undisputed gain coming out of Nürnberg is the formal recognition that there are crimes against humanity' said President Truman in his letter to the American member of the International Military Tribunal.[1]

While not dissenting from this view in principle, the international lawyer cannot but bear in mind the many restrictions, laid down in the Charter and the Berlin Protocol and adopted at Nuremberg, which qualify its scope and application. The idea of external judicial interference within the area of exclusive domestic jurisdiction has certainly made some progress, if we compare the position after World War II with that on the conclusion of its 1914–19 predecessor. Whereas, a quarter of a century ago, the subjection to outside jurisdiction of the internal matters of a state, even though the state was a vanquished state and the matters concerned war-time occurrences, had not proceeded beyond inclusion in a Treaty of Peace which was not ratified and has never come into force, in 1945/6 matters of domestic jurisdiction, provided only they were connected with the war, have been made the subject of criminal proceedings in a court which, in addition to being a local court, also functioned as an organ of the international community. A connexion with the war, moreover, has been presumed in respect of actions committed during the war. And where inhumane and criminal conduct had occurred in territories occupied before the outbreak of war in the traditional and technical sense of the word (i.e. before 1 September 1939), it was subjected to international jurisdiction because of its connexion with the aggression.

The notion of crimes against humanity, freed, moreover, from the fetters of the Charter and Berlin Protocol, has entered the sphere of many municipal legal orders. This, too, is certainly a gain, though it must be said that the jurisdiction over crimes against humanity of occupation and municipal courts in Germany and elsewhere has little bearing on the great principle which it is the desire of many to see embodied in the law of crimes against humanity, namely, the principle that the protection of a minimum standard of human rights should be guaranteed anywhere, at any time, and against anybody. The international aspect of such protection disappears in trials before courts which are unambiguously local courts. Interference in internal German affairs, e.g. under the Control Council Law No. 10, is not founded on the intention of protecting human rights from outside, but it is a hardly avoidable corollary to the disappearance of German sovereignty and to the temporary abolition of judicial and humanitarian standards in that country. The International Military Tribunal was established for the trial and punishment of the major war criminals of the

[1] 12 November 1946, *U.S. Department of State Bulletin* (24 November 1946), p. 954.

European Axis. It was, therefore, an *ad hoc* Tribunal. Article 5 of the Charter provided for the setting up of other tribunals, the establishment, functions, and procedure of which should have been identical and governed by the Charter. Only German accused, however, were tried under the Agreement and no second International Military Tribunal has been set up under it. 'The conclusions of Nuremberg may be ephemeral or may be significant.'[1] The task of making the protection of human rights general, permanent, and effective still lies ahead.

[1] Justice Francis Biddle, *U.S. Department of State Bulletin* (24 November 1946), p. 956.

BOOTY OF WAR

By H. A. SMITH, D.C.L.

UNLIKE the law of prize, upon which there is now a copious literature, the law of booty is almost unwritten. The reason is that questions of prize have generally been decided by courts of law, and the decisions of courts furnish the material which lawyers, especially Anglo-American, like best. Questions of booty are decided by commanders in the field, and their decisions, although advised by legal officers, are unrecorded outside the files. The standard text-books are almost silent, and the little that they say is seldom of any practical value in dealing with the actual problems which arise in modern war. For the most part the authors content themselves with paraphrasing the well-known provisions of The Hague and Geneva Conventions which prohibit the more obvious forms of misconduct, such as pillage and the robbing of prisoners.

The real problems of booty in modern war are entirely different. The text-books, although much revised by many editors, still speak the language of nineteenth-century war, and are chiefly concerned with booty found on the battlefield—discarded equipment and the personal effects of soldiers. Such questions present no legal difficulty and are in practice usually unimportant. Neither the standard authors nor their editors have envisaged the situation which arises when the whole economy of an occupied territory has been submitted for several years to the demands of total war.

Broadly speaking, the German policy in Europe was that the entire resources of an occupied country should be made to serve the purposes of the German war effort. It is idle to ask whether this can be brought within the words of The Hague Rules, which provide that requisitions must be limited to 'the needs of the army of occupation' (Article 52). This archaic language was inspired by the Napoleonic wars, and it is quite impossible under modern conditions to draw a logical line between the needs of the occupying forces and the vast organization upon which they depend. By decrees promulgated at the outbreak of war the whole internal economy of Germany had been harnessed to the war machine, and occupation merely extended this system to the occupied territories. Every source of food-supply, every factory, every means of transport was marshalled and organized to the same end.

The material results of this vast organization were uncovered when the Allied armies, after the collapse of German resistance south-west of the Seine, swept at great speed through northern France and Belgium and then into southern Holland. The material left behind by the Germans was of every conceivable kind, and it was found in every possible stage of

production or manufacture. Some goods were in transit, loaded upon trains and barges, others were still in the factories or on the farms. The raw materials had sometimes come from Germany, but more often they were the products of the country in which they were found. Those which had come from Germany could be further divided into those which were directly supplied by the state and those which had been supplied by commercial firms.

From this it will be seen that the problems calling for solution were substantially the same as those which arise in prize law, but they could not possibly be handled in the same way. The laws of war on land provide no tribunals for the decision of booty questions, nor would time permit of the elaborate and leisurely procedure of inquiry, documentation, and argument whereby a prize-court judge is assisted in reaching his decision. There is no ritual of seizure and capture, no 'visit and search', no recognized system of marshalling the evidence for adjudication. Capture usually consists of discovery, and this may be effected by all kinds of units. In the course of an advance troops come across property lying in a warehouse, a goods train, or a canal barge. The officer immediately responsible will usually be of junior rank, and it is not to be expected that he should have any precise knowledge of the law. It is usually impossible to determine upon the spot the question of ownership, if this is in dispute. All kinds of claims may be put forward, supported by irregular and fragmentary evidence, the value of which it is very difficult to assess.

The question of booty is not dealt with explicitly by conventional law, but in principle it seems to be covered by Article 53 of The Hague Rules of Land Warfare. Although this Article forms part of a chapter which purports only to define the rights of an army occupying hostile territory, there is no reason why the same rules should not apply in all theatres of war. In practice the problems in the European theatre which called for legal advice arose more frequently in friendly than in enemy territory.

Article 53 comprises two paragraphs, which deal respectively with state property and private property. The text is disfigured by the bad draftsmanship which is characteristic of The Hague Conventions, but the general sense seems to be fairly clear. By the first paragraph the army of occupation is entitled to seize 'all movable property of the state which may be used for military operations'. In the second paragraph the words used are 'all kinds of war material' (*toute espèce de munitions de guerre*), and in north-west Europe it was ruled that the two phrases must be taken to have the same meaning. The practical interpretation of both is that 'war material' comprises all movable articles for which a modern army can find any normal use. These will include, among other things, all forms of food, drink, and tobacco, since it is not in practice possible to drawn fine distinctions between the

more popular and the more luxurious varieties, but it will not include such articles as scent, cosmetics, or silk stockings. Such commodities may be in much demand by the troops, but they form no part of the normal requirements or amenities of the armed forces. To draw a line with perfect logic is almost impossible, and the distinction given was in fact questioned by some officers of the A.T.S., but it gave a practical working rule. We should not be far wrong in saying that 'war material' includes everything that is issued from quartermaster's stores or sold by the N.A.A.F.I. organization.

It will be seen that the problem of defining 'war material' is substantially the same as that of defining 'contraband' in the law of naval warfare. In each case it is clear that modern developments have rendered obsolete most of the problems so keenly controverted in the past, and that the armed forces of a belligerent are now entitled to seize anything for which they can find any normal use. The result is that the categories of things liable to seizure in modern war cover almost the entire range of ordinary commerce. Perhaps works of art and the things sought by collectors come nearest to forming clear exceptions, though even these may be liable to capture at sea if they are used by the enemy as a means of supporting his exchange.

In a word, almost everything is liable to seizure under Article 53 of The Hague Rules, and the only real difference between the two paragraphs is that compensation must be paid after the war for private property seized whereas state-owned war material may be taken without any liability to compensate. In the late war all property belonging to the Nazi or to the Fascist parties or to their affiliated organizations has been treated as state property, a decision which followed logically from the complete identification of state and party under totalitarian systems of government.

But the one-party system is not the only factor which affects the problem of booty. The basic ideas of Nazism are not really different from those of communism, and in Germany the attitude of the state towards private property, at least in time of war, was clearly based upon the communist principle. In September and October 1939 a series of decrees was promulgated which in effect transferred to the Reich the actual ownership of the products specified in each decree. In each case it was enacted that the products named were deemed 'to be seized in favour of the Reich' (or of some public department), and they could not then be dealt with in any way except under official authority. Imported products were deemed to be 'seized' at the moment when they crossed the frontier. Since it is not generally realized to what extent the German Government was prepared to go, it may be of interest to give a list of the decrees relating to particular products. They were as follows:

(*a*) Cereals and fodder. This covered bread and all other cereal

products, all animal fodder (except green stuff to be used by the grower), peas, beans, and other pulses, rice, coffee substitutes, and tea.

(*b*) Animals and animal products, including game and wild animals fit for food. Animals could only be slaughtered by official permission.

(*c*) Milk, milk products, oils, and fats.

(*d*) Potatoes and potato products.

(*e*) Sugar-beet, sugar, and other sugar-beet products.

(*f*) Spreads for bread, dried vegetables, onions, and spices. This included all forms of jams and preserves.

(*g*) Eggs and egg products.

(*h*) Fish and fish products.

(*i*) Cocoa, chocolates, and confectionery.

(*j*) Coffee.

(*k*) Textiles and textile articles.

(*l*) Leather and leather products.

(*m*) Furs, fur articles, hides and skins suitable for furs (other than those of tabby cats).[1]

Normal household stocks were excluded in each case, and growing stocks were not subject to seizure before severance from the soil.

The general effect of these decrees was that all substantial stocks of the goods specified were regarded as being in law the property of the Reich and therefore liable to seizure as booty of war without any obligation to compensate individuals, though this did not exclude *ex gratia* payments in suitable cases.

From this it will be clear that the question of booty is really only one particular aspect of a much wider problem. The real issue which confronts the lawyer to-day is to determine to what extent changes in the organization and functions of modern states have affected the principles of the law of nations and, in particular, the laws of war. To this question the books as yet can give us no answer, for the classical text-books of the nineteenth century are all founded upon the assumption of a clear distinction between the activities of the state and those of the individual, a distinction which is necessarily reflected in a sharp difference in the treatment accorded respectively to public and to private property. The Hague Rules dealing with the law of military occupation are only fifteen in number, but of these fifteen no less than eleven are concerned with the protection of private property against the exactions of an occupying army.

The truth is that there was something artificial and pedantic about the personification of 'The State' which became fashionable in the nineteenth

[1] Perhaps some expert can explain the reason for this exception.

century. The great scholars who founded the law of nations talked more sensibly about the rights and duties of 'princes', thus making it clear that in the last analysis all law is binding upon individuals and upon individuals alone. 'Universitas, sicut est capitulum, populus, gens, et huiusmodi nomina sunt iuris, et non personarum.' The words are those of Pope Innocent IV, commenting upon the decree of the Second Council of Lyons (1245) which prohibited the collective excommunication of corporate bodies. If war is made against a 'state', all the individuals in the enemy state become enemies. Such is the sensible and realistic teaching of English law, which has always refused to accept the artificial pedantry that the law of nations concerns states only, and not individuals.

Every political community is in fact controlled by a very few men, and under modern conditions these few men now have an almost unlimited power to command the services and the property of all persons who are in fact subject to their jurisdiction. Since the only real test of ownership lies in the power of disposition and control, as our prize courts have always taught, this means that in time of war the distinction between public and private property ceases to have any real meaning. The purpose of the law of booty is to enable a belligerent to take possession of all property which his enemy can make use of for the purpose of waging war, and under modern conditions there is very little which does not come within this definition. In so far as such property is 'private', it is clear that the rights of a belligerent over the private property of enemy individuals cannot be less than those of his enemy. If the government assumes and exercises an unlimited right to take and use the property of individuals for the prosecution of the war, the opposing belligerent who enters his territory must be entitled to do the same. In so far as making immediate use of the goods is concerned, he need not hesitate. The question of compensation, if compensation is due, is merely a question of accountancy, and this, under The Hague Rules (Article 53), need not be settled until after the war.

At this point it may be convenient to cite briefly a few of the problems which arose in practice during the campaign in north-western Europe. In Germany itself, for the reasons already given, no serious difficulties presented themselves, and the examples given are all drawn from the campaign in liberated territory. The real problem was not that which alone is envisaged by The Hague Rules, that is to say, the determination of rights between enemies. The practical questions to be solved were those which arose from the recapture of the property of friendly nationals which had fallen into the hands of the enemy. In the countries which they had occupied the Germans possessed the rights of an occupying force under The Hague Rules. In so far as property had been acquired under these rules, however harshly, it had become the property of the Reich, whether it had

been paid for or not,[1] except in the few cases where it could fairly be described as 'loot'. At the same time obvious reasons of policy and justice made it impossible for the Allied forces to rely entirely upon their strict legal rights.

The examples given are typical of a large number of cases which were referred for guidance to the legal section of the Civil Affairs Staff at the headquarters of 21st Army Group. The text-books available, being little more than barren paraphrases of The Hague Rules, proved to be of no practical help in the solution of problems which the authors of these rules had never envisaged. The legal officers, most of whom were practising solicitors, had to use such gifts of reason and common sense as they possessed in doing what they considered to be substantial justice within the broad principles of law. They had to assume the functions of a prize court, but without the assistance of counsel, without recourse to libraries stored with precedents, and without the unlimited time which a court of prize deems to be necessary for the full maturing of its wisdom. As 'authorities' the text-writers of the future may perhaps consider the examples here given to be of little weight, but they may at least serve to illustrate the practical nature of the problems which had to be solved. It should be made clear that the decisions reached cannot be cited as binding upon the British Government in future cases. Technically they are decisions of the Commander-in-Chief in the field, and in practice they represent the opinion of the legal officers on his staff.[2] In default of more dignified 'authorities' it is possible that these opinions may be cited as precedents, so they will be given provisional headings.

1. *The Le Havre Currency Case*

In Le Havre, as elsewhere in the occupied territory, the German commander of the garrison had authority to draw upon the local branch of the Bank of France for funds, the normal limit being 100,000,000 francs a month. When the town was cut off by the Allied advance, the garrison commander decided that the authorized credit might not be enough for a prolonged siege, and he persuaded the bank manager to grant a large overdraft. It is doubtful whether the manager had much option in the matter, but there was at least formal consent, and a receipt was given. Under this arrangement a sum of 300,000,000 francs was withdrawn in French currency. Some of this money was used to pay the troops or to purchase local supplies. When surrender became imminent a sum of 195,000,000 francs was returned to the bank, and the remainder, some 37,250,000 francs, was

[1] This principle is supported by several decisions of national courts cited in the earlier volumes of the *Annual Digest of Public International Law Cases*.

[2] As I was the senior officer of the Civil Affairs legal staff, the immediate responsibility was my own.

packed in bags for return. Le Havre was captured by assault before this money was in fact returned, and the bags were found in a tunnel. Further sums amounting to over 15,000,000 francs were found in various safes.

Upon these facts it was ruled that the captured currency was booty of war, and not the property of the bank. Whether the transaction may be regarded as a money 'contribution' or as an overdraft, in either case its legal result was to create a debt due from the German Government to the Bank of France. The actual currency became the property of the Reich as soon as it was handed over to the German authorities and it remained German state property until it should be in fact returned to the bank. The fact that the commander intended to return the notes and had begun to do so did not vest title to the notes in the bank until they were actually returned. At the time of capture they were German state property and therefore good booty.

2. *Cigars captured at Hapert*

A German firm delivered to a Dutch manufacturer a large quantity of leaf tobacco to be made into cigars for the German forces. No payment for the tobacco was made by the manufacturer. When the factory was overrun by the Allied advance some 2,000,000 cigars were found ready for dispatch, and enough leaf tobacco remained to make 5,000,000 more.

In this case both the manufactured cigars and the leaf were clearly booty of war. The legal position of the manufacturer was that of a workman who had been employed to work upon German materials for German use. As in the *Le Havre* case, it therefore follows that the German firm (or perhaps the German Government) was indebted to the manufacturer for the value of the work already done and was probably under a contractual obligation to take delivery of the remainder. But there is no 'succession' of obligations between one belligerent and another, and the Allies were clearly under no obligation to settle the unpaid bills of the enemy. So far as a legal ruling was concerned, there was no more to be said. In fact it was arranged that the Allied forces would buy the manufactured cigars at a price which represented the value of the work done. The remainder of the leaf was handed over to the Netherlands authorities. The question of the compensation (if any) due to the German firm was left for settlement after the war (Hague Rules, Article 53).

3. *Growing crops*

In many cases the Germans had supplied seed to Dutch farmers to raise crops which would ultimately be consumed by the German army or civil population. In reply to a question raised by the formation concerned a ruling was given that in no circumstances could growing crops (including

roots) be treated as booty of war. If such crops were required for military or civil affairs purposes they must be obtained through requisition by the Netherlands authorities. After severance from the soil crops could be requisitioned in the ordinary way, and such crops, if they had been requisitioned by the Germans, could be seized as booty.

4. *Goods in transit*

Very large quantities of war material (as defined above) were discovered loaded in trains, lorries, or barges for delivery to Germany or to the German forces. Such cases present an obvious analogy with the problems which come before prize courts. All goods of enemy destination were in fact seized, since the urgent need for transport demanded the immediate unloading of the vehicles. If the consignee was the Reich Government or any of its agencies no further question arose. If the consignee was an enemy commercial firm this made no practical difference, since in most cases the firm would be a supply agent for the German Government. In the unlikely event of the firm being a genuinely private concern, it could present a claim for compensation after the conclusion of peace (Article 53). It was not necessary to consider who was the owner in civil law of the goods at the moment of capture, a question which in German law would depend upon the agreement between the contracting parties. Under other systems of law the result might be different. The only cases which caused any practical difficulty were those in which claims of ownership were put forward by Allied nationals. These claims sometimes depended upon the terms of commercial agreements which could not be fully examined without judicial machinery. The substance of the decisions given was that goods in transit were treated as if they were the property of the claimant, if they had not in fact been paid for. This did not prevent them from being seized as war material, but it entitled the original owners to compensation. In law this often amounted to a waiver of Allied rights, since it is clear that goods requisitioned by the enemy in occupied territory become enemy property, whether they have been paid for or not.

5. *Pigs in Brabant*

In the advance across Belgium, Second Army uncovered about a thousand pigs which were being fattened on various farms for the ultimate use of the German army. So far as could be ascertained the pigs had been earmarked for requisition, and Second Army considered this sufficient to justify them in killing and eating a large number. The slaughter of the pigs was stopped pending further investigation, and it was ultimately ruled that the pigs remained Belgian private property, since they had not been in fact

requisitioned by the Germans at the date of capture. Since the pigs were clearly war material, the only question to be decided was that of compensation. The pigs which had been slaughtered were treated *ex post facto* as having been requisitioned, and the remainder, when suitably fattened, were requisitioned from their Belgian owners in the normal way.

6. *Stolen currency*

On 3 September 1944 three Belgians walking along a country road found two boxes full of currency in an abandoned German lorry. The sums amounted to 269,940 Belgian and 309,165 French francs. The money, less a certain amount alleged to have been spent by or on the respective wives, was subsequently discovered by the Belgian police in the men's homes. The men were tried and sentenced by the Belgian courts. In this case the physical identity of the currency which had been stolen was clearly established, so there was no difficulty in treating it as booty of war. The crime against Belgian law which had been committed consisted in the unlawful possession of Allied property.

A few words may be added about 'loot'. In the instructions given to the legal officers of 21st Army Group this term was defined as covering all movable property which had been physically seized by the Germans without any colour of legal right. Normally it would be found to consist of such things as works of art and other valuables which had no military use, and therefore did not constitute 'war material'. If the goods could be put to military use they might be seized as booty, the owners being entitled to compensation. In all cases of loot the legal title remained vested in the original owners, who would usually be Allied nationals. It was laid down that any sales of looted property should be treated as invalid, since the vendors would have no title which they could transfer, and the only remedy of the purchaser would therefore be against his vendor. When such property was discovered its custody and preservation was a matter for the Finance (Property Control) Section of the staff, which was given the power of control under Military Government Law No. 52. The function of legal officers was limited to advising the Custodian whether given property did or did not fall within the category of 'loot'.

Since the word 'loot' is often carelessly used in popular language, the importance was emphasized of distinguishing clearly between loot and property which had been requisitioned or seized by the Germans under Articles 52 and 53 of The Hague Rules. The latter became the property of the German Reich, even if no payment had been made, and the original owners were limited in law to a right to claim payment or compensation from the enemy. From this it followed that the Reich, as legal owner, could

give a good title to third parties, but this did not limit the right of the Allies to seize the property under the second paragraph of Article 53.

So far as questions of loot were concerned, the Allied command was only concerned with property taken from Allied nationals. It was no part of our duties to redress the wrongs which Germans had suffered before the period of occupation at the hands of their own authorities.

At this point a word must be said about the organization known as 'Civil Affairs'—the former 'A.M.G.O.T.' of the Italian campaign. As explained in the 1944 volume of this *Year Book*, this was a new branch of the military staff and was organized in the first instance with a view to the military control of civil administration in occupied enemy territory. The campaign in north-west Europe differed from the Italian campaign in that it began in friendly territory where the laws of military occupation did not apply. For this reason the branch of the staff which was to become 'Military Government' upon arrival in Germany was known as 'Civil Affairs' in the liberated territories. Its organization and personnel were the same, but its functions were different. Under the agreements signed with the Allied Governments, the 'Civil Affairs' staff became in effect a liaison organization between the tactical forces and the national authorities. In friendly countries there was no 'Military Government'.[1]

The organization was based upon the principle that Civil Affairs, like Military Government, was a responsibility of command. In the British forces every commander down to Corps level had a Civil Affairs Branch of his headquarters staff, and a similar staff was provided for the headquarters of the lines of communication. Through this staff the commander controlled a large number of small 'detachments', which were in effect the operational troops of this service. There was a legal section of the staff at Army Group and Army levels, while a few legal officers were also attached to detachments, usually in the more important centres.

In practice, questions of booty normally presented themselves as issues between civilian claimants and the military authorities. That being so, it was natural for commanders in the field to turn to Civil Affairs for guidance in all cases of difficulty. Most of these cases found their way up to Army Group level, and in due course it was recognized that the Civil Affairs Staff at Army Group Headquarters should decide whether particular items were or were not booty. Within the staff these questions were naturally referred to the legal section, which thus found itself compelled to solve problems of the kind which in naval warfare are submitted to a prize court. If the decision was in favour of the civilian claimant the goods

[1] In planning for the invasion all preparations had been made for the setting up of military government in liberated territories, should the national authorities be unable or unwilling to function. Fortunately these precautions all proved to be unnecessary.

were placed at the disposal of the Allied government concerned. If it was ruled that the goods were booty, the question of their disposal became one for the 'Q' Branch of the staff. In some cases it was found that the best thing to do was to turn the property over to Civil Affairs for the relief of the civil population. If the question of ownership was difficult or doubtful, as often happened, this did not mean that the material had to be immobilized for an indefinite time. What was important was to ensure that the best and quickest use should be made of everything which was in fact useful. If property seized as booty proved, after further inquiry, to be privately owned, it could be treated *ex post facto* as having been requisitioned. The civilian owner would then look to his own government for compensation, since it was a rule in friendly territories that all requisitions, wherever possible, should be made through national authorities, the final adjustment being a matter of accounting on an international basis.[1]

It remains to say something about the machinery of settlement, in so far as Belgium and Holland were concerned. Within the 21st Army Group, as we have already noted, it was agreed at an early stage that the legal staff of the Civil Affairs Branch should advise upon all questions of booty. The question of settling doubtful questions with Allied authorities was postponed for some time in the hope that an agreement might be made upon the political level. But the wheels of diplomacy turn slowly, and Foreign Office staffs sometimes find it difficult to realize the urgency of the problems which arise in the field. It was therefore decided to devise an international procedure at the military level. A committee was set up upon which were represented the interested branches (including Civil Affairs, Legal) of the Army Group Staff and the Belgian 'Organisation de Récupération Économique' ('O.R.É.'). This committee sat weekly and disposed quickly of such questions as arose. Subsequently a similar procedure was devised for cases arising in Holland, with the exception that the committee in Holland worked at Army level, the Dutch organization being the 'Militair Commissariat voor het Rechtsherstel', which represented the 'Netherlands Military Administration', 'N.M.A.', or 'Militair Gezag'.

It should be emphasized that the primary function of these committees was not to decide questions of law, but to ensure that all property captured should be put to the best use as quickly as possible. The first question to be answered was whether the goods could be put to any military use. In the liberated territories the situation created by the German occupation made the relief of the civil population a military task of the first urgency. From this it followed that goods which could be used for

[1] These and many other matters were dealt with in the agreements signed before the invasion with the Allied governments in London. The broad principle was that civil authority should be vested in the national governments concerned, these governments on their part agreeing to exercise all their emergency powers as requested by the military command.

the immediate relief of the civil population were 'war material' within the meaning of The Hague Rules. If captured goods were required for the needs of the combatant forces, the 'Q' Branch of the staff became responsible for their disposal. But Civil Affairs was also a branch of the staff, and the requirements of Civil Affairs were no less military than those of 'Q'. For example, the Germans had systematically plundered Holland for the supply of German needs inside Germany. Trains were captured full of such goods as clothing, blankets, and furniture for the use of bombed-out civilians. Such goods were handed over to Civil Affairs for distribution among the Dutch population, and this was a military activity. If the captured goods were of private Allied origin and had not been paid for, the original owners were entitled to compensation to be paid through their national authorities. Goods which were not required either for the actual use of the armed forces or for civilian relief were handed over to the Belgian or Dutch authorities, who were responsible for returning them, if ownership was proved, to private claimants.

It will be apparent that the story told in this article is the record of an improvisation, and the first draft was prepared under service conditions in the field in the spring of 1945. Further search in libraries at home has only served to reveal the emptiness of the larder stocked by the academic writers of the past. In due course it is to be hoped that additional material will be forthcoming from the records of other armies and from other theatres of war. In the meantime the experience of 21st Army Group Headquarters is offered for what it is worth. The task of the legal staff was to apply the accepted principles of law to the practical problems presented by the changed conditions of modern war. The law of nations, like all other law, can only survive as a living force if it proves that it is capable of adapting itself to the needs of the time. This task of necessary amendment, which the law of every country entrusts to its legislature, assisted by the courts, must for the law of nations be formed by various agencies, such as foreign offices, prize courts, or naval and military officers. It will be for the jurists of the future to determine how far the staff of 21st Army Group was successful in meeting its small share of this great responsibility.

NOTE

As a matter of historical record it may be of interest to reproduce the first order issued by 21st Army Group upon the question of booty (July 1944). It should be read with the qualification, which was decided at an early stage, that the apportionment of captured material between the Allies was a matter for the Supreme Command.

SUBJECT: Ownership of Movable Property Abandoned by or Captured from the Enemy

Jul. 44.

1. Questions having already arisen in the beachhead over the ownership of movable

property abandoned by or captured from the enemy the following legal guidance is given.

2. It must be borne in mind that the position of the Allied Forces in France differs from that of the enemy. The Germans in France were entitled to act under the law of military occupation as stated in the Hague Rules, and their title to any property which they may have acquired must be judged accordingly. The Allies are operating in friendly territory and the Hague Rules do not apply. The question in each case is whether the property is 'booty' (*butin de guerre*) under the general principles of the laws of war. That being so, the title to the various classes of property likely to be encountered will be decided in accordance with the following rules:

(*a*) All movable property in which the title has passed to the Germans under international law becomes the property of the State whose armed forces have taken possession of it, whether on the battlefield or subsequently. This includes:

(i) All military stores and equipment, wherever manufactured or acquired, belonging to the enemy or his Allies.

(ii) All movable property of the French Republic captured by the enemy in operations (including operations against the Forces of the Interior) or surrendered under the terms of the Franco-German armistice.

(iii) All property of communes, companies, or individuals acquired by requisition or purchase, even if payment has not been made.

From this it will be seen that any German military equipment, &c., captured by or on behalf of the French Forces of the Interior becomes the property of the French Republic. This will cover property taken by the French police.

(*b*) The Germans have acquired no title to private movable property (including the property of communes) which has been acquired by theft, looting, or pillage. Such property should be restored to its original owners as soon as their claims can be established according to French law. If used by the Allies such property should be treated as having been requisitioned by them.

(*c*) No individual, whether military or civilian, can acquire title to any property captured or recaptured from the enemy, and any attempt by individuals to appropriate captured articles should be punished.

3. It is probable that all questions relating to the disposal of property captured from the enemy will in due course be dealt with by an agreement upon the political level. Pending any such agreement, approval has been obtained from SHAEF for the making of any reasonable local arrangements which do not prejudice the question of legal title. Such arrangements may provide for such matters as the immediate distribution of perishable or consumable goods, the use of bicycles and other vehicles, &c., in accordance with local and practical needs. In all cases careful account should be kept of the money values of all property dealt with under such arrangements, so that questions of legal title may be transferred from the articles captured to the money which represents them.

4. The word 'movable' has been used here purely as a physical description and does not bear the technical meaning which it bears in French law.

Civil Affairs,
Rear Headquarters,
21 Army Group.

HAS/ABG.

THE CONCLUSIVENESS OF THE FOREIGN OFFICE CERTIFICATE

By A. B. LYONS, M.A., LL.B.

IT is the current general practice of English and American[1] courts to accept as conclusive, statements made to them by the Executive as to the existence of certain facts of an international law nature. The purpose of this article is to inquire how the practice arose and how it became settled. It will be shown that it is of fairly recent origin. A study of the reported cases over the past two hundred years tends to demonstrate that the doctrine of conclusiveness was not easily or speedily accepted by the English courts. Only within the past two or three decades has the position been reached where the doctrine may be termed established.

The categories or questions of fact in respect of which the Foreign Office or some other government department[2] have issued such a statement for the information of the court are set out in the sixth edition of Oppenheim's *International Law*[3] as follows:

'(*a*) the question whether a foreign State or Government has been recognised by this country either *de facto* or *de jure*;

'(*b*) the question whether recognition has been granted to conquest by another State or to other changes of territorial title, and, generally, whether certain territory is under the sovereignty of one foreign State or another;

'(*c*) the sovereign status of a foreign State or its monarch;

'(*d*) the commencement and termination of a state of war against another country;

'(*e*) the question whether a state of war exists with a foreign country or between two foreign countries;

'(*f*) the existence of a case for reprisals in maritime war;

'(*g*) the question whether a person is entitled to diplomatic status; and

'(*h*) the existence or extent of British jurisdiction in a foreign country.'[4]

The above list covers a very wide range of subjects, and it is proposed to deal, for the most part, only with three or four of these, namely, the sovereign status of a foreign country and its monarch; the recognition of changes in the government of a country; and, in particular, the question whether a person is entitled to diplomatic status. There is a further class of cases

[1] It is hoped in a later article to examine the history of the 'suggestion' of the American State Department, and to show in what manner and to what extent its conclusiveness is accepted by the American courts.

[2] E.g. the Colonial Office, the India Office, &c. Even—in one case—the Home Office (see *Macartney* v. *Garbutt*, *infra*, p. 257, n. 2).

[3] Vol. i (6th ed. 1947, by Lauterpacht), p. 684 (a Section added by the editor).

[4] There is also a kind of negative certification expressed in a note to R.S.C., O. XXXVII, R. 1 in the *Annual Practice* (1940), p. 657: 'A statement by the Attorney-General as to the extent of territorial sovereignty claimed by the Crown will be accepted as conclusive that the sovereignty does not extend beyond these limits (*The Fagernes*, [1927] P. 311).'

which will also be reviewed, namely, those dealing with claims for immunity of ships (and other chattels) on the ground that they are state property.

I

The long line of reported cases where there has been a statement by the Executive to the courts seems to show a continued but diminishing reluctance in the English courts to enter upon the doctrine of the conclusiveness of such statements. At first the courts appear to be able to deal with cases before them without referring to the Crown at all: indeed, on occasions it is as though they strive to do so. Gradually, however, the tendency is to admit that there are some categories of fact of which the Executive has knowledge peculiar to itself, and that it is proper for the Judicature to inquire of the Executive as to these facts. This movement towards acceptance of the Crown as the source of information is retarded by several factors. Among these factors are the traditional conservatism of the English courts on the one hand, and their traditional suspicion of the Executive on the other hand. Another factor is the need which a court must naturally feel to scrutinize very carefully any attempt or claim on the part of a person or persons physically present, or having property within its jurisdiction, to be exempt from its jurisdiction. *Boni judicis est ampliare jurisdictionem*, and the *judex* must be loath to see any escape from his jurisdiction.

The simplest case of a plea of immunity from jurisdiction is that commonly made by an ambassador for himself or a member of his staff or retinue. This is the type of case first met with in the reports.

It is a universally accepted rule of international law that diplomatic envoys must be exempted from every kind of criminal jurisdiction by the receiving states;[1] nor can a civil action of any kind as regards debts and the like be there brought against them.[2] This privilege extends also to the envoy's staff, family, retinue, servants, chaplains, &c. It was obviously a privilege of particular worth in England in the days when a debtor could be imprisoned for non-payment of his debt, and it is not surprising, therefore, that some of the earliest cases in the English courts concerned with diplomatic persons are those dealing with claims of persons so imprisoned to be members of an envoy's staff, and thus immune from arrest.

Here is the main problem—granted the general principle of immunity of diplomatic persons, how is the court to decide whether a person before it is rightly claiming to belong to that class and to be exempt from its jurisdiction? Such an enviable privilege of immunity must often have been improperly claimed. On the other hand, it will perhaps as often have been

[1] Oppenheim, op. cit., §§ 386, 387.
[2] Ibid., § 391.

improperly denied by creditors whom the debtor sought to oust by his claim. The courts for their part sought to restrict evasions of their jurisdiction while conforming to the accepted principle of the inviolability of the 'publick minister' and all who came rightfully under his aegis.

In many of the cases in the older reports[1] where diplomatic immunity was claimed, it is not clear exactly how the defendant supported his claim, or whether indeed the plaintiff conceded that the defendant held a given position in the Minister's household, &c., and left it to the Court to decide whether that position gave him diplomatic status. As late as 1823[2] the court seems to have accepted the defendant's own affidavit as to his position and status, but there is a line of cases[3] about the middle of the eighteenth century in which the defendant produced a certificate from an ambassador to the effect that he was in the latter's employ, and on production of this certificate the Court held that the defendant was entitled to diplomatic immunity and ordered his release.

In the curious case of *Triquet* v. *Bath*[4] the question arose whether the defendant was 'really and truly and bona fide a domestic servant of Count H., the Bavarian Minister'. In an affidavit on behalf of the defendant it was sworn that he had been so appointed and had so served. This was denied by the plaintiffs in their affidavits, and the Court held that the affidavits on the part of the defendant had outsworn those on the part of the plaintiffs—which reads almost like a reversion to the medieval system of compurgators.[5] This mode of trial was exceptional, and is not found again.

In all these cases, however, the reports give the impression that the courts were content to let the parties fight out the question of immunity between themselves by means of affidavits. There is as yet no trace of what, it will be seen, later became the common practice of reference to, or intervention by, the Crown on the question of whether an individual was or was not entitled to diplomatic status and immunity. However, in two cases about the middle of the century the Crown receives an unexpected mention, not to be repeated for many years, and in a way that strongly suggests that intervention by the Crown was already common form. In the first, in 1743 Malachi Carolino,[6] interpreter to the Ambassador to the Court of Great Britain from the Bey of Tripoli, was arrested for

[1] E.g. *Holmes* v. *Cruden* (1734) ,7 G. 2 B.R.; *Poitier* v. *Croza* (1750), 23 G. 2 B.R.; 1 Wm. Bl. 47, 48; *Johnston* v. *Stewart* (1751), 24 G. 2 B.R.S.P. But in *Barbuit*'s case (1737), Cas. temp. Talbot, 281, the Court examined the envoy's commission from the King of Prussia to ascertain whether he was accredited to the King of England, and found that he was not.

[2] E.g. *English* v. *Caballero* (1823), 3 D. & R. 25.

[3] *Seacombe* v. *Bowlney* (1743), 1 Wils. 20; *Malachi Carolino*'s case (1743), 1 Wils. 78; *Lockwood* v. *Coysgarne* (1765), 3 Burr. 1676; *Darling* v. *Atkins* (1769), 3 Wils. 33.

[4] *Triquet and Others* v. *Bath* (1764), 4 Bing. 1478.

[5] See, e.g., Pollock and Maitland, *History of English Law*, vol. ii (2nd ed. 1911), p. 634.

[6] *Malachi Carolino*'s case (1743), 1 Wils. 78.

debt. He filed an affidavit to the effect that he was retained by the Ambassador to be his interpreter and that he himself was not a trader, and, with other affidavits, a certificate of the Ambassador that Carolino was his interpreter. The report states that 'Mr. Attorney General and Sir John Strange *totis viribus* pressed to have the rule made absolute' (i.e. for his discharge), but the Court was of the opinion that there was not sufficient matter before it for this. However, Sir Cecil Hurst submits[1] that the Attorney-General was appearing for the defendant not in his capacity as a Law Officer, but in the course of his private practice.

In the second case, *Heathfield* v. *Chilton*,[2] on the other hand, this explanation does not seem to apply. The defendant was in the custody of the Marshal (*sc.* of the Fleet Prison?), and in order to obtain his release swore himself to be bona-fide English Secretary to the Minister from the Prince Bishop of Liége. No certificate was produced from the Minister. On the hearing of the application for discharge, Mansfield J. desired to know in what manner the Minister was accredited. 'I find this is not an application by the Attorney-General, by the direction and at the expense of the Crown', he said. 'That indeed would have shown that the Crown thought this person intitled to the character of a public Minister. It now remains uncertain what his proper character is.' But this strong suggestion that intervention by the Crown was an accepted procedure is not repeated, and the case remains *sui generis* in the reports.

For a long time after *Heathfield* v. *Chilton* there is no case worthy of note. Men are arrested for debt and try, sometimes successfully, sometimes not, to obtain their release by claiming to be of the household or in the service of an ambassador. Some of their cases get into the law reports, but are dealt with very briefly, and one is left with very little impression as to the nature of the evidence required by the court as to their status. In any event, the fact that the debtor holds some position on the staff of an envoy is very often undisputed, and argument ranges only as to whether

[1] 'Diplomatic Immunity, Modern Developments', in this *Year Book*, 10 (1929), p. 12 And cf. *Revenga* v. *Mackintosh* (1824), 2 B. & C. 693, an action for malicious arrest. The plaintiff was the accredited agent of the Colombian Government. This was not disputed—indeed, the point was not taken, and the case was agreed on the 'want of probable cause' for the arrest. The Attorney-General appeared, but made no reference to the Crown or to recognition of Colombia as a state or of the plaintiff as a diplomatic envoy. He also appeared for one of the parties in *Cambridge* v. *Anderton* (1824), 2 B. & C. 691, where there was no question in which the Crown could have been interested. In a still earlier case, of *Ball* v. *Fitzgerald* (1730), Ld. Raym. 1524; 1 Barn. 401, the defendant, who was in custody, claimed to be servant to an ambassador, but in his affidavit had styled himself an apothecary and so was outside the protection of the Act of 1708. The Attorney-General appeared and argued with some subtlety, but to no effect, that the defendant might be only a journeyman and not liable to be made bankrupt; therefore he was within the Act. No indication is given whether the Attorney-General appeared in the course of his private practice or as a Law Officer of the Crown. And see *Dolder* v. *Bank of England*, *infra*, p. 247.

[2] (1767), 4 Burr. 2016.

his particular employment[1] qualifies or disqualifies him for diplomatic immunity. Then, in 1811, there occurs a case[2] of a debtor claiming diplomatic immunity, this time for his goods and not for his person, where the evidence put in on his behalf included a certificate from the Secretary of State's Office. This certified that the person named therein was the Minister of the Prince of Hesse. There was also put in a written appointment from the latter constituting the debtor his housekeeper, and a copy of a notice stuck up in the Sheriff's office intimating that the debtor was one of the Minister's servants.[3] It was proved, however, that the debtor kept a boarding-house, and the Court held that it could go behind the appointment and, incidentally, behind the Secretary of State's notice, and ascertain that the man was in fact a trader, and therefore outside the statute of 1708.[4]

Delvalle v. *Plomer* is important as the first reported case in which the Crown is asked to support a claim for diplomatic immunity, in this instance by certifying the status of the public Minister. The Minister in turn certifies that of the claimant. The Court did not attempt to dispute the certification by the Crown of the Hessian Minister; the fact that there was no need to consider the point would not necessarily have prevented the Court, at that time, from doing so: and it may perhaps be taken that the Court regarded the certificate as conclusive.

Three years later, we find that in *Viveash* v. *Becker*[5] the party claiming immunity actually applied direct to the Crown to assist him in his claim. The defendant, who was sued in a bail bond, was consul to the Duke of a minor German Duchy. He claimed 'privilege of arrest', and filed an affidavit, in which it was said that an application had been made at the Secretary of State's Office to discover if the defendant's name was registered there as a public minister. The deponent was, of course, informed that a consul 'was not considered in that department as a foreign minister', but the fact that he went to the length of setting this out in his affidavit suggests that the application to the Crown had by now become common practice in cases of this sort, and that he felt that he ought to mention an unsuccessful application in order to account for the absence of the Secretary of State's certificate.

[1] E.g. *Hopkins* v. *De Robeck* (1789), 3 Term. Rep. 79 (secretary); *Darling* v. *Atkins* (1769), 3 Wils. 33 (purser of a ship of war); *Triquet* v. *Bath* (1764), 4 Bing. 1478 (trader); *Seacomb* v. *Bownley* (1743), 1 Wils. 20 (chaplain); *Masters* v. *Manby* (1757), 1 Burr. 401 (land waiter at a Custom House); *Novello* v. *Toogood* (1823), 1 B. and C. 554 (where the debtor was at once a lodging-house keeper, a teacher of languages, and a prompter at the Opera). On this, see Langton J. in [1939] P. at p. 326.

[2] *Delvalle* v. *Plomer* (1811), 3 Camp. 47.

[3] As required by the Diplomatic Privileges Act, 1708. See next note.

[4] Diplomatic Privileges Act, 1708, 7 Anne, c. 2.

[5] (1814), 3 M. & S. 284.

II

It is now necessary to turn to a series of cases of a totally different nature. In reviewing the attitude of the Court to recognition of 'international persons'[1] and diplomatic envoys, it will be found that, once the country has, as it were, settled down to the Diplomatic Privileges Act of 1708, decided cases on diplomatic persons are comparatively few. But at the beginning of the nineteenth century the courts are called upon to decide a number of cases which depend on the recognition of states and of revolutionary or post-revolutionary governments. This is something new for English courts, and it is interesting to note the way in which they work out a solution of the question, how to know whether a state, or government, which is alleged to have been recognized by Great Britain has in fact been so recognized. The question is, of course, intimately bound up with the substantive problem of judicial recognition, but an attempt will be made to confine attention to those cases dealing with the evidential side of the question. In the working out of the problem there are resemblances to the course of judgments in the cases which we have just noted. At first it is sufficient for a party to allege in pleadings, to depose in his affidavit, that the country or government concerned has been recognized by the United Kingdom; and for the other party to deny it in his pleadings. Then there is an attempt to bring in evidence of the ordinary kind. Finally there is recourse to the Crown to provide the evidence.

First, we should perhaps notice the *City of Berne* case,[2] on which, and on the case of *Taylor* v. *Barclay*,[3] the learned editor of Roscoe's *Digest of the Law of Evidence*[4] bases the rule that 'There are many facts which the Court will notice judicially and of which it is therefore unnecessary to give any evidence. Example: The existence of a foreign state recognised by the British Government but not otherwise.' Members of the Common Council Chamber of the City of Berne applied to the English Court of Chancery to restrain the Bank of England and the South Sea Company from permitting a transfer of certain funds standing in their names under a purchase by the former Government of Berne before the Revolution of 1798. The motion was opposed on the ground that the existing Government of Switzerland, created under the aegis of Napoleon, had not been acknowledged by the Government of this country. Eldon L.C. was 'much struck by the objection'. It was, he said, 'extremely difficult to say a judicial Court can take notice of a government never authorized [*sic*] by the

[1] See Oppenheim, op. cit., vol. i, § 63.

[2] *City of Berne* v. *Bank of England* (1804), 9 Ves. Jun. 347.

[3] (1828), 7 L.J. (O.S.) Ch. 65: also *Foster* v. *Globe Venture Syndicate Ltd.*, [1900] 1 Ch. D. 811.

[4] Roscoe's *Law of Evidence in the Trial of Civil Actions* (20th ed. 1934), p. 26.

Government of the country in which that Court sits and whether the foreign Government is recognized or not is a matter of public notoriety'. In other words, the Court would take judicial notice of the grant or withholding of recognition by the British Government. As has been pointed out,[1] Lord Eldon believed that if he allowed anything to be said in his Court about an unrecognized state he would be 'recognizing' it. (Lord Eldon, it must be remembered, was also a member of His Majesty's Government.)

The effects of the Swiss Revolution were again considered in 1805, in the case of *Dolder* v. *Bank of England*,[2] when, incidentally, the Attorney-General once again makes an appearance in the reports. The plaintiffs, 'constituting the present government of Switzerland', moved that the defendants be ordered to pay into court dividends of stock purchased by the Governments of Berne and Zürich before the Revolution. The defendants stated that the Government 'had ceased to exist in consequence of the revolution'. Lord Eldon L.C. asked whether the Attorney-General was a party, but was told that he was not. He went on to say: 'The Government of this Country does not acknowledge the Government in whose right these Plaintiffs sue. The Court cannot agitate the question without the presence of the Attorney-General. A considerable question is whether upon the statement of the Plaintiffs the Crown has not the property.' From this last sentence it seems clear that Lord Eldon had in mind the question whether the stock were not *bona vacantia*, since the former Government no longer existed, and the new Government had not been recognized: and whether the Crown ought to be represented to argue its title to the property.[3] He cited *Barclay* v. *Russell*,[4] where the like question arose with regard to property of the former Colony of Maryland. He continued: 'Some perplexity arises from what we know and what we can only know judicially. I cannot affect to be ignorant of the fact that the Revolution in Switzerland has not been recognized by the Government of this country, but as a judge I cannot take notice of that.' This is a most ambiguous sentence, and his perplexity at his own judicial ignorance might have been increased had he considered how he found no difficulty in accepting the fact of the extinction of the old Government, without formal proof or certification, yet could not acknowledge that there was a new Government. However, what Lord Eldon probably meant was: I cannot affect to be ignorant of the fact that there have been revolutions in Switzer-

[1] By Lord Brougham in *Thompson* v. *Barclay* (1826), 9 L.J. (O.S.), Ch. 215; 2 Sim. 213; see Bushe-Fox, 'The Court of Chancery and Recognition, 1804–31', in this *Year Book*, 12 (1931), p. 63.

[2] 10 Ves. J. 352.

[3] And not to give information as to the status of the new Government of Berne (see Bushe-Fox, loc. cit., p. 63).

[4] (1793), 3 Ves. J. 424.

land, but I know also that the new Governments have not been recognized by the Government of this country, and as a judge I cannot take notice of them.

Another case arising out of the Swiss Revolution was *Dolder* v. *Lord Huntingfield*,[1] which was decided in the following year and in which Lord Eldon C.J. attempted to refer the matter back, as it were, to the parties, to make it a matter of pleading. He asked: 'Whether, if a new state was to arise in Europe, a Court of Justice is to take notice of it, if it does not appear by averment on the record, or upon an allegation according to information and belief that a revolution has taken place'. This method of dealing with the question reminds us of that adopted in *Triquet* v. *Bath*.[2] *Dolder*'s case was an action for a decree transferring certain stock to the plaintiff[3] as 'Llandamman and 2 Stathalters of the Helvetic Republic'. The defendants,[3] agents of the Bank of England and others, denied that there was, since the Revolution of 1798, any such person in whom the Government of Berne vested, as alleged. They averred that they were informed, and believed, that another revolution had taken place in Switzerland, and that the powers of government were vested in quite other persons. They submitted that the plaintiff had no title to the relief prayed, and that the Attorney-General ought to be a party. The defendants insisted that the Bill stated no title in the plaintiff, neither that the new Government was recognized by the Government of this country, nor that it was legitimate. It was this idea, that recognition of a government is a matter to be pleaded if the Court is to take notice of it, that was adopted by Lord Eldon in the passage quoted above.

Despite the revolutionary fervour of the times, which must have resulted in many questions of changes of government in Europe, recognition of new governments, and claims of immunity by them and their envoys, the Law Reports are almost completely silent on such matters until the third decade of the century. In 1823 began the revolt of the Central and South American Colonies against the old monarchy, and Canning 'called the New World into existence to redress the balance of the old'.[4] Eldon and Wellington, who, in the words of Professor Trevelyan,[5] preferred old worlds to new at any time, were disgusted beyond measure at their colleague turned demagogue; and in 1827 Eldon refused to join the new Government which Canning formed. It is important to bear in mind that

[1] *Dolder* v. *Lord Huntingfield, St. Didier* v. *Lord Huntingfield* (1805), 11 Ves. J. 283.

[2] *Triquet and others* v. *Bath* (1764), 4 Bing. 1478: *supra*, p. 242.

[3] *Sic* in the report. Although the double title suggests that there were two plaintiffs and one defendant, the report speaks only of one plaintiff and indicates that there were several defendants. Dolder was an official of the Government of Berne; Lord Huntingfield was a trustee of the stock.

[4] King's Message, 12 December 1826.

[5] *History of England* (1926), p. 629.

Eldon was an active politician and a Chancery Judge at the same time. From that date onwards the Reports are occupied with a series of cases arising out of the revolutionary changes in South America and the establishment of the new Republics there, and it is of interest to note how, in the cases which came before him, Lord Eldon deals with the claims of the new states to be recognized. For a long time he will not allow them, and he achieves his purpose in a curious way. He divides his mind into two parts, one of which 'knows' of the existence of a new state, and the other, the judicial one, which does not. He lays down the unexceptionable principle that the courts of the King should act in unison with the Government of the King. He applies this principle to defeat the claim of immunity based upon recognition. The effect is, however, to drive the parties to ascertain from the Crown exactly what the Government of the King think about the country in question. The result is to introduce into the practice of cases dealing with claims of immunity the procedure of applying to the Foreign Office for a certificate regarding the status of the country (or, it may be, the Government or person) involved in the action. Thus, indirectly, Canning called into existence not only a new world, but a new procedure.

The first case arising out of the revolt of the Spanish Colonies to be noticed is *Jones* v. *Garcia*.[1] The new Republics floated loans which were eagerly taken upon the London market. Bondholders of the Peruvian Loan sued Garcia and another, who were stated 'to have come over from South America in the character of envoys and ministers, from a Government styling itself the Peruvian Government, to this Country', to issue the loan. Amongst other things, the Bill alleged 'that no such government as the Peruvian Government had ever been acknowledged by his Majesty, and that in fact there was no such government in existence, but that Peru still remained a province and dependency of the kingdom of Spain'. The defendant admitted that the Peruvian Government had not been acknowledged as an independent state by the Government of Great Britain, but he asserted that there was in fact such a Government in South America, and that it was an 'assumed' or revolutionary Government. He denied that Peru remained a province or dependency of the King of Spain, and insisted that it was independent of Spain. In his judgment Lord Eldon said:[2]

'We all know that Peru was part of the dominion of Spain, and that Spain and this Country are at peace, and that this Country has not acknowledged the government of Peru. I want to know, whether, supposing Peru to be so far absolved from the Government of Spain that it can never be attached to it again, the King's Courts will interfere at all while the Peruvian Government is not acknowledged by the government of this Country. What right have I, as the King's judge, to interfere upon the subject of a contract with a country which he does not recognise?'

[1] *Jones* v. *Garcia del Rio* (1823), 1 T. and R. 297.
[2] At p. 299.

A number of points will be remarked in this case. First, the independence of Peru is asserted and denied respectively in the pleadings: no evidence is called *ab extra* to support either side. Secondly, Lord Eldon deals with the crucial point in the form of an unresolved rhetorical question, as he did in *Dolder* v. *Lord Huntingfield*.[1] Thirdly, the crucial point is, virtually, his dictum that the courts of the King should act in unison with the Government of the King. Moreover, in the last sentence quoted, we see an intimation of Lord Eldon's belief, referred to above, that if he allowed anything to be said in his Court of an unrecognized state, he would be 'recognizing' it.

In the next year, in *Thompson* v. *Byree*,[2] which was an application for an injunction in respect of some Columbian debentures, Lord Eldon, keeping up his fiction of the split judicial mind, said: 'Sitting as a judge in one of His Majesty's Courts, I am not to know there is a government in the world which he has not recognised. I know that it is acknowledged elsewhere but I have nothing to do with that.' The last case in which he referred to unrecognized states was *Kinder* v. *Taylor*,[3] an action which turned entirely on what to-day would be called Company Law. It dealt with the constitution of a joint-stock company formed to work mines in Mexico. Although no question of independence or recognition was in issue, Lord Eldon could not let the opportunity pass. He said: 'If the Plaintiff's case were to depend on the truth of these facts, I should dismiss the bill directly, because His Majesty's Courts cannot recognise the fact that there was any such thing as a Government of Peru in the year 1823, nor am I aware at present, whatever matters may be in progress, that any of the King's Courts can acknowledge or admit that there is such a government at this moment.' The matters which were in progress may well have been moves to obtain the recognition of the new Republics. According to Bushe-Fox,[4] the attitude of Lord Eldon was largely influenced by the desire to do nothing in his Court contrary to the Government's policy in matters of recognition. But the reverse may also be the truth, and it is submitted that what he was about was to do all in his power as a judge to check the movement towards recognition, by discouraging investors in the South American loans by denying them remedies on the ground of non-recognition. On 2 May 1827 Lord Eldon ceased to be Chancellor, but his work was done; the force of precedent was too strong for change. As a politician Eldon was finished, and the policy he had striven to maintain was reversed; but as a judge he had secured for himself a high standing, and the means by which he maintained the policy survived. There was no reversal of his legal dicta.

In 1828, in the case of *Thompson* v. *Powles*,[5] Shadwell V.-C. stated that he

[1] *Supra*, p. 247.
[2] *The Times* newspaper, 31 May 1824, cited by Bushe-Fox, loc. cit., at p. 69.
[3] (1825), 3 L.J. (O.S.) Ch. 68.
[4] Loc. cit., p. 74.
[5] 2 Sim. 194.

was applying Lord Eldon's principles, and in *Taylor* v. *Barclay*[1] he again quoted him. In 1831 Lord Brougham, who followed in the Chancellorship,[2] heard the same case on appeal[3] and attacked Eldon's attitude to recognition. But he considered himself bound by the latter's decisions and had to apply them.

These cases involving recognition of states have been confined, for some reason, almost entirely to the Court of Chancery. Two cases in the common-law courts, however, deserve notice at this stage. The first is *MacGregor* v. *Lowe*,[4] an action in respect of scrip issued in a loan for the use of the state of Poyais.[5] Abbott C.J. held that 'there must be some evidence given that at the time of this transaction there existed a state of Poyais', and 'a witness of fact' was called; but all that he could do was to prove that a Governor and Lieutenant-Governor of Poyais had been appointed, but that no state of Poyais then existed. Two years later, in *Yrisarri* v. *Clement*,[6] an action for libel was brought against one Clement by Yrisarri, 'envoy extraordinary and minister plenipotentiary from the Republic or State of Chile', who came to England to raise certain loans for his country. One John Hullet was appointed Consul-General in London for the 'Republic or State of Buenos Aires'. The defendant, Clement, wrote to the *Morning Chronicle* newspaper impugning the good faith of Hullet, and referred to the plaintiff as a Creole Spaniard who had acted fraudulently in the matter of the loan. At the trial, before Best C.J., the plaintiff proved the Seal of the Government of Chile and 'that the country consisted of 3 provinces, two and a half of which were under the authority of the Director', the remaining half-province being in the hands of the 'old Spaniards'. The plaintiff's appointment as 'envoy to all the Courts of Europe' was put in, signed by the Director. Evidence was also given of the independence of Buenos Aires and of the Seal of that country attached to the appointment of John Hullet as Consul. The defendant objected that the plaintiff had failed to prove that Chile and Buenos Aires were states, the present Governments of those countries not having been recognized by the Government of this country.

The Lord Chief Justice observed that there were three sorts of foreign states: states merely acknowledged as sovereign independent states; states in connexion with us by treaties; and 'sovereign states neither in connexion with us nor acknowledged by our government, such as Japan, Siam, and many other states which conquest and commerce have made us acquainted

[1] (1828), 2 Sim. 213. See below, p. 251.
[2] In 1830, after the short tenure of Lyndhurst.
[3] *Sub nom. Thompson* v. *Barclay*.
[4] (1824), 1 C. & P. 200.
[5] This seems to be what is now called Patuca (territory of Mesquitia) in Honduras.
[6] (1826), 3 Bing. 432.

with'. In the first two cases, it was only necessary to prove that our Government has acknowledged them or treated them as sovereign independent states. In many cases it would be unnecessary to adduce this proof; the great states of the world are taken notice of in Acts of Parliament made for confirming treaties, and of such states the courts of law take judicial notice. The existence of unacknowledged states must be proved by evidence. He then set out the criteria of what constitutes such a state[1] and held that the existence of the states of Chile and Buenos Aires was proved, and that the plaintiff had been appointed Minister Plenipotentiary for the former, and Hullet Consul-General for the second.

The difference of approach from that of Lord Eldon is at once apparent. There is the insistence on proof of recognition as opposed to mere allegation of the fact (or its absence) in pleadings; and there is the positive analysis of what constitutes a recognized state, instead of a mere rhetorical question—a shrugging, as it were, of the judicial shoulders. But, in particular, Best C.J. has gone to the length of 'recognizing' two independent states which have not yet (it is still only 1826) been recognized by Canning, by the Government of the King.[2]

In 1828, under the new Lord Chancellor, Lord Brougham, the Court of Chancery again had to deal with the problem of the unrecognized state, and in *Taylor* v. *Barclay*[3] the Judge himself, for the first time, consulted the Foreign Office as to the status of a state.[4] In this action it was falsely alleged that a revolted colony of Spain had been recognized by Great Britain. The headnote asserts that 'The Court is bound to know judicially that the allegation is false', but it will be seen that the Court felt itself bound rather to inquire and to satisfy itself that the allegation was false. The defendants demurred that there was an existing treaty which recognized Guatemala as still belonging to Spain. An allegation had been introduced into the Bill that Guatemala was a sovereign and independent state, and recognized by His Majesty as such. Could such an allegation, asked the defendant, have the intended effect? We have seen that this question was in terms asked in *Dolder* v. *Lord Huntingfield*[5] by Lord Eldon, who did not stay for an answer. In *Taylor* v. *Barclay* the defendant asserted that 'the judge is bound to know that our government has never recognized this

[1] At p. 438.

[2] See Bushe-Fox, 'Unrecognised States: Cases in the Admiralty and Common Law Courts 1805–26', in this *Year Book*, 13 (1932), p. 39.

[3] 2 Sim. 213.

[4] The circumstances are fully set out by Bushe-Fox in this *Year Book*, 12 (1931), p. 72, n. Briefly, the defendant (Barclay) applied to the Foreign Office in the, by then, usual way, but H.M. Government found that they could not give the information as it was 'a matter of some delicacy'. Vice-Chancellor Shadwell thereupon applied, and received a formal reply. See also Dicey, *Conflict of Laws* (5th ed. 1932), p. 193, n.

[5] *Supra*, p. 247.

state'. For the plaintiff[1] it was contended that there might be 'such a recognition as a judge would not be held to have judicial knowledge of'. There had been a 'congress' at Panama (*sc.* of the Central American Republics), and consuls had been sent in 1823 to Spanish America. This was a distinct and unqualified recognition of the independence of the whole of Spanish America. Guatemala was part of Mexico; and the independence of Mexico was recognized—indeed it was the first of all the provinces to be recognized as independent. 'In the King's speech delivered in 1824[2] we find a distinct recognition of the independence.' In reply[3] the defendant said that three only of the provinces of South America had been recognized—'Guatemala is not one of them'. Inquiry had been made at the Foreign Office, and the answer returned was that Guatemala had not been recognized as an independent state.

In his judgment Shadwell V.-C. said:[4]

'I have communicated with the Foreign Office[5] and I am authorized to state that the federal Republic of Central America has not been recognized as an independent government by the government of this Country. . . . I conceive it is the duty of the judge in every Court to take notice of public matters which affect the government of the country, and [therefore] I am bound to take the fact as it really exists and not as it is averred to be.'

He quoted *Bire* v. *Thompson*,[6] in which he had himself appeared as Counsel before Lord Eldon, and which referred to a contract for a lease to be granted by the Republic of Colombia. 'Lord Eldon thought it right to refuse the application: he could not take notice of the Republic of Colombia.' The Vice-Chancellor followed the precedent, adding: 'You plead that which is historically false, and which the judges are bound to take notice of as being false.'

Later in the same year, Vice-Chancellor Shadwell again had before him the question of the new Republics. In *Thompson* v. *Powles*[7] bonds had been issued by the Government of the Federal Republic of Central America, or Guatemala. The Bill nowhere mentions that Guatemala was a revolted Colony of Spain, nor whether it had or had not been recognized, but the defendants, in their demurrer, allege that 'the Government was not recognized by this Country, and was still part of the dominions of the King of Spain', and 'the Courts of this Country take notice of those public Acts which are recited in treaties. In a treaty between Spain and Great Britain,

[1] At p. 215.

[2] Probably a mistake for 1826: see above, p. 247, n. 4.

[3] At p. 219.

[4] At p. 220.

[5] See above, p. 251, n. 4.

[6] Unreported, probably *Thompson* v. *Byree*, *The Times* newspaper, 31 May 1824. See this *Year Book*, 12 (1931), p. 69. (See also above, p. 249, n. 2, but the case appears to have dealt with Colombian debentures. However, perhaps the learned Vice-Chancellor's memory was at fault.)

[7] (1828) 2 Sim. 194.

the inhabitants of this Colony are treated as revolted subjects.' The plaintiff regarded this as immaterial. He did not ask the court to recognize the Guatemalan Government. However, he asked 'on what ground is the Court to presume that this is a revolted Province now in arms against Spain, or that it ever was part of the Spanish Colonies? or if it was, that it has not been recognized by Great Britain as an independent state?' But the court refused to answer. Said Vice-Chancellor Shadwell: 'After all I have heard fall from the mouth of Lord Eldon,[1] on the subject of persons representing themselves to be governments of foreign countries, which this Country had not acknowledged to be Governments, and which the Courts cannot acknowledge them to be, till the government of the Country has recognized them to be so . . .' and decided that as there had been no recognition of Guatemala by Great Britain, which he had ascertained in the previous case,[2] the contract could not be enforced. It seems a little odd that the plaintiff (or his Counsel) had not heard of the fact, announced in open court but a short time before; but if one accepts his ignorance, it seems that he goes very near the heart of the matter when he asks why the Court should presume that Guatemala had not been recognized, any more than it should presume that it was ever a Spanish Colony. It is rather like the dilemma in which Lord Eldon found himself in *Dolder* v. *The Bank of England*;[3] he 'knew' that there had been a revolution in Switzerland, but did not 'know' the Government which had come to power as a result.

The answer, as we know now, lies in the Crown. The Crown is the fountain-head of justice, and is at the head of the Judiciary. It is also the head of the Executive: it recognizes foreign governments, or decides to refuse to recognize foreign governments, on grounds of high policy best known to itself. What the Crown decides in its executive capacity must be known to it in its judicial capacity; and when the question arises whether a given state has or has not been recognized, the court[4] inquires of the Foreign Secretary, who gives his certificate. This is the practice to-day, but the Judicature, ever jealous of its independence of the Executive, moved slowly, and took a long time to find its way to its present position.

III

Similar considerations apply to questions connected with diplomatic immunity. The foreign ambassador is accredited to the King; he is

[1] E.g. in *Jones* v. *Garcia*, *supra*.

[2] In a similar case to-day, the position of Guatemala would have to be ascertained afresh. The present rule is that the circumstance that a fact has been proved in a case does not enable the courts to take judicial notice of it in other cases. See Phippson, *Law of Evidence* (8th ed. 1942), p. 23, citing *Lazard* v. *Midland Bank*, [1935] A.C., at p. 298.

[3] *Supra*, p. 247.

[4] The term 'Court' properly includes not only the Judge or Judges, but also Counsel for both sides, the jury, and probably solicitors.

accepted and received by the King, and his personal immunity has effect from that moment. Subordinate members of the mission are not to-day received in person by the King, but the names of those for whom immunity is claimed are submitted to the Foreign Office by the minister to whose staff they belong,[1] and if no objection is raised by the Foreign Secretary they become entitled to diplomatic immunity.

The Crown, then, acknowledges and recognizes the status of diplomatic agents; and, in the same way as has been described above in regard to states, the court may inquire of the Foreign Office whether a given person has been so acknowledged, and the Foreign Secretary will certify accordingly.

By the second decade of the nineteenth century the practice of the Court had come near to this—the Crown is asked to certify the status of the public minister, who in turn certifies that the *de cujus* is in his employ.[2] But it was a long time before the Court went any further in the direction of making an application to the Foreign Office a regular step in the procedure in cases of this sort. Not until the case of *Re Cloete*[3] is there any mention of the Crown at all; and not until *In re Suarez*,[4] more than one hundred years after *Delvalle* v. *Plomer*[5] and *Viveash* v. *Becker*,[6] is direct application made to the Foreign Office to confirm the status of a person claiming to be entitled to diplomatic immunity. Instead, the Court still seems content to rely on the affidavit of the defendant, his plea to the jurisdiction, or even oral evidence as to his work and duties; these are sufficient for the greater part of the nineteenth century to establish diplomatic status.

For instance, in the case of *Taylor* v. *Best*,[7] an important and much-relied-on case, the Crown was not approached at all in the matter. Taylor sued Best and three other defendants, to recover certain moneys. One of the other defendants, Drouet, filed an affidavit which stated that he was duly appointed as Secretary of the Belgian Legation at the Court of St. James, and was received as such at that Court. No other evidence of his status was adduced. The whole case depended on the liability of a public minister for a trading debt. Jervis C.J. said:[8] 'There is no doubt that the defendant Drouet fills the character of a public minister, to which the privilege contended for is applicable', and, later, 'M. Drouet is a person

[1] This is done annually at the commencement of each year, but the list is revised from time to time (see Swatow, *Diplomatic Practice* (1932), p. 179). The Diplomatic Privileges Act, 1708, requires that every servant of an ambassador must be registered in the office of one of the Principal Secretaries of State, i.e. the Foreign Office. But others than servants claim immunity—wives of diplomatic envoys, for example (see Oppenheim, op. cit., vol. i, § 404).

[2] See above, p. 244.

[3] *Re Cloete, ex parte Cloete* (1891), 65 T.L.R. 102.

[4] *In re Suarez, Suarez* v. *Suarez*, [1918] 1 Ch. 176.

[5] (1811), 3 Camp. 47.

[6] (1814), 3 M. & S. 284.

[7] (1854), 14 C.B. 487.

[8] At p. 519.

entitled to the privileges and immunities which the Law of England accords to ambassadors from foreign Courts. . . .' The court thus seems content to rely on the mere affidavit of the claimant to diplomatic immunity.

Again, in a case[1] five years later, the same Court admitted not the affidavit but the plea of a defendant in person as conclusive with respect to his status. Mr. Martin was sued for payment of certain money in shares. He pleaded that he was a public minister of several South American states, and authorized and received as such by Her Majesty the Queen. The case concerned his alleged trading activities, and in giving judgment Lord Campbell L.C. said:[2] 'He says by his plea to the jurisdiction of the Court that by reason of his privilege as such public minister, he ought not to be compelled to answer. We are of opinion that his plea is good.'

In the case of *Parkinson* v. *Potter*,[3] the Court somewhat complacently accepted oral evidence of diplomatic status, which evidence was very slight indeed. The facts in the case were, however, rather special, and the Envoy himself was never before the court: he was not a party to the action. By a local Act[4] relating to the parish of St. Marylebone, London, in which are situate many foreign embassies, legations, consulates-general, &c., it was provided that where the tenant of a house in that parish was the ambassador, envoy, &c., of any foreign state, or a servant of such ambassador, &c., the landlord should be liable to pay the rates. The defendant had assigned his tenancy of such a house to one De Basto, who claimed, as an attaché of the Portuguese embassy, to be exempt. The plaintiff, as his landlord, had had to pay the rates, under the local Act, and now sought to recover from the defendant the amount paid. He sued in the County Court, where it was proved that De Basto was Consul-General for Portugal, but 'no very direct evidence was adduced of his appointment to the position of attaché to the Portuguese Legation [*sic*]'. No one seems to have thought of inquiring of the Foreign Office—or of the Portuguese Ambassador, for that matter—whether or not De Basto had in fact been appointed attaché. A clerk from the Consulate was called and gave evidence that he had frequently seen De Basto at the Portuguese Embassy, where he was addressed and spoken of as an attaché. The clerk also gave details of the type of work De Basto had to do. On this, the County Court Judge found that De Basto was an attaché of the Portuguese Embassy.

The defendant appealed, saying, with some reason, that this evidence was of the most shadowy nature. But the Court (Mathew J.) held[5] nevertheless: 'On that evidence *unanswered*[6] the county court judge was warranted in finding that De Basto was an attaché of the embassy. No suggestion

[1] *Magdalena Steam Navigation Company* v. *Martin* (1859), 2 E. & E. 94.
[2] At p. 111.
[3] (1885), 16 Q.B.D. 152.
[4] 35 Geo. III, clxxiii, s. 190.
[5] At p. 157.
[6] My italics.

was made that there was any want of bona fides in reference to the appointment of De Basto. . . .' And Wills J., concurring,[1] set out the duties De Basto was said to have performed, and added: 'I think this is evidence in which the county court Judge might fairly find that he was an attaché. . . .'[2]

The usual method at the present day of verifying the claim of a person (normally the defendant to an action) to be a subordinate member of an embassy or legation staff is by either examining, and producing to the court, the Foreign Office List, which, as mentioned above, is published periodically, or producing a certificate from the Foreign Secretary certifying that the person's name appears on the list.[3] These lists provide a compendious form of effecting the application to the Crown described above. The King cannot be expected to receive and know every minor official of every diplomatic staff; and the practice appears to be for the list submitted by each head of legation to the Foreign Office to be scrutinized there: those names which are not rejected are incorporated in the next issue of the Foreign Office List. Publication constitutes acceptance and may be said to some extent to vest with diplomatic immunity persons whose names are newly added. Probably, this vesting dates back to the commencement of their employment on the diplomatic staff, but it is certain that employment alone, even with entry on the list submitted *to* the Foreign Office, is not sufficient. This was decided in the early cases of *Wigmore* v. *Alvarez*[4] and *Fisher* v. *Begrez*,[5] and in 1891 by *In re Cloete*.[6] Cloete was Consul-General for Persia, and judgment had been obtained against him in an action in the English courts in July 1890. In January 1891 he was appointed by the Persian Ambassador to be honorary attaché of the Persian Embassy. His name was sent to the Foreign Office as one of the suite of the Embassy, 'but his appointment had in no way been recognized by the British Government, and he was not accredited to the British Government'. Application was made for a Receiving Order, on which Cloete objected that he was not amenable to bankruptcy proceedings. The Receiving Order was nevertheless made, and Cloete appealed. He argued that his name had been submitted on the list to the Foreign Office, who had made no objection to his appointment. For the creditors, it was contended that Cloete had obtained the appointment in order to protect himself against his creditors. The Court (Lord Esher) accepted this, holding that Cloete had obtained entry of his name in the list submitted to the Foreign Office merely to defeat his creditors. He had no

[1] At p. 158.

[2] It should be noted that under the County Courts Acts (s. 105 of the present Act) appeal lies on questions of law only, not of mere fact.

[3] Cf., for instance, *The Amazone*, *infra*, p. 278.

[4] (1731), 94 E.R. 719; 2 Sharpe 797.

[5] (1832), 1 G. & M. 117, at p. 117.

[6] *Re Cloete, ex parte Cloete*, [1891] 65 L.T.R. 102.

more work to do for the Embassy than before his 'appointment'. Kay J.[1] said: 'Had the Persian Ambassador known all the facts of the case, he would not have granted the appointment, and it was inadvertently made.'[2]

IV

The cases which have been considered so far fall under two heads: (*a*) where the independence of a state and its recognition by the British Government are in dispute, but no question of immunity arises; (*b*) where the status of an individual is in question and immunity is claimed. Towards the end of the nineteenth century, a third type of case emerges—actions concerning state property. In these cases, immunity of the *res* is claimed, that is, immunity from arrest, execution, &c. It is admitted that the *res* belongs to a prince or a government, &c., but the status of the Government or state in whom the property in the *res* is vested is in question;[3] and the court has to inform itself on this point. As in the cases already dealt with, the court at this stage is still slow in deciding to approach the Crown for the requisite certification. Indeed, in the first case noted, the court rejected the idea in terms, and sought its information in at least two other directions.

This was the case of *The Charkieh*,[4] which arose out of a collision between that vessel and another ship in the Thames. The *Charkieh* was arrested. At a very early stage, and although no appearance was entered on behalf of the Owners, on representations being made[5] that the *Charkieh* was a vessel of the Royal Ottoman Navy, the court wrote to the Ottoman Ambassador informing him of the institution of proceedings in order that the proper steps might be taken for establishing that the vessel did belong to the Ottoman Navy. No reply was received, but an application was made to the Court of Queen's Bench by the Khedive of Egypt, in effect, for a prohibition to restrain proceedings, as the *Charkieh* was an Egyptian Government vessel. The Court referred the case to the Admiralty Court, and the Khedive entered an appearance under protest. He filed an affidavit in which he deposed that the *Charkieh* was the property of the Khedive of

[1] At p. 104.

[2] In *Macartney* v. *Garbutt and others* (1890), 24 Q.B.D. 368, the plaintiff, a British subject, had been appointed by the Chinese Government English Secretary of the Chinese Embassy, and had been received in that capacity by the British Government. His name had been submitted to the Foreign Office in the usual way, and his position as a member of the Embassy recognized without reservation or condition of any sort. It does not appear from the Report how all this was proved to the court, or whether it was common ground and agreed. But on the question whether the plaintiff's privilege had been lost by any express condition that he should be subject to the local jurisdiction, imposed by his own Government when he was received, it appears that correspondence passed between the Home Office and the defendants, who were informed that no such condition had been imposed upon the plaintiff.

[3] In *The Parlement Belge*, *infra*, p. 258, the status of the *res*, i.e. whether the ship was a public vessel, became the subject of inquiry.

[4] (1873), L.R. 4 A. & E. 59; L.R. 8 Q.B. 197.

[5] The report does not say by whom.

Egypt 'as reigning sovereign of the State of Egypt'. In answer, the plaintiffs alleged that the Khedive of Egypt was not 'such a reigning sovereign as to entitle him to have accorded to the *Charkieh* the privilege of immunities of a public vessel of war of an independent sovereign or state'. Counsel for the Khedive argued that the status of the Khedive was not a matter of evidence but that the Court was 'bound to take judicial notice of the fact as it really exists'. The Court, suggested Counsel,[1] ought to cause inquiries to be made at the Foreign Office. 'It would be presumptuous for the Defendants to have offered any evidence on the point.' The Court (Sir Robert Phillimore, LL.D.), however, would have none of this argument, and stated[2] that, with regard to the international status of the Khedive of Egypt, he had endeavoured to inform himself by considering, first, the general history of the Government of Egypt from 638 down to 1867; secondly, the firmans which concerned the public law of the Ottoman Empire on this subject; and, thirdly, the European treaties which concerned the relations between Egypt and the Porte. After all this, and with some excursus on the status of sovereignty and half-sovereignty respectively, he came to the conclusion[3] that the Khedive was a subject prince and not a sovereign.

Not satisfied, however, with the results of his own researches, Sir Robert wrote to the Foreign Office, who informed him that 'The Khedive has not been and is not now recognized by Her Majesty[4] as reigning sovereign of the State of Egypt. . . . He is recognized by Her Majesty's Government[4] as the hereditary Ruler of the province of Egypt under the Supremacy of the Sultan of Turkey.'

It was not long[5] before the question of the immunity of a public ship again came before the Court, but with a difference. That the *Charkieh* was a public ship, i.e. the property of and operated by a Head of State of one kind or another, was common ground. What was in dispute was whether the status of the Head of State in question, the Khedive, sufficed to render the vessel immune from the jurisdiction of the Court. The Court did its best to decide the matter from such evidence as a study of history provided, only resorting to the Foreign Office for information as an afterthought. In the case of *The Parlement Belge*,[6] which also was involved in a collision with

[1] At p. 65, citing *Taylor* v. *Barclay*, 2 Sim. 213. As to this suggestion, Sir Robert Phillimore said in the course of his judgment (at p. 74), 'Whether this was, or was not, the right course on the part of counsel to adopt, I do not now stop to enquire', which does not sound like unqualified approval. [2] At p. 74. [3] At p. 85.

[4] See Lauterpacht, 'The Form of Foreign Office Certificates', in this *Year Book*, 20 (1939), p. 125, as to the difference in terminology. He does not cite this case.

[5] In *The Constitution* (1879), 4 P.D. 39, an attempt was made to issue a writ for salvage against a U.S. warship. The Court directed notice to be given to the United States Minister and the British Foreign Office. The Minister appeared by Counsel to inform the Court of the status of the ship, and the Admiralty Advocate for the Crown protested against the jurisdiction of the Admiralty Court being invoked. [6] (1879), 4 P.D. 129.

an English ship in British waters, there was never any doubt about the status of the King of the Belgians, whose ship it was, but the Court exercised itself at some length to discover whether or not the *Parlement Belge* was a public vessel. In this case recourse to the Crown was had fully and at an early stage. In the first place, however, in their statement of claim the plaintiffs alleged (*inter alia*) that they were unable to discover whether the *Parlement Belge* was the property of H.M. the King of the Belgians or chartered by him. On a motion for judgment, the Admiralty Advocate appeared on behalf of the Crown and opposed the motion. The hearing was adjourned for formal argument, and in order that the Crown, if so advised, could show that the *Parlement Belge* was exempt from the jurisdiction of the Court. The Attorney-General then filed an Information and Protest on behalf of H.M. the Queen, 'giving the Court to understand and be informed that the *Parlement Belge* was a public vessel of the Sovereign State of Belgium', setting out the facts, and referring to a convention of 17 February 1876 between England and Belgium in support. The Attorney-General contended that the Court had no jurisdiction to entertain the suit, and that the plaintiffs could not prosecute the same. Sir Robert Phillimore, in his judgment, stated that on seeing from the papers and pleadings that the prerogative of the Crown and its relations with a foreign state were affected, he directed that notice be given to the Law Officers to give them the opportunity of appearing. The terms of the Protest were not disputed by the plaintiffs, nor was it referred to by the Court to any extent. It was held that the *Parlement Belge* was not a public vessel exempt from process of law.

The Crown appealed, contending[1] that Her Majesty's declaration that the ship was a public ship is conclusive. It is at this point that there enters into our study of the relations between Judicature and Executive on questions of recognition the important factor of how far the statement of the Crown binds the court. After this case, whenever the status of a person, or a state, or some property, is in dispute, the question is almost invariably referred to the Crown, and the Crown informs the court either by Foreign Office letter or through the mouth of the Attorney-General. But for many years after *The Parlement Belge* the court does not invariably and unquestioningly accept this information. Occasionally it will seek to interpret the certificate (and not seldom the certificate needs interpretation); at times the Judge will argue with the Attorney-General; in other cases the court will look beyond the certificate and take into consideration other matters, matters of fact or rules of law, before accepting the certificate and its implications.

In *The Parlement Belge*, Brett J. at once countered the Attorney-General's

[1] 5 P.D. 197, at p. 198.

argument by saying, 'I do not feel clear that if Her Majesty chooses thus to recognize as ambassador a person who had not been sent by any foreign Government, he could claim the privilege of an ambassador.' This is, of course, *reductio ad absurdum*, but it is apprehended that the dictum connotes the continued reluctance of the Judicature to be influenced by the Executive. The Executive may be right in this case, but it must not claim infallibility, is the reasoning, and the court reserves the right to examine, and if necessary reject, its declarations. James L.J. was more cautious. 'How can any municipal court', he asks, 'try that question? I apprehend that we should be bound to act on the representation of the Foreign Office.' The judgment of the Court[1] mentions the Protest by the Attorney-General, but does not otherwise refer to it. However, it contains one curious passage:[2]

'The ship has been by the Sovereign of Belgium, by the usual means, declared to be in his possession as sovereign, and to be a public vessel of the state. It seems very difficult to say that any Court can enquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the Court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war, that declaration cannot be inquired into.'[3]

The first and the last sentences quoted read together seem to mean that the declaration of the King of the Belgians (which, incidentally, was not before the court) was sufficient; if that be so, why, it may be asked, be at such pains to seek and examine the declaration of the Queen of England? However, the courts found,[4] on the facts of the case, that it could not be denied that the vessel was public property.[5]

V

The next two cases to be reviewed deal with the immunity from jurisdiction of the Head of a foreign state. The circumstances of both are a little unusual, as they involved the matrimonial affairs of each of the sovereigns concerned, i.e. he would appear before the court, if he did appear, as a man, and not as a king, a trader, or a corporation sole.

[1] At p. 203. [2] At p. 219.

[3] Cf. *The Exchange* v. *McFadden* (1812), 7 Cranch 116; Scott, *Cases on International Law* (1922), p. 300. [4] At p. 220.

[5] In *The Porto Alexandre*, [1920] p. 30, a vessel, originally a German ship, had in 1916 been requisitioned by the Portuguese Government and later detained by them pending the conclusion of peace. In 1919 it ran aground in the Mersey, and a writ *in rem* was issued for salvage against the owners, cargo, and freight. A motion to set aside the writ, &c., on the ground that the ship and its cargo, &c., were the 'public national property of . . . the Portuguese government' was supported by (1) a communication by the Portuguese Chargé d'Affaires that the ship was 'a state-owned vessel belonging to the Government of the Portuguese Republic', (2) an affidavit by the Portuguese Vice-consul in Liverpool, and (3) a further written statement as to the control of the ship and the ownership of the freight. No reference to the Foreign Office seems to have been thought necessary.

It had already been decided[1] that a foreign sovereign could sue in the courts of this country; and that he could be sued only if he submitted to the jurisdiction.[2] In *Mighell* v. *Sultan of Johore* the plaintiff sued for breach of promise a man whom she had known as Albert Baker. She had eventually to accept the fact that he was really a Sultan, but contended that he was not a sovereign prince immune from process. The plaintiff obtained an Order for substituted service of the writ, whereupon the defendant moved to set aside the Order, and stay all proceedings, on the ground that the court had no jurisdiction over him. On the motion coming before the Vacation Judge, he adjourned the hearing and 'caused a communication to be made to the Secretary of State for the Colonies in order to ascertain the status of the Defendant'. In its answer to the Court the Colonial Office stated that Johore was an independent state and that the defendant was 'the present sovereign thereof'; setting out the relations between the Sultan and Her Majesty the Queen, based on a treaty,[3] a copy of which was enclosed with the letter; and setting out a list of attributes of a sovereign ruler. At the hearing of the case it was argued for the defendant that the letter from the Colonial Office was not conclusive to show that the Sultan of Johore was an independent sovereign. It must be read with the treaty, under which Johore is a protected state only, and by which the Sultan bound himself not to enter into treaties with any foreign state.

Willis J., in his judgment,[4] entertained no doubt of the answer. 'It is clear that the proper mode of information with respect to the status of the defendant was adopted by Wright J., who communicated with and obtained a letter from the Colonial Office, which told that "the Sultan, generally speaking, exercises without question the attributes of a foreign ruler".' The provision in the Treaty restricting his rights as a sovereign ruler did not deprive the Sultan of his character as an 'independent sovereign'.

This, it should be noted in passing, is not accepting the Colonial Office ruling as conclusive: the court also examined the terms of the Treaty, and, incidentally, found that they supported the Colonial Office view. That they did so is hardly surprising, but it is interesting to speculate what would happen in a case where a court examined a treaty and found that the terms, or its own interpretation of them, differed from the Colonial Office (or Foreign Office) view.[5]

Willis J. found for the defendant, and the plaintiff appealed. Upholding the judgment of the court below, Lord Esher M.R. said[6] of the letter from

[1] E.g. *The Emperor of Austria* v. *Day and others* (1860), 2 Griff. 628; 30 L.T. Ch. 690.
[2] E.g. *Prioleau* v. *The United States of America* (1866), L.R. 2 Eq. 650.
[3] Of 11 December 1885.
[4] At p. 153.
[5] Cf. *Duff Development Co.* v. *Kelantan Government*, *infra*, p. 268.
[6] At p. 158.

the Colonial Office: 'The Secretary of State for the Colonies is in colonial matters the adviser of the Queen, and I think the letter has the same effect for the present purpose as a letter from the Queen.' The argument that the Judge ought not to have been satisfied with the letter but to have informed himself from historical and other sources as to the status of the Sultan of Johore failed. Sir Robert Phillimore did this in the case of *The Charkieh*,[1] it had been contended. 'I know he did,' remarked Lord Esher 'but I am of opinion that he ought not to have done so; that when once there is the authoritative certificate of the Queen, through her Minister of State, as to the status of another sovereign, that in the Courts of this Country is conclusive.' Kay L.J.[2] said:

> 'The status of a foreign sovereign is a matter of which the Courts of this country take judicial cognizance . . . a matter which the Court is either assumed to know, or to have the means of discovering without a contentious inquiry; . . . of course, the Court will take the best means of informing itself on the subject if there is any kind of doubt, and the matter is not so notorious as the status of some great monarch such as the Emperor of Germany.'

In other words, the learned Judge regards the Certificate of the Secretary of State merely as best evidence, required in case of doubt, but not exclusively so, as in its absence other evidence might be admitted. He 'could not conceive a more satisfactory mode of obtaining information' on the status of the Sultan of Johore than the letter from the Colonial Office. He, also, treated it as a statement by Her Majesty herself, and 'if her Majesty condescends to state to one of her Courts of Justice that an individual cited before it is an independent sovereign', that statement must be treated as conclusive. Kay J. then examined the argument that there were clauses in the Treaty whereby the Sultan of Johore ceased to be an independent sovereign, but disposed of them by regarding them as conditions on which protection was to be given. He did not think that there was anything in the Treaty which 'qualifies or disproves the statement in the letter that the Sultan of Johore was an independent sovereign'—thereby leaving open the same lacuna in reasoning as did Willis J., since Kay J. does not exclude the possibility that there *might* be something in the Treaty which derogated from or conflicted with the Colonial Office statement.

When a plea of diplomatic immunity came before the Divorce Court, in the case of *Statham* v. *Statham and the Gaekwar of Baroda*,[3] the Court did not at once fall into line with the practice which was being established at that time. The Gaekwar, who was cited as co-respondent, had avoided service of the petition, and left England for India. He applied, however, to be dismissed from the suit on the ground that he was an independent ruling prince. In order to ascertain the status of the Gaekwar of Baroda,

[1] *Supra*, p. 257. [2] At p. 161. [3] [1912] P. 92.

Bargreave Deane J. undertook some historical research of his own, the result of which, like Sir Robert Phillimore before him,[1] he embodied in his judgment.[2] He also referred to an earlier action, apparently unreported, brought in 1911 in the King's Bench Division by a Mr. Ernest Emmanuel against the Gaekwar of Baroda. The judge in that action had obtained a certificate from the India Office to the effect that the Gaekwar had been recognized by the Government of India as a ruling chief governing his own territories under the suzerainty of His Majesty. The certificate referred to the Interpretation Act, 1889,[3] section 18 (5), defining 'India' in reference to a native prince in chief, and continued: 'Though not independent, he [the Gaekwar] exercises various attributes of sovereignty and is not regarded as a subject of His Majesty.' Bargreave Dean J. quoted that certificate in full, and then considered the meaning of the word 'suzerainty' as defined by text-book writers,[4] and deduced that the status of the Gaekwar of Baroda as defined by the certificate of the India Office gave him immunity from being made a co-respondent.

In this case, it should be noted, the India Office Certificate was not a complete answer to the question before the court. The issue was 'Is the Gaekwar an independent sovereign?', i.e. a question of degree of sovereignty. It is unfortunately not clear from the report what question was actually put to the India Office in *Emmanuel*'s case, although it may be presumed to have been something similar to the question in *Statham* v. *Statham*. In any event the court seems to have thought the similarity close enough to enable it to avoid making its own inquiry of the Crown. But having to be satisfied with, as it were, a second-hand certificate,[5] the court then found that it had to analyse and construe its terms in an endeavour to find an answer to its own question. The Gaekwar, the court was informed, was 'not independent'; he exercised 'various attributes of sovereignty'; and he was 'not regarded as a subject of His Majesty'. It is not proposed here to consider whether these three characteristics ought properly to be regarded as together constituting the Gaekwar an independent sovereign and thus entitled to immunity from jurisdiction. The point is that the court took upon itself the task of considering whether they did, and so decided. The difference between this case and that of the Sultan of Johore is that, in the latter case, the court concerned itself with the conclusiveness of the certificate of the Crown as to the status of the Sultan; and in the *Baroda* case, without at all entering into the question of the conclusiveness of the certificate, the court had to interpret the certificate and discover whether the Gaekwar, on the face of it, had the status which carried immunity.

[1] See p. 258, above. [2] At p. 94. [3] 52 & 53 Vict., c. 63.

[4] He cited Grotius, Pufendorf, and Vattel. (As to suzerainty, see Hall, *International Law* (8th ed. 1924), p. 29; Westlake, *International Law* (2nd ed. 1910), vol. i, p. 25.)

[5] See p. 253, n. 2, *supra*, as to judicial notice of facts proved in an earlier case.

The conclusiveness of a communication from the Secretary of State was again debated, in the Chancery Division, in the case of *In re Suarez*.[1] The defendant, the Bolivian Minister in England, was administrator of an estate. In the course of administration proceedings the plaintiff applied for an Order of Sequestration against him. By this time the defendant had ceased to be Minister, yet he set up the Diplomatic Privilege Act, 1708,[2] as a defence. A number of points were involved in the decision in this case, one of which is thus expressed in the headnote:

'A letter from the Foreign Office under the hand of an Assistant Secretary of State stating that a foreign Minister's name has been removed from the Diplomatic List is sufficient evidence that the Minister has ceased to hold diplomatic office at the date of the letter.'

It appears[3] that the letter was written by the Foreign Office on 21 September 1917 to the plaintiff's solicitors, and was to the effect that H.M. Chargé d'Affaires at La Paz had ascertained and reported by telegraph that the Bolivian Government had terminated the appointment of the defendant as Bolivian Minister at the Court of St. James. His name had accordingly been removed from the Diplomatic List. For the defendant, it was contended[4] that the letter from the Foreign Office was not sufficient evidence that the defendant had ceased in fact to be a public minister. It was based on mere hearsay. If, on the other hand, it was sufficient evidence, it contained no evidence of the date when the defendant ceased to be a foreign minister, save that it was earlier than the date of the letter. Defendant also referred to the rule that the privilege of an ambassador extends for a reasonable time after the termination of his diplomatic mission.[5]

In his judgment[6] Warrington L.J. said: 'In my opinion this letter is for the purposes of the present matter sufficient evidence of the fact that at the date of the letter the Defendant had ceased to hold the office of Minister.' Scrutton J. concurred, saying:[7] 'On 21 Sept. 1917, the Foreign Office, through whom this Court obtains conclusive information as to the status of foreign dignitaries and their accredited representatives in this Country, informed the Court [*sic*] that the Bolivian Government had terminated the appointment of the Defendant as Bolivian Minister at the British Court.' The defendant was held, therefore, to have lost his diplomatic status and immunity.

Criminal proceedings against persons claiming diplomatic immunity are unusual,[8] but in 1918 a Mr. Chance was charged before the Kingston County Bench with assault. He claimed that he was employed at the

[1] *In re Suarez, Suarez* v. *Suarez*, [1918] 1 Ch. 176.
[2] 7 Anne, c. 2. [3] At p. 182. [4] At p. 186.
[5] See Oppenheim, op. cit., vol. i, §§ 391, 406.
[6] At p. 195. [7] At p. 199.
[8] See, however, *R.* v. *Tyler Kent*, [1941] 1 K.B. 454.

American Embassy. Counsel, however, read a letter from the Foreign Office stating that Mr. Chance was 'not returned in the list by the Ambassador'. He was duly fined.[1]

VI

The rearrangement of Europe at the end of the First World War, and in particular the establishment of the Russian Succession States, set many problems in recognition, and incidentally helped to confirm the judicial practice of inquiring of the Foreign Office in matters concerning foreign states. Two cases in 1919 show this markedly.

In *The Gagara*[2] an attempt was made to challenge the content and sufficiency of the Foreign Office letter. A writ had been issued against the ship and the parties interested in it. An appearance under protest was entered, and application was made that the writ, &c., be set aside, on the ground that the owners of the *Gagara* were the Esthonian Government, who claimed that she had been condemned as prize of war by a decree of that Government. The court invited the assistance of the Foreign Office for information as to the status of the Esthonian Government. The Law Officers attended, and informed the court that His Majesty had provisionally and with all necessary reservations as to the future 'recognized the Esthonian National Council as a *de facto* independent body, and had received certain gentlemen as informal diplomatic representatives of the Esthonian Provisional Government; and that the Esthonian Government was such a Government as could, if it thought fit, set up a Prize Court'. The Court having found for the Esthonian Government, the plaintiffs appealed, contending that the carefully framed letters from the Foreign Office to the Esthonian representatives, and the Attorney-General's statement, were deliberately ambiguous and merely showed a benevolent disposition to the Esthonians, and not such an emphatic statement of fact as the court should require. Bankes L.J., however, said:[3] 'I read the letters of the Foreign Office as being statements which do recognise, and recognise to the full the sovereignty of Esthonia', but with a limitation that no undertaking could be given to continue such recognition, in view of the then present Peace Conference. 'I think that would be a sufficient statement to require and compel the Court to decline jurisdiction.'

In the other case,[4] the Provisional Government of Northern Russia had requisitioned the *Annette* in September 1918. It was arrested by Esthonian subjects in England. On a motion to set aside the writ, &c., on the ground (*inter alia*) that the ship was the property of a foreign government, Hill J.

[1] *J.C.L.*, 18 (1918), p. 279.
[2] [1919] P. 95.
[3] At p. 102.
[4] *The Annette*; *The Dora*, [1919] P. 105.

said that he would require information from the Foreign Office as to the status of the Provisional Government of Northern Russia. The reply from the Foreign Office to the Admiralty showed that the Provisional Government was not formally recognized by His Majesty's Government as the Government of a sovereign independent state. His Majesty's Government and Allied Powers were 'co-operating with' the Provisional Government in its opposition to the forces of the Russian Soviet Government, and were represented at Archangel, its seat of government. Hill J. said:[1] 'Having read the letter with great care, I am unable to draw from it the conclusion that the Provisional Government of Northern Russia is recognized by the British Government as a sovereign power', and refused to infer that it had been 'informally recognized'.

It is not the purpose of this article to examine the interpretation by the court of the Foreign Office certificates regarding the Esthonian and the Russian Provisional Government respectively, but it is sufficient for the present that the court did hold itself free to interpret the certificate in each case. Thus, it seems to have held, for instance, that recognition of the Esthonian Government *de facto*, plus reception of informal diplomatic representatives, was sufficient, while reception of representatives of the Russian Provisional Government, in the absence of its formal recognition, was treated as not sufficient for the purpose of according it immunity from process.

The setting up of the new Russian Soviet Republic, for long unrecognized by the British Government, provided the courts with problems of evidence similar to those which arose a century earlier, at the break away of the South American Spanish Republics, and similarly attended by a strong political opposition to recognition. This strong political element revealed itself in a certain caution, a certain ambiguity, in the wording of the certificate supplied by the Foreign Office when questions concerning Russia were put to it in the course of litigation.

An example of such ambiguity occurred in 1921 in the case of *Luther* v. *Sagor*,[2] which involved the recognition of the Russian Soviet Republic and a confiscatory decree of that Republic. The decree affected certain plywood sold to defendants under a contract made between them and M. Krassin, representative of the Russian Commercial Delegation in London. A letter from the Foreign Office to the solicitors for M. Krassin stated that the latter was the authorized representative of the Soviet Government and had been received by His Majesty's Government for the purpose of carrying out certain negotiations. Further, the Secretary of State regarded Krassin

[1] At p. 107.

[2] *A. M. Luther* v. *James Sagor & Co.*, [1921] 1 K.B. 456; 3 K.B. (C.A.) 532. This has been called 'a much overworked case'—see Lauterpacht in *Mod. Law Rev.*, 3 (1939), p. 3.

as a foreign representative 'and one who in view of the negotiations should be exempt from the processes of the Court'. (The last part of this statement, claiming immunity for M. Krassin, is remarkable in that it goes a great deal farther than any other document emanating from the British Foreign Office, either previously or since *Luther* v. *Sagor*:[1] it almost partakes of some of the 'Suggestions' of the United States State Department.[2] Normally, the Foreign Office is content to prove status. Immunity is for the courts to determine.)

In a letter to the solicitors for the defendants the Foreign Office stated that 'His Majesty's Government assent to the claim of the Delegation to represent in this Country a State government of Russia.' And to the solicitors for the plaintiffs they wrote: 'For a certain limited time His Majesty's Government has regarded M. Krassin as exempt from the process of the Courts, and also for the like limited purpose His Majesty's Government has assented to the claim that that which M. Krassin represents in this country is a State Government of Russia, but that beyond these propositions, the Foreign Office has not gone, nor, moreover, do these expressions of opinion purport to decide difficult and, it may be, very special questions of law upon which it may become necessary for the Courts to pronounce', and added that His Majesty's Government had never recognized the Soviet Government in any way.

Argument by counsel turned on the question whether these letters led to the conclusion that the government which Krassin represented had been recognized as a *de facto* government, and the court (Roche J.) called them 'guarded rather than vague and ambiguous, but as clear as the indeterminate position of affairs entitled them to be'. In reply to a letter from the court the Foreign Office replied that there was no further information, and on this Roche J. decided that he was not satisfied that His Majesty's Government had recognized the Soviet Government. The defendants appealed.[3] Meanwhile, they again wrote to the Foreign Office, who replied that His Majesty's Government now recognized the Soviet Government as the *de facto* Government of Russia. (The earlier letters cited above had been written during 1920: it was now April 1921, and in March of that year a trade agreement had been signed between Great Britain and Russia.) This letter was accepted by respondents' counsel as 'the proper and sufficient proof of the recognition of the Soviet Government as the *de facto* Government of Russia', and the case thenceforth dealt with the retroactive effect of such recognition.[4]

[1] Such a suggestion would probably not have been contained in a formal Foreign Office certificate.

[2] See footnote 1, p. 240, n. 1, *supra*.

[3] [1921] 3 K.B. 532.

[4] See also *White, Child & Beney, Ltd.* v. *Simmons, Same* v. *Eagle Star & British Dominions Insurance Co.*, [1922] L.T. 571, 38 T.L.R. 616, where the question was the date on which the

Mention should also be made of *The Jupiter* cases,[1] in which, however, recognition of Soviet Russia was either conceded or assumed. It was contended that the *Jupiter* was the property of a recognized foreign independent state and so immune from arrest. Hill J. said:[2]

'As admitted and as shown by the letter of the Foreign Office addressed to the solicitors for the Union, and the documents sent therewith, the Crown, the sovereign of this Court, recognise the U.S.S.R. as the *de jure* rulers of those territories of the old Russian Empire which acknowledge their authority. I am bound therefore to treat the Union as an independent sovereign.'[3]

VII

After this succession of adventures in jurisprudence, the English courts were in 1924 and 1928 presented with opportunities for a thorough discussion, at the highest judicial level, of the principles involved in the certification and recognition of the status of, first, an independent foreign government, and secondly, a diplomatic person. The circumstances of both cases were most favourable. The problem in respect of the foreign government was uncomplicated by the hesitations and ambiguities arising from the unsettled political state of Europe immediately after the First World War. The diplomatic person was a member of the staff of a first-class Power, and the court was assisted by the intervention of one of the Law Officers of the Crown.

The case involving the foreign government was *Duff Development Company, Ltd.* v. *Government of Kelantan and Another*,[4] the headnote of which reads as follows:

'It is the settled practice of the Court to take judicial notice of the status of any foreign government, and for that purpose, in any case of uncertainty to seek information from a Secretary of State, and the information so received is conclusive.'

Soviet Government should be considered to have commenced its existence as a government. The Foreign Office supplied some information but, despite the request of Roche J., refused to state the date on which His Majesty's Government's recognition of the Soviet Government should be deemed to be retrospective. The court had to decide on the evidence before it, and the Court of Appeal held that certain acts committed in December 1917 by persons purporting to act under the authority of the Commissaries of the People were acts of a body since recognized by His Majesty's Government as the *de facto* Government of Russia. A note in *Annual Digest*, 1919–22, at p. 51, says: 'The Court of Appeal thus recognized the Soviet Union as having been established as early as December 1917.' But the court does not *recognize*. It found on the evidence what was a matter of historical fact.

[1] (No. 1) [1924] P. 236; (No. 2) [1925] P. 69; (No. 3) [1927] P. 122, 250.

[2] At p. 238.

[3] It is perhaps worthy of note that in *Princess Paley Olga* v. *Weisz*, [1929] 1 K.B. 718, a case of a claim based on acts done by Russian revolutionaries and adopted by the Soviet Government, Sankey L.J. said (at p. 739): 'The Soviet Government was recognised by the English Government on 16 March 1921 as *de facto* and on 1 February 1924 as *de jure* the Government of Russia', without quoting any authority for his statement or, so far as appears from the report, having made any request for information to the Foreign Office. The event had apparently by now become a matter of historical fact, and had of course been mentioned in the reports of earlier cases.

[4] [1924] A.C. 797.

The Government of Kelantan, a native (unfederated) state in the Malay Peninsula under British protection, entered into an agreement with the appellant company which contained an arbitration clause. Disputes which arose were submitted to an arbitrator, who directed that the Government of Kelantan should pay the costs of the arbitration and award. The Company applied to the court for leave to enforce the award, but the court ordered a stay of all further proceedings on the grounds that the Sultan of Kelantan was an independent foreign ruler and the state of Kelantan an independent sovereign state, and that the court had no jurisdiction over either. Appeals from this Order reached the House of Lords. In reply to a request for information as to the status of the state of Kelantan, the Secretary of State for the Colonies sent a copy of an Agreement (dated 22 October 1910) between the King and the Sultan, and stated that Kelantan was an independent state and the Sultan the sultan thereof, and that the King did not exercise or claim any rights of sovereignty over Kelantan.

In the House of Lords, it was contended for the appellants[1] that Kelantan was not an independent sovereignty since, under the Agreement, the King of England had a right to appoint a resident official to tell the Sultan how he was to manage the affairs of his country. The letter from the Colonial Office was not conclusive:

> 'If the letter had merely contained a declaration of the recognition of the State of Kelantan by Great Britain, no objection could be taken to it, as recognition is a question of fact: but the declaration that Kelantan is an independent state is an unwarrantable attempt by the Secretary of State to deprive the Courts of this country of the right to determine questions of law.'

(This was palpably playing on the court's traditional mistrust of the Executive.) The proper course, it was contended, was for the Colonial Office to furnish the court with the necessary documents and leave it to decide the question of independence. Further, the letter was ambiguous. 'Notwithstanding the declaration of the independence of Kelantan, when the letter is read in conjunction with the documents enclosed in it, it shews that the state of Kelantan is not independent.'

The Attorney-General obtained leave to intervene, and said[2] that 'The Colonial Office has sent forth no uncertain sound and if it has informed the Court that the State of Kelantan is a sovereign state, that is conclusive'. The form of letter was taken from that used in *Mighell* v. *Sultan of Johore*[3] and was adopted in *Carr* v. *Fracis Times & Co.*[4] and in *Luther* v. *Sagor*:[5] '*The letter amounts to a recognition.*[6] . . . Assuming that the letter is ambiguous

[1] At p. 801. [2] At p. 802. [3] *Supra*, p. 261.

[4] [1902] A.C. 176, at p. 184, where the certificate stated that Muscat was at the time in question an independent state and that the Sultan was the sovereign ruler thereof.

[5] *Supra*, p. 266.

[6] Present writer's italics.

(which is denied) the proper course was to apply to the Colonial Office for further information.'

In his judgment Viscount Cave said:[1]

'It has for some time been the practice of our Courts, when the question [of immunity] is raised, to take judicial notice of the sovereignty of a state, and for that purpose, in any case of uncertainty, to seek information from a Secretary of State, and when information is so obtained, the Court does not permit it to be questioned by the parties.'

Viscount Finlay[2] added:

'Such information is not in the nature of evidence; it is a statement by the sovereign . . . upon a matter which is peculiarly within his cognisance.'

He then made the following comment[3] on the Treaty appended to the letter:

'It has been the practice when there are agreements or treaties dealing with the powers of the alleged sovereign to append to the reply on the question of sovereignty copies of any documents [relevant thereto]. . . . The Department might lay itself open to misunderstanding if it took any other course.'

He thought it might be said that there was a want of candour if any limitation on the sovereignty were not disclosed, and continued:

'The contention that by appending these documents the Colonial Office remits the question to the Court to form its own opinion on it is based on a misconception. . . . The answer of the King through the appropriate department settles the matter whether it depends on fact or law. . . .'

Lord Dunedin[4] attempted to base the whole question on the doctrine of comity, while Lord Sumner[5] was an adherent of the 'best evidence' theory of the certificate of the Executive, saying:

'The status of foreign communities and the identity of high personages who are the chiefs of foreign states are matters of which the Courts of this Country take judicial notice. Instead of requiring proof to be furnished on these subjects by the litigants,

[1] At p. 806.
[2] At p. 813.
[3] At p. 815.
[4] At p. 820.
[5] He also dealt with the pertinent and practical question of exactly who 'the Crown' is, in the complicated arrangement of the modern constitutional Executive. He said (at p. 823): '. . . the principle is well settled that the Court may and generally should make its own enquiry of the competent Secretary of State in order to ascertain, in case of need, whether a particular state is a sovereign state. . . . "But", the appellants say, "an official of the Colonial Office advises the Sultan to go to arbitration, and the same official of the Colonial Office, or some other, advises him to dispute the award; and then the Colonial Office, in the name of the Crown, says that the Sultan is a sovereign and so is bound to do nothing . . . what then is the statement that the Sultan is a sovereign? Is it the voice of the sovereign of this Country, or is it in reality nothing but the contention of someone in the Colonial Office?" Without contesting in the least either the inconvenience or the impropriety of any conflict between the High Court and the Secretary of State upon the grave question of the sovereignty of the Sultan of Kelantan, I venture to think that the mere obligation of deferring to any statement made in His Majesty's name hardly constitutes the whole legal basis for the rule laid down in the *Johore* case.' (*Supra*, p. 261.)

they act on their own knowledge, or, if necessary, obtain the requisite information for themselves. I take it that in doing so, the Courts are bound as they would be on any other issue of fact raised before them, to act on the best evidence, and, if the question is whether some . . . state is a sovereign state or not, the best evidence is a statement, which the Crown condescends to permit the appropriate Secretary of State to give on its behalf. It is the prerogative of the Crown to recognise, or to withhold recognition from States or Chiefs of States. . . . A foreign ruler, whom the Crown recognises as a sovereign, is such a sovereign for the purposes of English law, and the best evidence of such recognition is the statement duly made in regard to it in His Majesty's name. Accordingly where such a statement is forthcoming no other evidence is admissible or needed. . . .[1] *It was not the business of the Court to inquire whether the Colonial Office rightly concluded that the Sultan was entitled to be recognised as a sovereign, by International Law.*[2] All it had to do was to examine the communication to see if the meaning of it really was that the Sultan had been and was recognised as a sovereign.'

His Lordship then expounded, in terms which have become classic, the position when, owing to political changes, the precise definition of the status of a foreign sovereign or state is a matter of some delicacy.

'There may be occasions when for reasons of state full, unconditional or permanent recognition has not been accorded by the Crown; and the answer to the question has to be temporary if not temporising, or even when some vaguer expression has to be used. . . . In such cases, not only has the Court to collect the true meaning of the communication for itself, but also to consider whether the statements as to sovereignty made in the communication, and the expression "sovereign", or "independent" sovereign used in the legal rule mean the same thing. . . . If the Crown declined to answer the inquiry, as in changing and difficult times policy might require it to do, the Court might be entitled to accept secondary evidence in default of the best. . . .'[3]

Finally, Lord Carson, pronouncing more strongly than had before been done for the conclusiveness of the Executive's certificate, said that if he could disregard the statement in the letter that 'Kelantan is an independent state', &c., he would find great difficulty in reaching that conclusion, having regard to the terms of the treaty, but he agreed with the other Law Lords that 'the Courts of this Country are bound to take judicial notice of the status of any other Country in accordance with the information afforded to them by the proper representative of the Crown. . . . It is difficult to

[1] But if such a statement is not forthcoming? The answer is not given in the judgment, but is supplied by Lauterpacht in a note on 'The Form of Foreign Office Certificates', in this *Year Book*, 20 (1939), p. 125: 'If there is a refusal to give an answer, if the information is insufficient or obscure, it may be properly supplemented from other sources. Statements of the Crown are conclusive only so far as they are meant to supply the answer to an inquiry put by the Court or by parties. When there is no such intention, the statement, while conclusive as to the facts which it recites, is not exclusive of other sources of evidence.'

[2] Present writer's italics.

[3] 'In matters of status, that question . . . has as a rule been reduced to the question whether H.M. Government has granted the necessary degree of recognition to the foreign community. The principle of the conclusiveness of the statements of the Crown in these matters is merely a rule of evidence. [Presumably then] the Court may in case of doubt have recourse to sources of evidence other than the facts enumerated in the letter from the Foreign Office, if that . . . is insufficient or obscure' (Lauterpacht in this *Year Book*, 20 (1939), p. 125).

see in what other way such a question could be decided without creating chaos and confusion', as there exist various limited and qualified degrees of sovereignty. The only proper evidence of the recognition of the status of a government is that supplied by an officer representing the Crown.[1]

Some four years after this long and thorough examination of the force and sufficiency of the certificate of a Secretary of State in respect of a foreign sovereign or a foreign state, the English courts, at every level, had in *Mussman* v. *Engelke*[2] the opportunity of thrashing out fully and, perhaps, finally the principle as it applied to the Foreign Office certificate regarding a foreign diplomatic envoy.

The course of the action was very involved, and it is convenient to quote the excellent synopsis given by Sir Cecil Hurst, in his article 'Diplomatic Immunities—Modern Developments':[3]

'The case came into Court because Engelke, in support of his claim to diplomatic immunity, filed an affidavit, and the Plaintiff applied for leave to cross-examine the deponent as to the facts asserted in the affidavit. . . . A Summons in Chambers was taken out, asking for an Order . . . that Engelke should attend for purposes of cross-examination. The Master said "No"; in appeal the Judge in Chambers said "Yes": on appeal from the Judge in Chambers the Court of Appeal by a majority of two to one said "Yes". On appeal from the Court of Appeal, the House of Lords unanimously said "No".'

The genesis of the affair was the non-payment of rent by Mr. Engelke to his landlord Mr. Mussman. The latter issued a writ against his tenant, and it was served. Engelke's solicitors then wrote informing Mussman that the defendant was 'an official at the German Embassy duly registered on the list of officials kept by the Foreign Office'. Referring to the Diplomatic Privilege Act, 1708, they asked that the writ be withdrawn. This was declined. Defendant entered a conditional appearance and issued a summons to set aside the writ on 'the ground that Defendant is a consular secretary on the staff of the German Embassy . . . and has been notified as such to the British Foreign Office and that the Defendant's name appears in the diplomatic list issued by the British Foreign Office'. With the summons was filed a certificate to that effect by the German Chargé d'Affaires. An order was made, and was appealed from; and Engelke issued another summons to set aside the writ. This time he filed a certificate from the Foreign Office, stating that the name of the defendant appeared in the Foreign Office List in June 1921, and thereafter, until 1924, as assistant clerk on the staff of the German Ambassador, and since then as consular secretary on the staff of the German Ambassador. This certificate was

[1] See note in *Annual Digest*, 1923–24, p. 128, where it is suggested that the appeal in the *Duff* case was in substance an appeal from the decision of the Court of Appeal in *Mighell*'s case (*supra*).

[2] *Mussman* v. *Engelke*, [1928] 1 K.B. 90; *Engelke* v. *Mussman*, [1928] A.C. 433.

[3] This *Year Book*, 10 (1929), p. 12.

controverted by the plaintiff, who applied for leave to cross-examine the defendant on his affidavit. It was on that point, the grant or refusal of an order for cross-examination of Engelke, that this important case went to the Court of Appeal.

At the hearing the Attorney-General appeared 'at the request and on behalf of the Foreign Office to support the statement made by that office as to the status of the Defendant' and in the course of his argument made a statement for the information of the Court. In this he set out the fact of Engelke's recognition by the Foreign Office as a member of the German Embassy. In reply to the Master of the Rolls, he said that he had given the information as a statement 'because the Foreign Office is the authoritative department of the Government to determine the questions as to the status of diplomats and the like'. The fact that some person's name was on a list was not conclusive, because he may have ceased to be attached after the date of the list, which indeed was merely information given by the Foreign Office to the Sheriffs 'for their own convenience and protection'. But 'when the Foreign Office is asked by the Court to give information . . . the responsibility of the Foreign Office is . . . examining into the matter in order to give the Court . . . exclusive information on that particular'. The Foreign Office had satisfied itself that Engelke performed 'some service on the right side of the line between consular service and ambassadorial service'. In argument, the Attorney-General said: 'It is the settled practice of the Court to take judicial notice of the status of any foreign government, and for that purpose, in any case of uncertainty, to seek information from a secretary of state, and the information so received is conclusive.'

He cited *Mighell*'s case,[1] *Foster*'s case,[2] *Duff*'s case[3] (with the dictum of Viscount Cave L.C. that 'when information is so obtained the Court does not permit it to be questioned by the parties'), and *Suarez*'s case.[4]

For Mussman, it was now contended that the Foreign Office could have no knowledge whether the duties Engelke was performing brought him within the exception, and it was not a fact which could be proved by the Attorney-General. This was an obvious piece of bait, appealing to the Courts' inherent reluctance to allow persons within the realm to escape from its jurisdiction, on the one hand, and to its traditional distrust of anything that looked like control or direction by the Executive, on the other.

However, in his written judgment Lord Hanworth M.R. dealt faithfully with this. He said: 'It is clear that as to the status of a foreign potentate or foreign power, the proper course is that the Court should apply to H.M. Government, and is bound to act on the information given to them.

[1] *Supra*, p. 261.
[2] *Supra*, p. 245, n. 3.
[3] *Supra*, p. 268.
[4] *Supra*, p. 254.

Such information is not in the nature of evidence; it is a statement of the Sovereign . . . through one of his Ministers.' The same principle applies to the position of an ambassador. The question, who is the ambassador of a foreign country, must be decided upon information obtained from the Foreign Office, which 'when received cannot be questioned in a Court of Law'. But having laid down the principle so categorically, the Master of the Rolls took a few paces backward, as it were, and examined the evidence of fact. In the present case, he noted, there was evidence that Engelke was 'within the definition of a consul—a consular secretary—who had at one time worked at the German Consulate', and continued: 'It is not claimed that the Certificate of the Foreign Office is conclusive. If the matter rested upon [it] alone, further information might be required.' 'The Court must act on the best evidence', said the Master of the Rolls, thereby throwing the whole question back into obscurity. Groping dimly through the fog, he found it impossible to neglect the intervention of the Foreign Office, through the Attorney-General, and to hold that, in spite of it, the matter is left in uncertainty. 'What better evidence than [the statement of the Attorney-General] could be forthcoming?' he asked, and, not waiting for answer, turned quickly from the 'best evidence' rule to the old idea of comity. If Engelke were cross-examined on his affidavit, and the courts then came to the conclusion that he was not entitled to diplomatic privilege, there would be a 'divergence between the decision of the Courts and the comity extended by the department charged to exercise such in the name of His Majesty'. In brief, when appealed to in a case such as this, the Foreign Office need not intervene; or they might submit the facts and leave the court to draw the necessary inference in law; but if they do intervene, and communicate to the court the status of the diplomat, such evidence is conclusive. However, Scrutton and Sargent LL.J. differed, and pointed out inaccuracies in the affidavit of the German Chargé d'Affaires. They questioned the Foreign Office's means of knowledge of the facts certified. The Foreign Office seemed to have held 'an inquiry not on oath, at which the Plaintiff was not represented', and to have arrived at the conclusion that Engelke had immunity from process. In the event it was held that the question of immunity would be decided 'in the usual way'—by cross-examination of Engelke on his affidavit.

Engelke promptly appealed to the House of Lords,[1] and the Attorney-General obtained leave to intervene on the ground that 'the issues raised in these proceedings might affect the interest of His Majesty in the conduct of foreign affairs and his relations with foreign states'—comity again. In his contentions, the Attorney-General answered much of the arguments of Scrutton L.J. by revealing some of the workings of the Foreign Office in

[1] *Engelke* v. *Mussman*, [1928] A.C. 433.

matters of this nature, which are of interest to note. It appears that the list furnished by a foreign ambassador to the Secretary of State is not accepted as of course on behalf of His Majesty, but is investigated; and recognition 'not infrequently' is withheld from a person in the list because his diplomatic status is in doubt, or because the number of persons for whom status is claimed appears to be excessive.

The Attorney-General admitted that it was for the Court to determine as a matter of law whether, the diplomatic status of a person having been proved by the Foreign Office statement that recognition had been accorded, immunity from process necessarily followed. He contended, however, that if the Court could go behind the statement and investigate the facts, 'it would involve a breach of diplomatic immunity which in the event the Court might decide to have been established'.

These contentions were upheld, and Engelke's appeal allowed, by a very strong court consisting of Lord Buckmaster, Viscount Dunedin, Lord Phillimore, Lord Blanesburgh, and Lord Warrington of Clyffe.

Lord Phillimore seized[1] on the Attorney-General's exposure of the 'circular' process in which non-acceptance of the Foreign Office would result.

> 'Where an applicant is claiming that he is privileged from litigation, it seems a strange result if he is forced to litigate in order to obtain his exemption from litigation.'
>
> 'According to English law, once the man is tendered as a domestic or a domestic servant, and the tender is accepted [by the Foreign Office] the status is created, and the privilege attaches.'[2]

The certificate from the Foreign Office was not a piece of hearsay evidence, it was a statement of what the Foreign Office had done. The status had been created by the Crown in virtue of its prerogative. 'The exact inquiry is not whether [Engelke] is a member of the Ambassadorial Staff, but whether he has been accepted and recognized by the Crown as a member.'[3]

VIII

The *Duff* case and the case of *Mussman* v. *Engelke* have been dealt with at considerable length, not only as the outstanding cases of the century on diplomatic immunity and the conclusiveness of the Foreign Office certificate, but because they display the wealth and complexity of the arguments available for and against such conclusiveness. After careful reading of the contentions of the many judges, the impression remains that no one was quite sure what the doctrine of conclusiveness really rested on, or where it would lead the court if finally and completely accepted. But completely accepted it was, and these cases mark a turning-point in the history of the

[1] At p. 449. [2] At p. 451. [3] At p. 457.

matter in that the Foreign Office certificate thereafter comes to be applied for and accepted as of course. The last word had not, however, been said on the matter of recognition of a foreign sovereign or government, and this became apparent when political considerations again required the Foreign Office to cause their certificates to be 'temporary if not temporizing'.[1]

In October 1935 war broke out between Ethiopia and Italy. The Emperor Haile Selassie left Abyssinia on 1 or 2 May 1936. On 19 May the Italian Government proclaimed the annexation of Abyssinia. On 18 June 1936 civil war broke out in Spain. Before the end of 1936, and then progressively, General Franco and a Nationalist Government were in control of part of Spanish territory. They demanded, and received, recognition from other states. For reasons of state neither their claim nor the claim of the existing Republican Government was accorded 'full, unconditional or permanent recognition by the Crown'.[2] Nor were either of the opposing claims of the Emperor of Abyssinia and the King of Italy. This was reflected in the Foreign Office certificates of the day relating to Abyssinian and Spanish matters respectively.

As regards Abyssinia, the two cases of *Haile Selassie* v. *Cable & Wireless, Ltd.*[3] are instructive. Both arose out of a claim by the Emperor of Abyssinia for money owing on a contract. The defendants admitted that the money was due, but, contending that the Italian Government claimed the money, moved for the dismissal of the action for want of jurisdiction. A letter from the Foreign Office stated (*inter alia*) that His Majesty's Government still recognized the plaintiff as *de jure* Emperor of Ethiopia, and recognized the Italian Government as the Government *de facto* of virtually the whole of Ethiopia. In the No. 2 case the defendants, while still admitting that the money was due, said that the claim was now transferred to the King of Italy as the sovereign head of the Italian Government. The same Foreign Office letter was referred to in court. On the matter coming before the Court of Appeal, the attention of the Court was called by Counsel to the fact that the previous day an announcement had been made by the Prime Minister in the House of Commons that it was the intention of His Majesty's Government in a very short time to recognize the King of Italy as Emperor of Ethiopia. On this simple and, strictly speaking, second-hand statement, the Court adjourned the proceedings until such recognition had taken place. Later, the solicitors for the defendants appear to have received a certificate from the Foreign Office that His Majesty's

[1] 'It is the duty of the Secretary of State to inform the court of the facts, and if the facts are complicated and unprecedented, his statement cannot be an example of lucidity.' Lauterpacht, 'The Form of Foreign Office Certificates', in this *Year Book*, 20 (1939), p. 125.

[2] Cf. Lord Sumner, *supra*, p. 270.

[3] (No. 1), [1928] Ch. 545; (No. 2), [1939] Ch. 182.

Government no longer recognized the plaintiff as *de jure* Emperor of Ethiopia, but recognized the King of Italy as such. On this, the Court held that the right to sue in this action must be treated in the courts of this country as having become vested in His Majesty the King of Italy.[1]

As regards Spain, the cases in which the Court had to consider the questions arising out of the recognition first *de facto* and then *de jure* of the revolutionary or 'Nationalist' Government arose for the most part out of seizures and requisitions of ships. In none of these was any attempt made to question the conclusive effect of the Foreign Office certificate as to the position at the time.[2] Three brief examples may here be given. In *The Rita Garcia*[3] the Republican Government of Spain moved to set aside a writ for possession of the ship, which, as it claimed, it had requisitioned. The Republican Government pleaded to the jurisdiction, on the ground that the vessel was in its possession. Giving judgment (setting aside the arrest), Langton J. said:

'The broad circumstance by which I am governed and must be governed is this: that I have an intimation [*sic*] from the Foreign Office that they regard the Spanish Republican Government as the Government of a foreign Sovereign State, and I have, from the accredited representatives of that Foreign Sovereign State in this country an affidavit as to the requisitioning of the ship. . . .'

His Lordship 'had no option but to accede to the prayer in the Motion'.

In *Banca de Bilbao* v. *Sancha and Rey*,[4] the issue was whether the decrees of the autonomous Basque Government (set up under General Franco's Government) were valid under Spanish law to constitute a new board as the executive organ of a bank. A letter by the British Foreign Office addressed to the Court stated that General Franco's Government was recognized as exercising *de facto* administrative control over a considerable portion of the Basque country, including Bilbao, but nevertheless His Majesty's Government recognized the Republican Government as the *de jure* Government of the whole of Spain, including the part under the control of the Nationalist Government. From this letter the Court managed to deduce that the laws of the Nationalist Government could be

[1] In an earlier case, *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* (L.R., [1937] Ch. 513), a certificate from the Foreign Office was before the Court, stating that in the middle of December 1936 His Majesty's Government had recognized the Italian Government as being in fact (*de facto*) the government of the area of Abyssinia then under Italian control; that an envoy extraordinary and minister plenipotentiary for the Emperor of Ethiopia had been received at the Court of St. James; and that he continued to be accorded recognition in that capacity. This certificate appears not to have been contested by either party. In his judgment Clauson J. said: 'The effect of that certificate is that I am bound to treat the acts of the Government which was so recognised as acts which cannot be impugned, (etc.) . . .'

[2] According to Lauterpacht, 'Recognition of Insurgents as a *de facto* Government', in *Modern Law Review*, 3 (1939), p. 1, grant of *de facto* recognition is a function which is within the province of the Government and not of the courts.

[3] *Ll.L. Rep.*, 59 (1937), p. 140.

[4] [1938] 2 K.B. 176.

impugned as acts of a usurping Government, and that, conversely, in that area, acts of a rival Government, even if recognized by H.M. Government, were to be treated as a nullity: 'Should the question arise as to what government must be recognized in this Court as the Government of the territory (in question), the question must in case of doubt be resolved by a statement made by His Majesty to this Court through the appropriate channel.'

In *The Arantzazu Mendi*,[1] a case which was taken on appeal to the House of Lords, the vessel had been requisitioned by General Franco. The Government of the Republic of Spain claimed the ship as requisitioned, and issued a writ *in rem*. The Nationalist Government of General Franco entered a conditional appearance, and moved to set aside the writ on the ground that it impleaded the Nationalist Government of Spain, a foreign sovereign state. The court inquired from the Secretary of State for Foreign Affairs whether the Nationalist Government of Spain was recognized by His Majesty's Government as a foreign sovereign state. A long and circumstantiated reply was sent,[2] on which the court held that it had no jurisdiction. On appeal, Slesser J. held[3] that the answers of the Foreign Office 'require this Court to say that His Majesty's Government has recognized the National Government of Spain as the Government of a Foreign Sovereign State'. On further appeal to the House of Lords, Lord Atkin said:[4] 'This letter [of the Foreign Office] appears to me to dispose of the controversy' and held that it established that the Nationalist Government of Spain was a foreign sovereign state and could not be impleaded.

There, it would appear, the matter rests, so far, at least, as concerns the status and recognition of a state or a head of state as being independent and sovereign. The current rearrangement of Europe's frontiers and sovereignties has not yet led to any reported legal decisions. That they will come is not to be doubted, and it remains to be seen whether a new phase in the relations of Judiciary and Executive, as shown in the Foreign Office certificates, will be displayed.

IX

As regards the position of diplomatic envoys, the exhaustive treatment accorded to the subject by *Mussman* v. *Engelke*[5] seems to have silenced criticism and stifled judicial inquiry; the subject is not seriously raised again until the case of *The Amazone*[6] in 1939. Meanwhile, the authorities

[1] L.R., [1938] P. 233; [1939] P. 37 [C.A.]; [1939] A.C. 256 (H.L.).
[2] At pp. 242–3 (and see *Annual Digest and Reports*, 1938–40, p. 61).
[3] At p. 34.
[4] At p. 264.
[5] *Supra*, p. 272.
[6] [1939] P.322.

are categorical and enunciate the rule as though there had never been any doubt, and as though to obviate doubt. Says '*Halsbury*':[1]

'A statement made to the Court by the Secretary of State for Foreign Affairs or by the Attorney-General on the instructions of the Foreign Office, as to the status of a person claiming diplomatic immunity, whether as ambassador or as a member of an ambassador's staff, is accepted by the Court as being conclusive (*Engelke* v. *Mussman*): and in any case of uncertainty the Court will apply to the Foreign Office for information (*Duff* v. *Kelantan Government*).[2] It is usual for a list of persons attached to an embassy to be furnished to the Secretary of State for Foreign Affairs, but inclusion in or omission from the list is not conclusive as to the status of a person claiming privilege.'

And the *Yearly Practice of the Supreme Court* says:[3] 'The Court will invite and accept as conclusive information from a Secretary of State.' Again:[4] 'A statement of the Attorney-General based on the instructions of the Foreign Office as to the status of the Defendant is conclusive.'[5]

For all this the Court had to meet the challenge that that was not the end of the matter when the question came before it in *The Amazone*. Differences having arisen between husband and wife as to the ownership of a yacht, the wife issued a writ *in rem* for possession. The husband was assistant military attaché at the Belgian Embassy in London. His name appeared in the list prepared by the Foreign Office under the Statute of Anne. He moved to set aside the writ on the ground of immunity, and contended[6] that 'on any question of Defendant's status, the Court should cause enquiry to be made of the Foreign Office, who could reply in writing or instruct the Attorney General to appear', which reads like an echo of the extract from the *Yearly Practice* quoted above. To such an inquiry as to the defendant's diplomatic status the Foreign Office replied with a certificate that 'the Defendant had been received by His Majesty's Government as Assistant Military Attaché', (&c.), and since that date his name had been included in the list prepared under the Statute of 1708. 'The List', said the learned Judge,[7] 'as I understand it is one which the Foreign Office prepares from names submitted by the members of the various diplomatic corps [*sic*] of those recognised by His Majesty as enjoying diplomatic immunity. It is therefore beyond question that the Defendant does enjoy full diplomatic immunity.' The wife appealed,[8] arguing[9] that the Foreign

[1] Halsbury's *Laws of England*, vol. vi (Hailsham ed., 1932), p. 512.

[2] *Supra*: this was a case not of diplomatic immunity but of the status of a foreign sovereign and a foreign state.

[3] 1940 ed., at p. 678. [4] Ibid., p. 11.

[5] Cf. Dicey, *Conflict of Laws* (5th ed. 1932), p. 197. 'The Court is bound to take judicial cognisance of the status not only of an ambassador (&c.) but also of members of his staff. Normally, a list of the staff is submitted to the Secretary of State for Foreign Affairs, who may refuse recognition either because the person's claim to diplomatic status is dubious, or because the number of persons for whom such status is claimed is excessive. If recognition is accorded, a statement by the Secretary of State is binding on the Court, as it is a necessary right of the royal prerogative to accord or refuse recognition.'

[6] At p. 324. [7] Ibid. [8] [1940] P. 40. [9] At p. 43.

Office certificate merely stated that he was assistant Military Attaché, &c., and that his name had been included in the List prepared under the Act of 1708,[1] but did not go any farther, and that it still remained for the defendant to show that not only he but also the yacht had diplomatic immunity under the Statute; he had to show that the *Amazone* was his property, which was the point in issue. In other words, the question whether the yacht was protected by the Statute of Anne could not apply to the husband as a diplomatic agent until the matter had been litigated. This circular argument, similar to that detected by Lord Phillimore in *Engelke* v. *Mussman*,[2] was ignored by the Court. Slesser L.J.[3] would have none of it. 'That is to put an entirely too narrow construction upon the certificate of the Foreign Office,' he said. 'I read the certificate as informing the Court, as it so states, that the Defendant is the Assistant Military Attaché, and that he is a person having diplomatic privilege not only under the statute, but also under the Common Law—such privilege as would normally attach to an assistant military attaché.' He then proceeded to consider the content of the privilege, and held that, even if not protected by the Statute, the husband could derive his protection from the common law: as he had possession of the yacht, he could claim its immunity irrespective of the Statute.[4]

X

Modern statutory provision for a new kind of Foreign Office List is to be found in the Diplomatic Privilege (Extension) Acts, 1941, 1944, and 1946. The 1941 Act[5] regulates the position of Allied Governments and 'movements' in the United Kingdom, and puts their leading members on a basis similar to the Diplomatic Corps. The Act[6] extends diplomatic privilege to a person recognized by His Majesty to be a member of a foreign Government, national Committee, &c., by treating him as an envoy of a foreign Power accredited to His Majesty. It provides[7] that the Secretary of State shall compile a list of persons to whom immunities and privileges are so extended, and publish it in the *London*, *Edinburgh* and *Belfast Gazettes*. Amending Lists are to be published, showing the date from which immunities cease or begin to be extended to such persons. The fact that any person is, or is not, included among persons to whom

[1] 7 Anne, c. 12, s. 3, makes 'utterly null and void' 'all writs and processes . . . whereby . . . any such ambassador or other public minister may be arrested . . . or his . . . goods or chattels may be distrained, seized or attached', provided that (s. 6) their names are registered with the Foreign Office.

[2] See p. 272, *supra*.

[3] At p. 41.

[4] This case is also interesting as showing that where diplomatic privilege exists, it operates between parties entitled to it, seeing that the plaintiff as the wife of a 'diplomatic person' presumably enjoyed diplomatic immunity herself. See Oppenheim, op. cit., vol. i, § 404.

[5] 4 & 5 Geo. VI, c. 7.

[6] S. 1 (1).

[7] S. 1 (2).

immunities and privileges are extended is conclusively proved by producing the *Gazette* and any subsequent *Gazette* containing notices of amendment. This provision for the production of the lists themselves in court appears to obviate the necessity for, though it does not exclude, the production of a Foreign Office certificate.[1]

The 1941 Act was a war-time measure and in itself was limited to expire with the Emergency Powers (Defence) Act, 1939, but the Act of 1944 applied its provisions to officials of certain international Organizations of which His Majesty's Government in the United Kingdom are members, and which will presumably be of a more or less permanent nature. His Majesty is empowered[2] by Order-in-Council to provide that such an Organization shall have immunities, and to confer on (*a*) its higher officials, not being British subjects, certain immunities and privileges,[3] and (*b*) higher officials and servants, certain lesser immunities and privileges.[4] The Act provides[5] that the Secretary of State *shall* compile a list of persons entitled under (*a*) and *may* compile a list of persons under (*b*) *supra*; these lists are published and amended in the same manner as the 1941 Act lists. Yet other series of lists and amending lists are authorized[6] in the case of representatives (and their staffs) attending international conferences in the United Kingdom where it appears to the Secretary of State that doubts may arise as to the extent to which representatives of such foreign Powers, and members of their official staffs, are entitled to diplomatic immunity.

The 1946 Act[7] amends the 1944 Act in connexion with the general convention on privileges and immunities of the United Nations approved at the first General Assembly thereof, and in connexion with certain resolutions taken at the said Assembly.

It is too early to judge of the effect of these Acts, but altogether it rather looks as though in some instances matters may not have been simplified. In course of time, the lists contemplated may well have reached voluminous proportions and require a great deal of scrutinizing to establish whether the name of a given person appears in them or not. From experience of official lists in the *London Gazette*, subject to unconscionable 'time lag' and frequent corrigenda, the older system of a certificate issued in each individual case may appear preferable.[8] It is not excluded by the Acts, and it seems possible that litigants will continue to approach the Foreign Office and seek up-to-date information as to the status of any individual claiming or thought to have diplomatic immunity.

[1] Cf. *The Amazone, supra*, p. 279.
[2] 1944 Act, S. 1 (2).
[3] Set out in Part V of the Schedule to the Act.
[4] Set out in Part III of the Schedule to the Act.
[5] S. 1 (3).
[6] S. 3.
[7] 9 & 10 Geo. VI, c. 66.
[8] For a note on the list to be issued by the Secretary of State under S. 3 of the Act of 1944, and the advantages of such a list, see this *Year Book*, 21 (1945), p. 249.

ITALIAN PRIZE LAW, 1940–1943

By S. W. D. ROWSON, LL.B.

THIS article is intended as an analysis of the contribution of the Italian Prize Tribunal to the international law of war during the period from the entry of Italy into the war against France and Great Britain on 10 June 1940 to the Armistice with the United Nations on 3 September 1943. It is based on the four volumes of the *Bollettino del Tribunale delle Prede* issued by the Fascist Government.[1]

Italian prize law is statute law, and is to be found in Articles 132–279 of the Laws of War of 8 July 1938,[2] brought into force on 10 June 1940 in Italy and the Italian Empire.[3] The Laws of War were amended by Law of 16 December 1940,[4] by Royal Decree Law of 6 March 1941,[5] and by Law of 29 November 1941.[6] The duty of the Tribunal to apply this law is laid down in Article 222 which provides: 'The Prize Tribunal shall apply the internal law of the State. Whenever a question cannot be decided by reference to a precise provision of internal law or to provisions governing similar or analogous cases, recourse may be had to the generally recognized principles of international law.' The effect of this provision in practice is that the Prize Tribunal has to find express provision in Italian municipal law on which to base its judgment. Commenting on Article 222 in *The Athinai*[7] it remarked: 'In every case the Tribunal, in accordance with Article 222, applies the internal law of the State. It has no jurisdiction to decide whether the internal law conforms to international law in general or to the international obligations of

[1] Ministero della Marina, *Bollettino del Tribunale delle Prede*: Fasciculo I, 1941, fasciculo II, Dicembre 1941, fasciculo III, Giugno 1942, fasciculo IV, Dicembre 1942. Roma, Tipografia del Senato del Dott. Giovanni Bardi: a cura del Prof. R. Sandiford, sotto la direzione dell' Ecc. Dott. G. Messina. Each fascicule is divided into four parts separately paginated as follows: Part I, Italian legislation, 309 pages; Part II, Judicial Decisions, 483 pages; Part III, Foreign legislation, 125 pages; Part IV, Italian and Foreign Decisions from the last war and miscellaneous items, 139 pages. There is nothing of importance to this paper in Parts III and IV. This work will be cited herein as *Boll.* As far as I am aware no further fascicules have been published, and I have no knowledge of what happened to the Tribunal after the Armistice with the United Nations.

[2] Royal Decree of 8 July 1938, No. 1415, approving the texts of the Laws of War and Laws of Neutrality, published in the Ordinary Supplement of the *Gazzetta Ufficiale* of 15 September 1938, No. 211. *Boll.* i. 3 (herein called the principal decree).

[3] Royal Decree of 10 June 1940, No. 566, bringing into force the Laws of War. *G.U.*, 15 June 1940, *Boll.* i. 143; in accordance with Articles 2, 5, and 10 of the principal decree.

[4] *G.U.*, 30 January 1941, No. 24, *Boll.* i. 172, amending the following articles of the principal decree: 3 (1), 7, 13, 159 (5), 207, 218, 323, 360, and 362.

[5] *G.U.*, 18 April 1941, No. 93, amending Article 218 (as amended), *Boll.* i. 178. Royal Decree converted into law by Law of 4 July 1941, No. 872, *G.U.*, 2 September 1941, No. 206, *Boll.* i. 221.

[6] No. 1571. *G.U.*, 4 February 1942, No. 28, *Boll.* i. 255, adding new articles 125 (*b*), 125 (*c*), 125 (*d*), and 125 (*e*).

[7] *Minister of Marine* v. *Hellenic Lines Ltd.* (S.S. *Athinai*), 20 March 1942. *Boll.* ii. 302 at p. 362.

the State in particular. Eventual nonconformity between internal law and international law can only affect the international responsibility of the State and is a political matter without the jurisdiction of the Tribunal.' A further important rule of interpretation was laid down in one of the *Cilicia* cases.[1] Where international conventional legislation, in the instant case the Sixth Hague Convention, has been given a restricted interpretation, Italian municipal legislation giving effect to such international legislation must be similarly interpreted: so that where, in international jurisprudence, the former has been held not to be capable of extension by analogy to matters not expressly referred to in it, the latter, too, cannot be extended by analogy. There appear to have been no instances wherein the Prize Tribunal was unable to reach a decision on the basis of the municipal law of the state, although international law, in its broad sense, is often considered as an aid to the interpretation of an Italian rule which is declaratory of international law.

The Laws of War contain a comprehensive code of prize law, and because of this and of the interpretation given to Article 222, the judgments themselves contain few references either to previous Italian decisions or to those of foreign prize courts. The Tribunal does, however, refer to its own jurisprudence, and occasionally British and German authorities are cited, with perhaps a tendency to favour the *Oberprisenhof*.[2] Among international agreements, the Hague Conventions and the Declaration of London are frequently mentioned, though neither are of binding force.

The constitution and jurisdiction of the Prize Tribunal are governed by Articles 218–27 of the Laws of War. The Prize Tribunal itself was set up by Royal Decree of 1 April 1941,[3] and by Royal Decree of 8 July 1941[4] special provisions were made for the event that the Tribunal be seized with a suit concerning aerial prize. As finally constituted the Tribunal consisted of ten judges, of whom the President was an Admiral, the Vice-President the President of the Court of Cassation, two were naval representatives, two air force officers, and the remainder legal persons. There were also twelve additional judges, representing the services and the legal profession.[5] Under the original Article 218 of the Laws of War the Tribunal was constituted from a special session of the Council of State,

[1] *Minister of Marine* v. *Anglo-Palestine Bank Ltd.* (part cargo *ex* S.S. *Cilicia*), 10 October 1941, p. 227.

[2] Part IV of the *Bollettino* reprints 45 Italian decisions, 14 German, and 6 British of the war of 1914–18. In the course of all these proceedings one foreign case of the war of 1939–45 is referred to in pleadings presented by the Procurator-General, e.g. an unnamed decision of the Hamburg Prize Court of December 1940 in *The Capo Lena*, *Boll.* ii. 436 at p. 438.

[3] No. 220. *G.U.*, 18 April 1941, No. 93, *Boll.* i. 180; amended 11 July 1941, *G.U.*, 4 August 1941, No. 182, *Boll.* i. 223; 8 July 1941 (as to aerial prize), No. 914, *G.U.*, 10 September 1941, No. 214, *Boll.* i. 222; 12 March 1942, *G.U.*, 16 June 1942, No. 141, *Boll.* i. 285.

[4] No. 914 (*supra*). There are no cases concerning aircraft.

[5] See list at commencement of each fascicule of the *Bollettino*.

but by the amendment to that Article it was given a more independent status.[1]

Procedure in the Prize Tribunal is regulated by the Rules of Procedure of 5 September 1938,[2] as amended by Royal Decree of 14 June 1941.[3] These Rules were promulgated under powers contained in Article 226 of the Laws of War. The jurisdiction of the Tribunal is laid down in Article 219, extended to aircraft by Article 279. In its own jurisprudence it held that the main object of prize proceedings is to produce a *res judicata* good against all the world, and in particular against those who had a title to oppose the claim:[4] 'as is known, the old fundamental principle of prize law, according to which *toute prise doit être jugée*, imposes on the capturing state the rôle of plaintiff in judicial proceedings to uphold the validity of the capture, for only by means of such an action can the capturing state obtain a title which will legally transfer to its favour the property in the thing seized, and the validity of which other states must recognize in accordance with the obligations imposed by international law. Because this practice is so uniform, our positive law, in Article 214 of the Laws of War, contrary to the usual provisions regarding public administration, requires the state to submit to the Prize Tribunal a full statement regarding those things which have formed the object of a seizure *jure belli*.'[5] Thus the captor is in the position of plaintiff and the claimant assumes the rôle of defendant.[6] Therefore the Tribunal consistently required the state to prove its case[7] once the matter came before the court; although at the same time it was prepared to draw inferences from non-appearance on the part of claimants.[8] But this was limited to cases in which the state sought condemnation, and did not apply where sequestration[9] or requisition[10] was sought.

There is no appeal against a sentence of the Prize Tribunal in normal

[1] See *Boll.* i. 67.

[2] *G.U.*, 9 December 1938, No. 280, *Boll.* i. 120. Court forms will be found in *Boll.* iv. 299 ff.

[3] No. 878. *G.U.*, 3 September 1941, No. 207, amending Articles 25, 61, 63, 65, and 66, *Boll.* i. 217.

[4] *Minister of Marine* v. *Crédit Foncier d'Algérie et Tunisie* (part cargo *ex* S.S. *Polinnia*), 13 June 1941, p. 3.

[5] *Boll.* ii. 19.

[6] *Minister of Marine* v. *Crédit Foncier d'Algérie et Tunisie* (part cargo *ex* S.S. *Polinnia*), 13 June 1941, p. 3.

[7] E.g. *Minister of Marine* v. *The Firm Terzian's Trading House* (part cargo *ex* S.S. *Vulcania*), 1 August 1941, p. 81.

[8] E.g. *Minister of Marine* v. *Bank of London and South America Ltd.* (part cargo *ex* S.S. *Beatrice C.*), 13 June 1941, p. 103.

[9] *Minister of Marine* v. *A. Smith Associated Company* (*The Ulmus*), 18 July 1941, p. 63.

[10] *Minister of Marine* v. *The Cultivated Home* (part cargo *ex* S.S. *Cilicia*), 17 October 1941, p. 237. For a modern restatement of the British view on the burden of proof see *The Monte Contes*, [1943] 1 Ll.P.C. (2nd) 147 (Chief Justice Greene of the Gibraltar Prize Court) and 150 (Lord Wright in the Privy Council), reaffirmed by the Privy Council in *The Sidi Ifni*, [1945] ibid. 200 at p. 204.

circumstances. However, either party can submit a claim for annulment in accordance with the provisions of the Code of Civil Procedure. Furthermore and exceptionally, only where there is an absolute defect of jurisdiction can either party have recourse to a full Court of Cassation.[1] There is no reported instance of this in the *Bollettino*.

It may be observed here that there is little difference in its attitude to the law applicable, in the organization or in jurisdiction, between the Prize Commission of the 1915–18 war and the Prize Tribunal lately at work.[2] The fascist revolution, which was followed by new legislation and administrative arrangements in regard to prize law which were all conditioned by a new philosophy of government, on the surface constitutes a definite break with pre-fascist law; and it might have been expected before the entry of fascist Italy into the war in 1940 that her Prize Tribunal would reflect more fascist tendencies in its attitude towards international law. That it was content to follow the paths of its predecessors is eloquent testimony to the force of international law.

Commencement and termination of prize law. Place of exercise. Objects of maritime seizure. Aircraft

By Article 2 of the Decree of 8 July 1938, approving the texts of the Laws of War and Neutrality, the application in whole or in part of the Laws of War is to be promulgated by Royal Decree whenever the Italian state is at war with another state, and upon the outbreak of the war in 1940 the necessary decree was issued.[3] The Tribunal itself held that prize law, in the more restricted sense of the law applicable to enemy goods found at sea, comes into force with the declaration of war,[4] the precise time of which is fixed either by law or by notice.[5]

By Article 200 of the Laws of War exercise of the right of prize will cease with the end of the war and ships and goods subsequently captured will be released, although conclusion of peace will not affect prize judg-

[1] Rules of Procedure, Article 54.

[2] See Garner, *Prize Law during the World War*, p. 15 (organization), 25 (appeal), 47 and 76 (jurisdiction), 91 (procedure), and 200 (relation of internal to international law).

[3] *Boll.* i. 143. Royal Decree of 10 June 1940, No. 566, *G.U.*, 15 June 1940, No. 140.

[4] *The Athinai* (part cargo *ex*) (*Minister of Marine* v. *Socony Vacuum Oil Co. Inc. of New York*), 13 November 1942. *Boll.* ii. 404 at p. 420.

[5] See Declaration of State of War, Royal Decree of 10 June 1940, No. 566. *G.U.*, 15 June 1940, No. 140, *Boll.* i. 143, Great Britain and France; Royal Decree 16 December 1940, No. 1893, *G.U.*, 29 January 1941, No. 23, *Boll.* i. 170, Greece; Notice *re* Jugoslavia, *G.U.*, 11 April 1941, No. 87, *Boll.* i. 212; U.S.S.R., *G.U.*, 23 June 1941, No. 145, *Boll.* i. 220; U.S.A., *G.U.*, 13 December 1941, *Boll.* i. 252; Guatemala and Cuba, *G.U.*, 29 December 1941, *Boll.* i. 254; South American Republics, Royal Decrêe 2 January 1942, No. 112, *G.U.*, 9 March 1942, No. 56, *Boll.* i. 262; Brazil, Royal Decree 18 September 1942, No. 1410, *G.U.*, 15 December 1942, No. 296, *Boll.* i. 309. It will be noticed that the Royal Decree of 10 June 1940 states that the Italian state is at war with Great Britain ('lo Stato italiano è in guerra con . . . la Gran Bretagna'). It makes no reference to the British Empire or the self-governing Dominions.

ments given antecedently. The Franco-Italian Armistice of 24 June 1940[1] gave rise to a number of interesting cases, owing to the combined effects of Article 1, whereby France agreed to cease hostilities against Italy, and Article 16, which placed French merchant traffic under joint German and Italian control. The Prize Tribunal defined the Armistice as 'a general convention, political, economic and military in character, having as its object the suspension of hostilities for its duration on such terms as are considered necessary and sufficient to lead to the re-establishment of peace. Therefore, during the subsistence of the Armistice, acts which are contrary to, or which are merely outside the essential limits of, the mere suspension of hostilities, or which contravene the specific terms of the Armistice Convention, cannot be lawful.'[2] Article 200 was more specifically considered in *The Paolina* (part cargo *ex*).[3] After examining cases wherein prize law ceased to operate on the conclusion of an armistice, the Tribunal turned to the doctrine that prize law is not exercisable after the signing of an armistice, and said:

'Such a doctrine is contradicted by a large number of jurists, among whom, it is interesting to note, the English take a leading part.[4] These hold that the right of prize does not cease during an Armistice for the simple reason that the Armistice does not in fact imply the grant to the enemy of any right to reprovision himself. It is true that the Italian legislation of 1917 appears to follow a different principle,[5] but this difference is of no import to-day in view of the Laws of War of 1938 according to which (Article 200) the exercise of the right of prize ceases "with the end of the war". Clearly "end of the war" and "armistice" are two different concepts, and no argument can be based on the distinction between cessation of hostilities and suspension of the right of prize. In fact the substance of the rule cannot be other than to confirm the validity of the exercise of the right of prize during the armistice, otherwise it would have no practical significance. If the right of prize is admitted during the armistice, then it is illogical to exclude the right of capture. For the rest, keeping in mind the fact that the best source of the law on this topic lies in the various armistice conventions concluded in the past, it is sufficient to remember that in the Franco-Italian Convention of 24 June 1940 no mention is made of the exercise of the right of prize. It may well be that, under the

[1] Text in *Boll.* i. 185. The Franco-German Armistice will be found in *Boll.* iii. 35.

[2] *Minister of Marine* v. *Ralli Brothers Ltd., S.A.* (in the matter of 119 bales of jute *ex* S.S. *Perla* transhipped *ex* M.V. *Mauly*), 18 July 1943. *Boll.* ii. 71, at p. 74.

[3] *Minister of Marine* v. *French Food Purchasing Commission in London* (*re* part cargo *ex* S.S. *Paolina*), 13 June 1941: *Boll.* ii. 85 at p. 101. See also *Minister of Marine* v. *Associated Manganese Mines of South Africa, Ltd.* (part cargo *ex* S.S. *Perla*), 21 July 1941, p. 147; *The Same* v. *Hong Kong and Shanghai Banking Corporation* (part cargo *ex* S.S. *Perla*), 11 July 1941, p. 152; *The Same* v. *A. & G. Valcke & Cie* (part cargo *ex* S.S. *Cilicia*), 23 September 1941, p. 185; *The Same* v. *Hanau* (part cargo *ex* S.S. *Cilicia*), 30 September 1941, p. 207; *The Same* v. *Banque du Syrie et du Liban* (part cargo *ex* S.S. *Cilicia*), 31 October 1941, p. 259; *The Same* v. *Montmorency Paper Co., Ltd., and others* (part cargo *ex* S.S. *Capo Lena*), 8 January 1943, p. 436.

[4] See *The Ranneveig*, ix. Ll.P.C. 380, where a cargo of contraband captured between the Armistice of 1918 and the Treaty of Peace was condemned by the British Prize Court, the condemnation being upheld by the Privy Council on appeal.

[5] The Italian Prize Regulations of 1917 (Article 6) directed that vessels captured after the suspension of hostilities should be released even when the master of the vessel making the capture is ignorant of the suspension. Garner, op. cit., p. 204.

Convention, France was bound to recall to her ports all French merchant ships abroad,[1] but that does not imply any renunciation by the Italian Government of its rights over such ships, prejudicing thereby its own self-defence to which prize law is subordinate. In fact the opposite is the case. The régime established by the Convention gave the Axis Powers full control over French maritime traffic and obligated France to restore merchant ships with their cargoes intact direct to Italy without imposing any similar obligation on Italy. No clause renouncing any of the provisions of the Italian Laws of War can be deduced from this document.'

In the result it was consistently held that the Armistice did not imply any suspension of prize rights on the part of Italy. The same was held in regard to the Armistice between Italy and Greece.[2]

By Article 214 of the Laws of War ships belonging to the enemy state can be confiscated administratively. Under this provision a number of Jugoslav and Greek vessels were confiscated by decrees of 15 March 1942,[3] i.e. after the termination of actual hostilities against those countries.[4]

The Laws of War do not define positively where the right of prize may be exercised. By Article 139 belligerent operations are forbidden in neutral territorial waters and in neutralized waters even in so far as such waters are entered in hot pursuit initiated on the high seas. The two questions that have been raised before the Tribunal concern captures made in harbour warehouses and a capture in French territorial waters after the Armistice. As to the first, it was consistently held that goods discharged from ships and captured while still within the harbour precincts were legitimately the objects of maritime seizure and that such goods do not lose their character of maritime cargo so long as they are within the harbour precincts.[5] In *The Capo Lena*[6] the captured goods had been sold locally prior to the trial and the proceeds of sale deposited in manner prescribed by Italian law. The Tribunal declined to be influenced by this, stating that if the original seizure was valid it was a matter of indifference whether the judicial proceedings were directed towards the goods themselves or their money's worth. Nor is the Tribunal concerned with the reasons for

[1] Article XVI.

[2] *The Kriti, Minister of Marine* v. *Società Anonima della Costiera Greca A. E.*, 22 January, 1943, *Boll.* ii. 445 at p. 449. See also *Minister of Marine* v. *Compagnie Alais Groges et Camarque* (part cargo *ex* S.S. *Bosforo*), 4 July 1941, p. 140. 'The surrender of the enemy's armed forces is irrelevant in considering the validity of a subsequent capture of goods of enemy ownership which retain their enemy character.' This rule is a useful precedent for courts called upon to consider the effects of unconditional surrender on prize law.

[3] *Boll.* i. 286 and 295.

[4] In a Royal Decree Law of 7 May 1942, No. 645, *G.U.*, 23 June 1942, No. 147, *Boll.* i. 302, reference is made to the 'former kingdom of Jugoslavia' (*ex-regno*).

[5] See *Minister of Marine* v. *Cia. Swift de la Plata S.A.* (part cargo *ex* S.S. *Beatrice C.*), 20 June 1941, p. 29; *The Same* v. *Bank of London and South America, Ltd.* (part cargo, *ex* S.S. *Beatrice C.*), 13 June 1941 p. 103; *The Same* v. *Ionian Bank, Ltd.* (part cargo *ex* S.S. *Beatrice C.*), 27 June 1941, p. 119.

[6] *Minister of Marine* v. *Montmorency Paper Co., Ltd., and others* (part cargo *ex* S.S. *Capo Lena*), 8 January 1943, p. 436.

the sale. The capture in this case had been made at Bordeaux, an enemy (French) port occupied by Germany, a Power allied to Italy. The Tribunal declined to apply the provisions of Article 139, holding that prize law can be exercised in any territory nominated as a theatre of war, including the territory of belligerents, and on the high seas, as well as on enemy territory occupied by Allied forces. In reaching this conclusion the Tribunal relied on German and British precedents and on its own jurisprudence as to the effect of the Armistice Convention on Italian Prize Law.[1]

The question whether a wreck was a ship so as to be the legitimate object of prize proceedings arose in *The Kriti*,[2] a wrecked Greek vessel salvaged by an Italian company. After an extensive review of Italian and foreign authorities it was decided that the wreck was a valid object of such proceedings, and it was accordingly condemned. Again, in *The Ljubica*,[3] a yacht of 2,340 tons captured in an enemy port which had come under the belligerent occupation of Italy was held to be good and lawful prize and not covered by the exemption given to ships engaged in coastal fishing or minor local navigation.

An interesting gloss on the expressions 'ships at sea' and 'encountered at sea' is contained in the important *Athinai* judgment.[4] A ship will have the status of a ship at sea so long as it is at sea, that is to say, is on a defined position on the sea, and the reasons for its being in such position are immaterial, except that the captor will not be able to claim rights against such ship if he has acted with malice. The expression 'encountered at sea' as used, for example, in Article 147 has not only its mere philological meaning, which contains an element of chance, but also a judicial significance of 'encountered in the exercise of belligerent rights'.

Personal property of the crew will be exempt from capture, save in the circumstances envisaged in Article 184 relative to active resistance to visit, but not the ship's fittings.[5]

The Tribunal declined to accept jurisdiction in cases of unopposed requisition on the ground that this was an administrative act, the decree of the Tribunal not being necessary as a document of title.[6]

Aerial warfare is regulated by Articles 228–79 of the Laws of War, and Articles 239–79 apply maritime prize law to aerial prize, with necessary consequential adjustments. The Prize Tribunal is given jurisdiction over

[1] *Minister of Marine* v. *Montmorency Paper Co., Ltd., and others* (No. 2) (part cargo *ex* S.S. *Capo Lena*), 8 January 1943, p. 478.

[2] *Minister of Marine* v. *Soc. An. della Costiera Greca A. E.* (S.S. *Kriti*), 22 January 1943, p. 445.

[3] *Minister of Marine* v. *J. G. E. Montague* (*The Ljubica*), 5 March 1943, p. 456.

[4] *Minister of Marine* v. *Hellenic Lines, Ltd.* (S.S. *Athinai*), 20 March 1942, p. 302.

[5] *Minister of Marine* v. *J. G. E. Montague* (*The Ljubica*), 5 March 1943, p. 456.

[6] *Minister of Marine* v. *A. Smith Associated Company* (*The Ulmus*), 18 July 1941, p. 63; *The Same* v. *The Cultivated Home* (part cargo *ex* S.S. *Cilicia*), 17 October 1941, p. 237.

cases of aerial prize by Article 279. No cases involving aircraft, either as the objects of the exercise of belligerent rights or wherein aircraft had exercised belligerent rights against other aircraft or ships, are recorded in the *Bollettino*.

Contraband of war

The original Italian contraband list was contained in Article 159 of the Laws of War; it made no distinction between absolute and conditional contraband, and did not include foodstuffs. By Article 160 power was given for additions to be made to the list by Royal Decree to be communicated to neutral governments, but in no case were items in exclusive use for sanitary purposes or for use on board the ship on which they were found to be included.[1] On the outbreak of the war Article 159 was repealed[2] and in the new contraband list the distinction between absolute and conditional contraband was restored. The list is as follows:

Absolute contraband:

1. Warships.
2. Aircraft, complete, and parts.
3. Armoured cars, tanks, and armoured trains.
4. Arms and all kinds of munitions of war.
5. Explosives, including materials and products for chemical or bacteriological warfare.
6. Items of military clothing and equipment.
7. Fuels and lubricants.
8. Means of transport on land, sea, or air, including beasts of burden.
9. All means of communication.
10. Tools, utensils, instruments, equipment, maps and charts, drawings, machines, documents, and all other similar objects.
11. Gold, silver, metal and paper money, negotiable instruments, and documents of credit.
12. Component parts of these items, machines, tools, apparatus, utensils, materials, and products used in the manufacture of, or repair of, or in connexion with the foregoing items, as well as everything used in the production of machines, tools, apparatus, utensils, materials, and products of the above mentioned.

[1] These two articles are made applicable to aircraft by Article 253.

[2] Note of 10 June 1940, in *Boll.* i. 147. Royal Decree 16 July 1940, No. 1056, *G.U.*, 9 August 1940, No. 186, *Boll.* i. 158; applied to England, France, and Greece (retrospectively) by Royal Decree of 16 December 1940, No. 1893, *G.U.*, 29 January 1941, No. 23, *Boll.* i. 170; Jugoslavia, Royal Decree of 10 April 1941, No. 457, *G.U.*, 9 June 1941, No. 134, *Boll.* i. 211; Cuba, Royal Decree of 27 December 1941, No. 1656, *G.U.*, 9 March 1942, No. 56, *Boll.* i. 259; Guatemala, ibid., *Boll.* i. 260; U.S.A., Royal Decree 28 December 1941, *G.U.*, 28 January 1942, No. 22, *Boll.* i. 261; South American Republics, Royal Decree 2 January 1942, *G.U.*, 9 March 1942, No. 56, *Boll.* i. 262; U.S.S.R., Royal Decree 15 April 1942, No. 503, *G.U.*, 26 May 1942, No. 124, *Boll.* i. 300; Brazil, Royal Decree 18 September 1942, No. 1410, *G.U.*, 15 December 1942, No. 296, *Boll.* i. 309.

Conditional contraband:

Foodstuffs for human and animal consumption, forage, clothing, and materials used in their production.[1]

Items included in the list of conditional contraband will be considered as contraband when their destination is the armed forces of the enemy or the administration of the enemy state.[2]

The same Decree recited that the British and French Governments had in the present war adopted provisions including in their lists of contraband of war matters not included in the said Article 159, and went on to order that 'during the present conflict in addition to the items mentioned above, all items included in the lists adopted by the British and French Governments will be regarded as contraband of war'.[3]

There are but few important cases on the law of contraband, and no new principles are established. *The Tergestea*[4] early laid down that where a claim is based on the two grounds, namely, that the goods are contraband of war and are of enemy ownership, the latter is wider in scope and may absorb the former, and should therefore be preferred by the Prize Tribunal.[5] Similarly, in view of the presumption that goods are of enemy character if they are consigned to an enemy base,[6] there is no need to investigate the specific intentions which are necessary if the basis of the capture is contraband.[7]

[1] Foodstuffs were not included in the original list of Article 159. Their inclusion in the British and French lists of 1939 as conditional contraband led to considerable dispute with neutral countries as well as to an amendment by the German Government of Articles 22 and 24 of the *Prisenordnung* of 1939; see *Reichsgesetzblatt* (1939), vol. i, pp. 1585, 1751, 1752, also quoted in *Boll.* iii, 3 at p. 11 (the amendment for some reason is omitted). See also my 'British Prize Law, 1939–44' in *Law Quarterly Review*, 61 (1945), pp. 49 ff. at pp. 54–7, and Hackworth, *Digest of International Law*, vol. vii, pp. 24–7. The revised Italian list is almost identical with the revised German list.

[2] Royal Decree of 16 July 1940 (*supra*), Article 2. Note the following remark of Lord Roche in giving the opinion of the Judicial Committee in *The Sidi Ifni*, Ll.P.C. (2nd) 200 at p. 204: 'The lemons it is true were only conditional contraband, and therefore it must be shown that if they should reach enemy destination they would assist the warlike operation of the enemy. *But under the existing circumstances all foodstuffs of necessity fell into this category.*' (Italics supplied.)

[3] This is an interesting example of legislation by reference, the more so when it is remembered that the British list is a framework, to be filled in by the judges. I find the reinstatement of the distinction between absolute and conditional contraband somewhat of a retrograde step. The tendency of the First World War was towards the abolition of the distinction. While there is something to be said, on theoretical grounds only, for its retention, once a government has formally abolished it it seems illogical and unnecessary to reintroduce it at a later stage.

[4] *Minister of Marine* v. *North African Commercial Company* (part cargo *ex* S.S. *Tergestea*), 11 July 1941, p. 57.

[5] See also *Minister of Marine* v. *French Food Purchasing Commission in London* (*re* part cargo *ex* S.S. *Paolina*), 13 June 1941, p. 85. The British view is not dissimilar, see *The Glenroy* (cargo *ex*) (No. 2), [1945] 1 Ll.P.C. (2nd) 191 at p. 197 (*per* Lord Porter, Privy Council).

[6] This presumption was established by the facts: consignor and consignee were both of enemy (British) nationality, and the goods were consigned to the Egyptian port of Alexandria, 'a base notoriously used for the reinforcement of the British Armed Forces' (*Boll.* ii. 167).

[7] *Minister of Marine* v. *Nile Cold Storage and Ice Co., Ltd.* (part cargo *ex* S.S. *Vulcania*), 25 July 1941, p. 165.

Knowledge on the part of the shipper of the existence of war and of the contraband proclamation is necessary before contraband goods can be condemned,[1] knowledge being presumed in certain circumstances. Exemptions accorded in the case of ignorance will not be granted if the skipper of the ship attempts to avoid the orders of the military authorities by flight.[2]

Days of grace

By Article 146 of the Laws of War arrangements may be made for the grant of days of grace to privately owned enemy merchant ships in Italian ports on the outbreak of war, or entering Italian ports in ignorance of the outbreak of war, and by Article 147 similar provisions (*mutatis mutandis*) are made in the case of ships encountered at sea in ignorance of the war. A Royal Decree to give effect to Article 146 was issued on 16 June 1940,[3] on condition of reciprocity. By Article 149 such ships which remain may by Royal Decree be subject to sequestration or requisition against compensation, and by Royal Decree of 25 November 1940[4] it was provided that they would be sequestrated for the duration of the war. The *Ulmus*[5] was a British vessel which had entered an Italian port prior to the outbreak of the war for repairs, and was there seized. She was sequestrated under Article 146 on 22 June 1940, and re-sequestrated under the Royal Decree of 25 November. Doubts subsequently arising as to the legal position, regard being had to Article 213 of the Laws of War,[6] the Procurator-General applied to the Tribunal for a declaration upholding the validity of the sequestration under the combined effect of Article 149 of the Laws of War[7] and the said Royal Decree. No defence was made. The Tribunal declined to make the declaration as requested, holding that sequestration of this nature is an administrative act, the state not requiring the order of the Court to complete its title. Nevertheless, the Tribunal would function, by virtue of Article 219 of the Laws of War,[8] if there was a controversy either of fact or otherwise concerning the validity of the order for sequestration, between the Administration and the individual opposing the order.

[1] Laws of War, Article 166. *Minister of Marine* v. *Hanau* (part cargo *ex* S.S. *Cilicia*), 30 September 1941, p. 207.

[2] *Minister of Marine* v. *Socony Vacuum Oil Co. Inc.* (part cargo *ex* S.S. *Athinai*), 13 November 1942, p. 404.

[3] No. 655, *G.U.*, 28 June 1940, No. 151, *Boll.* i. 149. Similar provisions regarding aircraft are contained in Article 242 of the Laws of War and in Royal Decree of 16 June 1940, No. 656, *G.U.*, ibid., *Boll.* i. 150.

[4] No. 1886, *G.U.*, 28 January 1941, No. 22, *Boll.* i. 168. Article 244 of the Laws of War provides automatically for the sequestration or requisition against compensation of aircraft so remaining, and no Royal Decree is called for in their case.

[5] *Minister of Marine* v. *A. Smith Associated Company* (*The Ulmus*), 18 July 1941, p. 63.

[6] Relating to the custody of prizes. Text not reproduced.

[7] Relating to the treatment of enemy ships which are detained.

[8] Relating to the jurisdiction of the Prize Tribunal.

Article 146 only applies to enemy ships and cannot be invoked in aid of enemy goods on board an Italian vessel.[1] This matter was discussed at greater length in *The Cilicia* (part cargo *ex*):[2] 'Articles 146 and 147 of the Laws of War refer to enemy merchant vessels in an Italian port on the outbreak of war; or which enter it in ignorance of the existence of the war; or which are encountered at sea also in ignorance of the existence of the war. They cannot, therefore, apply to enemy goods which on the outbreak of the war are on board an Italian ship, or which have been discharged at an Italian port and are within its precincts so as not to have lost their character of maritime cargo.[3] In support of this it should be noted that Articles 146 and 147 of the Laws of War correspond to Articles I and III of the Sixth Hague Convention of 1907, which speak exclusively of *navires de commerce ennemis*[4] and of goods found on board them, and cannot be given an analogous application to goods not on enemy ships.'[5] Support for this was found in a number of foreign decisions.

Article 147 allows privately owned enemy merchant ships encountered at sea[6] in ignorance of war to be authorized under safe conduct to proceed to their destination or other specified port. Article 148 (3) establishes an absolute and irrebuttable presumption *juris et de jure* of knowledge when a ship is fitted with radio-telegraphic apparatus. In *The Athinai*[7] a Greek-owned vessel left New York for the Piraeus and Istanbul on 5 October 1941, calling at Gibraltar on 21st–23rd of that month. She then proceeded towards Messina in accordance with instructions from the Italian control authorities. War between Italy and Greece broke out on 28 October, on which day the vessel was in semaphore and radio communication with the Italian mainland. Later in the morning a message was received from Greece in international code instructing the vessel to repair to a neutral (Spanish) port, but the captain averred that he had not got the code book beside him to decode the message immediately. Subsequently, the vessel disobeyed the instructions of the Italian control and attempted to escape,

[1] *Minister of Marine* v. *Cia. Swift de la Plata S.A.* (part cargo *ex* S.S. *Beatrice C.*), 20 June 1941, p. 29; *The Same* v. *D. Braslawsky* (part cargo *ex* S.S. *Cilicia*), 23 September 1941, p. 179.

[2] *Minister of Marine* v. *Anglo-Palestine Bank, Ltd.* (part cargo *ex* S.S. *Cilicia*), 10 October 1941; *Boll.* ii. 227 at p. 232.

[3] *Supra*, p. 288.

[4] Italy was not a party to the Sixth Hague Convention on her entry into the First World War in 1915, when an existing law granting days of grace was repealed: decree of 31 May 1915, providing that all such enemy merchant vessels would be sequestrated. They were later confiscated by way of reprisal for alleged unlawful acts of the enemy. There are consequently no Italian decisions on this point. For the current British view of the international law on this topic see *The Pomona*, [1939] 1 Ll.P.C. (2nd), 1 (requisition) and [1942] ibid. 121 (condemnation).

[5] Cf. rule of interpretation quoted above, p. 283; *Minister of Marine* v. *Ralli Brothers Ltd., S.A.* (in the matter of 119 bales of jute *ex* S.S. *Perla* transhipped *ex* M.V. *Mauly*), 18 July 1941, p. 71.

[6] *Supra*, p. 288.

[7] *Minister of Marine* v. *Hellenic Lines, Ltd.* (S.S. *Athinai*), 20 March 1942, p. 302. For the treatment of her cargo see *Minister of Marine* v. *Socony Vacuum Oil Co., Inc.* (part cargo S.S. *Athinai*), 13 November 1942, p. 404.

being pursued by Italian naval units and ultimately captured. The Tribunal held that she was not encountered at sea in ignorance of hostilities in view of the fact that at the time she was captured she was actually trying to escape, and she was accordingly condemned. For the same reason it was later held that the skipper could not plead the 'impossibility of unloading the cargo' as provided by Article 166, and so avoid its confiscation.[1]

Enemy character. Passing of property

By Article 157 the enemy or neutral character of goods is made to depend upon the nationality of their owner, as is normal in continental practice, commercial domicil only being the test in case of stateless persons. Enemy character further depends upon the date of the declaration of war,[2] so that property neutral at time of capture may be condemned as good and lawful prize if enemy at time of trial.[3] The national character of ships depends upon the flag they are entitled to fly. If a ship is not entitled to any flag she will be regarded as enemy if her owner is an enemy subject, as neutral if belonging to a person who is neither of enemy nor of Italian nationality or to one who is stateless and, not being regarded as an enemy subject, resides in neutral territory.[4] A full definition of enemy subject will be found in Articles 3 and 5 of the Laws of War.[5] The nationality of firms is a matter not specifically covered by the Laws of War. It has caused some difficulty, and the Tribunal frequently proceeded by way of presumption. In *The Polinnia*[6] the consignor firm was composed partly of British and partly of Egyptian nationals, Egypt not then being belligerent. The Tribunal avoided deciding its nationality on the ground that in fact the property in the goods had already passed to the enemy consignee. Some of the presumptions used by the Tribunal are the creations of the law: others have been evolved by the Tribunal itself. Thus goods on

[1] *Minister of Marine* v. *Socony Vacuum Oil Co., Inc.* (part cargo S.S. *Athinai*), 13 November 1942, p. 404.

[2] *Minister of Marine* v. *Cie. Alais Groges et Camarque* (part cargo *ex* S.S. *Bosforo*), 4 July 1941, p. 140.

[3] *Minister of Marine* v. *New Zealand Loan and Mercantile Agency Co., Ltd.* (part cargo *ex* S.S. *Beatrice C.*), 4 July 1941, p. 43; *The Same* v. *Anglo-Thai Corporation, Ltd.* (part cargo *ex* S.S. *Diana*), 4 July 1941, p. 133; *The Same* v. *Socony Vacuum Oil Co., Inc.* (part cargo *ex* S.S. *Athinai*), 13 November 1942, p. 404.

[4] Laws of War, Article 150.

[5] Persons of dual nationality will be regarded as enemy subjects if one of their two nationalities is enemy: amendment to Article 3 (1) contained in Law of 16 December 1940: see p. 282, n. 4. Previously such a person would have been considered an enemy if in addition to his enemy nationality he simultaneously possessed Italian or any other nationality. Article 5 deals with the nationality of juridical persons.

[6] *Minister of Marine* v. *Crédit Foncier d'Algérie et Tunisie* (part cargo *ex* S.S. *Polinnia*), 13 June 1941, p. 3. In *Minister of Marine* v. *Hanau* (part cargo *ex* S.S. *Cilicia*), 30 September 1941, the consignee Palestinian firm was 'presumably of British nationality, being established on territory under British control': *Boll.* ii. 207 at p. 209.

board an enemy ship are presumed to be enemy goods in the absence of contrary proof;[1] and the same will be assumed if the goods are consigned to a place which is under enemy control or which serves as an important enemy supply base.[2] Secondly, goods consigned under bills to order will be regarded as enemy goods in the absence of contrary proof:[3] the position will be the same if the shipper is named as consignee[4] or if the goods are consigned to order of the consignor.[5] Nevertheless, the presumption can be rebutted, if, for example, it is proved that there is a representative of the consignor in the port of disembarkation, and such evidence must be furnished by the consignor himself.[6] A bill of lading to order of the shipper will be regarded as a device to conceal the identity of the real consignee, and is therefore suspect.[7] Among the other factors which will strengthen the presumption of enemy character may be mentioned: the absence of an appearance by interested parties to dispute the claim for condemnation;[8] the names of the shipper or consignee;[9] the fact that the

[1] Laws of War, Article 157. *Minister of Marine* v. *D. Karrer and Chr. Christopoulos* (part cargo *ex* S.S. *Athinai*), 11 April 1942, p. 367.

[2] *Minister of Marine* v. *Cia. Swift de la Plata S.A.* (part cargo *ex* S.S. *Beatrice C.*), 20 June 1941, p. 29; *The Same* v. *Anglo-Palestine Bank, Ltd.* (part cargo *ex* S.S. *Beatrice C.*), 20 June 1941, p. 106; *The Same* v. *Nile Cold Storage and Ice Co., Ltd.* (part cargo *ex* S.S. *Vulcania*), 25 July 1941, p. 165; *The Same* v. *Fenech & Scerri* (part cargo *ex* S.S. *Vulcania*), 8 August 1941, p. 175; *The Same* v. *The Palestine Gas Co.* (part cargo *ex* S.S. *Cilicia*), 10 October 1941, p. 223; *The Same* v. *The Cultivated Home* (part cargo *ex* S.S. *Cilicia*), 17 October 1941, p. 237; *The Same* v. *N. and D. I. Benjamin Levy Brothers* (part cargo *ex* S.S. *Cilicia*), 5 December 1941, p. 272; *The Same* v. *Bank Misrahi* (part cargo *ex* S.S. *Cilicia*), 5 December 1941, p. 277; *The Same* v. *D. Karrer and Chr. Christopoulos* (part cargo *ex* S.S. *Athinai*), 11 April 1942, p. 367. The following places were held to be enemy ports or important enemy supply bases: Tel Aviv, Alexandria, Valleta, Marseilles, and the Piraeus.

[3] *Minister of Marine* v. *Crédit Foncier d'Algérie et Tunisie* (part cargo *ex* S.S. *Polinnia*), 13 June 1941, p. 3; *The Same* v. *North African Commercial Co.* (part cargo *ex* S.S. *Tergestea*), 11 July 1941, p. 57; *The Same* v. *A. & G. Valcke & Cie* (part cargo *ex* S.S. *Cilicia*), 23 September 1941, p. 185; *The Same* v. *Joel Magazinik* (part cargo *ex* S.S. *Cilicia*), 30 September 1941, p. 189; *The Same* v. *John Bull Ironmongery Stores* (part cargo *ex* S.S. *Roma*), 8 August 1941, p. 195; *The Same* v. *The Palestine Gas Co.* (part cargo *ex* S.S. *Cilicia*), 10 October 1941, p. 223; *The Same* v. *The Cultivated Home* (part cargo *ex* S.S. *Cilicia*), 17 October 1941, p. 237; *The Same* v. *Bank Misrahi* (part cargo *ex* S.S. *Cilicia*), 5 December 1941, p. 277.

[4] *Minister of Marine* v. *Cia. Swift de la Plata S.A.* (part cargo *ex* S.S. *Beatrice C.*), 20 June 1941, p. 29.

[5] *Minister of Marine* v. *The Firm A. L. van Beeck* (part cargo *ex* S.S. *Maria* transhipped *ex* S.S. *Carnia*), 25 July 1941, p. 77; *The Same* v. *Fenech & Scerri* (part cargo *ex* S.S. *Vulcania*), 8 August 1941, p. 175.

[6] *Minister of Marine* v. *The Firm A. L. van Beeck* (part cargo *ex* S.S. *Maria* transhipped *ex* S.S. *Carnia*), 25 July 1941, p. 77.

[7] *Minister of Marine* v. *Cia. Swift de la Plata S.A.* (part cargo *ex* S.S. *Beatrice C.*), 20 June 1941, p. 29.

[8] *Minister of Marine* v. *Bank of London and South America Ltd.* (part cargo *ex* S.S. *Beatrice C.*), 13 June 1941, p. 103; *The Same* v. *Comptoir National d'Escompte de Paris* (part cargo *ex* S.S. *Beatrice C.*), 20 June 1941, p. 109; *The Same* v. *Ionian Bank Ltd.* (part cargo *ex* S.S. *Beatrice C.*), 27 June 1941, p. 119; *The Same* v. *D. Karrer and Chr. Christopoulos* (part cargo *ex* S.S. *Athinai*), 11 April 1942, p. 367.

[9] *Minister of Marine* v. *Bank of London and South America Ltd.* (part cargo *ex* S.S. *Beatrice C.*), 13 June 1941, p. 103; *The Same* v. *Anglo-French and Bendixen's Ltd.* (part cargo *ex* S.S. *Diana*), 4 July 1941, p. 129.

consignee, being a person of neutral nationality, has acted as agent for, or furnished supplies to, the enemy or has, during the course of the war dispatched contraband goods into enemy or enemy-occupied territory;[1] the fact that the goods were consigned to an export house on account of an enemy firm;[2] and the fact that the firm uses a language different from that of the country wherein it has its *siège social*, provided there is other evidence and nothing to suggest to the contrary.[3] On the other hand, an obligation to notify the safe arrival of the goods to a third person will be irrelevant,[4] although in certain circumstances such a person may be presumed to be the consignee, as when he is a supplier of war material to the enemy.[5]

By Article 5 of the Laws of War juridical persons will be enemy subjects (1) when they possess the nationality of the enemy state in accordance with the laws of that state, or (2) when enemy subjects have the preponderating interest in them. Under Greek laws of 10 August 1861 and 13 March 1881, foreign limited liability companies are permitted under conditions of reciprocity to carry on business in Greece while retaining their foreign personality and nationality, provided they have been so authorized by Royal Decree issued with the advice and consent of the Council of Ministers. The status of one of these companies, being a subsidiary of a company incorporated in the United States of America, fell to be considered in the case of *The Athinai* (part cargo *ex*),[6] and it was held that a company carrying on business thereunder was a Greek company, in the absence of an international treaty providing otherwise, concerning which no evidence was adduced by the claimants; and goods consigned to it from the parent neutral company liable to seizure as enemy goods.

Because of these rules for determining the nationality of cargoes, cases involving the passing of property do not present the same complexity as they do in England: indeed cases such as *The Gabbiano*,[7] *The Glenearn*,[8] or *The Glenroy* (No. 2)[9] are almost inconceivable in Italian law, especially in view of the fact that the quality of enemy nationality attaches with

[1] *Minister of Marine* v. *Les Pouderies et Cartoucheries Helléniques* (part cargo *ex* S.S. *Attiki*), 11 July 1941, p. 143.

[2] *Minister of Marine* v. *Mendelson Brothers* (part cargo *ex* S.S. *Maria*), 25 July 1941, p. 168.

[3] *Minister of Marine* v. *Nile Cold Storage Co., Ltd.* (part cargo *ex* S.S. *Vulcania*), 1 August 1941, p. 172.

[4] *Minister of Marine* v. *Bank of London and South America Ltd.* (part cargo *ex* S.S. *Beatrice C.*), 13 June 1941, p. 103; *The Same* v. *Ionian Bank Ltd.* (part cargo *ex* S.S. *Beatrice C.*), 27 June 1941, p. 119.

[5] *Minister of Marine* v. *Associated Manganese Mines of South Africa Ltd.* (part cargo *ex* S.S. *Perla*), 11 July 1941, p. 147.

[6] *Minister of Marine* v. *Socony Vacuum Oil Co. Inc.* (part cargo *ex* S.S. *Athinai*), 13 November 1942, p. 404. See in particular *Boll.* ii. 419, for an analysis of the authorities.

[7] [1940] Ll.P.C. (2nd) 27.

[8] [1940] ibid. 63.

[9] [1943] ibid. 153; on appeal [1945], ibid., 191.

effect from the declaration of war[1] and therefore colours all subsequent dealings, the material date being that of the seizure and not that of the loading.[2] The general principles which the Tribunal would apply were explained in *The Polinnia*[3] in the following terms: 'the time of the passing of the property will be ascertained by reference to the proper law of the contracts as interpreted by the Italian Courts under their normal rules of private international law. If the Tribunal is unable to define what is the proper law of the contracts under consideration in accordance with those rules, then it will have recourse to Italian law as the *lex fori*.'[4] The second main principle is that property will lie with him who has the *jus disponendi*.[5] This is subject to the rule that although the existence of a state of war does not modify the juridical principles on which the ownership of goods and the transfer of rights over them are based, contractual provisions formally leaving the *jus disponendi* with the neutral seller so as to defeat the rights of belligerents will be disregarded if in fact the goods are effectively in the hands of an enemy consignee:[6] the judicial treatment of maritime prizes, being determined by the rigorous necessities of war, cannot admit any forms of transaction which may give rise to fraud.[7] Under both Italian law and international law the holder of a bill of lading to a named consignee, even without the shipping documents, will be able to make good title and will therefore be presumed to be the owner,[8] and the same rule applies to the holder of a bill to order.[9] Furthermore, an indication of a named consignee on a bill to order, being a limitation on the unconditional transfer of title, will be disregarded in accordance with Italian municipal law, and the bill will be regarded simply as one to order.[10] Once the vendor has

[1] *Minister of Marine* v. *New Zealand Loan and Mercantile Agency Co., Ltd.* (part cargo *ex* S.S. *Beatrice C.*), 4 July 1941, p. 43; *The Same* v. *Anglo-Thai Corporation Ltd.* (part cargo *ex* S.S. *Diana*), 4 July 1941, p. 133; *The Same* v. *Cie. Alais Groges et Camarque* (part cargo *ex* S.S. *Bosforo*), 4 July 1941, p. 140; *The Same* v. *Socony Vacuum Oil Co., Inc.* (part cargo *ex* S.S. *Athinai*), 13 November 1942, p. 404.

[2] *Minister of Marine* v. *Comptoir National d'Escompte* (part cargo *ex* S.S. *Beatrice C.*), 20 June 1941, p. 109.

[3] *Minister of Marine* v. *Crédit Foncier d'Algérie et Tunisie* (part cargo *ex* S.S. *Polinnia*), 13 June 1941, p. 3. *Boll.* ii. 3 at p. 23.

[4] Because of the insistence on the nationality concept and this rule, the Tribunal does not make the distinction between *post-bellum* and *ante-bellum* contracts of sale usual in the British prize courts.

[5] *Minister of Marine* v. *Mendelson Brothers* (part cargo *ex* S.S. *Maria*), 25 July 1941, p. 168. This, of course, is a universal rule, though its extent is subject to varying interpretations.

[6] *Minister of Marine* v. *New Zealand Loan and Mercantile Agency Co., Ltd.* (part cargo *ex* S.S. *Beatrice C.*), 4 July 1941, p. 43. See also *The Same* v. *Messrs. J. Sasks & Sons, Meshi Silk Works* (part cargo *ex* S.S. *Cilicia*), 23 September 1941, p. 198.

[7] *Minister of Marine* v. *The Cultivated Home* (part cargo *ex* S.S. *Cilicia*), 17 October 1941, p. 237.

[8] *Minister of Marine* v. *M. Hereuth Ltd.* (part cargo *ex* S.S. *Cilicia*), 17 October 1941, p. 246.

[9] *Minister of Marine* v. *Bank Misrahi* (part cargo *ex* S.S. *Cilicia*), 5 December 1941, p. 277.

[10] *Minister of Marine* v. *John Bull Ironmongery Stores* (part cargo *ex* S.S. *Roma*), 8 August 1941, p. 195.

parted with possession of the goods to the consignee under such terms that the consignee is to be deemed the owner thereof, the vendor cannot take any active part in the prize proceedings.[1] The Tribunal has also decided, somewhat obviously, that where the enemy nationality of the goods is not in dispute, such as where both consignor and consignee are of enemy nationality, there is no need to examine the question of the passing of the property.[2] In similar circumstances the time of dispatch will also be irrelevant.[3]

The presumption that the property has passed to the consignee will be confirmed if the vendor has sent the purchaser an invoice naming the purchaser debtor as per current account.[4] Non-proprietary interests—such as a contractual obligation to notify a third person of arrival[5]—will in general be disregarded: except that the nature of the captured goods in relation to such third person, being a supplier of war material to the enemy, may raise a presumption that they are in fact sold to him.[6] The position is similar if such third persons are of enemy nationality.[7]

A cancellation of the sale subsequent to capture and effected by withdrawing the authority conferred by the documents will be disregarded in prize proceedings.[8] And in the event of a discrepancy between the bill of lading and the cargo manifest the Tribunal will rely on the bill of lading to establish the status of the goods, the reason for this being that the cargo manifest is an administrative document intended for customs use, and is not one of title.[9]

The only article dealing with transfer of property in the Laws of War is Article 158 which provides that goods on board an enemy ship will be considered enemy until they arrive at their destination, notwithstanding any *post bellum* transfer while in transit. The only exception is where an unpaid neutral vendor exercises his right of stoppage *in transitu* on the

[1] *Minister of Marine* v. *N. and D. I. Benjamin Levy Brothers* (part cargo *ex* S.S. *Cilicia*), 5 December 1941, p. 272.

[2] *Minister of Marine* v. *Hong Kong and Shanghai Banking Corporation* (part cargo *ex* S.S. *Perla*), 11 July 1941, p. 152; *The Same* v. *Nile Cold Storage and Ice Co. Ltd.* (part cargo *ex* S.S. *Vulcania*), 25 July 1941, p. 165.

[3] *Minister of Marine* v. *Messrs. J. Sasks & Sons, Meshi Silk Works* (part cargo *ex* S.S. *Cilicia*), 23 September 1941, p. 198.

[4] *Minister of Marine* v. *Socony Vacuum Oil Co. Inc.* (part cargo *ex* S.S. *Athinai*), 13 November 1942, p. 404.

[5] *Minister of Marine* v. *Bank of London and South America Ltd.* (part cargo *ex* S.S. *Beatrice C.*), 13 June 1941, p. 103; *The Same* v. *Ionian Bank Ltd.* (part cargo *ex* S.S. *Beatrice C.*), 27 June 1941, p. 119.

[6] *Minister of Marine* v. *Associated Manganese Mines of South Africa Ltd.* (part cargo *ex* S.S. *Perla*), 11 July 1941, p. 147.

[7] *Minister of Marine* v. *Fenech & Scerri* (part cargo *ex* S.S. *Vulcania*), 8 August 1941 (bill of lading to order of consignor), p. 175.

[8] *Minister of Marine* v. *Crédit Foncier d'Algérie et Tunisie* (part cargo *ex* S.S. *Polinnia*), 13 June 1941, p. 3.

[9] *Minister of Marine* v. *North African Commercial* (part cargo *ex* S.S. *Tergestea*), 11 July 1941, p. 57.

bankruptcy of the buyer. Therefore the majority of the rules and presumptions are the creation of the Tribunal. It will be readily observed that there are no striking departures from the accepted norms of prize law as applied in countries which follow the nationality and not the commercial domicil principle in determining enemy character. It is submitted that the rules here are clearer and less open to abuse than the more complicated and less flexible[1] standards of the British prize courts.

Prize proceedings

We have seen above the formal extent of the Tribunal's jurisdiction, as laid down in Article 219 of the Laws of War, and its own conception of its duties to give effect to the old maxim of prize law, *toute prise doit être jugée*.[2] It is now necessary to examine its actual workings in greater detail.

In the first place the Tribunal placed on the claimant a strong duty of establishing a prima facie case. Article 217 of the Laws of War established a presumption of the validity of seizure and sequestration, but this rule was strictly confined to pre-judicial acts[3] and could not be relied on by the captors in court even in the absence of any defence,[4] although supporting inferences in favour of the captors would be drawn from such absence:[5] and the presumption is absolutely rebutted by the entry of an appearance.[6] For these reasons the Rules of Procedure laid down an elaborate procedure for notifying the institution of the cause to interested parties, with the assistance of the Foreign Office,[7] and the Tribunal held that when these formalities had been completed the possibility of a defence was assured and the cause properly instituted.[8] For in order to comply with the rule that *toute prise doit être jugée* it is not necessary for a defence actually to have been made, but that the possibilities therefor should have been created.[9]

With this sound basic approach, not only was no difficulty placed in the

[1] Cf. Garner, op. cit., pp. 443–64, particularly p. 454.

[2] *Supra*, p. 284.

[3] *Minister of Marine* v. *New Zealand Loan and Mercantile Agency Co.* (part cargo *ex* S.S. *Beatrice C.*), 4 July 1941, p. 43.

[4] *Minister of Marine* v. *The Firm Terzian's Trading House* (part cargo *ex* S.S. *Vulcania*), 1 August 1941, p. 81.

[5] *Minister of Marine* v. *Bank of London and South America Ltd.* (part cargo *ex* S.S. *Beatrice C.*), 13 June 1941, p. 103; *The Same* v. *Rabone Peterson & Co., Ltd.* (part cargo *ex* S.S. *Beatrice C.*), 27 June 1941, p. 113; *The Same* v. *S.A. Air Liquide* (part cargo *ex* S.S. *Cilicia*), 31 October 1941, p. 255. Cf. the inferences drawn by the Gibraltar Prize Court in *The Sidi Ifni*, [1945] 1 Ll.P.C. (2nd), 200 at p. 201, upheld by the Privy Council at p. 204.

[6] *Minister of Marine* v. *Rabone Peterson & Co., Ltd.* (part cargo *ex* S.S. *Beatrice C.*), 27 June 1941, p. 113.

[7] Rules of Procedure, Article 20.

[8] *Minister of Marine* v. *New Zealand Loan and Mercantile Agency Co.* (part cargo *ex* S.S. *Beatrice C.*), 4 July 1941, p. 43.

[9] *Minister of Marine* v. *Crédit Foncier d'Algérie et Tunisie* (part cargo *ex* S.S. *Polinnia*), 13 June 1941, p. 3.

way of enemy aliens who wished to defend their interests, but considerable and in some respects extraordinary concessions were given to them.[1] Article 280 of the Laws of War preserves intact the general procedural capacity of enemy aliens before Italian courts, and this general capacity was extended, in the case of the Prize Tribunal, by Article 5 of the Rules of Procedure which allowed the diplomatic or consular agents of foreign Powers accredited to the Royal Italian Government to submit 'observations' to the Procurator-General in the interests of their co-nationals, and imposed on the Procurator-General the duty of 'taking account' thereof in his pleadings. This right was extensively used and gave rise to a number of interesting decisions. In practice two types of intervention occur: to protect the interests of the co-nationals of the embassy so intervening, and to protect the interests of the nationals of enemy states the protection of whose interests has been assumed by the embassy so intervening; and the following general principles emerge. First, the diplomatic representatives as such do not have a general right of appearance in the cause,[2] because a neutral state which assumes the protection of the interests of a belligerent state cannot assume any rights which its principal does not possess, and an appearance can only be entered by an advocate acting under a personal mandate from the interested claimant.[3] Secondly, the party in whose interests the diplomatic representatives intervene must be a national[4] or a protected person[5] of the protecting States, and must have a title to appear in the proceedings.[6] Thirdly, the diplomatic representatives of protecting Powers are not the diplomatic representatives of the opposing belligerent, because the breaking off of diplomatic relations is inconsistent with any form of representation between the belligerents. Therefore the most that the protecting Power can do is to use its good offices, and the instructions of the United States Under-Secretary of State, Mr. W. Y. Bryan, of 17 August 1914 to this effect were cited with approval.[7] Moreover, the right which every state has to protect the interests of its subjects in any foreign state does not include the right to undertake judicial pro-

[1] No difficulties were placed in their way in the First World War: Colombos, *Treatise on the Law of Prize* (2nd ed., 1940), p. 318.

[2] *Minister of Marine* v. *Cia. Swift de la Plata S.A.* (part cargo *ex* S.S. *Beatrice C.*), 20 June 1941, p. 29.

[3] *Minister of Marine* v. *Messrs. J. Sasks & Sons, Meshi Silk Works* (part cargo *ex* S.S. *Cilicia*), 23 September 1941, p. 198; *The Same* v. *Banque du Syrie et du Liban* (part cargo *ex* S.S. *Cilicia*), 31 October 1941, p. 259.

[4] Rules of Procedure, Article 5.

[5] *Minister of Marine* v. *D. Braslawsky* (part cargo *ex* S.S. *Cilicia*), 23 September 1941, p. 179; *The Same* v. *Joel Magazinik* (part cargo *ex* S.S. *Cilicia*), 30 September 1941, p. 189; *The Same* v. *Barclays Bank D.C. & O.* (part cargo *ex* S.S. *Cilicia*), 23 September 1941, p. 203; *The Same* v. *The Cultivated Home* (part cargo *ex* S.S. *Cilicia*), 17 October 1941, p. 237.

[6] *Minister of Marine* v. *Joel Magazinik* (part cargo *ex* S.S. *Cilicia*), 30 September 1941, p. 189.

[7] Ibid. See *Boll.* ii. 192. These instructions will also be found in *Revue générale de droit international public*, 22 (1915), Documents, p. 161.

ceedings in their interests in the absence of international convention.[1] In the absence of a regular appearance, that is, by an advocate personally instructed by the claimant having a proprietary interest, diplomatic representation will be accepted as 'observations' under Article 5 of the Rules of Procedure,[2] except where the person on whose behalf the intervention is made is neither a citizen nor a protected person of the embassy,[3] although even such observations may be taken into consideration by the Tribunal in deciding questions of its own jurisdiction.[4]

There is no objection to an enemy state opposing a claim. In *The Paolina* (part cargo *ex*)[5] the holder of the bill of lading was the French Minister of National Production and Labour, and it was held that he was the proper person to oppose the captors' claim.

It should be noted that despite Italian anti-Jewish legislation no objection ever appears to have been taken to the fact that the claimant was a Jew, although reference was once made to it.[6]

No intervention in the cause for condemnation may be made by persons not having a proprietary interest in the *res*.[7]

There are no important decisions in regard to costs. The Tribunal laid down a general rule that no costs would be awarded to the captors in an undefended case.[8] No order as to costs was made when an undefended claim by the captors was rejected,[9] but in *The Athinai*,[10] where the captors' claim was unsuccessfully opposed, the Minister of Marine was awarded 3,000 lire costs. In no other case, defended or undefended, was any order made as to costs.

Ancillary jurisdiction. Third-party rights

Although Article 219 of the Laws of War gives the Tribunal a wide

[1] *Minister of Marine* v. *Cia. Swift de la Plata S.A.* (part cargo *ex* S.S. *Beatrice C.*), 20 June 1941, *Boll.* ii. 29, at p. 33. *Minister of Marine* v. *N. and D. I. Benjamin Levy Brothers* (part cargo *ex* S.S. *Cilicia*), 5 December 1941, p. 272.

[2] *Minister of Marine* v. *A. & G. Valcke & Cie* (part cargo *ex* S.S. *Cilicia*), 23 September 1941, p. 185.

[3] *Minister of Marine* v. *Barclays Bank D.C. & O.* (part cargo *ex* S.S. *Cilicia*), 23 September 1941, p. 203.

[4] *Minister of Marine* v. *D. Braslawsky* (part cargo *ex* S.S. *Cilicia*), 23 September 1941, p. 179.

[5] *Minister of Marine* v. *French Food Purchasing Commission in London* (part cargo *ex* S.S. *Paolina*), 13 June 1941, p. 85.

[6] *Minister of Marine* v. *Crédit Foncier d'Algérie et Tunisie* (part cargo *ex* S.S. *Polinnia*), 13 June 1941, *Boll.* ii. 3, at p. 9. Palestine itself was called a 'country under British mandate and occupied by the armed forces of the enemy' by the Procurator-General in *Minister of Marine* v. *Cia. Swift de la Plata S.A.* (part cargo *ex* S.S. *Beatrice C.*), 20 June 1941, *Boll.* ii. 29, at p. 32.

[7] *Minister of Marine* v. *Joel Magazinik* (part cargo *ex* S.S. *Cilicia*), 30 September 1941, p. 189; *The Same* v. *N. and D. I. Benjamin Levy Brothers* (part cargo *ex* S.S. *Cilicia*), 5 December 1941, p. 272.

[8] E.g. *Minister of Marine* v. *Palestine Co-operative Wholesale Society* (part cargo *ex* S.S. *Beatrice C.*), 13 June 1941, p. 25.

[9] *Minister of Marine* v. *A. Smith Associated Company* (*The Ulmus*), 18 July 1941, p. 63.

[10] *Minister of Marine* v. *Hellenic Lines Ltd.* (S.S. *Athinai*), 20 March 1942, p. 302.

ancillary jurisdiction, it was rarely invoked. A claim for freight is not regarded as a proprietary interest capable of supporting an appearance, under the general principles we have already discussed. In two cases the shippers entered their claims for freight in respect of diversion in the *procès-verbal* relating to the capture, but failed to pursue them before the Tribunal in manner prescribed by the law, and it was accordingly held that no award could be made.[1] In fact there is no record of any award for freight being made.

The Kriti[2] might have given a parallel to the English case of *The Prins Knud*,[3] but no claim was made in prize by the salvors for salvage, and the vessel was apparently condemned free of all lien.

No claims were made by mortgagees, pledgees, or other persons having similar third-party interests, but on general principles such claims would undoubtedly have been disallowed.

The activities of this Tribunal were brought to an end by the Italian Armistice.[4] Article 15 of the Instrument of Surrender of Italy, dated 29 September 1943, provided as follows:

'United Nations merchant ships, fishing and other craft in Italian hands wherever they may be (including for this purpose those of any country which has broken off diplomatic relations with Italy) whether or not the title has been transferred as the result of prize court proceedings or otherwise, will be surrendered to the United Nations and will be assembled in ports to be specified by the United Nations for disposal as directed by them. The Italian Government will take all such steps as may be required to secure any necessary transfers of title. Any neutral merchant ship, fishing or other craft under Italian operation or control will be assembled in the same manner pending arrangements for their ultimate disposal. Any necessary repairs to any of the above mentioned vessels will be effected by the Italian Government, if required, at their expense. The Italian Government will take the necessary measures to insure that the vessels and their cargo are not damaged.'

An official commentary issued in 1945[5] says that the provisions of Article 15, as regards small vessels and craft, have not been fully satisfied owing to the difficulty of locating and identifying the vessels and craft concerned.

[1] *Minister of Marine* v. *Ralli Brothers Ltd., S.A.* (in the matter of 119 bales of jute *ex* S.S. *Perla* transhipped *ex* M.V. *Mauly*), 18 July 1941, p. 71; *The Same* v. *Hong Kong and Shanghai Banking Corporation* (part cargo *ex* S.S. *Perla*), 11 July 1941, p. 152.

[2] *Minister of Marine* v. *S.A. della Costiera Greca A.E.* (S.S. *Kriti*), 22 January 1943, p. 445.

[3] [1941] 1 Ll.P.C. (2nd) 57: on appeal (the principal judgment on this point), [1942] ibid., p. 99.

[4] See Documents relating to the Conditions of an Armistice with Italy (September–November 1943). *British Parliamentary Papers*, Italy No. 1 (1945), Cmd. 6693.

[5] Ibid., p. 18. By virtue of Part A of Annex XVII of the Treaty of Peace with Italy the Allies reserved the right to re-examine the decisions of the Italian prize courts during the war. Where they find that any such decisions were not in conformity with international law, Italy shall be required to set the decisions aside and to revise them as the Allied Powers concerned shall indicate. *Parl. Papers*, Misc. No. 1 (1947), Cmd. 7022, p. 78; *Official Commentary*, Misc. No. 2 (1947), Cmd. 7026, p. 20. Compare Article 440 of the Treaty of Versailles of 1919.

In the course of the period under review the Italian Prize Tribunal held 183 sessions, of which 96 were chamber proceedings (*Udienza presidenziale*) and the remaining 87 full sessions (*Udienza collegiale*), and it handed down 181 reasoned judgments[1] concerning 25 different ships and their various cargoes. Many of the judgments are, of course, repetitive. The Reports create the impression of fairness and objectivity, not only of the Tribunal itself, but also of the internal law of the state which it was charged to apply. To one conversant with the English doctrines of prize law, with its broad conceptions of the relations between international and internal law, and its somewhat incongruously narrow views on procedural matters, the Italian doctrine exhibits many peculiarities. But it cannot be said that the Italian Laws of War as administered during the late war in the Prize Tribunal exhibit any undesirable features. On the other hand, save in the procedural matter of the right of appearance, and the facilities for its exercise, where the Italian practice represents a considerable advance on previous ideas, it cannot be said that in the period under review the Italian prize courts have made any notable contribution to the law of maritime warfare.

[1] Articles 50 and 51 of the Rules of Procedure require all final judgments to give reasons. This requirement does not exist in the case of interlocutory orders.

NOTES

THE REVISION OF THE CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANIZATION

THE adoption at the Twenty-ninth Session of the International Labour Conference at Montreal on 9 October 1946 of the Constitution of the International Labour Organization Instrument of Amendment, 1946, carries to the verge of completion the process of constitutional revision which has been a major pre-occupation of the International Labour Organization since the Philadelphia Session of the Conference in May 1944.

There have been three main stages in this process.

The first stage was the adoption at the Twenty-sixth Session of the Conference of the Declaration of Philadelphia which redefines the aims and purposes of the International Labour Organization.

The Declaration of Philadelphia asserts the primacy of the social objective in international policy; it defines this objective as being the attainment of conditions in which all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'; it affirms the 'responsibility of the International Labour Organization to examine and consider all international, economic and financial policies and measures in the light of this fundamental objective' and provides that 'in discharging the tasks entrusted to it the International Labour Organisation, having considered all relevant economic and financial factors, may include in its decisions and recommendations any provisions which it considers appropriate'.

Having set forth these general principles, the Declaration lists a number of specific objectives. It recognizes the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve: full employment and the raising of standards of living; the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being; the provision, as a means to the attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labour, including migration for employment and settlement; policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection; the effective recognition of the right of collective bargaining, the co-operation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures; the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care; adequate protection for the life and health of workers in all occupations; provision for child welfare and maternity protection; the provision of adequate nutrition, housing, and facilities for recreation and culture; and the assurance of equality of educational and vocational opportunity.

The Declaration expresses confidence that 'the fuller and broader utilisation of the world's productive resources necessary for the achievement of the objectives set forth' therein 'can be secured by effective international and national action, including measures to expand production and consumption, to avoid severe economic fluctuations, to promote the economic and social advancement of the less developed regions of the world, to assure greater stability in world prices of primary products, and to promote a high

and steady volume of international trade', and it pledges 'the full co-operation of the International Labour Organization with such international bodies as may be entrusted with a share of the responsibility for this great task and for the promotion of the health, education and well-being of all peoples'.

The Twenty-sixth Session of the Conference also adopted a resolution requesting the Governing Body to appoint a committee to consider the future constitutional development of the Organization and to give special attention to (i) the relationship of the Organization to other international bodies, (ii) the constitutional practice of the Organization and its clarification and codification, (iii) the status, immunities, and other facilities to be accorded to the Organization by governments as necessary to the efficient discharge of the responsibilities of the Organization, and (iv) the methods of financing the Organization. On the basis of this resolution the Governing Body appointed a committee which had exhaustive preliminary discussions of the issues involved in the revision of the Constitution of the Organization. These discussions served to focus the issues for detailed consideration at the Twenty-eighth and Twenty-ninth Sessions of the Conference.

The second stage in the process of revision was the adoption at the Twenty-seventh Session of the Conference at Paris on 5 November 1945 of the Constitution of the International Labour Organization Instrument of Amendment, 1945, which embodied a limited number of amendments to the Constitution of the Organization, designed to deal with three questions which were of immediate urgency in view of the prospective liquidation of the League of Nations in the near future, namely the membership of the International Labour Organization, the arrangements for the financing of the Organization, and the procedure for the entry into force of further amendments to the Constitution.

The rules relating to the membership of the Organization embodied in the amended text of Article 1 of the Constitution involve one important departure from the earlier arrangements. Hitherto membership of the League of Nations has involved membership of the International Labour Organization, and the provisions of the Constitution of the International Labour Organization have been binding upon the League and its Members as an integral part of the constitutional arrangements of the League. The Charter of the United Nations, while providing that all Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice, does not provide for any comparable automatic membership of the members of the United Nations in the International Labour Organization or in any of the specialized agencies. The International Labour Organization has always aspired to achieve universality of membership, and has repeatedly made clear its desire to secure the full participation in the Organization of all states which are Members of the United Nations. The amended text of Article 1 provides that any original Member of the United Nations and any state admitted to membership of the United Nations by a decision of the General Assembly in accordance with the provisions of the Charter may become a Member of the International Labour Organization by communicating to the Director of the International Labour Office its acceptance of the obligations contained in the Constitution of the International Labour Organization. It was felt that such an arrangement would be an expression of the aspiration of the Organization towards universality and would be calculated to facilitate the acceptance of membership in the Organization by all of the United Nations.

The other provisions of the amended article restate the existing constitutional practice of the Organization in regard to the admission of Members to the Organization by the

Conference, and the conditions under which states may withdraw from the Organization. In restating the existing practice in this way it has been necessary to define the majority required for the admission of new Members to the Organization by the Conference; this question has not arisen hitherto owing to the substantial unanimity which has been secured in all the cases in which states have been admitted to the Organization by the Conference. Under the amended text, a vote concurred in by two-thirds of the delegates attending the session, including two-thirds of the government delegates present and voting, is required for the admission of new Members. Questions relating to the membership of the Organization will always have an important political aspect, the first question for consideration in connexion with any proposed admission to membership by the Conference being whether the applicant government has the international status necessary to enable it to discharge the obligations involved in membership of the Organization, and it has been the practice of the Conference in the past to be guided in regard to such matters by the views of governments. In regard to withdrawal the amended text provides that no Member may withdraw without giving notice of its intention so to do, that such notice shall take effect two years after the date of its reception, subject to the Member having at that time fulfilled all financial obligations arising out of its membership, and that when a Member has ratified any international labour Convention such withdrawal shall not affect the continued validity for the period provided for in the Convention of all obligations arising thereunder or relating thereto.

The amendment relating to the finances of the Organization empowers the International Labour Organization to make such financial and budgetary arrangements with the United Nations as may appear appropriate and to make provision for autonomous financing in the absence of such arrangements. The reference to financial arrangements with the United Nations has been framed in the light of the provision contained in the Charter of the United Nations that the General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies and shall examine their administrative budgets with a view to making recommendations to the agencies concerned (Article 17 (3) of the Charter). It is not intended to prejudice in any way the question of what financial and budgetary arrangements the International Labour Organization should work out with the United Nations. This will be a matter to be settled by mutual agreement. The article does, however, give expression to the desire of the International Labour Organization to play its part in the framing of appropriate general arrangements concerning the financing of international bodies.

The alternative provision for autonomous financing applies both pending the conclusion of financial and budgetary arrangements with the United Nations and if at any time no such arrangements are in force. In order to safeguard the principle, embodied in the earlier arrangements for the financing of the International Labour Office through the budget of the League of Nations, that ultimate responsibility for finance must rest with the governments which bear the expenses of the Organization, the amended article provides that the arrangements for the approval, allocation, and collection of the budget, which are to be determined by the Conference by a two-thirds majority of the votes cast by the delegates present, shall provide for the approval of the budget and of the arrangements for the allocation of expenses among Members by a committee of government representatives. The relationship of this committee to the Conference and the rules to be adopted in regard to voting in the committee are left to be determined by the arrangements to be approved by the Conference. The amended article also provides that a Member of the Organization which is in arrears in the payment of its financial contribution to the Organization shall have no vote in the Conference, in the

Governing Body, in any committee, or in the elections of members of the Governing Body if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years.

The new procedure of amendment introduced by the Paris amendments involves a substantial liberalization of the conditions governing the entry into force of amendments provided for in Article 36 of the Constitution of the Organization as previously in force. Under the original procedure ratification by three-quarters of the Members of the Organization, including all the states whose representatives composed the Council of the League of Nations, was required for the entry into force of an amendment. Under the new procedure the proportion of Members which must ratify or accept an amendment in order to bring it into force has been reduced from three-quarters to two-thirds. Both the Covenant of the League of Nations and the Charter of the United Nations provide for the ratification of amendments by two-thirds of the Members, and ratification by the same proportion of Members is also required under the constitutions of a number of the new specialized agencies. It was not thought necessary to give any Member of the Organization a veto on the entry into force of amendments to the Constitution such as is provided for in the Charter of the United Nations, but after a discussion in which opposing views were expressed it was considered that any amendment to the Constitution should command the full support of a majority of the major industrial Powers. The amended article therefore requires the ratification or acceptance of an amendment by two-thirds of the Members of the Organization, including five of the eight states of chief industrial importance, in order to bring it into force.

The 1945 Instrument of Amendment came into force in accordance with its terms on 26 September 1946, having on that date been formally ratified or accepted by 39 Members of the Organization.

The Twenty-seventh Session of the Conference also appointed a Conference Delegation on Constitutional Questions with a comprehensive mandate to review all outstanding questions relating to the Constitution and constitutional practice of the Organization. This Delegation, which met under the Chairmanship of Mr. G. Myrddin-Evans, C.B., Chairman of the Governing Body of the International Labour Office, held its first session in London from 21 January to 15 February 1946, and its second session in Montreal on 13 May and in New York on 30 May 1946. At its first session the Delegation adopted a comprehensive report on the questions referred to it; at its second session it gave special consideration, with the assistance of representatives of the federal states which are Members of the Organization, to the problems which arise in connexion with the application by federal states of the Conventions and Recommendations adopted by the International Labour Conference. The Delegation reached unanimous conclusions on all the questions submitted to it with the exception of the question of the basis of representation in the Conference and the Governing Body.

On the basis of the recommendations of the Conference Delegation on Constitutional Questions, the Twenty-ninth Session of the Conference adopted at Montreal on 9 October 1946 the Constitution of the International Labour Organization Instrument of Amendment, 1946. This Instrument of Amendment, which represents the third stage in the revision of the Constitution of the Organization, was framed in the light of certain general considerations of long-range constitutional policy, which are summarized in the following terms in the Report of the Conference Delegation on Constitutional Questions:

(*a*) Flexibility is the first essential of a good constitution. The circumstances in which it may have to be applied in the future cannot now be foreseen and are likely to change

greatly in the course of years. Flexibility allows of growth and of adaptation to the needs and opportunities of the unknown future; rigidity is likely to result in frustration rather than progress.

(*b*) No constitution can work successfully unless there is general agreement on its fundamental provisions. The Delegation has therefore considered that its essential task is to put forward proposals in the constitutional field which will secure such agreement and thus maintain unimpaired the unity and strength of the Organization as an indispensable instrument which the peoples of the world can use for the implementation of the aims and purposes of the Organization.

(*c*) On the basis of its existing Constitution the International Labour Organization has been able to become a solid reality. Its record shows that it has discharged its responsibilities and adapted itself to changing needs with a considerable measure of success through the long years of the depression, the rise of totalitarian aggression and the Second World War. Nothing in the existing practice and tradition of the Organization can be regarded as sacrosanct whenever new needs create new requirements, but there is no virtue in change as such, and in modifying the Constitution great care should be taken to conserve all those features of it which have been important elements in the success of the Organization.

(*d*) The proposed amendments to the Constitution will not come into force by virtue of their receiving the approval of the Conference. In order to bring them into force they will require, under the amendments already adopted in Paris, ratification or acceptance by two-thirds of the Members of the Organization, including five of the eight states of chief industrial importance. Such ratification or acceptance may frequently involve legislative approval, and the Delegation has therefore limited the scope of the proposed amendments to matters in respect of which it feels it reasonable to assume that such approval will be forthcoming.'

The 1946 Instrument of Amendment adds to Article 1 of the Constitution of the Organization, which defines the purpose of the Organization as being the promotion of the objects set forth in the Preamble, a reference to the Declaration of Philadelphia and incorporates the text of the Declaration in the Constitution as an annex.

It embodies a number of amendments consequential upon the dissolution of the League of Nations which are complementary to the amendments to the articles of the Constitution dealing with membership, finance, and the procedure for future amendments which were approved by the Conference at its Paris Session. These further amendments involve:

(*a*) the omission of the reference to the League of Nations contained in the opening paragraph of the Preamble to the Constitution;

(*b*) the abrogation of the provision contained in Article 6 of the Constitution that the International Labour Office shall be established at the seat of the League of Nations 'as part of the organisation of the League';

(*c*) the deletion of the present Article 12 of the Constitution which provides that 'the International Labour Office shall be entitled to the assistance of the Secretary-General of the League of Nations in any matter in which it can be given';

(*d*) the substitution for the power of deciding any question as to which are the States of chief industrial importance attributed to the Council of the League of Nations by the present text of Article 7, paragraph 3, of provisions that 'The Governing Body shall as occasion requires determine which are the Members of the Organisation of chief industrial importance and shall make rules to ensure that all questions relating to the selection of the Members of chief industrial importance are considered by an impartial committee before being decided by the Governing Body' and that 'Any appeal made by a Member from the declaration of the Governing

Body as to which are the Members of chief industrial importance shall be decided by the Conference but such an appeal to the Conference shall not suspend the application of the declaration until such time as the Conference decides the appeal';

(*e*) the transfer to the International Labour Office of the chancery functions in connexion with Conventions and Recommendations hitherto entrusted to the Secretary-General of the League of Nations;

(*f*) the transfer from the Secretary-General of the League of Nations to the Governing Body of the function of nominating the members of Commissions of Inquiry, and the transfer to the International Labour Office of the functions of communicating and publishing the reports of Commissions of Inquiry and receiving the replies of Governments;

(*g*) modifications of the articles concerning the seat of the Office and the place of meeting of the Conference;

(*h*) the substitution of references to the International Court of Justice for the references to the Permanent Court of International Justice contained in various articles of the Constitution; and

(*i*) the abrogation of the transitory provisions contained in Articles 38 to 40 of the Constitution, which deal with the arrangements for the 1919 Session of the International Labour Conference and certain arrangements applicable prior to the constitution of the League of Nations and the creation of the Permanent Court of International Justice.

The Instrument also embodies five amendments designed to facilitate co-operation between the International Labour Organization and the United Nations. One of these amendments is a general provision that 'the International Labour Organisation shall co-operate within the terms of this Constitution with any general international organisation entrusted with the coordination of the activities of public international organisations having specialised responsibilities and with public international organisations having specialised responsibilities in related fields'. The other amendments are of a relatively minor character and relate to reciprocal representation at meetings, the proposal of items for inclusion in the agenda of the Conference, and the deposit and registration of Conventions with the Secretary-General of the United Nations in accordance with Article 102 of the Charter of the United Nations.

There are a number of amendments designed to clarify the existing constitutional position of the Governing Body. Among these may be mentioned the inclusion in Article 2 of the Constitution, which at present provides that the Organization shall consist of a General Conference and of an International Labour Office controlled by a Governing Body, of an independent reference to the Governing Body; the inclusion in Article 9 of a provision that the staff of the Office shall be appointed by the Director-General 'under regulations approved by the Governing Body'; the inclusion in Article 10 of an indication that the functions entrusted to the Office by that article are to be discharged 'subject to such directions as the Governing Body may give'; and the amendment of Article 10 to give the Governing Body the same powers as the Conference to order the conduct of special investigations by the Office and to assign to the Office powers and duties other than those specifically provided for in the article.

The title of the Director of the International Labour Office is changed to that of Director-General in order to secure uniformity of practice with the other specialized agencies. Advantage has also been taken of the present revision to include in the

Constitution provisions specifying that 'the responsibilities of the Director-General and the staff shall be exclusively international in character', that 'in the performance of their duties, the Director-General and the staff shall not seek or receive instructions from any Government or from any other authority external to the Organisation', and that 'they shall refrain from any action which might reflect upon their position as international officials responsible only to the Organisation', together with an undertaking by each Member of the Organization 'to respect the exclusively international character of the responsibilities of the Director-General and the staff and not seek to influence them in the discharge of their responsibilities'.

There has been included in Article 10 a provision that, subject to such directions as the Governing Body may give, the Office shall accord to governments at their request all appropriate assistance within its power in connexion with the framing of laws and regulations on the basis of the decisions of the Conference and the improvement of administrative practices and systems of inspection.

A provision that 'the International Labour Organisation may make suitable arrangements for such consultation as it may think desirable with recognised non-governmental international organisations, including international organisations of employers, workers, agriculturists and co-operators' has also been included.

The majority required for waiving the suspension of the voting privileges of states in arrears in the payment of their financial contributions to the Organization provided for in the Constitution as amended in Paris has been increased from a simple to a two-thirds majority.

Important changes have been made in Article 19 of the Constitution with a view to introducing three new obligations and clarifying the nature of Recommendations and the scope of the 'without prejudice' clause which at present constitutes paragraphs 10 and 11.

(*a*) The first of the amendments introducing new obligations provides that Members of the Organization shall inform the Director-General of the measures taken in accordance with the article to bring Conventions and Recommendations before the competent authority or authorities, with particulars of the authority or authorities regarded as competent and of the action taken by them.

(*b*) The second substitutes for the present provision that if a Convention fails to obtain the consent of the competent authority or authorities 'no further obligation shall rest upon the Member' a provision that 'no further obligation shall rest upon the Member except that it shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention and showing the extent to which effect has been given or is proposed to be given to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention'.

(*c*) The third substitutes for the provision that if on a Recommendation no legislative or other action is taken to make the Recommendation effective no further obligation shall rest upon the Member, a provision that 'apart from bringing the Recommendation before the said competent authority or authorities, no further obligation shall rest upon the Members, except that they will report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation and showing the extent to which effect has been given or is proposed

to be given to the provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them'.

(*d*) The first of the clarifying amendments describes Recommendations as being designed 'to meet circumstances where the subject, or aspect of it, dealt with is not considered suitable or appropriate at that time for a Convention'.

(*e*) The second of the clarifying amendments substitutes for the existing provision that 'In no case shall any Member be asked or required, as the result of the adoption of any Recommendation or Draft Convention by the Conference, to lessen the protection afforded by its existing legislation to the workers concerned' a more comprehensive provision that 'In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom, or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation'.

The provisions of the article as a whole have also been rearranged so as to present the existing obligations more clearly, and the term 'Convention' has been substituted for the term 'Draft Convention' which is not used by any other international organization and which has frequently led to misunderstanding and has tended to obscure the binding character of the obligations resulting from the ratification of Conventions.

Another amendment is designed to clarify the obligations of federal states under Article 19 of the Constitution of the Organization. This amendment specifies that in respect of Conventions and Recommendations which the federal government regards as appropriate under its constitutional system for federal action, the obligations of the federal state shall be the same as those of other Members. In respect of Conventions and Recommendations which the federal government regards as appropriate, in whole or in part, for action by the constituent states, provinces, or cantons rather than for federal action, the federal government is required (*a*) to make effective arrangements for the reference of such Conventions and Recommendations to the appropriate federal state, provincial, or cantonal authorities, (*b*) to arrange, subject to the concurrence of the state, provincial, or cantonal governments concerned, for periodical consultations between the federal and the state, provincial, or cantonal authorities with a view to promoting within the federal state co-ordinated action to give effect to the provisions of such Conventions and Recommendations, (*c*) to inform the Director-General of the action taken to bring such Conventions and Recommendations before the appropriate authorities with particulars of the action taken by them, and (*d*) to report to the Director-General at appropriate intervals as requested by the Governing Body on the position of federal and state, provincial, or cantonal law and practice in regard to unratified Conventions and Recommendations.

The provisions concerning economic sanctions contained in the present text of Article 28, paragraph 2, and Articles 32, 33, and 34 have been eliminated from the Constitution and replaced by a provision that in the event of any Member failing to carry out the recommendations of a Committee of Inquiry or the International Court the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.

Article 35 of the Constitution has been amended to improve the procedure for the application of Conventions to non-metropolitan territories, especially where the subject-matter of a Convention is within the self-governing powers of the territory.

There has been added to Article 37 of the Constitution a paragraph authorizing the

Governing Body 'to make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious settlement of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention' and providing that 'any applicable judgment or advisory opinion of the International Court of Justice shall be binding upon any tribunal established' in virtue thereof and that 'any award made by such a tribunal shall be circulated to the Members of the Organisation and any observations which they may make thereon shall be brought before the Conference'.

There has also been added a general provision authorizing the Organization to 'convene such regional conferences and establish such regional agencies as may be desirable to promote the aims and purposes of the Organisation' and laying down that 'the powers, functions and procedure of regional conferences shall be governed by rules drawn up by the Governing Body and submitted to the General Conference for confirmation'.[1]

Two new articles dealing with the legal status and immunities of the Organization have been included in the Constitution. The first of these articles provides that 'The International Labour Organisation shall possess full juridical personality and in particular the capacity (*a*) to contract; (*b*) to acquire and dispose of movable and immovable property; (*c*) to institute legal proceedings'. The second article provides that 'The International Labour Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes', that 'delegates to the Conference, members of the Governing Body, and the Director-General and officials of the Office shall likewise enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation', and that 'such privileges and immunities shall be defined in a separate agreement to be prepared by the Organisation with a view to acceptance by the Members'.

The 1946 Instrument of Amendment, which was adopted by the Conference by 124 votes to nil, is supplemented by a Convention for the revision of the final articles of the existing International Labour Conventions for the purpose of making provision for the future discharge of the chancery functions entrusted by the said Conventions to the Secretary-General of the League of Nations. This Convention is purely formal in character and applies to the supplementary provisions of the individual Conventions the principles underlying the amendments to the provisions of the Constitution dealing with the procedure for the registration of ratifications.

After adopting the Instrument of Amendment and the Final Articles Revision Convention the Conference adopted a resolution expressing keen appreciation of the prompt ratification of the 1945 Instrument of Amendment and voicing the hope that the 1946 Instrument of Amendment and the Final Articles Revision Convention will be ratified equally promptly.

The Montreal Session of the Conference discussed at length a proposal by the French Government to change the present composition of the International Labour Conference which at present consists of four representatives of each Member, of whom two are government delegates, one an employers' delegate, and one a workers' delegate, so that it would consist of six representatives of each Member of whom two would be government delegates, two employers' delegates, and two workers' delegates, one of the employers' delegates being chosen from among the managers of undertakings

[1] Article 38.

possessed or controlled by public organizations where such organizations exist. It was contended in support of the proposal that its adoption was necessary in order to reflect the general trend in the world towards a directed economy and to keep the International Labour Organization in touch with the times. Among the grounds on which the proposal was opposed were the following: any changes in the proportionate strength of the three groups would cut at the roots of governmental responsibility in regard to both legislation and finance, and this would be particularly serious at a time when the Organization was amending Article 19 of its Constitution with a view to securing the acceptance by governments of increased obligations in connexion with its legislative activities and would for the first time assume full responsibility for its own finances; the adoption of the proposal which had been made in regard to the representation of socialized management would provoke an ideological conflict which would create a profound division of opinion within the Organization and fundamentally impair its utility as an instrument of co-operation between labour and management; an increase in the number of workers' delegates which would allow representation for separate labour movements would be calculated to place a premium on labour disunity throughout the world and by establishing a reward for separate trade-union movements in the form of separate representation at the Conference would tend to encourage such movements, thereby doing a great disservice to both labour and the community. In view of the weight of opinion in the Conference, the amendment was withdrawn and the Committee on Constitutional Questions of the Conference drew attention in its report to the Conference to the discussion of the problems involved contained in the First Report of the Conference Delegation on Constitutional Questions:

'110. All of the Employers' members of the Delegation drew attention to the fact that the existing Constitution had permitted of the appointment of a representative of socialised management when the U.S.S.R. was a Member of the Organisation. Although the Employers' representatives had requested clarification of the legal position at the time, they had not challenged the credentials of the Soviet Employers' delegate. If the U.S.S.R. resumed membership of the Organisation, and the Employers' representatives shared the general desire that it should do so, it would naturally appoint as Employers' delegate a representative of the socialised management of the U.S.S.R. . . . Socialised management in States with mixed economies unquestionably has an essential contribution to make to the work of the Conference, but provision for the representation of such management can and should be made either among the advisers to the Government delegates or, with the concurrence of the most representative organisation of employers in the country concerned, among the advisers to the Employers' delegate. . . .

'111. . . . The Constitution does not provide for the representation of individual labour organisations, however great and powerful, and it does not disfranchise any minority labour movement. It provides for the representation at the Conference of the workers of each country by a person designated by the Government to represent the workers as a whole. In order to ensure the representative character of the persons so designated the Government is required "to nominate non-Government delegates and advisers chosen in agreement with the industrial organisations, if such organisations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries". The majority of the Delegation expressed the view that these provisions can be made to work and must be made to work, since there is no alternative to them which would not create more difficulties than it would eliminate. . . . The right course was to get the rival organisations together, in the manner required by the existing provisions of the Constitution, and to induce them to agree on the appointment of representatives who would work in close co-operation and acknowledge a common responsibility to the labour movement as a whole in the country concerned. . . .

'113. The discussion brought into sharp relief the keen desire of the International Labour Organisation for the active collaboration in pursuit of the aims and purposes defined in the Declaration of Philadelphia of the Governments and peoples of all countries, acting through whatever political and economic institutions they may freely choose. The working of the International Labour Organisation rests on five essential principles: the responsibility of the Governments of its Members to their peoples, which entitles them as the authorised spokesmen of the whole community to have a decisive voice in the deliberations and decisions of the Organisation; the selection of Employers' and Workers' representatives on the principle of majority rule, after consultation with all parties concerned, including minorities; the freedom of Employers' and Workers' delegates to represent their constituents without Government instructions or interference and to speak and vote freely without Government control; the equal rights in the Conference of nations great and small, irrespective of their social and economic structure; and the obligation of Members of the Organisation to submit for consideration by the constitutional authorities in their own countries the decisions reached by the Conference by an appropriate majority.

'114. The Delegation is unanimous in desiring the active participation in the International Labour Organisation as Members of States with all types of economic and social structure. The Conference adopted at Paris an amendment to the Constitution designed to make it clear that the doors of membership in the Organisation are wide open to all of the United Nations and that a cordial greeting awaits those members of the United Nations which are not at present Members of the I.L.O.

'The Delegation is equally unanimous in desiring the active participation in the International Labour Organisation of all important sections in the labour movements of all Member States.

'The Delegation is no less unanimous in considering that the Government representatives must continue to hold the balance of power in the Organisation between the other two groups.

'. . . They desire to emphasise that appropriate provision for the representation of socialised management and of different sections of the labour movements of Member States can be made within the framework of the present system of representation, and to express the hope and conviction that the necessary arrangements to secure this result will be made by all Members of the Organisation where the problem arises with the full co-operation of all parties concerned.'

Simultaneously with the revision of the Constitution of the Organization the relations of the I.L.O. with other international bodies have been placed on a new basis as the result of the dissolution of the League of Nations and the negotiation of an agreement bringing the I.L.O. into relationship with the United Nations.

The resolution for the dissolution of the League of Nations adopted by the final session of the Assembly of the League of Nations on 18 April 1946 provided that it should not in any way prejudice the continued existence of the International Labour Office or the measures taken or to be taken by the International Labour Organization to make in its Constitution such changes as may be required as the result of the dissolution of the League, or the enjoyment by the International Labour Organization of the privileges and immunities provided by Article 7 of the Covenant pending elaboration of an acceptance by the Members of the Organization of other provisions dealing with the matter. Another paragraph specified that 'An agreement to cause the full ownership of the land and buildings at present occupied by the International Labour Organisation to vest in that Organisation shall be concluded between the Secretary-General of the League and the Acting Director of the International Labour Office and all the steps which, under the law of the Republic and

Canton of Geneva or of the Swiss Confederation, are necessary to give effect to the agreement shall be taken as soon as possible'. The resolution also provided for the transfer to the International Labour Organization of the Working Capital Fund of the League, the Administrative Tribunal, the Staff Pensions Fund, and an appropriate share of other League funds. The Common Plan for the Transfer of League of Nations Assets to the United Nations approved by both the Assembly of the League and the General Assembly of the United Nations includes the following undertaking by the United Nations: 'The United Nations further agrees: (*a*) That the International Labour Organisation may use the Assembly Hall, together with the necessary committee rooms, office accommodation and other facilities connected therewith at times and on financial terms to be agreed from time to time between the United Nations and the International Labour Organisation; (*b*) That the International Labour Organisation may use the Library under the same conditions as other official users thereof.' The decisions of the League Assembly also provided for the transfer to the International Labour Organization of the contents of the League treaty registry relating to the International Labour Organization, including the authentic texts of International Labour Conventions, the instruments of ratification of these Conventions, and the register of such ratifications.

An international agreement for the transfer of the I.L.O. building in Geneva was concluded between the Secretary-General of the League of Nations and the Acting Director of the International Labour Office on 4 and 17 May 1946 and supplemented by a notarial agreement of 1 July 1946 designed to make the international agreement fully effective under Swiss law. The documents relating to the International Labour Organization contained in the League treaty registry were transferred to the Organization on 20 August 1946. An Agreement between the Swiss Federal Council and the International Labour Organization concerning the legal status of the International Labour Organization in Switzerland, and an Arrangement for the Execution of this Agreement were signed at Geneva on 11 March 1946 and have since been brought into force by an exchange of notes between the Swiss Federal Council and the International Labour Office. A proposed general convention on the privileges and immunities of the International Labour Organization, similar to the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly of the United Nations on 13 February 1946, was considered at the Twenty-ninth Session of the International Labour Conference (Montreal, September–October 1946) and referred to the Governing Body for fuller consideration with a view to the adoption of a revised draft in 1947. The Twenty-ninth Session of the Conference adopted amendments to the Financial Regulations, the Statute of the Administrative Tribunal, and the Staff Pensions Regulations consequential upon the transfer from the League of Nations to the International Labour Organization of responsibility for the administration of these instruments and made a number of other changes in them in the light of past experience.

The Agreement for bringing the International Labour Organization into relationship with the United Nations was negotiated at New York on 28 and 29 May 1946 between a negotiating delegation of the Governing Body of the International Labour Office and a negotiating delegation of the Economic and Social Council of the United Nations. By this Agreement the United Nations recognizes the International Labour Organization 'as a specialised agency responsible for taking such action as may be appropriate under its basic instrument for the accomplishment of the purposes set forth therein'. The Agreement embodies detailed arrangements in regard to reciprocal representation at meetings, the proposal of agenda items, the consideration by the International Labour Organization of recommendations of the General Assembly and of the Council,

and the exchange of information and documents. By it the International Labour Organization agrees to co-operate with the Economic and Social Council in furnishing information and rendering assistance to the Security Council; it agrees to co-operate with the Trusteeship Council and to co-operate with the United Nations in giving effect to the principles and obligations set forth in the Charter with regard to matters affecting the well-being and development of the peoples of non-self-governing territories. By the Agreement the General Assembly authorizes the International Labour Organization to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationships of the Organization and the United Nations or other specialized agencies. The International Labour Organization agrees to consult the United Nations before making any decision concerning the location of its permanent headquarters. The United Nations and the International Labour Organization recognize that the eventual development of a single unified international civil service is desirable from the standpoint of effective administrative co-ordination, and agree to co-operate with this end in view. The two organizations agree to strive for maximum co-operation in respect of statistical services, and recognize the desirability of avoiding the establishment of overlapping or competitive administrative or technical services. The Agreement provides that arrangements shall be made between the United Nations and the International Labour Organization in regard to the registration and deposit of official documents. The Agreement envisages a number of alternatives in regard to future budgetary and financial arrangements. The International Labour Organization recognizes the desirability of establishing close budgetary and financial relationships with the United Nations, and the United Nations and the International Labour Organization agree to consult together concerning the desirability of making appropriate arrangements for the inclusion of the budget of the Organization within a general budget of the United Nations. Any such arrangements which may be made are to be defined in a supplementary agreement between the two organizations. Meanwhile, the International Labour Organization agrees to transmit its proposed budget to the United Nations annually at the same time as such budget is transmitted to its Members, and it is provided that the General Assembly shall examine the budget or proposed budget of the Organization and make recommendations to it concerning any item or items contained therein. There is a further provision that the United Nations may undertake the collection of contributions from those Members of the International Labour Organization which are also Members of the United Nations in accordance with such arrangements as may be defined by a later agreement between the United Nations and the International Labour Organization. The Agreement authorizes the Secretary-General and the Director to enter into such supplementary arrangements for its implementation as may be found desirable in the light of the operating experience of the two organizations. It is subject to revision by agreement between the United Nations and the International Labour Organization.

The Agreement provides that it shall come into force on approval of the General Assembly of the United Nations and the General Conference of the International Labour Organization. The Economic and Social Council of the United Nations unanimously approved the Agreement on 21 June 1946 and recommended it to the General Assembly for approval. The General Conference of the International Labour Organization approved the Agreement unanimously on 2 October 1946; it was approved by the General Assembly on 14 December 1946.

In addition to negotiating the agreement with the United Nations the International

Labour Organization has also, during the period since the Philadelphia Session of the Conference, established direct relationships of mutual co-operation with U.N.R.R.A., F.A.O., U.N.E.S.C.O., the World Health Organization, the Fund, the Bank, P.I.C.A.O., I.R.O., E.C.I.T.O., and a number of other similar organizations.

In the constitutional development of the I.L.O. the growth of practice and tradition has always played a leading part. This has not ceased to be true, and some of the extra-constitutional developments of recent years may prove to be at least as important as the modifications which have been made in the text of the Constitution. Industrial committees designed to afford opportunities for the direct participation in the work of the International Labour Organization of representatives of the main world industries have been established for inland transport, textiles, coal-mining, iron and steel production, the metal trades, petroleum production and refining, the chemical industries, and building and civil engineering and public works. The regional activities of the Organization are being intensified. A third Labour Conference of American States which are Members of the I.L.O. was held in Mexico City in April 1946. A Preparatory Asiatic Regional Conference is to be held in New Delhi in October 1947 and is to be followed by an Asiatic Regional Conference in China in 1948. A Middle-Eastern Regional Meeting is to be held in Cairo in the autumn of 1947. Considerable progress has been made in the reorganization of the various I.L.O. committees in the light of the new conditions resulting from the war, and with a view to co-ordinating work previously entrusted to a number of different committees the Governing Body has established an Employment Committee with a comprehensive mandate to advise it on the wide range of problems in the field of employment in which it is desirable for the I.L.O. to play a part in the formulation of policy.

The preoccupation of the I.L.O. with constitutional questions and with these new developments has not been allowed to interrupt the normal rhythm of the pre-legislative work of the Conference. The Twenty-sixth Session of the Conference (Philadelphia, April–May 1944) adopted important recommendations concerning the organization of employment in the transition from war to peace, income security and medical care, and social policy in dependent territories. The Twenty-seventh Session (Paris, October–November 1945) adopted a supplementary recommendation on social policy for dependent territories. The Philadelphia Session also adopted a resolution on economic policies for the attainment of social objectives, and the Paris Session comprehensive resolutions on the maintenance of full employment during the period of industrial rehabilitation and reconversion and on the protection of children and young persons, which afford valuable guides to policy. The Twenty-eighth (Maritime) Session (Seattle, June 1946) adopted nine Conventions and four Recommendations. The Conventions deal with food and catering for crews on board ship, the certification of ships' cooks, social security for seafarers, seafarers' pensions, holidays with pay for seafarers, the medical examination of seafarers, the certification of able seamen, crew accommodation on board ship, and wages, hours of work, and manning. One of the Recommendations deals with the organization of training for sea service; the others are supplementary to the Conventions. The Twenty-ninth Session (Montreal, September–October 1946) adopted three Conventions concerning medical examination for fitness for employment of children and young persons in industry and in non-industrial occupations and concerning the restriction of night work of children and young persons in non-industrial occupations, with supplementary Recommendations. The Conference Delegation on Constitutional Questions summarized the present position of the Organization in the following terms: 'In the 25 years of the life of the I.L.O. there has never been a point

at which it has discharged heavier responsibilities or responded more readily to the changing requirements of a revolutionary epoch.'

C. W. JENKS

THE DISSOLUTION OF THE LEAGUE OF NATIONS

THE political activities of the League of Nations may be said to have ceased with the expulsion of the Union of Soviet Socialist Republics during the Assembly's session of 1939, but to maintain it in existence as a going concern, together with the International Labour Organization, the other part of the Siamese twin organization created by Part XIII of the Treaty of Versailles, continued to be the policy of the governments of the British Commonwealth of Nations and of most of the other League Members. It still possessed potential political utility, if only as the nucleus of a new world organization, and it still was capable of useful work in a number of non-political fields such as economic and financial research, particularly in connexion with post-war reconstruction considered in the light of events since 1919, public health including measures necessitated by the war, control of the manufacture of narcotic drugs and of the illicit traffic in such drugs. The Assembly during the crisis of 1938, and at its session of 1939, had anticipated the possibility that neither the Assembly itself nor the Council would be able to meet, and had adopted resolutions which in effect transferred to the Secretary-General acting with the approval of the Supervisory Commission and, as regards the Labour Organization, to its Director acting with the Commission's approval, enough of the powers of the two supreme authorities of the League to make it possible to maintain not merely the existence of the League and the Labour Organization but also their efficient operation on a reduced scale. The Permanent Court of International Justice also continued in being, although the election of the whole court which should have been held in 1939 had not taken place, the judges being required by an express provision of the Statute to retain office until their successors were appointed. The Court was, however, condemned to inactivity from an early date in the war.

As the war progressed, however, and the Union of Soviet Socialist Republics and the United States of America were successively involved, it became increasingly improbable that the League of Nations as established by the Covenant would survive, even in a modified form. Not merely had its Members failed to make it a political success but it had incurred the enmity of the Soviets and was through no fault of its own sufficiently unpopular in the United States to prevent any attempt to base upon it a new system of security. The Atlantic Charter did not mention it. The Dumbarton Oaks Proposals contemplated a wholly new organization. When the fifty-one original Members of the United Nations, including the great majority of the League's own Members, signed the Charter of the United Nations on 26 June 1945, they rendered the early dissolution of the League inevitable. At the same time they reaped the benefits of the wise policy which had refused to allow it to collapse and had on the contrary maintained its structure, equipment, and finances intact and continued its non-political activities. The Agreement which was signed at the same time as the Charter, officially known as the Interim Arrangements, and which established a Preparatory Commission to prepare the way for the sessions of the organs of the United Nations, provided that the Commission should: 'Formulate recommendations concerning the possible transfer of certain functions, activities and assets of the League of Nations which it may be considered desirable for the new Organisation to take over on terms to be arranged.'[1]

[1] Paragraph 4 (*c*) of Interim Arrangements.

Even before the adoption of the Charter the initiative in preparing for the orderly consideration of the problems which would arise in connexion with the League at the end of the war had been taken in Geneva and in London. At the end of 1943 the Acting Secretary-General caused a booklet to be prepared classifying and giving an analytical account of the functions attributed to the League by international agreements other than the Covenant and the Statute of the Court.[1] In London a committee under the chairmanship of the Legal Adviser of the Foreign Office drew up a report, dated 19 February 1945, containing a comprehensive plan for the dissolution of the League and the disposal of its functions and assets. Extracts from this plan were communicated by the United Kingdom Government to the United Nations and, although not followed in many of its details, it formed, with the information supplied by the Acting Secretary-General of the League, the indispensable basis for the examination of the questions at issue.

The process by which preparation was made for the assumption of their functions by the organs of the United Nations was curiously elaborate and protracted. After the Preparatory Commission had held in San Francisco a first session consisting of one meeting, another body provided for in the Interim Arrangements[2] which was called the Executive Committee and was identical in composition with the Executive Committee of the San Francisco Conference, sat in London from 16 August to 24 November to draw up recommendations to the Commission. It was therefore in the League of Nations Committee of the Executive Committee that the League's fate, which depended on the extent to which the new organization was prepared to profit by the work it had done and the assets which it could furnish, was first discussed.

The Committee began by referring to a legal sub-committee the special problem of the League's functions under international agreements.[3] A simple solution was found for part of the problem, namely, the clauses which related to services to be performed for the Parties by the League Secretariat, such as custody of the signed originals, receipt of ratifications, accessions and denunciations, and notification of these acts to the states concerned. It was held that the custody of the originals and the services ancillary thereto could properly be transferred from the League Secretariat to that of the United Nations, without amending the text of the agreements, since to do so by agreement between the two organizations could not affect the relations between the Parties. This course has accordingly been followed under decisions of the Assemblies of the two organizations. Functions affecting the operation of the agreements could clearly not be transferred except by agreement of the Parties. It was therefore only possible for the United Nations to declare its willingness to consider which functions of this nature it would be ready to assume. The only case to which this decision is likely to apply is that of the functions hitherto belonging to the League under the international conventions which deal with narcotic drugs. Certain of these functions are essential for the maintenance of the system of control over manufacture and illicit traffic. A Protocol amending the conventions to fill the gap left by the disappearance of the League was drafted by the Economic and Social Council and was adopted by the General Assembly of the United Nations during the Second Part of its First Session.

[1] Powers and Duties attributed to the League of Nations by International Treaties (Official No. C. 3, M. 3, 1944, v).

[2] Paragraph 3 of Interim Arrangements.

[3] For the United Nations resolution dealing with the matters discussed in this paragraph see Resolutions adopted by the General Assembly during the First Part of its First Session, p. 35. The relevant League of Nations resolution is on p. 5 of Document A. 33, 1946.

The main task of the League of Nations Committee was more complicated. It had to survey the League's activities, inform itself of its financial position, consider the utility to the new organization of its assets in buildings and equipment and personnel, and take account of its relationship to the International Labour Office, which was in process of preparing the international agreements necessary for the purpose of enabling it to survive the dissolution of the League and was on the alert to prevent any interference with its rights. It is not remarkable that the report which the Committee drew up, and the recommendations based on that document which were adopted by the Executive Committee, failed to give a clear picture of the policy to be followed.[1] Moreover, at the outset, with a view to simplifying its task, the Committee had accepted the idea of a total transfer of the League's functions and assets to the United Nations, subject to exceptions and without prejudice to future action. Although the results of the Committee's work bore no resemblance to such an operation, the language appropriate to it still appeared in the report and the recommendations and caused the Soviet delegation unexpectedly to repudiate the report at the very end of the Committee's session on the ground that it made the United Nations appear to be the successor in law of the League. The recommendations accordingly failed to secure unanimity in the Executive Committee. Their chief importance is on the one hand that they called attention to the value of certain League activities, and on the other hand that they made it clear to the Supervisory Commission that the League must wind up its financial affairs without assistance from the United Nations, collecting its arrears of contributions from the defaulting governments and making its own arrangements with regard to its pension funds; that the United Nations did not desire to make either a profit or a loss on any assets which it took over from the League; and that it would not take over the staff of the Secretariat but only such members as it might select—all points of great interest for the League.

A new start was made in the Preparatory Commission (24 November to 22 December 1945). Its seventh Committee, which dealt with the problem of the League, felt no difficulty in dispelling the suspicions of the Soviet delegation by admitting that misunderstanding could be avoided by speaking of the United Nations 'taking up or assuming' functions hitherto performed by the League rather than of its 'taking over' such functions. It also accepted a Soviet suggestion that the Economic and Social Council should consider what functions and activities should be assumed. This enabled the Committee to put forward unanimously a recommendation which covered the whole of the functions belonging to the League in its own right and which in the form given to it by the General Assembly reads as follows:[2]

'1. The General Assembly requests the Economic and Social Council to survey the functions and activities of a non-political character which have hitherto been performed by the League of Nations, in order to determine which of them should, with such modifications as are desirable, be assumed by organs of the United Nations or be entrusted to specialised agencies which have been brought into relationship with the United Nations. Pending the adoption of the measures decided upon as the result of this examination, the Council should, on or before the dissolution of the League, assume and continue provisionally the work hitherto done by the following League departments: the Economic, Financial and Transit Department, particularly the research and statistical work; the Health Section, particularly the epidemiological service; the Opium Section and the secretariats of the Permanent Central Opium Board and Supervisory Body.'

[1] For the Recommendations and the Report of the Committee see *Report by the Executive Committee to the Preparatory Commission*, chapter ix, p. 108.

[2] *Resolutions Adopted by the General Assembly*, p. 35.

'2. The General Assembly requests the Secretary-General to make provision for taking over and maintaining in operation the Library and Archives and for completing the League of Nations treaty series.'

'3. The General Assembly considers that it would also be desirable for the Secretary-General to engage for the work referred to in paragraphs 1 and 2 above, on appropriate terms, such members of the experienced personnel as the Secretary-General may select.'

There remained the question of acquiring the League's assets in buildings, land, and equipment for the United Nations. The Preparatory Commission on 18 December 1945 set up 'a committee to enter, on its behalf, into discussion with the League of Nations Supervisory Commission, which has been duly authorised by the Members of the League of Nations, for the purpose of establishing a common plan for the transfer of the assets of the League to the United Nations on such terms as are considered just and convenient'. The plan was to be subject to approval by the General Assembly.[1]

It was not until the Committee so appointed met the Supervisory Commission that direct relations were established between the League and the United Nations, but the Supervisory Commission had closely followed the discussions in the Executive and Preparatory Commissions and had formed definite views as to how the interests of the United Nations could best be promoted without injustice towards the League Members, particularly those states whose contributions had kept the organization alive during the war. Its attitude was wholly friendly and helpful, and the 'Common Plan'[2] which resulted from the negotiations was largely the result of its efforts. The most difficult points were the method by which payment would be made to the Members of the League and the value to be put on the assets to be transferred, consisting of the Secretariat Building, Assembly Building, other real estate in proximity to these buildings, office equipment in the buildings and branch offices, stationery, stocks of publications, the vast collection of books in the Library, the Archives, and finally the books, stationery, stocks of publications and office equipment of the Permanent Court of International Justice at The Hague. The Plan provided that all the assets should be valued at the price they cost the League, no charge being made for the numerous costly gifts which the League had received. A proposal to value the buildings at a later date on account of the uncertainty as to the use which the United Nations would be able to make of them, was successfully resisted by the Commission. Payment was to be made by the United Nations granting credits in its books, available to be drawn upon after 31 December 1948 for purposes approved by the General Assembly, to those League Members which the League considered to be entitled to shares in the payment, and in proportion to the share allotted to each such Member, subject to the proviso that League Members not belonging to the United Nations would be excluded from participation in the system of credits and would receive their shares out of League funds. The Plan provided for use of the Assembly Hall and appropriate additional accommodation by the International Labour Organization at times and on financial terms to be agreed from time to time, and it made the Library available to the Organization on the same conditions as to other official users. The United Nations and the League were to conclude with the Swiss Government whatever agreements

[1] *Report of the Preparatory Commission*, p. 118.

[2] Text in Annex to the Supervisory Commission's 'Report on Discussions with the Representatives of the United Nations on Questions of the Transfer of League of Nations Assets' (Official No. A. 8, 1946, x). The report of the United Nations Committee is printed in the League Document A. 9, 1946, and the United Nations Document A. 18.

might be necessary in connexion with the transfer of the League's assets. This Common Plan was approved by the General Assembly on 12 February 1946.[1]

The Assembly of the League of Nations met for its last session in April 1946 to pronounce, and pronounce favourably, upon the manner in which the League's administration had been conducted since the winter of 1939, to provide for winding up the League's affairs, and to declare it to be dissolved. The problems to be faced had already been foreseen and solutions prepared. So far as they were administrative in character the efforts of the Supervisory Commission had reduced them to their simplest terms and the Assembly had little or no occasion to alter its proposals. Legally the Assembly was faced with an operation for which it would be hard to find a precedent. Methods immune from theoretical criticism, but highly inconvenient and cumbrous in practice, could have been found. The Members of the League could have negotiated a treaty among themselves and thereby vested in the Assembly express power to take the necessary measures. Perhaps the same result might have been secured by inviting them to deposit instruments formally agreeing to the dissolution of the League by action of the Assembly. But the League was a community of states whose Members had all joined or were known to desire to join a rival community established for substantially the same purposes, and, so far as their enemy or ex-enemy character did not deprive them of a voice in the matter, all were anxious for a speedy termination of their commitments to the League. It would have been hardly tolerable to adopt a procedure subject not only to the delays which always attend the conclusion of multipartite treaties but also to the risk of encountering some difficulty of parliamentary procedure or constitutional practice in some of the states concerned. Accordingly the United Kingdom Foreign Office took the responsibility of drafting a resolution by which the Assembly, an organ in which all League Members except enemies and ex-enemies could, if they chose, be represented and make their wishes felt, and an organ which must be unanimous in its decisions, would declare that 'With effect from the day following the close of the session of the Assembly, the League of Nations shall cease to exist except for the sole purpose of the liquidation of its affairs as provided in the present Resolution' and would set up a board of representatives of League Members to carry out the liquidation. The attitude which the Dominion governments and other League governments would assume towards such a proposal was tested by circulating for their observations a memorandum which described in detail the policy proposed, and significantly opened with the statement that His Majesty's Government in the United Kingdom believed that in the circumstances the Members of the League would regard a resolution of the Assembly as both a sufficient and a proper method of effecting the League's dissolution. The absence of comment showed that the governments saw nothing shocking in this proposition, and the draft, with the changes made in it by the Assembly, became the instrument by which the League was dissolved.

Under the Resolution as adopted,[2] the Assembly and the Council together with the whole system of Committees of the League disappear and a 'Board of Liquidation' appointed by the Assembly, to which the Secretary-General is responsible, receives full power to wind up the League in accordance with the Resolution and with other decisions taken during the session. Vacancies on the Board are to be filled by co-option by the remaining Members. The staff of the Secretariat, who had all been given notice terminating their appointments, are put on a temporary basis from 1 August 1946. The Resolution requires enough staff to be maintained to enable the United Nations to take

[1] *Resolutions adopted by the General Assembly*, p. 36.
[2] Document A. 32 (1), 1946, x, p. 12.

up under the best possible conditions the League activities which it desires to assume. The Common Plan is approved and direction given that its terms shall be carried out in the manner described in the Report of the Finance Committee.[1] The effect of this is, briefly, that the share of each Member State in the payment due for the transferred assets will depend upon the ratio between the sum total of the contributions which it has paid and the sum total of all the contributions which have been paid, subject, however, to the proviso that any arrears due at the time of settlement are to be deducted from the debtor Member's share. The distribution of any balance remaining after the liquidation has been completed will be made in the same proportions. The Board has the duty of collecting arrears of contributions and the right to make compositions with debtor governments; and at the end of the liquidation it is to make a report to the Labour Organization on any arrears of contributions due to that institution in order that they may be collected.[2] As some check upon its proceedings, the Board is required to make interim reports to the governments at three-monthly intervals and to take account of any observations to which these reports may give rise. When its task is accomplished and the final accounts audited, the Board must make and publish a report to the governments giving a full statement of the measures which it has taken, and will declare itself to be dissolved. The Secretary-General will then retire from office and no further claims upon the League will be recognized.

Other provisions of the Resolution relate to the International Labour Organization. Nothing in the Resolution is to prejudice the continued existence of the Labour Office or the measures taken and to be taken to make in the constitution of the Labour Organization such changes as may be required as a result of the dissolution of the League. Financial provision of various kinds is made for the Organization, including the transfer to it of the Working Capital Fund. Measures are to be taken to vest in it in full ownership the land and buildings which it occupies and which have hitherto been entered in the land register of the Canton of Geneva in the name of the League. The Statute of the League of Nations Tribunal is amended so as to convert it into a court maintained by the Labour Organization to hear complaints from members of the staff of the Labour Office and members of the Staff Pensions Fund. Two further groups of articles contain the provisions necessary to enable the Organization to take over, if it is willing to do so, the administration of the Staff Pensions Fund and of the Pensions Fund for the former Judges of the Permanent Court of International Justice.

The creation by Chapter XIV of the United Nations Charter of the International Court of Justice to serve the same purposes and with almost the same Statute as the Permanent Court made the dissolution of the latter institution as inevitable as that of the League of Nations and presented the governments with much the same legal problem as arose in the case of the League. Administratively the Court was part of the League but the international instrument from which it derived its existence and jurisdiction was the signed and ratified Protocol of Signature of its Statute. In the Executive Committee it was generally felt that the dissolution of the Court could only

[1] Document A. 32 (1), 1946, x, p. 10.

[2] Before and during the Assembly's session compositions were made with or arrears of contributions were paid up by some eighteen governments. After reporting this fact, the Finance Committee's Report observes: 'It is worth recording that, over the full period of the League's activity from its inception in 1919 to December 31st, 1945, a little over 90% of the annual income Budgets has been received, upwards of 4½% cancelled, and about 1½% consolidated for payment over periods of years. Therefore, only 4% of the contributions are still outstanding. Contrary to impressions prevailing in ill-informed circles, the situation may be regarded as very satisfactory' (ibid., p. 4).

be effected by agreement between the Parties to the Protocol. The consent of states which had belonged to the Axis could be extracted from them by appropriate clauses in the peace treaties. All the other Parties, with the exception of Spain, were members of the Preparatory Commission or of the League of Nations. If they all signified their consent, Spain could, it was thought, be disregarded, although this idea aroused some protest. It was decided to introduce in the Preparatory Commission and in the League Assembly resolutions referring to the necessity of effecting the Court's dissolution which would be so drafted that, in the expected event of all the states whose consent was required being represented in one or the other body, the voting of the two resolutions would make it possible to treat the Court as dissolved. A resolution drawn up with this purpose by the Executive Committee was adopted by the Preparatory Commission,[1] but when the corresponding resolution was presented to the competent Committee of the League Assembly, that body abandoned the idea of dissolution by consent of the Parties. It very sensibly took the view that the logic of events afforded sufficient justification for declaring the Court to be dissolved. The resolution which on the Committee's advice was adopted by the Assembly was as follows:

'The Assembly of the League of Nations,

'Considering that, by Article 92 of the Charter of the United Nations, provision is made for an International Court of Justice which is to be the principal judicial organ of the United Nations and which is to be open to States not members of the United Nations on terms to be determined by the United Nations;

'Considering that the establishment of this Court and the impending dissolution of the League of Nations render it desirable that measures for the formal dissolution of the Permanent Court of International Justice shall be taken;

'Considering that the Preparatory Commission of the United Nations, in a resolution of December 18th, 1945, declared that it would welcome the taking of appropriate steps by the League of Nations for the purpose of dissolving the Permanent Court, and that this resolution records the assent to the dissolution of the Permanent Court of all the Members of the United Nations which are Parties to the Protocol of Signature of the Permanent Court, whether Members of the League or not;

'Considering that all the Judges of the Permanent Court have resigned and that on the dissolution of the League no machinery will exist for the appointment of new Judges;

'Resolves:

'That the Permanent Court of International Justice is for all purposes to be regarded as dissolved with effect from the day following the close of the present session of the Assembly, but without prejudice to such subsequent measures of liquidation as may be necessary.'

H. McKINNON WOOD

ACQUISITION OF BRITISH NATIONALITY THROUGH ABSENTEE MARRIAGES

DURING the Second World War the United States Government adopted a general practice of denying applications for American passports made by American citizens whose proposed journeys were not directly connected with the war effort or otherwise in the national interest. There was no such general practice relating to the issuance of British passports to British subjects in the United States who desired to travel abroad, and consequently many applications for British passports were made by persons in the United States who claimed British nationality in addition to American citizenship.

[1] *Report of the Preparatory Commission*, p. 57.

Most of these applications were based on a claim to British nationality acquired by marriage to a British subject. An American woman who had met a Royal Air Force pilot training in the United States might decide after the transfer of her British friend or fiancé from the United States, that she desired to join him in England so that they could marry. She could travel only if she obtained a British passport and some priority. Situations of this kind resulted in a number of applications for British passports (and for inclusion in the scheme for the repatriation at government expense of British subjects who volunteered for war work in the United Kingdom) founded upon absentee marriages between American women in the United States and British subjects elsewhere.

The Attorney-General of the State of Kansas published an opinion that marriage by proxy is permitted and effective under the law of Kansas, a view based not on Kansas cases but on the principle that generally, in the absence of legislative prohibition, those states which still recognize the validity of common-law marriages also recognize the validity of a marriage by proxy. It has been the practice of British consular officers to accept as valid a marriage which is established to be valid in accordance with the law of the jurisdiction in which it was celebrated. This opinion of the Attorney-General of Kansas was accepted by the British authorities as establishing the law of Kansas for the purposes of passport applications founded upon proxy marriages taking place in Kansas. Passports were therefore granted to women who had married British subjects in proxy ceremonies taking place in the State of Kansas; but the passport in such cases was validated for the one journey to the United Kingdom and the holder was required to undertake to go through a formal ceremony of marriage with her husband as soon as opportunity offered.

Some passport applications were founded upon a claim to British nationality acquired through a common-law marriage concluded by a written contract of marriage made in a state which recognizes and permits common-law marriages.

Such applications involved a consideration of the following principles. Although marriage is created by a contract, it is itself a status and the parties cannot agree between themselves about its incidents with the same freedom as can parties who enter into commercial contracts. The contract cannot, for example, provide that its validity and effect shall be governed by the law of (e.g.) South Carolina if the rules of private international law prescribe otherwise as to the law which shall govern some aspect of the contract. The parties may not enter into such a contract of marriage outside of South Carolina in a jurisdiction where, through non-compliance with formalities, it would be a nullity, and give it efficacy by expressly providing that the law of South Carolina (by which it would be formally valid) shall govern it completely. That would be legislation by act of the parties.

A number of states of the Union recognize common-law marriages; in other words, by agreement concluded in such a state there may be created a perfectly valid marriage with the same rights and liabilities as would arise from a marriage ceremony performed between two capable parties in accordance with statutory provisions. Such a common-law marriage is ordinarily contracted by the method described in the old cases as *per verba de praesenti tempore*, that is to say, by agreement expressed in words in the present tense, whereby each party declares that he or she forthwith takes the other as spouse. Such agreement is often presumed from cohabitation and established local reputation as husband and wife. Some states of the Union still recognize marriages so arranged, in spite of the existence of statutory provisions relating to marriage ceremonies. This is so if the provisions do not exclude the possibility of common-law

marriages by enacting mandatory requirements, non-compliance with which would render any other form of marriage a nullity. Accordingly, where a state which originally recognized common-law marriages has subsequently enacted statutory provisions about marriages, it is necessary to see whether the statutory provisions are mandatory and so necessarily exclude by implication the possibility of a common-law marriage.

There is a division of authority in the states which recognize common-law marriages on whether the mere agreement between the parties of itself creates the status of husband and wife, or whether it must be followed by consummation and cohabitation.

The American authorities are also divided about the necessity for the presence of both parties at the time and place of the making of the agreement. It may be that the division of authority about the need for presence of the parties derives from the requirement of words in the present tense in the declaration. Words in the future tense may be merely a statement of intention, or may constitute an offer which, if accepted, would create an engagement to marry in the future. On the other hand, on the analogy that in contract an offer unlimited as to time by its terms continues until either it is accepted by the offeree or notice of revocation reaches him before acceptance, a declaration *per verba de praesenti tempore* may be said to continue to operate as such until it is the subject of effective revocation or acceptance. Consequently, the declaration of one party operates forthwith when the other party later declares, as if by way of acceptance, *per verba de praesenti tempore* that he or she takes the other now and forthwith as spouse. The contract is then concluded.

A contract is deemed to be made in the jurisdiction where the last act necessary to make it a binding agreement takes place.[1] Beale in his book on *Conflict of Laws*[2] states that in the case of a marriage by correspondence the marriage contract is made when the acceptance of the offer of marriage is mailed by the offeree from a place which recognizes such marriages. An example occurred in a federal case. A man in the State of Minnesota sent to his intended wife, who was living in the State of Missouri, a written agreement, in duplicate and signed by him, whereby the parties undertook to assume from that day henceforth the relation of husband and wife. The woman signed the papers in Missouri and sent one copy back to the man. It was held that this acceptance constituted a valid marriage in Missouri, and the woman could recover in Minnesota damages, as a widow, for the wrongful act causing the death of her husband.[3] The validity of the marriage was determined by the laws of Missouri and as the marriage was valid as to form in that jurisdiction, Minnesota recognized it, even though there common-law marriages were not permitted. This case, Goodrich suggests,[4] would have been decided differently if Missouri had been a state which requires cohabitation as well as consent for a common-law marriage.

A case with which the writer was required to deal involved an American citizen domiciled and resident in South Carolina who desired to marry a British army officer stationed in Cairo, so that she could travel to the United Kingdom on a British passport. Accordingly, a contract between the two parties was prepared whereby each of the parties declared his or her desire to marry and stated that he or she thereby took the other as spouse. This contract was executed first in South Carolina by the intended wife and then in Cairo by the British officer.

[1] Goodrich, *Conflict of Laws*, 2nd ed., p. 262.
[2] Vol. ii, p. 676.
[3] *Great Northern Railroad Company* v. *Johnson*, 254 Federal 683.
[4] Op. cit., p. 303.

It appears generally accepted by text-book writers in the United States that common-law marriages are valid in South Carolina, and authority supports this view. It was said in one South Carolina case[1] that a common-law marriage is effective *in praesenti*, that like any other contract it may be proved by any evidence, and (at p. 96) that no *copula* is necessary. It may be proved by evidence generally, by declarations of the parties, by cohabitation and by repute. All that is needed is the agreement of the parties with the intention that that agreement shall of itself constitute the marriage.[2] It therefore appears that in South Carolina no cohabitation is necessary; this only aids in showing consent, i.e. is evidence of the agreement.

The Civil Code of South Carolina (1942) provides (section 8557) that it is 'unlawful to contract matrimony' without a licence, regulates (section 8565) who may perform a marriage ceremony, and enacts (section 8563) that absence of a licence shall not invalidate a marriage. It appears that these provisions are not mandatory and that a common-law marriage is not prohibited by their operation. A common-law marriage by agreement is therefore still possible in South Carolina and is effective even though the parties do not follow the conclusion of the agreement with immediate cohabitation.

Despite these considerations, the issuance of a British passport on the application in the case mentioned was not justified, because the contract could not be said to have been made in South Carolina. The contract of marriage was signed in South Carolina in August 1943 by the intended wife and in Egypt in October 1943 by the intended husband. The last act which was necessary to make it a binding contract was deemed to have been made in Egypt, the law of which—the *lex loci actus*—would govern its form. The law of South Carolina relating to common-law marriages was therefore inapplicable to the form of the contract, and the application for a British passport was denied.

M. E. BATHURST

THE DOUBLE TAXATION AGREEMENTS WITH THE UNITED STATES

I

ON 16 April 1945 there were concluded in Washington between the Governments of the United Kingdom and the United States two Conventions for the avoidance of double taxation and the prevention of fiscal evasion in regard, respectively, to taxes on income and duties on the estates of deceased persons. The first of these (Treaty Series No. 26 (1946)) relates, in so far as American taxes are concerned, to Federal income taxes including surtaxes and excess profits taxes, and to British income-tax, surtax, national defence contribution, and the former excess profits tax; it is to apply also to other taxes of a substantially similar character which either country may in the future impose (Art. I). It is to have effect as respects American taxes for taxable years beginning on or after 1 January 1945, as respects British income-tax for the year of assessment beginning on 6 April 1945, and as respects other British taxes upon other appropriate dates (e.g. in the case of surtax, 6 April 1944) (Art. XXIII). The Convention is to continue in force indefinitely, but either Party thereto may on or before 30 June in any year after 1946 give notice of its determination, whereupon it shall cease to be effective upon the various appropriate dates in the year following and its determination shall not have the effect of reviving any previous arrangements

[1] *Fryer* v. *Fryer*, Richardson's Equity Cases, 85, at p. 93.

[2] See *Davenport* v. *Caldwell*, 10 S.C. 317, 336, 337, citing *Fryer* v. *Fryer*, *supra*.

between the Governments concerned (Art. XXIV). It applies primarily to the metropolitan territories of the Parties (i.e. the States, the Federal Territories of Alaska and Hawaii and the District of Columbia in the case of the United States, and Great Britain and Northern Ireland, excluding the Channel Islands and the Isle of Man, in the case of the United Kingdom (Art. II (1)). But Article XXII provides that either Party may at the time of the exchange of ratifications or thereafter, by a written notice effective sixty days from the date thereof, extend its operation to any or all of its colonies (including, in the case of Great Britain, the Channel Islands and the Isle of Man), overseas territories, protectorates or mandates which impose taxes similar in character to those which are its subject. Ratifications were exchanged on 25 July 1946 without any such notice being given. S. 51 (1) of the Finance (No. 2) Act, 1945 (9 & 10 Geo. VI, c. 13) containing a general provision that intergovernmental arrangements made with a view to affording relief from double taxation shall have force and effect if and to the extent that they are specified by Order in Council, an Order under that section, entitled the Double Taxation Relief (Taxes on Income) (U.S.A.) Order, whereby full force was given to the whole of the Convention, was made by his Majesty in Council on 2 August 1946 (S.R. & O., 1946, No. 1327).

II

The Convention lays down as a general principle that persons from such of the territories of either Party to which the provisions apply shall not, whilst resident in the territory of the other, be subjected to more burdensome taxes of whatsoever description than resident nationals of such other Party (Art. XXI). The rest of its substantive provisions are as follows:

1. *Profits of industrial and commercial enterprises.* An industrial or commercial enterprise carried on by a resident of either country is not (save in pursuance of the law of the United Kingdom relating to the liability of inter-connected companies to E.P.T. and N.D.C.) to be subject to the taxes of the other in respect of its profits unless it be engaged in trade or business in the territory of that other through a permanent establishment therein maintained. A branch, management, factory, or other fixed place of business will constitute such a permanent establishment, but an agency—unless the agent has and habitually exercises a general authority to negotiate and conclude contracts—or an arrangement with a bona-fide commission agent acting in the ordinary course of his business, or a mere place of business exclusively for purchasing purposes will not, nor yet, in the case of a corporation, a local subsidiary. An enterprise of the one country so engaged in business in the other may be taxed by that other in respect of its entire income from sources therein. And there may be attributed to the permanent establishment of such enterprise the profits which it might be expected to derive were it an independent concern, other than profits from the mere purchase of goods (Art. III). There may also be attributed to such establishments profits which would have accrued to them but for the conclusion of some profit-excluding arrangement with a local enterprise in the management, control, or capital of which the foreign enterprise participates (Art. IV). These provisions notwithstanding, profits from the operation of ships or aircraft registered or documented under the laws of either Party accruing to persons resident or corporations registered in the territory thereof are to be in general exempt from taxation by the other Party. This rule is to supersede all previous arrangements on this point (Art. V).

2. *Dividends receivable by non-residents not engaged in trade or business.* The Convention provides that a resident in the territory of the one Party, who is not engaged

in trade or business in the territory of the other and who is taxed in his place of residence in respect of them, shall be liable to tax at source upon dividends derived from sources within the territory of that other only to a limited extent. That is to say: the rate of United States tax on dividends of United States corporations receivable by residents in the United Kingdom of the category described shall not exceed 15 per cent.—or 5 per cent. where the recipient is a corporation which is virtually the proprietor of the paying corporation, provided that in this case their mutual relations shall not have been arranged primarily to secure this reduction. And, correspondingly, United States residents of the category described are exempt from British surtax. This provision may, however, be determined separately from the Convention as a whole and in the same manner as the latter (Art. VI).

3. *Interest receivable by non-residents.* Persons resident and paying tax thereon in the one country who are not engaged in trade or business in the other are to be exempt from taxation in that other of interest derived from sources (i.e. bonds, securities, notes, debentures or any other forms of indebtedness) within that other. But this exemption does not apply to corporations controlling directly or indirectly more than 50 per cent. of the voting-power of a paying corporation (Art. VII).

4. *Royalties.* Copyright, patent, trade-mark and like royalties, including film rents, drawn by residents of one country who pay tax upon them therein are likewise exempt from taxation in the country in which they arise (Art. VIII). Mineral royalties and real property rents taxed in the country of receipt will be partially exempt (to the same extent, almost exactly, as dividends) from taxation in the country of origin (Art. IX).

5. *Salaries and pensions.* Salaries and pensions paid by the Government of the one country in respect of official services (other than services in enterprises with a view of profit) to individuals other than nationals of the other (who are not simultaneously nationals of both) are to be exempt from taxation by that other (Art. X). An individual resident in either country who receives emoluments for personal (including professional) services performed for or on behalf of a person resident in that same country is not taxable in respect thereof in the other country provided he be not there resident for periods amounting in the aggregate to more than six months in any tax year (Art. XI). In the Convention as originally signed this provision was expressed not to apply in relation to public entertainers, but by a Protocol signed on 6 June 1946 the exception was deleted. Pensions, other than official pensions, and annuities for life or for an ascertained or ascertainable term acquired for value which are derived from sources within the one country by residents in the other are not to be taxed in the former (Art. XII).

6. *Other exemptions from U.S. tax.* Residents of the United Kingdom not engaged in trade or business in the United States are to be exempt from United States tax on gains from the sale or exchange of capital assets (Art. XIV). United Kingdom corporations are to be exempt from United States tax on accumulated or undistributed earnings if more than half the voting-power during the latter part of any taxable year is controlled directly or indirectly by individuals resident in the United Kingdom (Art. XVI). Dividends and interest paid by United Kingdom corporations are to be exempt from United States tax save where the recipient is a citizen or resident of the United States or a United States corporation (Art. XV).

7. *Special exemptions.* Professors or teachers from the one country teaching in educational establishments of the other during periods not exceeding two years are to be exempt from taxation upon their emoluments in that other (Art. XVIII). And no

tax is payable in the country of receipt on remittances for the maintenance, education, or training of students or business apprentices from the other country (Art. XIX).

8. *Credits.* Subject to the detailed provisions of the general fiscal law of each country not affecting the scheme of the Convention as a whole, tax payable in the one country in respect of income arising from sources therein, including emoluments for services there performed, is to be allowed as a credit against tax payable thereon in the other country (Art. XIII).

9. *Executory provisions.* The fiscal authorities of the Parties are to exchange under conditions of secrecy such information available to them under the existing law as is necessary for the carrying out of the provisions of the Convention, the prevention of fraud, or for the administration of statutory provisions against 'legal avoidance' of taxes the subject of the Convention (Art. XX). In regard to the liability of individuals resident in the United Kingdom (other than citizens of the United States) or of United Kingdom corporations to United States income-tax, the Convention is to apply as from 1 January 1936. The liability of such categories of taxpayers in respect of earlier years may be adjusted upon certain terms satisfactory to the United States Commissioner of Internal Revenue (Art. XVII).

III

The Convention is a highly particular instrument. It enunciates no such general principle concerning the proper spheres of national taxation as was embodied in the various model conventions drafted by the Fiscal Committee of the League of Nations or in the resolutions of the International Chamber of Commerce in regard to double taxation (as to which see Ke Chin Wang, 'International Double Taxation of Income; Relief through International Agreement 1921–1945', *Harv. L. R.*, 59 (1945), p. 73). A general principle applied in a bipartite agreement of this type has of course to be translated into a form which fits the facts, but it might be thought that a more general manner of drafting would conduce to a clearer understanding of the long-term implications of the instrument in question. However this may be, it would seem that the instant Convention was primarily framed to fit the facts of the United States rather than the United Kingdom fiscal system. That this is the case is to be deduced from the virtual identity of its text with that of the United States-Canadian double taxation Agreement of 1942 (cf. Ke Chin Wang, *op. cit.*). The Convention applies the principle of source as the jurisdictional basis of taxation in a restricted number of instances, i.e.:

(1) taxation of enterprises of the one country engaged in business in the other through permanent establishments therein in respect of income accruing through such establishments (Art. III);
(2) taxation of official pensions only at source (Art. X);
(3) limited taxation at source of dividends receivable by non-residents (Art. VI).

But in all other provisions it is the principle of residence which is dominant so long as the *de cujus* be not engaged in trade or business in the country other than that in which he is resident. This is in accord with the general trend of thought and practice during the past three decades. It is an arrangement alleged to benefit creditor states rather than debtor states, though it may import compensations for the latter in the shape of greater willingness of foreign investors to invest in it and the possibility of obtaining foreign capital at low interest rates.

It is instructive to compare the Convention discussed with the Double Taxation

Agreement concluded between Britain and France in the same year (France No. 3 (1945), Cmd. 6692). The latter Agreement is of much narrower scope. It deals only with the taxation of companies with fiscal domicil in one country and carrying on business in the other, of profits accruing to residents of one country from the sale of a stock of goods or the operations of a branch or agency in the other, of profits similarly accruing through mere purchase of goods in the one country, and of Service pensions, and to all these save the third it applies the principle of source. It is also interesting to compare the Anglo-American Convention on the double taxation of incomes with the simultaneous agreement between the same Parties which has already been mentioned, namely the Convention on double taxation of estates of deceased persons. The latter instrument, unlike the Convention on income-taxes, provides for no exemptions whatsoever where an estate is taxed on grounds of the domicil of the decedent. The problem involved is evaded by a provision under which the Party imposing tax on grounds of domicil will allow deduction from the amount otherwise payable of the equivalent of what has been paid in the other country (Art. V (1)). Where each Party imposes tax on grounds of domicil each will allow deduction in respect of tax attributable to property situate in the territory of both or of neither (Art. V (2)). Where either country imposes tax upon the estate of a person dying domiciled in the other no account will be taken in its computation of property situated outside the taxing state. But this arrangement is expressed to be subject to an exception in the case of an American citizen dying domiciled in Great Britain and, in Great Britain, in the case of property passing under a disposition governed by the law thereof (Art. IV). The whole scheme, which applies only to British estate duty and United States federal estate tax, is governed by common rules respecting the *situs* of rights and interests of different categories. These rules provide that rights in or over immovables, movables, and currency shall be deemed to be situated where such items are located, stocks and shares, &c., other than government or municipal stocks, at the place where the corporation to which they relate is incorporated, debts and policies of insurance at the place where the decedent was domiciled, ships, aircraft, and patents at the place where they are registered, &c. In some instances therefore, but with the perhaps notable exception of the case of debts, the arrangement follows the principle of source rather than that of residence. In this respect, as also in that it proceeds for the most part by the method of deduction rather than that of exemption, it stands in some contrast to the Convention regarding income-taxes.

CLIVE PARRY

STATE SUCCESSION AND ACT OF STATE IN THE PALESTINE COURTS

IN the *Digest of International Law Cases for 1935/37* (p. 123) there is included a report of the case, tried in the Palestine courts, of the Heirs of Sultan Abdul Hamid against the Government of Palestine. The case, which was a subject of romance, raised also interesting questions of State Succession, Act of State, and the interpretation of treaties. It was claimed by the plaintiffs in the action that certain areas of land in Palestine, which had been registered in the name of Sultan Abdul Hamid during his reign 1876–1909, were the private property of his heirs, and that the purported transfer of these lands to the Ottoman Government by two imperial decrees or Irades, one made

by Abdul Hamid himself in 1908, the other immediately after his deposition by his successor, Sultan Mohamed Rashad in 1909, were invalid and of no effect. The Sultan had acquired vast estates in all parts of the Ottoman Empire. It was claimed also that the provision in the Treaty of Lausanne, made between the Principal Allied Powers and Turkey in 1923, by which properties transferred by these Irades were declared to be included in the Ottoman State property ceded to the successor states, was not decisive, because the successor states were by the terms of the Article 'subrogated' to the Ottoman Empire. If there was a flaw in the title of the Ottoman Empire, the heirs of Sultan Abdul Hamid were entitled to claim that the successor state was in no better position than the Turkish Government. The Government of Palestine, which had taken possession of the lands after the military occupation, and had caused them to be registered in its name in the land books when the Land Settlement was conducted, was the defendant in the action brought by the heirs for recovery of ownership and for rectification of the registers.

In that action the Palestine Land Court, composed of two judges, was divided in its opinion. The British President found for the plaintiffs on the grounds (*a*) that the imperial decrees were not legally proved, (*b*) that an Act of State should be interpreted so as not to involve confiscation of private property, and (*c*) that the Treaty of Lausanne should be similarly interpreted, because state succession should not involve confiscation of private rights. The Arab Judge was of the contrary opinion, concluding that the title of the Government of Palestine was fully established. In the end, however, judgment was given for the plaintiffs. But that judgment was held by the Palestine Supreme Court to be bad on the questions of procedure and of the onus of proof, and the case was sent for retrial. The Judicial Committee of the Privy Council, which granted special leave to appeal, upheld the judgment of the Supreme Court of Palestine, without going into the merits of the case; and the suit was remitted to Palestine. The decision of the Privy Council is reported in [1941] Appeal Cases, p. 350. After a delay caused by the war the claim was reinstated, and came again before the Land Court in Palestine in 1945. It was tried on this occasion by a single British Judge who, in January 1946, gave judgment dismissing the claim of the heirs of Sultan Abdul Hamid, and upholding the registered title of the Government of Palestine. This judgment is subject to appeal, and the appeal has been entered. But it is worth while to consider the issues of international law which were raised and decided in the Court of First Instance. They were similar to those of the first trial, but differently decided.

The Judge on this occasion found that the Turkish Imperial decrees, the Irades, were sufficiently proved. He had to consider two questions about them: (1) whether the land in dispute was covered by either of them, and (2) whether either or both were constitutional and valid. He held that the land which was the subject of the action did not pass under the earlier Irade, made by Sultan Abdul Hamid, but was covered by the schedule to the later Irade, made by the Sultan Mohamed Rashad. In his view, however, the transfer to the state by that Sultan of properties which were registered in the name of his predecessor was unconstitutional, because it amounted to confiscation of private property. He turned then to consider the submission made by the Government that the properties had been transferred by an Act of State of the Ottoman Government which could not be questioned in a British or Palestine court. It was urged that both the Irades themselves were Acts of State; and apart from that, the executive and administrative acts of the Ottoman state in taking the revenues of the land for the state budget were Acts of State which were protected from scrutiny.

On this point he pronounced in favour of the Government. He relied particularly on four cases in the English courts about the doctrine of Act of State:[1]

'The principle to be extracted from these decisions is twofold; first, that a municipal court may and should always inquire whether an alleged act of State is in fact an act of State, that is to say, whether it was the act of the foreign State in question; secondly, that if upon such inquiry it appears that the act was not the act of the foreign State when it was first done, it may still be shown to be an act of State upon proof that the original act, even if not the act of the foreign state itself, and even if legally defective, was subsequently adopted and acted upon by that State and treated on the footing that it was valid.'

He quoted a passage in *Salaman*'s case:

'An act of State is essentially an exercise of sovereign power, and hence cannot be challenged, controlled or interfered with by municipal courts. Its sanction is not that of law, but that of sovereign power, and, whatever it be, municipal courts must accept it, as it is, without question. But it may, and often must, be part of their duty to take cognizance of it. For instance, if an act is relied on as being an act of State, and as thus affording an answer to claims made by a subject, the courts must decide whether it was in truth an act of State, and what was its nature and extent.'

And there was a pertinent passage from the judgment of Scrutton L.J. in *Princess Paley Olga* v. *Weisz* at p. 722:

'There is, however, a third defence which he' (i.e. the learned judge) 'rejected, which I think should also succeed. Counsel for the defendants put in the front of his argument below and before us that, if the seizure of this property began without legal justification, or only by revolutionary right, it was ultimately adopted by a Government, which was recognised by the British Government as the lawful Government of the territory in which the property was, and that this was an act of State into the validity of which this court would not inquire.'

While the Irade of 1909 was not itself initially an Act of State, because, though it was issued by the Sultan, it had not been approved or ratified by the Ottoman Parliament, it did appear that the Ottoman State subsequently adopted the Irade, and treated it and the transfers of property which it purported to effect as valid. So the state by its act cured the constitutional defects of the decree, and made the transfers themselves acts of state which the Palestine court was obliged to accept.

In the latter part of the judgment, the Court dealt with the effect of the Article of the Treaty of Lausanne, which contained the following clause referring to the Irades:

'The State in favour of which territory was or is detached from the Ottoman Empire after the Balkan wars or by the present Treaty shall acquire, without payment, all the property and possessions of the Ottoman Empire situated therein.

'It is understood that the property and possessions of which the transfer from the Civil List to the State was laid down by the Irades of the 26th August, 1324 (8th September, 1908), and the 20th April 1325 (2nd May 1909), and also those which on the 30th October 1918, were administered by the Civil List for the benefit of a public service, are included among the property and possessions referred to in the preceding paragraph, the aforesaid States being subrogated to the Ottoman Empire in regard to the property and possessions in question. The wakfs created on such property shall be maintained.

'The provisions of this Article will not modify the juridical nature of the property and possessions registered in the name of the Civil List or administered by it, which are not referred to in the second and third paragraphs above.'

[1] *Carr* v. *Fracis Times & Co.*, [1902] A.C. 176; *Salaman* v. *Secretary of State for India*, [1906] 1 K.B. 613; *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.*, [1921] 1 K.B. 456; and *Princess Paley Olga* v. *Weisz and others*, [1929] 1 K.B. 178.

The Court had allowed the plaintiffs to produce evidence of the discussions at the Conference of Lausanne and of the previous drafts of the Article, with a view to showing that the question of private property of the Sultan's family was considered by the delegations, and that the term 'subrogated' was used with reference to these claims of private property. The Court, in fact, followed the practice of international tribunals in allowing references to the *travaux préparatoires* of a treaty with a view to clearing up any ambiguity in its terms. On this point the judge held:

'The first point is that the Article, having recited that the successor states would acquire the properties of which a transfer from the Civil List to the State was laid down by the two Iradehs, precludes this court from holding that no property was transferred by them, and thus precludes it from holding that the Iradehs were, or that either of them was, invalid. For this would amount to a holding that no properties were transferred, and the Article necessarily implies that some property did pass. It would thus be absurd to interpret the reference to 'subrogation' in the Article as implying that the heirs of Sultan Abdul Hamid could prove in the courts of any of the successor states that the Iradehs (or either of them) were invalid and therefore inoperative to pass any properties at all, thereby contradicting the immediately preceding statement in the Article that some properties had passed. It therefore seems to me that, even had I not found that the transfers effected by the Iradeh of 1909 were acts of State and therefore not to be challenged in this court, I must have held that by reason of the wording of Article 60 the validity of that Iradeh could not be challenged.'

The word 'subrogation' applied, so far as the particular suit was concerned, to allow the Court to consider whether any particular property did pass under the Irade. The Article of the Treaty transferred to the Government of Palestine only those properties which were passed from the Civil List to the Ottoman State by the Irades. But there was nothing in the discussions on the Treaty of Lausanne which could upset the natural interpretation of the words of the Article, that the imperial decrees had transferred properties of Sultan Abdul Hamid to the Ottoman State and that these properties were ceded to the Allied successor states. It was true that during the discussions a distinction was drawn between the properties of the ex-Sultan held by him in his private capacity, and those held by him in his capacity as Sultan. But since the Irade purported to transfer property held in either capacity, that distinction had no importance for the purpose of this case.

The long-drawn litigation which started twenty years ago before the Mixed Arbitral Tribunals, set up in accordance with the Treaty of Lausanne, has now entered on another stage. It may be hoped that, so far as the lands of Palestine are concerned, the final decision which will be given by the supreme appellate tribunal in this case will be the final decision.

NORMAN BENTWICH

THE CONTINENTAL SHELF

IN the *British Year Book of International Law* for 1923–4, Sir Cecil Hurst posed the question 'Whose is the Bed of the Sea?' He then cited Section 2 of the Cornwall Submarine Mines Act, 1858, which declared that all mines and minerals below low-water mark under the open sea, adjacent to, but not being part of the County of Cornwall, were, as between the Queen in right of Her Crown and the Duke of Cornwall, vested in the Queen in right of Her Crown 'as part of the soil and territorial possessions of the Crown'. This makes the Crown's right to the minerals depend upon

the Crown's title to the sea bed and subsoil. This title is not limited by the Act to the area beneath territorial waters: indeed, the outward boundary is not defined at all.

The Act was passed to deal with a specific situation and it is a pure matter of speculation to inquire into the principle of international law on which the Crown title was based. Neither the arbitral award of Sir John Patteson which gave rise to the Act nor the Act itself is entirely consistent with the theory of title by occupation. After reviewing this Act and a number of cases and opinions Sir Cecil Hurst concludes that, 'So far as Great Britain at any rate is concerned, the ownership of the bed of the sea within the three-mile limit is the survival of more extensive claims to the ownership of and sovereignty over the bed of the sea. The claims have become restricted by the silent abandonment of the more extended claims.'

The view generally held by modern authors is that the sea bed beyond the limits of territorial waters is *res nullius* over which sovereignty may be acquired by occupation.

The treatment of the submarine areas of the Gulf of Paria by treaty between the United Kingdom and Venezuela dated 26 February 1942 is in accordance with this view. By that Treaty provision was made for the division between the United Kingdom and Venezuela of the sea bed and subsoil of the submarine areas of the Gulf of Paria outside territorial waters. The Treaty itself contains no claim by either party to sovereignty over these submarine areas as against other states. Each party simply agreed not to assert any claim to sovereignty or control over those parts of the submarine areas lying on the other's side of the boundary and to recognize any rights of sovereignty or control which had been or might thereafter be lawfully acquired by the other. It is fairly clear, however, that it was the intention of both parties that each should enjoy the fruits of the areas free from the interference of other states. In fact, the waters are narrow and it is unlikely that the enjoyment of either party will ever be challenged, occupation of the sea bed and subsoil of these areas being practicable only for the United Kingdom and Venezuela.

Moreover, the submarine areas renounced by Venezuela under the treaty were annexed to His Majesty's dominions by Order in Council of 6 August 1942. This order does not refer to the Treaty, but merely recites that Venezuela has annexed certain parts of the submarine areas of the Gulf of Paria and that it is expedient that the rest of the submarine areas of the Gulf should be annexed to His Majesty's dominion. However, the definitions of the areas affected correspond with those given in the Treaty.

On 28 September 1945 the President of the United States adopted a somewhat different approach to the problem of sovereignty over the sea bed. On that date he made a formal proclamation the operative part of which was as follows:

'Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.'

This unilateral declaration does not purport to be based on any recognized and established rule of international law, but on what is reasonable and just. The reasons for the Proclamation are principally economic. This is made clear by the preamble

which emphasizes the need for new sources of petroleum and other minerals, the opinion of experts that such resources underlie many parts of the continental shelf off the coasts of the United States and the advance of modern technology making their utilization practicable. A press release made in the United States on the same day as the Proclamation points out that ore mines already extend under the sea from the coasts of England, Chile, and other countries.

There is every possibility that the resources of the sea bed and subsoil beneath the seas even outside territorial waters will become increasingly accessible and, for that reason, more valuable. The principle of international law, at present generally accepted, that the sea bed and subsoil outside the boundaries of territorial waters is *res nullius* over which sovereignty may be acquired by effective occupation may not be adequate to meet this new situation. It is a principle of rush and grab which may easily lead to disputes and inconvenient situations. A state might find it embarrassing to have mining installations of another state a short distance outside its territorial waters. On this point, the President's Proclamation states quite frankly that 'self-protection compels the coastal nation to keep close watch over activities off its shore'.

The preamble to the Proclamation also asserts that the claim to jurisdiction over the natural resources of the continental shelf by the contiguous nation is reasonable and just because 'the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore', because the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, and because 'these resources frequently form a seaward extension of a pool or deposit lying within the territory'. These are cogent arguments for regarding the doctrine of the continental shelf as reasonable and just at least where it is applicable.

In the case of the United States the doctrine is comparatively easy to apply. The continental shelf is a definite geographical feature. The sea bed falls gradually for some distance from the shore until along a fairly well-defined line it drops more rapidly to the deeps of the ocean. It is estimated that the area affected is 750,000 square miles in extent. In the press release which accompanied the Proclamation the continental shelf is, generally speaking, considered to be the 'submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms (600 feet) of water'. It is believed, however, that oil is not yet workable at depths exceeding 10 fathoms. Therefore, occupation of all parts of this shelf even by the United States does not appear to be practicable at present.

Though there are many other parts of the world whose geographical features also make the application of the doctrine of the continental shelf simple, there are many where it cannot be so easily applied. How would it apply to large gulfs or bays bordered by several states, such as the Persian Gulf? How would it apply to narrow seas such as the English Channel? Where there is no 'shelf' or the 'shelf' extends to the shores of another state or is shared with an adjacent state, it is necessary to seek some other guide. This was foreseen by the President's Proclamation which said that in such cases 'the boundary shall be determined by the United States and the State concerned in accordance with equitable principles'. This is an important qualification to the doctrine of the continental shelf. It implies that the unilateral declaration of the United States is only intended to affect areas which no other state could reasonably claim without title based on occupation. Those parts of the shelf to which neighbouring states may reasonably claim a share are to be divided by agreement. Presumably in each case the agreement would conform to the principles of the President's Pro-

clamation and would contain a joint declaration on similar lines. In express terms, the Treaty for the division of the submarine areas of the Gulf of Paria between the United Kingdom and Venezuela does not go as far as this, but its spirit is not far removed from that of the Proclamation.

Besides recognizing the need for agreement in circumstances where dispute may arise, the Proclamation says that the boundary is to be determined 'in accordance with equitable principles'. It does not say, however, what these equitable principles are. A practical solution of the difficulty was adopted in the Gulf of Paria Treaty, for the purpose of which the parties selected four points and agreed that, subject to the recognition of the existing limits of territorial waters, the boundary should be formed by the straight lines joining these four points. By Article 4, the parties agreed to appoint a mixed commission to mark the boundary line.

This, of course, does not answer the question of principle, but it is possible to suggest some answers. The submarine areas of narrow seas might be divided by a line drawn equidistant from the shores of the limitrophe states or following the deepest channel. Areas to be shared between adjacent states might be divided by a line representing the seaward extension of the land boundary or by a line drawn at right angles to the coast at the point where the land boundary meets the sea. Where a large bay or a gulf is bounded by several states the problem is more complicated. Perhaps the most equitable solution would be to divide the submarine area outside territorial waters among the contiguous states in proportion to the length of their coast lines. Even if this were adopted as a basis, it would not provide the necessary boundaries. It would probably not be possible to draw these according to any simple geometric rule. The mere seaward extension of the land boundaries certainly would not do. A more satisfactory method would be to take a point or a line, the position of which could be calculated to give the desired division of area, and to draw the boundaries of the submarine areas from the point or line to the land boundaries of the limitrophe states. The case of the Gulf of Paria shows how difficult it is to adopt any simple rule.

Whatever methods may be adopted for determining the submarine boundaries, the Proclamation comes as a timely warning that if disputes are to be avoided these boundaries should be determined either by unilateral action where this is appropriate or by agreement where this is required by geographical considerations. But assuming the boundaries to have been fixed, what is to be the nature of the right of the state which has laid claim to some area of the sea bed and its subsoil?

The answer to be deduced from the terms of the Gulf of Paria Treaty is that no legal right against third parties is claimed or acquired. It only amounts to an agreement of mutual restraint coupled with an undertaking to recognize sovereignty or control lawfully acquired by the other party. The Treaty is a fact of which third parties would in practice be bound to take notice but no more than that. It should not be forgotten, however, that both Venezuela and the United Kingdom have purported to annex their share of the submarine areas of the Gulf of Paria in accordance with the division which was made by this Treaty.

The President's Proclamation, though not explicit on this point, purports to go farther than the Treaty. It says that the United States regards the 'natural resources' of the subsoil and sea bed of the continental shelf as being subject to its 'jurisdiction and control'. It is difficult to see what distinction there is between control over the 'natural resources' and control over the subsoil and sea bed themselves. Anything of value might be included in 'natural resources', and any use or interference with the subsoil or sea bed might equally be regarded as a use of or interference with their

'natural resources'. Therefore, it does not seem that the use of this expression imports any real limitation, and the claim may be taken as relating to the subsoil and sea bed themselves. Indeed, the contemporaneous press release spoke simply of 'jurisdiction over the continental shelf'. Moreover, 'jurisdiction and control' are tantamount to sovereignty. Thus, notwithstanding the restrained language of the Proclamation, it does appear to amount to a declaration that the Government of the United States regards the sovereignty over the continental shelf as belonging to the United States.

The failure to state this expressly may have been due to the realization that a bare unilateral declaration could not, in international law, vest any legal right to sovereignty in the United States. The mere statement that the United States regards the continental shelf as subject to its jurisdiction and control is not equivalent to actual occupation or control which is necessary to found a legal claim to sovereignty according to accepted views of international law.

On the other hand, the Proclamation, like the Gulf of Paria Treaty, is a fact which other states cannot entirely ignore. Moreover, international law is not so fully developed and rigid that it is incapable of being adapted so as to recognize a claim such as that made by the United States. The doctrine of sovereignty over the continental shelf is not unreasonable in itself and is in many ways similar in principle to that of sovereignty over territorial waters. Perhaps the most important difference is that while effective control from the land can be presumed in the case of territorial waters, this is not necessarily so in the case of the submarine areas of the continental shelf. Even this is a point on which opinions may differ, and in the case of the United States it is unlikely that anyone will challenge any measures of control which it may purport to exercise over the areas to which the Proclamation applies.

Therefore, while the unilateral declaration of the United States cannot in itself create any new rights or any new rules of international law, it may be regarded as providing the seed from which such rights and rules may grow. It is submitted that general recognition and acceptance by states may perfect the rights claimed by the United States and establish new rules of international law based on the doctrine of the continental shelf.

The example set by the United States has been followed by Mexico and Argentina. The President of the Mexican Republic issued a proclamation on 29 October 1945 by which 'the Government of Mexico claim the whole of the continental platform or base adjacent to its coast'. In this respect the Mexican Proclamation is more forthright than that of the United States, but the principle is the same. One difficulty in the application of the principle is indicated by the fact that the United States Proclamation does not attempt an exact definition of the continental shelf, while the one given in the press release mentioned above differs from that given in the Mexican Proclamation which describes the continental platform as being bounded by a 'line joining points of equal depth (200 metres)'.

On the other hand, in common with the Gulf of Paria Treaty and the Order in Council of 1942, and the United States Proclamation, the Mexican Proclamation respects the freedom of navigation on the high seas above the continental shelf. According to the report in *The Times* of 11 October 1946, the Argentine Decree claims sovereignty over the Antarctic submarine platform and the water covering it. Whatever view is taken of the legal effect of the claims to the subsoil and sea bed, the claim to sovereignty over the waters outside the limits of territorial waters is clearly contrary to accepted principles of international law. It is thought that the limitation as to the waters above the submarine areas is essential if the doctrine of the continental shelf is

to receive any sort of legal blessing. There is no grave objection to a unilateral declaration which claims a *res nullius* but respects the international rights of other states: from a purely juristic point of view there is serious objection to such a declaration which purports to ignore or extinguish the rights with regard to the open sea which are enjoyed by all states in common.

Important problems may arise in this connexion when mining operations are in progress from the surface of the sea outside territorial waters. It is submitted that these works should be carefully marked and conducted so as not to impede or endanger navigation. Freedom of navigation should be respected both in fact and in law. Even if sovereignty can be acquired over submarine areas contiguous to but outside the boundaries of territorial waters, this cannot extend the limit of the territorial waters themselves. Claims may be made to new belts of territorial waters surrounding works established in the open sea. It is thought, however, that, as in the case of lighthouses, there would be no foundation for such claims.

F. A. V.

JURISDICTION OVER FRIENDLY FOREIGN ARMED FORCES: THE AMERICAN LAW

WHEN His Majesty's Government in the United Kingdom agreed with the Government of the United States to introduce the legislation which ultimately became the United States of America (Visiting Forces) Act, 1942, its agreement was not made dependent upon a formal grant of reciprocity in respect of United Kingdom forces in the territory of the United States of America. The United States Ambassador, however, informed the Foreign Secretary in a Note dated 27 July 1942 that his Government accepted the suggestion made by Mr. Eden that it would be agreeable if the Government of the United States were to state its readiness to take all steps in its power to ensure to the British forces concerned a position corresponding to that of United States forces in the United Kingdom under the arrangement which His Majesty's Government were proposing to make. When His Majesty's Government later asked the United States Government if it would make similar arrangements for British forces in United States territory, the United States agreed to do so but stated the view that, under international law and the law of the United States, United Kingdom service tribunals already had primary jurisdiction in criminal cases over members of the United Kingdom armed forces stationed in or passing through United States territory. Accordingly, they considered that no legislation was necessary to confer this jurisdiction and that it merely needed implementation by the provision of procedural machinery. The reasoning in support of this view may be summarized as follows.

The jurisdiction of the United States within its own territory—ordinarily absolute and exclusive—is limited as regards members of a friendly foreign force within the United States with the consent of the United States Government, by a rule of international law derived from 'the common consent of nations'. There is no need for the United States Government to impose by legislation any restrictions in this regard. Its formal consent to the imposition of the restriction is not required, although its consent to the admission to United States territory of the members of the friendly force is a prerequisite to the application of this rule of international law.

Although most of the early writers on international law make no reference to the immunity from local jurisdiction of members of foreign armed forces in the territory of a state with the latter's consent, this is probably because such immunity was taken

for granted. Vattel makes one reference to the matter.[1] Most modern British and American authorities deal with the question and recognize the existence of some such rule.[2] French, German, and Italian writers on international law recognize the rule too.[3]

Some writers limit the immunity to certain places and certain times. For example, Oppenheim[4] states that the rule 'applies only in case the crime is committed either within the place where the force is stationed, or in some place where the criminal was on duty; it does not apply, if, for example, soldiers belonging to a foreign garrison of a fortress leave the *rayon* of the fortress, not on duty but for recreation or for pleasure, and then and there commit a crime'. The local authorities are in that case competent to punish them.[5]

But the better view is that the opinions of these writers are against the weight of authority and contrary to the reason for the immunity, and are too vague and indefinite to be considered rules of law; for example, Oppenheim's qualification would make the jurisdiction of the military authorities dependent on the range of the guns of the fortress. Similarly, 'the place where the force is stationed' might mean the barracks, the city, the state, or the whole country. The phrase 'on duty' is questioned, too, because a soldier on leave for 'recreation or pleasure' is still under the orders of his superior officers and subject to military law. The supposed qualifications probably arose out of garrisoning troops in places limited or defined by agreement; then the forces would not have the consent of the sovereign to go outside that area, and so the supposed qualification is really in harmony with the rule.[6]

Judicial support for the broader view is derived from an *obiter dictum* of Chief Justice Marshall in *The Schooner 'Exchange' v. McFaddon.*[7] The case arose from a libel filed in the United States District Court for the District of Pennsylvania against the *Exchange*, alleging that McFaddon and Greetham were owners of the vessel and had been forcibly deprived of it by persons acting under orders of the Emperor of France. The District Court dismissed the libel on the ground that the public armed vessel of a friendly foreign sovereign is not subject to the jurisdiction of the United States courts. On appeal, the Circuit Court reversed the judgment. A further appeal was brought before the Supreme Court of the United States. In the course of his judgment therein the Chief Justice said:[8]

'A third case in which a sovereign is understood to cede a portion of his territorial

[1] *The Law of Nations*, vol. iii, ch. vii, sec. 130 (Carnegie Institution of Washington, 1916).

[2] Hall, *International Law* (8th ed.), pp. 237, 250, 251; Wheaton, *International Law* (6th ed.), vol. i, pp. 234, 235; Westlake, *International Law*, vol. i, pp. 264–5; Travers Twiss, *The Law of Nations* (1884), pp. 271–2; Phillimore, *International Law* (3rd ed.), vol. i, pp. 460, 474; Holland, *Lectures on International Law* (1933), pp. 148–9; Lorrimer, *Institutes of the Law of Nations* (1883), vol. i, p. 260; Wildman, *Institutes of International Law* (1849), vol. i, p. 66; Hannis Taylor, *Treatise on International Public Law* (1901), p. 207.

[3] Calvo, *Le Droit International* (1896), vol. iii, p. 341; Foelix, *Droit International Privé* (1866), vol. ii, p. 263; Travers, *Le Droit Pénal International* (1921), sec. 879; Holtzendorff, *Handbuch des Völkerrechts* (1887), p. 664; Heyking, *L'exterritorialité* (1889), pp. 153, 156; Adinolfi, *Diritto Internazionale Penale* (1913), secs. 115–16.

[4] *International Law* (1920), vol. i, sec. 445.

[5] See also Strupp, *Éléments du Droit International Public* (2nd ed.), p. 243; Despagnet, *Droit International Public* (1905), sec. 264; Bonfils, *Manuel de Droit International Public* (6th ed.), sec. 266; Fiore's *International Law Codified* (Borchard, 1918), secs. 389, 392.

[6] See von Praag, *Juridiction et Droit International Public* (1915), sec. 246. Raymond Robin, *Des Occupations militaires en dehors des occupations de guerre* (transl. Carnegie Endowment for International Peace, 1942), pp. 156, 161.

[7] 7 Cranch 116 (1812).

[8] At p. 140.

jurisdiction is where he allows the troops of a foreign prince to pass through his dominions. In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and dispositions of this force. The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the Government of his army may require.'

This view was approved by Mr. Justice Field in dicta in two later cases in the United States Supreme Court, *Coleman* v. *Tennessee*[1] and *Dow* v. *Johnson*.[2] In the first case, Field J. said:

'It is well settled that a foreign army, permitted to march through a friendly country, or to be stationed in it by permission of its government or sovereign is exempt from the civil and criminal jurisdiction of the place.'

Gray J., dissenting in *Tucker* v. *Alexandroff*,[3] used the same language.

In *Hamilton* v. *McClaughry*,[4] a private in the United States Army stationed in Peking, China, for the purpose of protecting the United States Legation during the 'Boxer Uprising', shot and killed another soldier of his regiment, for which he was tried by court martial and convicted. He sought release from imprisonment by means of a writ of habeas corpus. The Circuit Court for the District of Kansas said that the offender was not amenable to the laws of China and that the offence was 'not committed in violation of any law of China, because done by persons in the military service' of the United States, while stationed in China. This appears to be partially erroneous, because there is, it is submitted, under the rule here discussed, only immunity from the jurisdiction of the local courts—not an exemption from application of the local laws, to which a soldier would be subject concurrently with his subjection to military law. The Court was, it is thought, not directing its attention to the rule when it said that the punishment must be imposed by a United States court martial 'or the offender go unpunished; and this is true, whether the military occupation of China by the forces of this Government was by or against the consent of the Government of China'. The statements must refer to the operation of extra-territoriality in China at that time. The statements might be accurate also if the occupation were against the consent of the Government of China, because then the force would have been hostile and not subject to the local jurisdiction. It is thought, however, that the members of a friendly foreign force are subject both to their own service laws and to the laws of the territory where they are stationed with the consent of the sovereign. But they are immune from the local jurisdiction over offences committed by them against either set of laws, unless their commanding officer waives the military jurisdiction in which case the member of the force over whom jurisdiction is waived may be tried by the local courts for an offence against the *local* law.

A decision of the Supreme Court of Panama on this subject is reported in translation in *American Journal of International Law*, 21 (1927), at p. 182: *The Republic of Panama* v. *Wilbert L. Schwartzfiger*, [1926] 24 Registro Judicial 772. An ambulance driven by a United States soldier (on duty) in Colon, Panama, became involved in an

[1] 97 U.S. 509 at p. 515.
[2] 100 U.S. 158 at p. 165.
[3] 183 U.S. 424 at p. 459.
[4] 136 Fed. 445.

accident, as a result of which a man was killed. The Supreme Court of Justice of Panama held that the soldier was not amenable to the jurisdiction of the courts of Panama and said:

'It is a principle of international law that the armed force of one state when crossing the territory of another friendly country, with the acquiescence of the latter, is not subject to the jurisdiction of the territorial sovereign but to that of the officers and superior authorities of its own command.'

The Court, however, also said that the members of 'those forces when acting in the name of or on behalf of the Government of the United States, are subject to the authority and jurisdiction to which they belong, and not to our national authorities; nor to both simultaneously, because such a double jurisdiction is contrary to law'. By this language, the Court appears to confine the rule to wrongs committed while 'on duty'.

This subject is discussed in an article entitled 'Jurisdiction over Friendly Foreign Armed Forces' by Colonel Archibald King in *American Journal of International Law*, 36 (1942), p. 539, in which the writer concludes 'that the general principle is abundantly established by reason, authority, and precedent, that the personnel of the armed forces of Nation A, in Nation B by the latter's invitation or consent, are subject to the exclusive jurisdiction of their own courts martial and exempt from that of the courts of B, unless such exemption be waived'.[1]

The result of the American view stated above was that the American equivalent of the Visiting Forces legislation in the United Kingdom deals only with matters of procedure.

Public Law 384, 78th Congress (Chapter 326, 2nd Session), brought into force as regards United Kingdom armed forces by Presidential Proclamation No. 2626 of 11 October 1944,[2] assumes the existence of this exclusive jurisdiction under international law and implements it. That this is the legislative intent is clear from the debate in the Senate reported in *Congressional Record* for 22 June 1944, pp. 6569 ff. (especially p. 6577, second column, Senator Revercomb). The Act provides for the arrest of offenders by United States civil and military authorities and their surrender to the foreign armed forces concerned, enables federal courts to compel the attendance of witnesses before foreign service tribunals sitting in the United States, ensures the immunity of the members of the tribunals and witnesses, and makes provision for the imprisonment of offenders sentenced by foreign service tribunals in institutions maintained by the United States Government for the detention or treatment of prisoners.

M. E. BATHURST

TREATIES AS A 'SOURCE' OF INTERNATIONAL LAW

THE effect of any treaty in leading to the formation of rules of international law depends on the nature of the particular treaty concerned.

At the outset there is the familiar but important distinction between the two types of treaties: (1) the 'law-making' treaty, and (2) the ordinary contractual type of treaty, or as it is put more compendiously in French, between *traités-lois* and *traités-contrats*. The 'law-making' treaty is represented by the number of multipartite instruments concluded during the last half-century, laying down rules binding a large number of

[1] At p. 567. [2] 9 Federal Register 12403.

states, such as for example The Hague Conventions and the various Conventions concluded under the auspices of the League of Nations and the International Labour Office. The *traité-contrat* is generally speaking a bilateral treaty, or treaty between a few parties only, directed to a special object affecting the particular interests of the signatories.

The distinction has been discussed from the scientific standpoint by several writers, and classically by Bergbohm and Triepel. Bergbohm drew a line between two classes of international agreements: (*a*) agreements embodying legal transactions (*Rechtsgeschäfte*) which establish or annul subjective rights and do not constitute 'sources' of objective international law, (*b*) agreements by which states lay down certain general rules determining their conduct for the future; such agreements, according to Bergbohm, are not to be regarded as contractual in their essential nature.[1] Similarly, Triepel in his celebrated *Völkerrecht und Landesrecht* differentiated between the *Kontrakt* or agreement *simpliciter*, and the *Vereinbarung* or union of wills whereby the states parties agree to set up a rule of general conduct for the future.

'Law-making' treaties

It is of the essence of a 'law-making' treaty that its provisions are *directly* a source of international law, whereas this is not the case with the *traité-contrat* which purports only to lay down special obligations between the states parties.

The problem in most cases is to determine whether or not a treaty is of a 'law-making' character. Every multipartite instrument is not necessarily 'law-making'. Moreover, it is a condition precedent of a treaty operating as a 'law-making' instrument that it has actually entered into force, or in other words has been ratified by the requisite number of states parties; frequently unratified treaties or conventions are referred to as 'law-making', or as 'international legislation', but this is quite incorrect.

It is not easy to provide a satisfactory definition of a 'law-making' treaty. Oppenheim[2] has essayed a definition in these terms:

'. . . such treaties . . . as stipulate new general rules for future international conduct or confirm, define, or abolish existing customary or conventional rules of a general character. Such treaties may conveniently be called *law-making treaties*.'

Brierly's definition is somewhat similar:[3]

'. . . those which a large number of states have concluded for the purpose either of declaring their understanding of what the law is on a particular subject, or of laying down a new general rule for future conduct, or of creating some international institution.'

Both definitions suffer from an element of vagueness which is inherent in the nature of the subject. Practically, there is little difficulty in determining whether a particular multipartite treaty falls within the category of 'law-making' instruments.

Several jurists have opposed the use of the expression 'law-making' treaties. In their view, the instruments which have been dubbed 'law-making' or 'international legislation' are purely of a contractual character; the rules therein laid down are conformed to not because they represent objective international law, but because of the contractual obligations assumed by the states parties. An expression like *traité-loi* offends against the doctrine that treaties depend ultimately on consent, and suggests that the wills of the states signatories are of subordinate importance only. The critics

[1] *Staatsverträge und Gesetze als Quellen des Völkerrechts*, at pp. 77 ff.
[2] Oppenheim, *International Law* (5th ed. 1937), vol. i, at pp. 25–6.
[3] Brierly, *Law of Nations* (3rd ed. 1942), at p. 47.

of the term 'law-making' treaties resent the objective element implicit in the expression, and denounce it as contrary to the subjective, consensual element, which they imply is the dominant consideration.

A convincing answer to this criticism has been given by Scelle in his *Théorie Juridique de la révision des traités.*[1] There he pointedly dealt with the question: Are treaties really contracts? He noted that if we consider what happens in the sphere of municipal law, it is obvious that every agreement or conjunction of wills is not necessarily a contract; for example, agreements of wills like the judgment of a court composed of two or more judges, and the majority required in a legislative chamber to pass an Act of Parliament. Such legal acts are quite distinct from contracts; distinct, inasmuch as they are impersonal, abstract, and general, whereas the contract is nearly always personal, concrete, and particular. Applying this analogy, it would be clearly insufficient to describe certain treaties or conventions as contracts. This amounts almost to a truism; it might be as accurate to say after having executed a specific form of deed before a notary, that a notarial act has been drawn up. The important point in treaties is not the particular form of execution employed, but the substantial transaction which the contracting states had in mind, and the legal results which flow directly from the instrument agreed to.

Pursuant to this reasoning, Scelle proceeded to consider the provisions of the Treaty of Versailles, 1919. On closer examination, as he showed, the Treaty consisted *inter alia* of the following: (*a*) provisions laying down principles of international constitutional law such as those embodied in the Covenant of the League of Nations; (*b*) international legislative measures such as those regulating the rivers, straits, and canals; (*c*) provisions having the character of administrative regulations such as those relative to the plebiscites.[2] More important than the contractual aspect of the Treaty of Versailles were the substance and true effect of its provisions. Similar considerations would apply to the examination of any particular treaty, the real effect of the treaty being the matter of paramount importance. If a treaty lays down general rules of law, if in other words it is a 'law-making' instrument, the fact that it is in the consensual form of a treaty or convention is of secondary significance.[3] Perhaps Scelle overemphasizes an excellent case by contending that practically all treaties are 'law-making', and by referring in this spirit to 'la distinction un peu trop simpliste entre traités-lois et traités-contrats'.

The true effect of a 'law-making' treaty has been discussed less elaborately but no less scientifically by Bourquin.[4] Bourquin distinguished two operations in the conclusion of a 'law-making' treaty: (1) a 'legislative' act consisting in laying down a rule or rules; (2) the undertakings of the contracting parties to conform to the rule or rules. The second operation is really subsidiary to the first.

Although the obligations of the contracting parties may be a secondary consideration to the substantive effect of the provisions of the convention, the number and importance of the contracting states have none the less an important bearing on the question whether the convention is or is not 'law-making'. True, it is not necessary that, to be 'law-making', conventions should bind all states in the international community. There are a large number of conventions which by virtue of their subject-matter can only interest a limited number of states, and it would seem sufficient if all the interested

[1] At pp. 38 ff.

[2] Note a similar classification of 'law-making' treaty provisions by McNair in 'The Functions and Differing Legal Character of Treaties', in this *Year Book*, 11 (1930), at pp. 112 ff.

[3] Ibid., at p. 41.

[4] *Hague Recueil*, 35 (1931), at p. 57.

states are parties to the conventions affecting them. Whaling (since a limited number of states participate in this industry), European waterways, export of wheat, export of sugar, are a few examples of interests limited to a certain number of states only, and which have constituted the subject of international treaty. But, in general, to be 'law-making', a treaty or convention should be adopted by almost all the great states of the world. The practical considerations affecting this question have been stated by Sir Frederick Pollock[1] as follows:

'There is no doubt that, when all or most of the great Powers have deliberately agreed to certain rules of general application, the rules approved by them have very great weight in practice even among states which have never expressly consented to them. It is hardly too much to say that declarations of this kind may be expected in the absence of prompt and effective dissent by some Power of the first rank, to become part of the universally received law of nations within a moderate time.'

This suggests that in certain cases the universal operation of a 'law-making' treaty may in effect be due to the same principles which govern the crystallization into custom of usages adopted by nearly all the great Powers.[2]

No doubt it becomes bewildering when the number of states bound by so-called 'law-making' treaties varies widely in particular cases. Oppenheim's solution was to lay down three categories of international law depending on the extent to which the treaties or conventions in question had been adopted. The first category was *particular* international law when the instruments were concluded by a few states only. The second category was *general* international law where the majority of states, including the leading Powers, were parties to the convention.[3] As regards the third category, termed *universal* international law, the condition laid down by Oppenheim was that 'all or practically all the members of the Family of Nations' were parties to the instruments.

Treaty-contracts (Traités-contrats)

In contrast to 'law-making' treaties, the contractual types of treaty, the *traités-contrats*, are not directly a source of international law. Given certain conditions, such treaties may lead to the formation of rules of international law, but this depends almost entirely on the operation of principles governing the development of international custom.

There are three cases to be considered:

(*a*) A series or a recurrence of treaties laying down a similar rule may produce a principle of customary international law to the same effect. Such treaties are thus a step in the process whereby a rule of international custom emerges. As Wheaton has said:[4]

'What has been called the positive or practical law of nations may also be inferred from the treaties; for though one or two treaties, varying from the general usage and custom of nations, cannot alter the international law, yet an almost perpetual succession of treaties, establishing a particular rule, will go very far towards proving what a law is on a disputed point. Some of the most important modifications and improvements in the modern law of nations have thus originated in treaties. . . .'

[1] 'The Sources of International Law', *Columbia Law Review* (1902), at pp. 511–12.

[2] Cf. *The Scotia*, 14 Wallace 170.

[3] Op. cit., vol. i, p. 26. Cf., as regards the first two categories, Article 38 (1) of the Statute of the International Court of Justice where the Court is directed to apply: 'International conventions, whether *general* or *particular* establishing rules expressly recognised by the contesting states.'

[4] *International Law* (Carnegie Endowment Edition), at p. 21.

This function treaties share with state practice, with diplomatic declarations, judicial decisions of municipal prize courts, and instructions issued by states to their diplomatic representatives and military commanders. An illustration is the series of bilateral extradition treaties concluded during the nineteenth century, from which such general rules as those that the nationals of the state demanding extradition and nationals of third states are extraditable were deduced and became established.

Before a particular rule of law can be spelled out of a series of treaties, the same tests as in respect of the growth of a customary rule of international law must be satisfied. It must in other words be shown that the rule which is claimed to exist as a matter of deduction from a repetition of treaties is one generally recognized by the international community.[1] Thus in *The Lotus* case[2] the French Government claimed before the Permanent Court of International Justice that a rule of exclusive jurisdiction of the ship's flag in collision cases was deducible from the various treaties or conventions 'creating exceptions to the principle of the freedom of the seas by permitting the war and police vessels of a state to exercise a more or less extensive control over the merchant vessels of another state, but reserving jurisdiction to the courts of the country whose flag is flown by the vessel proceeded against'. The Permanent Court held by a majority, however, that by these treaties no recognition of a general principle of international law was involved; in other words, the *opinio juris* necessary for a customary rule of international law was not present. The Court pointed out that these treaties or conventions related to matters of a *particular* kind closely connected with the policing of the seas, such as the slave trade, damage to submarine cables, fisheries, &c., and not to common-law offences. Moreover, the offences envisaged by these instruments concerned only a single ship, and it was impossible to make deductions therefrom as to matters concerning two ships and therefore the jurisdiction of two different states.[3]

(*b*) It may happen with a treaty originally concluded between a limited number of parties only that a rule in it be generalized by subsequent independent acceptance or imitation. In this case, the treaty represents the initial stage in the process of recurrence of usage by which, in general, customary rules of international law have evolved. Thus, for instance, the rule 'free ships, free goods' first appeared in a treaty of 1650 between Spain and the United Provinces, and became established only at a much later period after a long process of generalization and recognition.[4] The possibility of such a development is one recognized by leading authorities on international law. In one interesting discussion on the Panama Canal Question, Oppenheim, for example, expressed the hope that the Canal should have been in use for such a length of time 'as to call into existence—under the influence and working of the Hay–Pauncefote Treaty—a customary rule of international law according to which the Canal is permanently neutralized and open to vessels of all nations'.[5]

[1] Cp. Article 38 (2) of the Statute of the International Court of Justice where the Court is directed to apply: 'International custom, as evidence of a general practice accepted as law.'

[2] *P.C.I.J.*, Series A, No. 10.

[3] Ibid., at p. 27.

[4] Hall, *International Law* (8th ed.), at pp. 752 ff. Cf. also the case of the unratified Declaration of London, 1909, which was recognized and applied by the belligerent Powers in the First World War (Hackworth, *Digest of International Law*, vol. i, pp. 19–20).

[5] *The Panama Canal Conflict* (2nd ed. 1913), at p. 46. Note also the explanation of Reddie that a treaty provision may 'by subsequent imitation and adoption without special stipulation . . . have become a rule of common and consuetudinary international law' (cited by Roxburgh, *International Conventions and Third States*, at pp. 74–5). Cf. also the judgment of the Permanent Court of International Justice in *The Wimbledon* (*P.C.I.J.*, Series A, No. 1, at p. 25).

(*c*) Treaties may, without necessarily being links in the chain by which a customary rule of international law is formed, be of considerable evidential value as to the existence of the rule. Certain treaties may record the assent of states to propositions which have crystallized into law by an independent process of development. The treaty itself is an instrument possessing greater authority and solemnity than other materials which are used as evidence for a particular rule.[1] Phillimore noted that it is 'a sound maxim that a principle of international law acquires *additional* force from having been solemnly acknowledged as such in the provisions of a Public Treaty'.[2] The evidential value of treaties is such that they often have a negative operation. Sir Frederick Pollock,[3] for instance, drew attention to the fact that treaties and conventions may not only go to show, according to the nature of the case and of particular circumstances, the existence of a general custom which the parties wished to record, but also the *absence* of any settled custom at all antecedent to the instrument.

If illustration be necessary of this type of treaty, it is to be found frequently in bilateral treaties of commerce and navigation, of extradition, and of civil procedure, which all in terms provide recognition of many established rules of international law.

To sum up, the operation of treaty-contracts (*traités-contrats*) in the creation of rules of international law is generically part of the process whereby usage and practice crystallize into custom, and because of the peculiar authority of treaties the process is invested with additional value and weight. For this reason, apart from their constitutive effect, these treaties may often be of considerable evidential importance.

J. G. STARKE

MODERN BLOCKADE: SOME LEGAL ASPECTS

I

THE object of this Note is to investigate certain legal aspects of modern blockade as applied in the Second World War, with a view to considering how far prize law can be utilized in enforcing the rule of law. It is therefore convenient, by way of introduction, to examine briefly the place and functions of prize law in the laws of war and neutrality, and the changes that have occurred in the basic features of prize law.

In the past, the administration and application of international law of war, whether by prize courts or by governments, were faced with serious difficulties in reconciling the claims of belligerents with those of neutrals. The problem has always been complicated by the political, economic, geographic, or strategic importance of neutrals in modern major wars. In its essence the problem can be stated quite simply: belligerents, because their very existence is at stake in the outcome of the war, demand to be allowed to use all the means at their disposal to bring about the defeat of the enemy. In maritime warfare this includes the right to use their sea power in such a way as to sever completely all the enemy's sea-borne trade, for, as Lord Parker has put it, one of the greatest advantages of sea power is the ability to cripple an enemy's external trade.[4] Neutrals, on the other hand, demand to be allowed to continue their proper

[1] Hall, op. cit., at pp. 7–8, discussed the view supported by Hautefeuille, Calvo, and Ortolan, that treaties have a more special authority than other acts which lead to the formation of international law, and that because of this authority their influence may reach out to non-parties in respect of the creation of rules of international law. He dismissed this view as essentially unsound, and strenuously urged that treaties were limited in their operation and effects.

[2] Phillimore, *Commentaries upon International Law*, vol. i, at p. 53.

[3] Pollock, 'The Sources of International Law', *Columbia Law Review* (1902), at pp. 511–12.

[4] *The Roumanian*, 1 B. & C.P.C. (British and Colonial Prize Cases), 536 at p. 545.

trade relations with both belligerents with the minimum of interference from either. At sea this implies their right to continue their sea-borne trade with both of them.

The difficulties inherent in this situation have been fully appreciated both in the British Prize Court and by governments: for example, Sir Samuel Evans in a striking passage in *The Leonora* pointed out that 'the object—and the legitimate object—of a belligerent is to destroy or cripple the enemy's commerce. The result—and the inevitable result—to neutrals is interference with their trade.'[1] Lord Sumner, in delivering the opinion of the Privy Council in *The Stigstad*, was more blunt:[2]

'Neutrals whose principles or policy lead them to refrain from punitory or repressive action of their own may well be called on to bear a passive part in the necessary suppression of courses which are fatal to the freedom of all who use the seas.'

Both in 1914 and in 1939 the neutral standpoint was well stated by the Government of the United States. In 1914 the Department of State wrote:

'The existence of war does not suspend trade or commerce between this country and those at war. The right to continue trade with belligerents is upheld by the well-recognised principles of international law, subject to the exceptions herein noted. . . .'

In 1939 it gave expression to a similar view:

'This Government . . . desires that its trade with neutral countries proceed with the least possible disturbance due to the existence of a state of war in Europe. As regards trade of neutral countries . . . with the United States, it should be fully understood, as has already been publicly announced, that this Government reserves all rights of the United States and its nationals under international law, and is not to be understood as endorsing any principle of interference with trade of genuine neutral character.'[3]

These two sets of quotations illustrate the point which Professor Brierly has recently emphasized, namely, that experience taught states that when they were at war they could not simply prosecute their war without any regard to the interests of other states not involved in it, and, conversely, that neutral states learned that they could not insist on retaining their full peace-time freedom of action in total disregard of the interests of belligerents.[4]

It is a comparatively modern notion that neutrals have rights against belligerents, who are under corresponding duties to neutrals. The growth of this idea parallels the growth of the commercial liberalism of the eighteenth and nineteenth centuries, and it is significant that it is accompanied by a continuous weakening of the old distinction between just and unjust wars.[5] From the starting-point that no third

[1] 3 B. & C.P.C. 181 at pp. 202–3.

[2] 3 B. & C.P.C. 347 at p. 352. This sentence occurs in a passage analysing the function of the Court when examining the validity of an Order authorizing reprisals.

[3] See Hackworth, *Digest of International Law*, vol. vii (1943), p. 8. In a Note of 10 September 1939 to the State Department, the British Government stated that they intended to 'use their best endeavours to facilitate innocent neutral trade so far as consonant with their determination to prevent contraband goods reaching the enemy. They will be compelled to use their belligerent rights to the full . . .' (ibid., p. 7). On 23 September 1939 the British Ministry of Information issued a statement containing the following passages: 'Neutrals have a perfect right to trade with Germany, but equally Great Britain has by international law the right to intercept, if she can, contraband goods destined to Germany, even if those goods are to pass through neutral countries on their way there. . . . It is not to be expected that any belligerent will stand by and allow the enemy freely to import the means of carrying on the war' (*Bulletin of International News* (1939), part ii, p. 1040).

[4] Brierly, *The Outlook for International Law* (1945), p. 23.

[5] Brierly, op. cit., p. 26; Hackworth, op. cit., p. 345.

party can claim rights against a belligerent whose cause is just, we have arrived at the position where not only a state may legitimately stand aside from a war, however just is the cause of one side, but also that such a neutral state may claim to carry on as far as possible normal trade relations with all belligerents and all other states.

This process is well illustrated in the history of prize law.[1] Originally, it seems, prize proceedings were a disciplinary process where complaint was made regarding the exercise or the mode of exercise of belligerent rights on the sea, especially by privateers, after states had come to realize that there is no analogy, in so far as private property is concerned, between war on land and war on the sea.[2] In the course of time, however, prize proceedings have become an important element in maritime seizure. Indeed, the decree of a prize court is conceived to be an essential document of title whenever there has been a seizure *jure belli*.[3] The exact procedure was described in 1914 by the then Attorney-General, Sir John Simon, in *The Chile*:[4]

'Under the old practice[5] the captors applied for a condemnation of the ship, but if a decree of condemnation was made it decreed a good and lawful prize to the Crown and it was by a subsequent act of the Royal judgment and discretion that the proceeds might be distributed among those more immediately responsible for its capture.'

At the same time, as commercial dealings grew in complexity, and the body of international law itself expanded both by means of new conventional arrangements and by the increased volume of case law in the eighteenth and nineteenth centuries, the work and influence of the prize court, and the law which it applied, extended. Once the principle was universally accepted that whenever there has been a maritime seizure *jure belli* a decree of the prize court must appear as a document of title, the prize court was at hand as a convenient vehicle to examine and pass upon the conflicting claims of belligerent and neutral and to indicate what belligerents would regard as the legitimate rights of neutrals; and decisions of prize courts have been the main source of international law on these topics.

Nevertheless it must be recognized that the practice of states shows considerable divergence in their particular rules of prize law, and in their attitude to the nature and extent of belligerent rights at sea. Both in the Napoleonic wars of the last century and the two World Wars, the struggle has essentially been one between a European sea power and a European land power, and in every case the sea power has ultimately triumphed.

As the result, there have emerged several conceptions of prize law. Great Britain insists on the maximum of belligerent rights at sea.[6] Continental Powers not only

[1] For the emergence of English Prize jurisdiction see Holdsworth, *History of English Law* (5th ed.), vol. i, pp. 56 ff.

[2] Wheaton (7th ed.), vol. ii, p. 290.

[3] *The Flad Oyen*, 1 [1799] English Prize Cases 78: 'A neutral purchaser in Europe during war does look to the legal sentence of condemnation as one of the title deeds of the ship if he buys a prize vessel' (*per* Lord Stowell). International tribunals have assumed a similar attitude: see *Dutfoy* v. *Germany*, [1923] quoted in Schwarzenberger, *International Law*, vol. i (1945), p. 306.

[4] 1 B. & C.P.C. 1 at p. 4.

[5] Particularly before the abolition of privateering.

[6] J. A. Spender, in *Great Britain, 1886–1935*, remarks that 'As the chief Naval Power, Great Britain before the war had stood for the largest belligerent rights in time of war, and as the principal presumptive neutral, the United States stood for "the freedom of the seas" in war as in peace' (p. 526). Elsewhere he points out that the aim of the British Government in the negotiations preceding the Declaration of London was to 'appease foreign and neutral opinion which had been chilled and alienated by their blunt refusal in the previous year to recognise the "freedom of the seas"' (ibid., p. 266). The reference is to the British attitude to the Russo-Japanese war.

lemand for themselves less than Great Britain, the precise extent of their demands lepending upon the scope of their oversea interests and the degree to which they ıre dependent upon oversea trade for their power to wage war; they also resent the vide rights demanded by Great Britain. The neutral standpoint has been consis-ently championed by the United States, and, on isolated occasions, by Great Britain ıerself.[1]

With the various attempts to codify international law, particularly the laws of war, luring the nineteenth century considerable attention was paid to prize law, and a ;eries of conventions, commencing with the Declaration of Paris of 1856, attempted o lay down internationally acceptable rules of prize law. In the process international aw has proceded farthest from the early conception of a just and unjust war, for not ɔnly does the right to be neutral now appear as an absolute one regardless of the nature ɔf the war, but the rights and duties of neutrals and belligerents to each other are :arefully defined. This is not surprising. In both the Napoleonic wars and the American Civil War there had been influential neutrals who themselves were strong naritime Powers, and it was from the neutral point of view in general, and from that ɔf international commerce in particular, that most of the discussions on prize law ɔroceeded.[2]

II

The grounds upon which ships and cargoes can be condemned in prize are com-ɔaratively limited—indeed too limited for modern conditions. While there is broad ıgreement between states as to what these grounds are, there is considerable dis-ıgreement as to their precise interpretation and delimitation. The means by which ı belligerent who possesses a fleet had, up to the time of the First World War, nterfered with the commerce of his enemy were three in number: (i) the capture of :ontraband of war on neutral ships; (ii) the capture of enemy property at sea; (iii) a ɔlockade by which all access to the coast of the enemy is cut off. The second of these ɔowers has been cut down since the Napoleonic wars by the Declaration of Paris of 1856, under which enemy goods on a neutral ship, with the exception of contraband ɔf war, were exempted from capture.[3] Although previously accepted rules referring :o each of these categories were widely extended during the First World War, particu-larly in the sphere of contraband and of the new developments in the doctrine of :ontinuous voyage, they were insufficient in the light of modern conditions. In ɔarticular, they did not cover those imports to and exports from Germany which fell ɔutside these categories. By way of self-help a number of remedies, outside the scope ɔf the prize court, but legal by the rules of international law, were brought into force to support the fleet in its efforts to prevent infringements of belligerent rights by neutrals. We are not here concerned with these remedies, though mention may be made of the improved machinery of contraband control initiated in 1916 with the

[1] See, for example, correspondence between the British and French Governments regarding the treatment of rice as contraband in the Franco-Chinese war of 1885 (Cd. 5520, Misc. No. 2 of 1911).

[2] It is interesting to notice how British commercial interests opposed the Declaration of London of 1909. Prominent among the objections was the fear of harm to British commercial interests if Britain were neutral in a war waged under the régime established by the Declaration. See Correspondence and Further Correspondence relating to the Declaration of London in Parl. Papers, Misc. No. 4 (1910), Cd. 5418 and Misc. No. 8 (1911), Cd. 5718.

[3] Statement of the Measures adopted to intercept the sea-borne commerce of Germany, Misc. No. 2 (1916), Cd. 8145, para. 2.

invention of navicerts.[1] These measures, however, were not strong enough to prevent enemy imports and exports which fell outside any of the above-mentioned categories. This essential weakness in British economic warfare which was based on the traditional rules of prize law required, if it was to be remedied, more than sporadic measures of self-help. It needed a new legal régime. This régime was found in the measures introduced, under the doctrine of retaliation, by a series of Orders in Council[2] the effect of which was to subject to detention goods (not being contraband of war) consigned to or from any German port and the ultimate destination or ultimate origin of which was Germany. By a further Order of 16 February 1917[3] the definitions of enemy destination and enemy origin were narrowed, and confiscation was substituted for detention as the penalty. This whole system is conveniently known as the 'long-distance blockade'.

Upon the outbreak of the Second World War in 1939 the legal régime, which included all the developments of the First World War, with the exception of that part of it which was based on retaliation, as well as the extra-legal measures of self-help, were resumed with great rapidity. A blockade of Germany was established, based in the main on a system of contraband control.[4] But whereas in 1914–18 the 'battlefield' of economic warfare was, to a large extent, the high seas themselves, in 1939 the emphasis of the struggle was shifted as it were from the high seas to dry land, to the German frontier. 'We seek . . . to put our barrier round German occupied territory. The more we can succeed in shifting this barrier from the sea approaches to the Continent to the actual German frontier, provided always that the efficiency of our control is in no wise relaxed, the fewer will be the delays to neutral shipping and the greater the convenience to bona fide neutral trade.' In these words did the Minister of Economic Warfare describe his policy early in the war.[5] When the German frontier became coextensive with the European coastline it naturally became the object of the blockade to permit only allied trade on the high seas. The same is true of the war against Japan.

It will be noted that, despite the obvious importance, in the light of the experience gained in the First World War, of taking firm action in regard to those enemy imports and exports which, not being contraband of war or otherwise liable to seizure, would not be subject to interference under the normal rules of prize law, nearly three months were to elapse in 1939 before the introduction of that part of the blockade system of 1914–18 which had been justified on the doctrine of reprisals.[6] For it was not until the Order in Council of 27 November 1939[7] that goods of enemy origin or enemy destination, not being contraband of war, became liable to detention. And it was not until after the collapse of France that navicerts were made 'compulsory' by a further Retaliatory Order in Council of 31 July 1940.[8]

[1] For further details see Moos in *American Journal of International Law*, 38 (1944), p. 115.

[2] 11 March 1915 (1915, no. 206) against Germany, extended by Order in Council of 10 January 1917 (1917, no. 6) to all enemy countries, after the decision of the Prize Court for Egypt in *The Constantinos*, 2 B. & C.P.C. 140 to the effect that the original Order did not so apply.

[3] 1917, no. 163.

[4] See G. G. Fitzmaurice, 'Some Aspects of Modern Contraband Control and the Law of Prize', in this *Year Book*, 22 (1945), p. 173, for the workings of the Contraband Control. The early measures are described in 'Neutrals and Naval Economic Warfare', *Bulletin of International News* (1939), p. 1033, and a note on 'Economic Warfare: British Measures against Germany', ibid., p. 1370.

[5] House of Commons, Debates, 17 January 1940, vol. 356, col. 145.

[6] Compare speech of Viscount Cecil in House of Lords, Debates, 17 January 1940, vol. 115, col. 317.

[7] 1939, no. 1709, extended to aircraft by Order of 17 July 1940, no. 1324.

[8] 1940, no. 1436.

But this delay only occurred in the case of Germany. As soon as Italy entered the war reprisals were ordered by an Order in Council of 11 June 1940[1] which contained a distinctive feature in that it was given retrospective effect to 4 June 1940.[2] In due course the system, as extended by the Navicert Order in Council of 31 July 1940, was forthwith applied to Japan[3] and to the various satellites of Germany[4] and Japan.[5] Although these Orders were also given retrospective effect, they applied back only to the date the country concerned actually entered the war. They cannot therefore be compared to the Italian order which stands unique in this respect.

III

Both for political and for legal reasons it is unfortunate that so important a part of British economic warfare should have so unstable a foundation as the doctrine of retaliation. Politically it implies uncertainty, prior to the event, whether the regulations will be introduced. The Privy Council laid down, in *The Zamora*,[6] that although an order authorizing reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency, any party aggrieved has the right to contend, and the court has the right to hold, that these means are unlawful, as entailing on neutrals a degree of inconvenience which is unreasonable considering all the circumstances of the case.[7] The meaning of this is clear. The instrument authorizing retaliation must on the face of it show a prima facie case for the application of the measures so authorized, but their validity may nevertheless be attacked in court and in public discussion. For, as has recently been emphasized, reprisals constitute an exceptional measure which must be exercised sparingly, and which should not be resorted to except in cases of imperious necessity and when all other means have failed.[8]

This doctrine of retaliation was observed during the early part of the Second World War, but it is submitted that in the case of Japan its application exhibits certain significant peculiarities. Against Germany, retaliatory measures were ordered prima facie because of alleged[9] illegalities in the carrying on of the war at sea. Against Italy

[1] 1940, no. 979.

[2] The reason for this is not clear, but on that date the Italian Cabinet approved a number of measures for the mobilization of Italian resources. See *Bulletin of International News* (1940), p. 751.

[3] 12 December 1941 (1941), no. 2136.

[4] Finland, Hungary, Roumania, and Bulgaria, 22 January 1942 (1942), no. 98.

[5] Thailand, 5 March 1942 (1942), no. 482.

[6] 2 B. & C.P.C. 1 at p. 18.

[7] It is interesting that in fact there is so far no reported instance of an attempt to challenge the validity of the Orders since 1939. For references to them see *The Monte Contes* [1943] Lloyds Prize Cases (2nd) 147 at p. 151, *The Sidi Ifni*, [1945] ibid. 200 at p. 204. In both these cases the absence of a navicert required under the Order of 31 July 1940 was a matter of suspicion, but condemnation having been decreed on other grounds, the validity of the Order was not considered.

[8] Higgins and Colombos, *The International Law of the Sea* (1943), p. 553.

[9] It is difficult to avoid using the word 'alleged' in this context as at the time of the Order the case against Germany was not proven. This is a pointer to the weakness of the whole doctrine. Doubts on this score are strengthened by the finding of the Nuremberg Tribunal that it was not prepared to hold Doenitz guilty for his conduct of submarine warfare against British armed merchant ships. This decision was based *inter alia* on evidence of certain orders issued by the British Admiralty: Judgment of the Nuremberg Tribunal, *Parl. Papers*, Misc. No. 12 (1946), Cmd. 6964, pp. 108–9. Yet one of the grounds for the British Order of 27 November 1939 was the alleged breach by Germany of the 1936 Protocol. For the text of the Protocol see *Parl. Papers*, Treaty Series No. 29 (1936), Cmd. 5302.

and the other satellite states they were imposed because these states had associated themselves with Germany and had thereby made themselves parties to the method of waging war adopted by Germany. Against Japan the grounds giving rise to the right of retaliation were stated to be as follows: her violation of Article I of the Third Hague Convention relative to the opening of hostilities,[1] her Treaty of Co-operation and Mutual Assistance with Germany and Italy dated 27 September 1940,[2] and the Treaty of Military Alliance of 11 December 1941.[3] It thus appears that in the case of Japan her very entry into the war was considered to be the real breach of international law giving rise to a right of retaliation on the part of her opponents. This seems to open important developments for the future.

The late Professor Berriedale Keith pointed out that the British Orders in Council of 1915 and 1917 were the basis on which the sanctions provisions of the League Covenant were founded.[4]

In view of the fact that none of the Axis Powers were Members of the League at the time of the outbreak of the war, it is an open question how far neutral rights can be said to have been waived as the result of the Covenant by states neutral in a war between Member states and non-Member states. But the Briand–Kellogg Pact for the Renunciation of War was in force and still is. Breach of it was referred to by the British and French Governments in their communications to the League of Nations announcing the outbreak of war.[5] It was hinted at in the recitals to the 'Navicert' Order in Council, and is in particular referred to in Appendix C of the indictment of major war criminals.[6] Because the Pact itself does not define its own sanctions it is submitted that a state aggrieved by a breach of it has every right to recourse to 'retaliation', and, as aggressive declaration of war is a breach of the Pact, it is suggested that no further illegalities are necessary to warrant the application of retaliatory measures.

IV

The law, as presently conceived, seems to contain a remarkable paradox. Under the United Nations Act, 1946,[7] H.M. Government has power to apply any measures for which the Security Council of the United Nations may call, under Article 41 of the United Nations Charter. Other governments have similar powers. In other words, the whole system of measures used in economic warfare can be applied in time of peace under the auspices of the United Nations Charter, whereas, in time of war, certain of these measures, e.g., those hitherto based on the doctrine of reprisals, cannot, in theory, be applied except under one of two conditions: (i) that the war is

[1] Cf. Mr. Churchill's speech announcing the opening of hostilities with Japan on 8 December 1941, *Bulletin of International News* (1941), p. 1962.

[2] Ibid. (1940), p. 1317.

[3] Ibid. (1941), p. 2029.

[4] Wheaton's *International Law* (7th English ed.), vol. ii, p. 560.

[5] *League of Nations Official Journal* (1939), p. 386. Cf. also Document no. 368 in *Le Livre Jaune Français* (1939).

[6] Cmd. 6696 (1945). Indeed, after the Nuremberg Tribunal had established that this Pact was violated by Germany in all the cases of aggressive war charged in the Indictment, it did not even find it necessary to consider any of the other treaties or assurances entered into by Germany and referred to in the Indictments: Judgment, p. 38.

[7] 9 & 10 Geo. VI, c. 45.

waged under some provision of the United Nations Charter, or (ii) that such measures are enforced in compliance with restrictions imposed by *The Zamora* decision. In this connexion it must be recalled that war broke out in 1939 without any attempt being made to enforce any measures of collective security under the Covenant of the League of Nations, and that the possibility of future wars breaking out because the system established by the United Nations Charter has broken down cannot therefore be overruled.

Analysis of the attitude of neutral states in the period 1939 to 1941 is also revealing.[1] Not only Soviet Russia and the United States of America, but also many of the smaller neutrals, complained of British economic warfare, the complaints ranging from the British Contraband List or the reprisals order to the treatment of mails. Yet, one by one the complainant states were engulfed in the holocaust, and, in so far as British economic warfare was an element of victory, shared in the advantages derived therefrom. It is only by the removal of all doubts as to the reactions of states to certain circumstances that peace can be made more secure. In so far as certainty in the application of prize law is a contribution to knowledge of the foreseeable course of economic warfare, it is a contribution to peace. That is the main justification for discussing this topic in time of peace.[2] Now that the technique of blockade has been changed, so that its object is not so much to capture seizable cargoes on the high seas as to prevent such cargoes even reaching the high seas, it follows that no loopholes can be allowed, and that adequate machinery should be available at all stages to deal with the enemy's sea-borne trade. In this concept, prize law has a very limited rôle. Prize proceedings are only the last link in the chain of blockade, and once the seizures made on the outbreak of war are disposed of, the fact that a suit has to be brought in the prize court is, in itself, an indication that in that particular respect the blockade has failed. It would be highly unsatisfactory if the efforts of the armed forces to prevent enemy cargoes reaching the high seas were to be cheated by a defect in the legislation governing such matters. If those responsible for national security still consider that the blockade can only be made really effective by the application of measures hitherto considered as 'reprisals', then a clear indication ought to be given in time of peace of the legal measures with which they will carry out their task. It is possible that the notice thus given to the world may reinforce the nations of the world in their quest for peace.

S. W. D. ROWSON

[1] For examples see *Bulletin of International News* (1939), p. 1225, regarding the Russian attitude to the British and French Contraband Lists; ibid., p. 1342, regarding Japanese, Danish, Dutch, Belgian, and Swedish protests against the decision to seize German exports under the Reprisals Order, ibid., pp. 1353 and 1421, as to the American attitude, and ibid., p. 1426, for Russian protest. For the correspondence with the Government of the United States regarding the censorship of mails, see Cmd. 6156 (1940). For the neutral attitude to the exercise of belligerent rights at sea, see the two Dutch Orange-Books of November 1939 and April 1940 and the Uruguayan Blue Book regarding events prior to the sinking of the *Admiral Graf Spee*, and Hackworth, op. cit., p. 702, regarding the Declaration of Panama and the so-called 'security zone' extending several hundred miles off the American coast. But for a more co-operative attitude towards the 1940 Reprisals Order on the part of the United States see *Bulletin of International News* (1940), p. 1057.

[2] In the *Law Quarterly Review*, 62 (1946), p. 186: at p. 189, Mr. F. C. Howard appeals for legislation which will deal once and for all with the whole subject of Trading with the Enemy.

GERMAN PROPERTY IN SWITZERLAND

1. ON 25 May 1946 Switzerland and the principality of Liechtenstein on the one hand, and the United States of America, France, the United Kingdom, and fifteen other nations on the other hand, concluded an Accord concerning the liquidation of German Property in Switzerland.[1] The Accord took the form of an exchange of letters and included an Annex setting forth 'the procedures relating to the application of the present Accord'. The principal provisions may be summarized as follows:

(*a*) Switzerland undertook to pay to the Allies 'the amount of 250,000,000 Swiss francs payable on demand in gold in New York'[2] in full settlement of all claims to gold acquired by Switzerland from Germany during the war.

(*b*) Switzerland, acting through the Swiss Compensation Office, will liquidate 'property of every description owned or controlled by Germans in Germany'[3] and by 'such other persons of German nationality as are to be repatriated'.[4] Property in Switzerland of the German state, including the Reichsbank and the German railways, is excluded.

(*c*) The proceeds of liquidation will be divided equally between Switzerland and the Allies, who will use the money 'for the rehabilitation of countries devastated or depleted by the war, including the sending of supplies to famine-stricken people'. The share allocated to Switzerland is obviously being treated as compensation for the losses suffered by Swiss nationals in Germany, for the cost of the administration and liquidation of German property payable by Switzerland, and for the contribution which, as mentioned in the following paragraph, Switzerland will make out of its German funds.

(*d*) 'The Germans[5] affected by this measure [liquidation] shall be indemnified in German money[6] for the property which has been liquidated in Switzerland pursuant to this Accord. In each such case an identical rate of exchange[7] shall be applied.' Switzerland will, out of funds available to it in Germany,[8] furnish one-half of the

[1] Cmd. 6884. The similar Agreement with Sweden does not seem to have been published.

[2] This is a curiously drawn gold clause. Difficulties must have arisen from the revaluation of the Swiss currency which occurred shortly after the date of the Accord.

[3] This expression means (Annex Clause IV. B) 'all natural persons resident in Germany and all juridical persons constituted or having a place of business or otherwise organized in Germany, other than those organizations of whatever nature the ownership or control of which is held by persons who are not of German nationality'. No reference is made to the date at which a natural person must be resident in Germany or at which a natural person controlling a corporation must be of non-German nationality. The definition includes non-German natural persons resident in Germany, although 'appropriate measures will be taken . . . to safeguard substantial [*sic!*] interests of non-German persons which would otherwise be liquidated'. All this may cause great hardship.

[4] It is not clear whether this refers to persons who are liable to be repatriated or to persons who will in fact be repatriated. Nor is it clear wherefrom and when such persons are to be repatriated. Clause IV. B merely gives an example when it provides that 'Germans who have been repatriated before January 1, 1948 or in connexion with whom, before that date, a decision by the Swiss Authorities has been taken that such persons should be repatriated from Switzerland, are to be considered as falling within the expression "Germans in Germany"'.

[5] The Accord does not use the phrase 'Germans in Germany', the definition of which is set out in note 3. It cannot be assumed that only persons of German nationality are to be indemnified.

[6] Nothing is said about the place of payment. Presumably payment is to be made in Germany.

[7] Nothing is said about the date with reference to which the rate of exchange is to be ascertained. This may be of great practical importance. Nor is anything said about the type of rate of exchange which will be applicable.

[8] It follows from Clause I. C of the Annex that the amount payable by Switzerland 'will be

German money necessary for this purpose. The Accord is silent on the question who will provide the remaining moiety of the necessary funds.[1]

(*e*) The Swiss Compensation Office will carry out the liquidation, and in this connexion it will make every effort 'to uncover all transactions of a cloaking nature whether by pawn, pledge, mortgage or otherwise, by which German property was concealed and will carry out their annulment' (Annex Clause I. B, Clause II. A). The Office will be assisted by a Joint Commission of four members representing Switzerland, the United States, France, and the United Kingdom and acting by a majority vote. The Joint Commission as well as the interested party may appeal against decisions of the Office to a Swiss Authority of Review which will be composed of three members and presided over by a Judge; its review 'will be administrative in form and the procedure shall be prompt and simple.' Although the decision of the Authority of Review is final, 'the three Allied Governments'[2] may require a case concerning 'matters covered by the Accord or the Annex or their interpretations' to be submitted to arbitration.

2. As appears from the illuminating *Message* sent by the Swiss Federal Council on 14 June 1946 to the Swiss Federal Assembly with a recommendation to approve the Accord, the question of the German gold which resulted in the Swiss undertaking to pay 250,000,000 Swiss francs did not really involve any question of legal principle. The right of the Allies to claim the restitution of gold looted by Germany during the war and exported to Switzerland was not, and could not be, seriously disputed. From the start the discussions ('parfois mouvementées et pas toujours agréables')[3] related to the quantum, Switzerland offering 100,000,000 francs and the Allies demanding 560,000,000 Swiss francs. Questions of great interest[4] were raised in the course of the negotiations, but they are not reflected in the Accord and are therefore beyond the province of these observations.

3. The real significance of the Agreement lies in those of its provisions which relate to the liquidation of German property in Switzerland. In this connexion it is necessary to ascertain precisely why these provisions are so important.

It is not the law of neutrality that is being infringed or threatened by the Agreement.[5] If the war were still continuing, then indeed both the Allies and Switzerland would be guilty of a flagrant breach of their duties by entering into an agreement which compels a neutral state to liquidate the property of the one belligerent and hand the proceeds of liquidation over to the other belligerent. But it must be assumed that in the opinion of the authors of the Agreement the war in the international sense ended on 5 June 1945.[6] Swiss neutrality ended simultaneously. It would therefore be

debited to the credit existing in the name of the Swiss Government at the "Verrechnungskasse" in Berlin'. It is interesting to learn that the High Contracting Parties regard the 'Verrechnungskasse' and the accounts kept with it as existing. This provision presupposes Soviet co-operation.

[1] The Annex does provide (Clause I. C) that, when the amounts realized by the liquidation have been notified, 'the competent authorities in Germany will take the necessary measures in order that there will be recorded the title of the German owners of the property liquidated to receive the counter-value thereof in German money calculated at a uniform rate of exchange'. The vagueness of this provision, particularly obvious to those conversant with the present factual and legal situation in Germany, must be presumed to be deliberate.

[2] Quaere, does this mean jointly only?

[3] *Message*, p. 10.

[4] Thus the Allies revealed that before June 1941 Germany received $23,000,000 from Russia. Switzerland disputed the Allied thesis that gold taken in Austria and Czechoslovakia was 'looted'. The question of the Belgian gold introduced great complications.

[5] But see Professor Guggenheim, *Schweizer Monatshefte* (1946), pp. 321 ff.

[6] See Kelsen in *American Journal of International Law*, 39 (1945), p. 518.

beside the point to inquire what contribution the Agreement makes to the development of a modern law of neutrality or to what extent it expresses a revision of traditional doctrine. Just as in June 1946 the passage of Allied troops over Swiss territory would have no bearing upon the law of neutrality, so in May 1946 the liquidation of German property cannot infringe duties which ceased to exist a year earlier.

In these circumstances it is not surprising that the Allies' demand for the rights granted to them by the Agreement was at no time based on their position as belligerents.

4. Nor is it relevant to consider the Agreement in the light of that alleged principle of customary international law according to which the confiscation of private enemy property on the territory of a belligerent is prohibited, and from which some writers have even drawn the conclusion that a Treaty of Peace authorizing such confiscation is inconsistent with 'traditional views and *mores*'.[1] If such rules existed, they would necessarily prohibit the demand for confiscation and liquidation of private enemy property on the territory of a non-belligerent, and the Swiss Agreement would be a far-reaching and probably indefensible innovation. Even in the absence of those rules an Agreement between two states about the confiscation of assets owned by nationals of a third state would be open to grave criticism. It is unnecessary, however, to inquire further into these matters. They have no bearing on the Swiss Agreement. The Allies, when concluding it, did not act either as victors or as assignees of a German Government. It was not their own right or title which they claimed or obtained.

5. The Allies 'claimed title to German property in Switzerland by reason of the capitulation of Germany and the exercise of supreme authority within Germany',[2] and for no other reason. They claimed title in their capacity as sovereigns in Germany. They stood in the shoes of a German Government. The Agreement involves two parties, not three. From the legal point of view it is essential to see this clearly and to eliminate any confusion which may arise from the peculiar position in which the Allies find themselves as co-administrators of Germany.

By the Declaration of Berlin of 5 June 1945 the Allied Representatives declared that 'the Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics and the Provisional Government of the French Republic hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government'. It was this Declaration which entitled the Governments of the United States, France, and the United Kingdom to claim German assets in Switzerland.[3]

The exclusion of the U.S.S.R. is due to the waiver of all claims on German foreign assets situate in countries other than Bulgaria, Finland, Hungary, Roumania, and Eastern Austria, which is contained in Chapter IV. 8 of the Declaration of Potsdam of 2 August 1945, and which may be construed as an implied authority for the three Western Allies to dispense in this particular matter with Soviet participation.

It is more difficult to reconcile the legal explanation given above with the fact that

[1] Borchard, Introduction to Gathings, *International Law and American Treatment of Enemy Property* (1940), p. ix. See also Borchard in *American Journal of International Law*, 40 (1946), pp. 623, 628.

[2] See the introductory words of the Agreement.

[3] Control Council Law No. 5, though invoked by the Allies in their negotiations with Switzerland, may be disregarded for present purposes. This law vests all property outside Germany, which is owned or controlled by German nationals, in the German External Property Commission. But this is German municipal legislation which cannot affect the issue under international law.

the three Western Allies purported to act as agents for fifteen other nations. Article 6 (*c*) of the First Act of the Paris Conference on Reparations of 21 December 1945,[1] it is true, provides that 'German assets in those countries which remained neutral in the war against Germany shall be removed from German ownership or control and liquidated or disposed of in accordance with the authority of France, the United Kingdom, and the United States, pursuant to arrangements to be negotiated with the neutrals by these countries. The net proceeds of liquidation or disposition shall be made available to the Inter-Allied Reparation Agency for distribution on reparation account.' But this provision does no more than explain the inter-Allied relationship. If the Western Allies acted as sovereigns in Germany, then the fifteen other Allies had no *locus standi vis-à-vis* Switzerland. Yet it would be wrong to argue that, because the fifteen Allies were granted a *locus standi*, the Western Allies cannot have acted as sovereigns in Germany. A mere flaw in drafting should not be allowed to obscure the fundamental legal position.[2]

If, then, the Allies, in their negotiations with Switzerland, exercised the functions of a German Government, it follows that the real significance of the Agreement[3] is to be found in the probably unique extension of the international effects of confiscation which it involves.

There cannot be any doubt that German municipal legislation confiscating German property in Switzerland would have been held by Swiss courts to be opposed to Swiss public order and would, consequently, not have been recognized. Nor can there be any doubt that no established rule of international law would have justified Germany in demanding recognition for her confiscatory legislation. The principle of the territorial character of confiscation was until recently too firmly established to be questioned. This doctrine, derived from the legal conscience of a liberal era, is at present being threatened not only by the growing control of commercial activities by the state, but also by such decisions as *United States* v. *Pink*,[4] *Anderson* v. *Transandine Handelsmaatschappij*,[5] and *Lorentzen* v. *Lydden & Co.*[6] It is this doctrine which is put in jeopardy by the Swiss Agreement and the survival of which cannot by any means be considered as certain.

6. Yet the legal significance of the Agreement should not be overrated. The Swiss Government did not fail to advance all the legal arguments open to it. But it was in an invidious bargaining position. All the trumps were in the hands of the Allies: Swiss Funds in the United States were blocked; the Black Lists greatly injured Swiss trade; Swiss assets in Germany were in danger; and the Allies' argument that 'si la guerre s'était terminée autrement, il n'est guère probable qu'il existerait actuellement une Suisse indépendante'[7] had a moral force which the Swiss negotiators could not deny. All these weapons seem to have been used with hardly concealed directness, the *Message* speaking of 'des discussions très âpres' or of 'd'interminables pourparlers

[1] Cmd. 6721.

[2] Cmd. 6884 does not publish the clause relating to the fifteen Allies. The French text states that the Western Allies 'agissent également pour le compte des Gouvernements des pays suivants . . . '. The argument that the words 'pour le compte' do not really express the relationship of an agency is untenable, although it derives support from certain continental systems of law.

[3] This note does not deal with less fundamental matters such as the fact that Allied representatives exercise important functions on Swiss territory, or the somewhat unusual provisions for arbitration.

[4] [1942] 315, U.S. 203.

[5] *American Journal of International Law*, 36 (1942), p. 701.

[6] [1942] 2 K.B. 202.

[7] *Message*, p. 4.

qui ne furent pas toujours agréables'.[1] The Swiss reluctantly bowed to the force of circumstances, mainly in order to secure the unblocking of their assets in the United States and the withdrawal of the Black Lists (Clause IV of the Accord). The international lawyer should remember that hard cases make bad law. The value of the Agreement as a precedent may still have to stand the test.

F. A. MANN

INTERNATIONAL CIVIL AVIATION 1945–6[2]

THE Final Act of the Chicago Civil Aviation Conference included an Interim Agreement providing for the establishing of a Provisional International Civil Aviation Organization (P.I.C.A.O.) with its seat in Canada. The most important development in the field of international civil aviation during the period under review has been the successful launching of this interim organization, which has provided a means of immediate action during the period between the close of the Chicago Conference and the coming into force of the main Chicago Convention. The setting up of P.I.C.A.O. was remarkably swift. The Chicago Conference ended on 7 December 1944. By 6 June 1945 the required number of twenty-six states had accepted the Interim Agreement and the way was open for the convening of the first session of the Interim Council on 15 August. By the close of 1946, the P.I.C.A.O., with its seat at Montreal, was a virile organization with a number of successes already to its credit.[3] P.I.C.A.O. is not a mere preparatory organization. Its constitution and functions are modelled on those of the I.C.A.O. which will replace it when the main Convention comes into force;[4] accordingly there will be complete continuity, and the techniques already developed and the experience already gained by P.I.C.A.O. will be carried over to the permanent régime. The work of P.I.C.A.O. therefore requires more than passing notice for it promises to be of permanent value.

Like the permanent organization provided for in the main Convention, P.I.C.A.O. has two principal organs, an Assembly and a Council. The Interim Assembly, which consists of all member states, each being entitled to one vote, has competence in all matters which come within the sphere of action of the organization and are not specifically assigned to the Interim Council. It elects members of the Interim Council, and is responsible for voting the annual budget of the organization. The Interim Assembly held its first session in Montreal from 21 May to 15 June 1946, and this is likely to be the only session of the Interim Assembly as the permanent Assembly is expected to meet early in 1947.[5]

The Interim Council is the executive body of P.I.C.A.O., consisting of not more than twenty-one states elected for two years, the first elections having been made at Chicago.[6] The Council has a large number of specific functions assigned to it. It is

[1] *Message*, pp. 11, 16.

[2] A general description of the development of the law up to the close of 1944 will be found in this *Year Book*, 21 (1945), at p. 191.

[3] By 2 October 1946 (the latest figures available at the time of writing) the Interim Agreement had been accepted by forty-six states. The only signatories which had not then accepted were Costa Rica, Cuba, Guatemala, Iran, Panama, Uruguay, Yugoslavia, and Thailand

[4] It was announced from Washington on 11 March 1947 that, 29 states having ratified the main convention, it would go into effect on 4 April 1947.

[5] In Resolution XVIII of the Interim Assembly the First Meeting of the Permanent Assembly is tentatively fixed for 6 May 1947.

[6] The following states were members of the Interim Council in October 1946: Australia, Belgium, Brazil, Canada, Chile, China, Colombia, Czechoslovakia, Egypt, El Salvador, France,

responsible for administrative matters, including the appointment of staff. It maintains liaison with member states, and receives, registers, and holds open for inspection all existing contracts and agreements relating to such matters as landing rights and airport facilities to which any member state, or airline of a member state, may be a party. It makes an annual report to the Assembly, and may, when so required by all the member states concerned, act as an arbitral body on any differences arising between member states in regard to international civil aviation matters. It appoints its own President and also the Secretary General of the organization. The Council is to be congratulated on having at the outset made two admirable appointments. Dr. Edward Warner, Vice-Chairman of the United States Civil Aeronautics Board, was elected President of the Council. Dr. Albert Roper was elected Secretary-General to P.I.C.A.O. Dr. Roper is thus Secretary-General to both P.I.C.A.O. and C.I.N.A., an excellent arrangement for the period during which P.I.C.A.O. is gradually assuming the functions formerly performed by C.I.N.A. During the course of 1945–6 the Interim Council has held six busy sessions at which a great deal of useful progress was made, some items of which are referred to more particularly below.

One very important function of the Council is to provide for the establishment of any subsidiary working groups which may be considered desirable and which shall include the following three interim committees, namely, a Committee on Air Transport, a Committee on Air Navigation, and a Committee on International Convention on Civil Aviation. These committees, like the Interim Council itself, are, of course, prototypes of the exactly similar institutions provided for in the Convention. The importance of these 'statutory' committees and their numerous sub-committees may be judged from the statement of the President of the Council at its second session that, apart from purely administrative matters, 'the work before the Council will be derived largely from that of the committees and sub-committees, and the frequency with which Council meetings should be held will depend upon the amount and character of material that the committees bring forward'.

The *Committee on International Convention* is designed to study the Chicago Convention and prepare and report on questions which should be laid before the next International Conference. Its work, therefore, lies in the future; but the other two committees are already extremely active.[1]

The *Air Navigation Committee* (A.N.) is, as its name suggests, concerned with technical matters such as communications systems, air navigation aids, rules of the air, air-traffic control, unification of dimensioning and specifications, search and rescue, and the investigation of accidents. This work is, of course, very closely linked with the preparation and administration of the International Standards and Recommended Practices (see below). This Committee is organized in a number of specialized technical groups called Divisions.[2]

India, Iraq, Ireland, Mexico, Netherlands, Norway, Peru, Turkey, United Kingdom, United States.

[1] In addition to the three committees provided for in the Interim Agreement, there are, of course, other specialized committees dealing, for example, with such matters as Legal Studies, Finance, Personnel, Credentials, &c. It is possible that the Legal Committee of the I.C.A.O. will eventually absorb the work in the private international law field at present done by the Comité international technique d'experts juridiques aériens (C.I.T.E.J.A.). This proposal was discussed at the C.I.T.E.J.A. Conference held at Cairo on 4 November 1946.

[2] A table showing the complete organization of the P.I.C.A.O. as it stood at September 1945 is given in *P.I.C.A.O. Journal*, vol. i, no. 1, Appendix 8. The name of the sub-committees was changed to 'Divisions' by a Resolution of the Interim Council at its second session.

The *Committee on Air Transport* is concerned with study and report on such matters as the origin and volume of international air traffic, the provision of facilities, subsidies, costs, tariffs, and the organization and operation of international air services (including the question of international ownership). It is also charged in the Interim Agreement to study and report on matters on which it was not found possible to reach agreement at Chicago.[1] This is clearly a vital Committee. The matters excluded from the Convention lie at the very heart of the whole problem of international air transport, and it may be that study by a small specialized working body, unattended by embarrassing publicity, will be more fruitful than the Chicago Conference which, in this particular field, did little more than underline differences. Like the A.N. Committee, this Committee is organized in technical groups called Divisions. Special mention must be made of the Division on the Facilitation of Air Transport (F.A.L.), covering 'all obstacles to aircraft, passengers and cargo in international air transportation arising from national laws and required forms, regulations and procedures prescribed by governmental and other public authorities'.[2] At its first session this Division recommended the adoption of an 'international travel card' in lieu of passports for tourists and business travel, and a 'passenger landing card' in place of the usual immigration certificates for short stays on route.[3]

International Standards and Recommended Practices. Technical annexes to the Convention were drafted at Chicago, making very considerable use of the valuable experience already gained in the working of the technical annexes to the Paris Convention. These were submitted to member-governments for comment and then referred to the A.N. Committee for further study and recommendation. This is not the place to describe the detailed recommendations, but it is of general interest to note that, pursuant to a recommendation of the A.N. Committee adopted by the Interim Council at its second session, it was decided to discontinue the use of the word 'annex' owing to its undesirable implication of physical attachment to the Convention; documents of the type hitherto referred to as 'annexes' would therefore henceforth be called 'International Standards' and/or 'Recommended Practices'.[4] The final drafts of the standards and recommended practices were prepared by six technical divisions of the A.N. Committee during October and November 1945, and were adopted by the Interim Council on 25 February 1946 at its third session.[5] They were thereupon published and addressed to member states for compliance with their undertakings under Article XIII of the Interim Agreement 'to apply, as rapidly as possible, in their national aviation practices . . . such recommendations as will be made through the continuing study of the Council'.

Regional Organizations. One of the most interesting results of the work of the A.N. Committee has been the inauguration of a scheme of P.I.C.A.O. Route Service Organizations adopted by the Interim Council at its second session. The immediate task

[1] Interim Agreement, Art. III, Sect. 6, sub-sect. (3), para. 4.

[2] Such as 'customs procedures and manifests, sanitary, public health or quarantine regulations, financial and monetary regulations, taxes, police and immigration requirements, military restrictions, and the regulations imposed by national or international aeronautical authorities'. See *P.I.C.A.O. Journal*, vol. i, no. 2, p. 21-2.

[3] See *P.I.C.A.O. Journal*, vol. i, no. 3, p. 16. This recommendation is being studied further in consultation with other interested international organizations.

[4] The new terminology is actually taken from the Convention; see Chapter VI, Art. 37.

[5] They deal with the following subjects: Aerodromes; Air Routes and Ground Aids; Aeronautical Maps and Charts; Communications and Radio Aids to Air Navigation; Meteorology; Rules of the Air and Air Traffic Control; Search and Rescue.

of the regional organizations is to co-ordinate the application of P.I.C.A.O. standards and recommended practices by states in particular areas of air transport operation (a task made the more urgent by the discontinuance of military facilities organized during the continuance of hostilities). When the Council determines that a Route Service Organization is desirable in any particular region, it requests one of the states primarily concerned to convene a meeting of the states concerned, including non-member states. The agenda of the meeting is prepared by the P.I.C.A.O. Secretariat, and participation in the meetings is limited to states named by the Council, having regard to (i) territorial location within the region, (ii) actual or prospective operation of airlines within the region, and (iii) provision or contribution to facilities for international air transport within the region. The right to vote is limited to the member states of P.I.C.A.O. The Route Service Organizations set up at these meetings consist of a general co-ordinating committee, expert technical committees, and a permanent secretary and secretariat. It has been decided to establish P.I.C.A.O. Route Service Organizations for the following ten regions: North Atlantic; European-Mediterranean; Middle East; Caribbean; South-East Asia; South Atlantic; South Pacific; North Pacific; South American; and African-Indian Ocean.[1]

North Atlantic Weather Stations. During the Second World War the Governments of the United Kingdom and the United States established a number of ocean weather stations to assist air navigation over the North Atlantic. At one time there were as many as twenty-one such stations. Most of these ocean weather ships and their crews were disbanded at the conclusion of hostilities, but the P.I.C.A.O. North Atlantic Route Service Conference at Dublin in March 1946 recommended the establishment of permanent stations. This recommendation was approved at the First Interim Assembly in May 1946, and as a result the London Conference on North Atlantic Weather Stations met on 17 September 1946, the following states being represented: Belgium, Canada, Denmark, Eire, France, Iceland, the Netherlands, Norway, Portugal, Spain, the United Kingdom, and the United States.[2] An international agreement was concluded providing for the establishment of thirteen ocean weather stations located at various points[3] in the North Atlantic, to give meteorological, search and rescue, air navigational, supplementary air traffic control, and other incidental services. Seven of these stations were to be provided and manned by the United States, one by the United States and Canada, two by the United Kingdom, one by Belgium and the Netherlands, one by France, and one by Norway, the United Kingdom, and Sweden.[4] The Agreement is valid until June 1950, and P.I.C.A.O. is to convene a further conference in 1949 to consider its renewal. It is expected that the system will be completely in operation by 1 July 1947.

The Bermuda Agreement. The period following the close of hostilities in the Second World War has seen the conclusion of a large number of bilateral agreements for air navigation. The most significant of these is the Air Transport Agreement concluded between the Governments of the United Kingdom and the United States on 11 Feb-

[1] For a detailed definition and map of these areas, see *P.I.C.A.O. Journal*, vol. i, no. 3, p. 38. The following regional meetings were held during 1946: the North Atlantic at Dublin, 4 March; European-Mediterranean at Paris, 24 May; Caribbean at Washington, D.C., 26 August; Middle East at Cairo, 1 October.

[2] The International Meteorological Organization and the International Air Traffic Association (I.A.T.A.) were also represented at the conference.

[3] For map of locations see *P.I.C.A.O. Bulletin*, November 1946, p. 8.

[4] Eire, while not participating in the direct operation of stations, is to contribute £5,000 per annum towards the total cost.

ruary 1946 at the close of their Bermuda Conference on Civil Aviation.[1] The Agreement provides for the provision on a reciprocal basis of the necessary facilities for the establishment of certain air services between the territories of the two Powers, the main text incorporating the standard clauses drawn up at Chicago. From the point of view of general principle, however, the most significant provisions are to be found in the Annex, which provides a tentative machinery for the fixing of rates. In the first place, the Civil Aeronautics Board agrees to approve for a period of one year the rate conference procedure of the International Air Traffic Association. The Annex then goes on to provide an alternative machinery for the fixing of rates by agreement between the parties. In case of failure to agree, an advisory report is to be sought from P.I.C.A.O., each party then to 'use its best efforts under the powers available to it to put into effect the opinion expressed in such report'. To implement this machinery the Civil Aeronautics Board agrees also to use its best efforts to secure the passing of the necessary legislation conferring on it power to fix fair and economic rates in international services such as it at present enjoys for air transport inside the United States.

There was an interesting sequel to this Agreement when United States civil aviation officials attended an exhibition of the Society of British Aircraft Constructors in London in September 1946. They took the opportunity of conferring with the Minister for Civil Aviation and the Foreign Office, and a joint statement was released to the press, expressing the accord of both parties that experience since the Bermuda Agreement had demonstrated that the principles of that Agreement were sound and provided a basis for a new multilateral agreement. They agreed, therefore, that both parties should follow the same principles when negotiating new bilateral treaties with other countries, including:

'(A) fair and equal opportunity to operate air services on international routes and the creation of machinery to obviate unfair competition by unjustifiable increases of frequencies or capacity;

'(B) the elimination of formulae for the predetermination of frequencies or capacity or of any arbitrary division of air traffic between countries and their national airlines;

'(C) the adjustment of Fifth Freedom Traffic with regard to:

(1) traffic requirements between the country of origin and the countries of destination,

(2) the requirements of through airline operation, and

(3) the traffic requirements of the area through which the airline passes after taking account of local and regional services.'

This clearly represents a great advance on the position reached at the Chicago Conference, and is made the more significant by the withdrawal of the United States on 25 July 1946 from the Five Freedoms Agreement.[2] At the time of withdrawal, the Agreement had been accepted by fifteen countries, but only two of these, besides the United States, were countries having developed air services. This circumstance, coupled with the dissatisfaction with the Five Freedoms Agreement expressed at the Interim Assembly of P.I.C.A.O., had convinced the United States that the Agreement was unlikely to provide an effective medium for the establishment of international air routes. This recognition of the failure of the attempt to secure commercial privileges unattended by a compensating machinery for the control of unfair competition, and the tentative acceptance of machinery for the control of rates and frequencies in the

[1] See *Department of State Bulletin*, vol. xiv, no. 353, p. 584.

[2] The Five Freedoms Agreement is described in this *Year Book*, 22 (1945), at p. 202. In accordance with Article 5 of the Agreement, the withdrawal will take effect one year after 25 July 1946.

Bermuda Agreement, seem to indicate an important reorientation of American aviation policy which gives good ground for hope of the early conclusion of a satisfactory multilateral convention regulating the matters excluded from the Chicago Convention.[1]

R. Y. JENNINGS

THE UNITED NATIONS WAR CRIMES COMMISSION[2]

I. *Establishment of the Commission. Terms of Reference. Legal Status and Organization*[3]

1. On 7 October 1942 it was announced simultaneously in London and Washington, with the concurrence of other Allied nations, that a United Nations Commission for the investigation of war crimes would be set up.[4] This was the first practical step towards the accomplishment of the aim of the Allied nations, announced in a great number of official statements, proclamations, and agreements, to bring to justice, after the victorious conclusion of the Second World War, persons guilty of war crimes.[5] It was not, however, until 20 October 1943 that the actual establishment of the Commission took place, at a meeting of the representatives of seventeen nations, held at the Foreign Office, London.[6] Representatives of the following governments and authorities were present at the inaugural meeting of the Commission: Australia, Belgium, Canada, China, Czechoslovakia, Greece, India, Luxembourg, the Netherlands, New Zealand, Norway, Poland, the Union of South Africa, the United Kingdom, the United States of America, Yugoslavia, and the French Committee of National Liberation. The U.S.S.R. did not take part in the meeting and has not joined the Commission since. The Union of South Africa, though represented at the meeting, did not become a member of the organization. After liberation, Denmark joined the Commission, which therefore has seventeen member states at present.

The Lord Chancellor, Lord Simon, who presided at the meeting, proposed that the Commission should serve two primary purposes:

(i) It should investigate and record the evidence of war crimes, identifying where possible the individuals responsible.

[1] The A.T. Committee of P.I.C.A.O. is already working on drafts of a proposed Multilateral Agreement on Commercial Rights in International Civil Air Transport; see *P.I.C.A.O. Bulletin*, December 1946, p. 5.

[2] The writer gratefully acknowledges the help given to him by the Rt. Hon. the Lord Wright of Durley, Chairman of the United Nations War Crimes Commission, who read the manuscript and gave invaluable advice.

[3] See Bathurst, 'The United Nations War Crimes Commission', *American Journal of International Law*, 39 (1945). p. 565.

[4] *Hansard, House of Lords*, vol. 124, no. 86, col. 577 (7 October 1942).

[5] The Declarations and statements are collected in: *Punishment for War Crimes*—The Inter-Allied Declaration signed at St. James's Palace, London, on 13 January 1942, and Relative Documents (issued by the Inter-Allied Information Committee, published by H.M. Stationery Office, London); *Punishment for War Crimes* (2)—Collective Notes presented to the Governments of Great Britain, the U.S.S.R., and the U.S.A., and Relative Correspondence (ibid.); *War Crimes and the Punishment of War Criminals*—Information Paper No. 1, issued by the Reference Division, United Nations Information Organization; The Molotov Notes on German Atrocities (Issued by His Majesty's Stationery Office on behalf of the Embassy of the U.S.S.R. in London, 1942); The Third Molotov Note on German Atrocities (ibid.). For the text of the Moscow Declaration of October 1943, see Lauterpacht, 'The Law of Nations and the Punishment of War Crimes', in this *Year Book*, 21 (1944), p. 60, note 1.

[6] The Diplomatic Protocol of 20 October 1943 has not been made public.

(ii) It should report to the Governments concerned cases in which it appeared that adequate evidence might be expected to be forthcoming.

It seemed important, the Lord Chancellor declared, to draw a clear distinction between the preparatory investigatory work of the Commission and the procedure for the eventual trial of war criminals. The latter would represent a later stage and would be a question for decision by the Governments concerned rather than by the proposed Commission. The Governments concerned would also be specially interested in the treatment of those who might properly be described as the arch criminals. It might well be felt that this was primarily a political question.[1] The meeting decided to set up the Commission, with the terms of reference outlined, reserving the question of the possible expansion of the scope of its investigations and functions for future consideration. It was agreed that the headquarters of the Commission should be established in London, but that the Commission should be empowered to set up panels or arrange otherwise, in the light of the wishes of the Governments most closely concerned, for investigations on its behalf so far as it seemed appropriate. This provision was the basis for the eventual establishment of the Far Eastern Sub-Commission of the United Nations War Crimes Commission.

In view of the way in which the question of chairmanship of international organizations and international conferences was subsequently dealt with in the organs of the United Nations and at the Peace Conferences, it may be recalled that the Lord Chancellor informed the inaugural meeting that the United Kingdom Government had originally proposed that it should be left to the Commission to settle the question of Chairmanship at its first meeting. The Soviet Government, however, had proposed that the Chairmanship might suitably be held in rotation by the representatives of the United Kingdom, the United States of America, the U.S.S.R., and China. It was agreed that it should be left to the Commission to settle the question of its first Chairman when it met, without prejudice to the question of *roulement*. Eventually, in the fourth meeting of the Commission, held on 11 January 1944, the United Kingdom delegate, Sir Cecil Hurst, was elected Chairman. When, in January 1945, Sir Cecil resigned for reasons of ill health, Lord Wright, who represents the Commonwealth of Australia on the Commission, was elected Chairman and has been Chairman of the Commission since that date.

It was proposed at the meeting of 20 October 1943, that in addition to the Commission there should be established a committee of legal experts to be nominated by the various Allied Governments participating in the work of the Commission. The Committee would work concurrently with the Commission and in adequate contact with it. It would be charged with advising the Government concerned upon matters of a technical nature, such as the type of tribunals to be employed for the trial of war criminals, the law to be applied, the procedure to be adopted, and the rules of evidence to be followed. The function of this Committee would be to formulate recommendations for the guidance of Governments. It would not be empowered to take any decisions which would be binding upon the Governments. Very soon afterwards, however, the Governments represented on the Commission came to the conclusion that the creation of an independent technical committee was unnecessary. The suggestion to establish it was therefore dropped and the Governments agreed that the Commission should deal in an advisory capacity with the questions which would have been dealt with by the technical committee.

[1] Cf. the Moscow Declaration: for text see Lauterpacht, op. cit. The decision envisaged in Moscow was made through the Four-Power Agreement of 8 August 1945.

The United Nations War Crimes Commission has therefore two different jurisdictions: (*a*) on the one hand it makes, as it were, in its own right the decisions coming within its original investigating, recording, and reporting function, and (*b*) it exercises advisory functions which originally were meant to be entrusted to an independent committee of technical experts.

2. The Commission is an international organization. The Diplomatic Privileges (Extension) Act, 1944, of the United Kingdom, has been applied to it by the Diplomatic Privileges (Transport Organization and War Crimes Commission) Order in Council, 1945.[1] Under Article 2 of the Order, and Section 1, sub-section 2 (*a*) of the Act of 1944, the Commission has the legal capacities of a body corporate. The Diplomatic Privileges (Extension) Act, 1946, has so far not been applied to the Commission.

3. In respect of its 'original' functions, which will be discussed presently, the Commission's work is prepared by its Committee on Facts and Evidence (Committee I) which throughout its existence has been presided over by the Belgian representative on the Commission. Committee II, under the chairmanship of the American delegate, prepared the Commission's recommendations respecting measures of enforcement which it considered necessary or advisable in order to make the prosecution of offenders effective. Committee III, the Legal Committee, is responsible for the preparation of the Commission's decisions and resolutions involving such legal questions as arise in connexion with the examination of individual cases and in making recommendations of a general nature.

The expenses of the Commission are covered by an equal basic contribution, paid by each member Government, and if the amount of expenditure exceeds the total amount of the basic contribution the excess is allocated to the member states in proportions which are similar to those adopted by the United Nations Relief and Rehabilitation Administration,[2] with the difference that an equal amount is allocated to the United Kingdom and the United States respectively, as is the case under the International Labour Office scale. The United Kingdom Government, in addition, supplies at its own charge the office premises in London, while the Chinese Government similarly supplies those of the Far-Eastern Sub-Commission originally at Chungking, later at Nanking. The United Kingdom representative has, throughout, been chairman of the Finance Committee.

II. *The 'original' functions of the Commission: Examination of Cases: Production of Lists of persons charged as war criminals*

When the Commission started its work it considered that there was no list of war crimes in existence which was authoritative in the sense that international law forbade an act not in the list being treated as a war crime and, conversely, obliged every state to treat as a war crime every act included in the list. After the First World War, the Responsibilities Commission of the Paris Peace Conference in 1919 had agreed on a list of acts which it considered should be treated as war crimes. The United Nations War Crimes Commission decided not to attempt to draw up at the beginning of its work a list of war crimes which would tie the hands of the Governments of the United Nations. The reason was that if such a list were prepared, it might be thought neces-

[1] S.R. & O. 1945, no. 1211, amended by the Diplomatic Privileges (General Amendment) Order in Council, 1946, S.R. & O. 1946, no. 2202.

[2] Resolution no. 38, adopted by the Council of U.N.R.R.A. at Atlantic City, November–December 1943, Miscellaneous no. 6 (1943), Cmd. 6497, p. 33.

sary in some countries to give it statutory force so as to ensure that the courts which were given jurisdiction to try war crimes were competent to try such offences.[1] It seemed that the ingenuity of the enemy was even then finding new ways of violating the laws and customs of war and it would have been inconvenient if, in countries where the list of war crimes had been given statutory force, new legislation would have been required to deal with new crimes which came to light. The Commission therefore decided to proceed upon the assumption that international law recognized the principle that a war crime was a violation of the laws and customs of war and that no question could be raised as to the right of the United Nations to put on trial as a war criminal, in respect of any such violation, any hostile offender who might fall into their hands. It was, however, considered convenient for the Commission and for the National Offices which were going to prepare the individual cases and transmit them to the Commission, that there should be a working list enumerating the various headings under which war crimes could be grouped. As such a working list, the United Nations War Crimes Commission adopted the list of war crimes drawn up by the Responsibilities Commission of the Paris Peace Conference in 1919[2] which contains the following 32 items: (1) Murder and massacres, systematic terrorism; (2) Putting hostages to death; (3) Torture of civilians; (4) Deliberate starvation of civilians; (5) Rape; (6) Abduction of girls and women for the purpose of enforced prostitution; (7) Deportation of civilians; (8) Internment of civilians under inhuman conditions; (9) Forced labour of civilians in connexion with the military operations of the enemy; (10) Usurpation of sovereignty during military occupation; (11) Compulsory enlistment of soldiers among the inhabitants of occupied territory; (12) Attempts to denationalize the inhabitants of occupied territory; (13) Pillage; (14) Confiscation of property; (15) Exaction of illegitimate or of exorbitant contributions and requisitions; (16) Debasement of the currency and issue of spurious currency; (17) Imposition of collective penalties; (18) Wanton devastation and destruction of property; (19) Deliberate bombardment of undefended places; (20) Wanton destruction of religious, charitable, educational, and historic buildings and monuments; (21) Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers or crew; (22) Destruction of fishing-boats and of relief ships; (23) Deliberate bombardment of hospitals; (24) Attack on and destruction of hospital ships; (25) Breach of other rules relating to the Red Cross; (26) Use of deleterious and asphyxiating gases; (27) Use of explosive or expanding bullets and other inhuman appliances; (28) Directions to give no quarter; (29) Ill-treatment of wounded and prisoners of war; (30) Employment of prisoners of war on unauthorized works; (31) Misuse of flags of truce; (32) Poisoning of wells.[3]

Subsequently, a thirty-third item was added to this list by a later decision of the United Nations War Crimes Commission, namely: 'Indiscriminate mass arrests for the purpose of terrorising the population whether described as taking of hostages or not.'

[1] One of the members of the United Nations War Crimes Commission, the Commonwealth of Australia, has actually introduced into its municipal legislation the 1919 list with some additions and modifications; Commonwealth of Australia War Crimes Act, 1945 (no. 48 of 1945) (Sec. 3 and Instrument of Appointment referred to).

[2] Violation of the laws and customs of War. Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919. Carnegie Endowment for International Peace, Division of International Law, Pamphlet no. 32.

[3] For a criticism of this list see Lauterpacht, op. cit., p. 78.

That this list is only a 'working list', without prejudice as to any of the legal issues involved, is shown by the fact that[1] in subsequent international agreements and municipal enactments a list of war crimes has not been adopted,[2] and that in the actual work of the Commission no stress was laid on the classification of individual charges under the different headings of the 1919 list.

In fulfilling its original task of investigating and recording the evidence of war crimes the Commission, by February 1947, has examined cases involving about 23,000 suspected or accused persons and has produced lists of war criminals containing the names of 22,500 persons of German, Italian, Albanian, Hungarian, Bulgarian, Roumanian, and Japanese nationality against whom, in the opinion of the Commission, a prima facie case of having committed war crimes has been established. The lists also include persons of Allied and neutral citizenship who had been in the service of the Axis states.

The placing of the name of a person on the Commission's lists is always preceded by an examination of the material submitted by the respective Allied Governments, particularly documents of municipal, military, and police authorities and depositions of witnesses. In very many cases the Commission, when deciding whether or not a person should be placed on the list, has to examine legal questions, sometimes of a novel nature. When, on the conclusion of the Commission's work, the proceedings of its Committee I concerning the listing of individual offenders become available for research, they will afford the student valuable information on state practice applied on an international level through a number of years, in respect of many—sometimes rather involved—questions of international law.

Among the preliminary legal problems with which the Commission has been faced, one of the most important was the question whether the term 'war crime', as used in the Commission's terms of reference, was to be understood in the narrower sense and therefore restricted to violations of the laws and customs of war, or whether it comprised also what later, in the London Agreement of 8 August 1945, was to be known as crimes against peace and crimes against humanity.[3] Eventually the Commission decided that 'crimes against peace and against humanity as referred to in the Four-Power Agreement of 8th August, 1945, are war crimes within the jurisdiction of the Commission'. This interpretation appears to have been confirmed by the Judgment of the International Military Tribunal at Nuremberg, where it is said that to initiate a war of aggression is the supreme international crime which differs from *other* war crimes in that it contains within itself the accumulated evil of the whole,[4] and according to which the crime against humanity is a subsidiary type of war crime.[5] This interpretation is further borne out by the Charter of the International Military Tribunal of the Far East and by the Indictment against the persons accused as the Japanese major war criminals.[6] Moreover, Article 5 (VII) (*b*) of the quadripartite Vienna Agreement on

[1] Apart from the exception mentioned in note 1, p. 366. The Australian Act contains, however, in addition to the enumeration based on the 1919 list, as it were, as a *clausula generalis* the item, violation of the laws and usages of war.

[2] Charter of the International Military Tribunal annexed to the Four-Power Agreement of 8 August 1945, Article 6; Charter of the International Military Tribunal for the Far East, Article 5; British Royal Warrant of 14 June 1945, A.O. 81/1945; Canadian War Crimes Act, 1946, Schedule, para. 2 (*f*); Regulations issued by the United States Military Authorities in the different Theatres of war, &c.

[3] See the statements made in the British House of Commons on 4 October 1944 and 31 January 1945, quoted in this *Year Book*, p. 186.

[4] Cmd. 6964, p. 13.

[5] See this *Year Book*, above, p. 205.

[6] See this *Year Book*, above, p. 220.

the Machinery of Control in Austria,[1] of 28 June 1946, enumerates among the activities reserved to the Allied Commission 'the tracing, arrest and handing-over of any person wanted by other United Nations' (than the four occupying Powers) for 'war crimes and crimes against humanity' and 'included in the lists of the United Nations Commission for War Crimes'.

The following are examples of questions of substantive law which the Commission had to examine and decide over and over again when dealing with particular charges brought before it by National Offices: The defence of military necessity, particularly in connexion with charges of the destruction of property, dykes, port installations, a library, works of art; the legality of pecuniary reprisals imposed on the civilian population by an occupant; the question whether and to what extent judges, including military judges, can be called upon to account for crimes committed in the exercise of their functions, particularly in connexion with the different types of special courts and courts martial instituted by the German authorities and the Italian 'Tribunale Speciale per la Difesa dello Stato'; the definition of crimes against humanity under the basic documents of 1945 in general; the question as to whether perpetrators of crimes committed on Czechoslovak territory at the beginning of 1939 can be prosecuted under the heading of crimes against humanity, and the legal character of acts of persecution committed during the war by Italian authorities against Italian nationals of Yugoslav race; the question to what extent attempts to denationalize the inhabitants of occupied territory are war crimes; the legal status of guerrilla fighters and partisans, particularly as applied respectively to the Yugoslav Army of National Liberation and the F.F.I. and to the Italian Fascist Republican formations—after September 1943; the criminal responsibility of administrators of seized property in occupied territory, particularly of Jewish property; individual responsibility for violations of conventional and customary rules of international law ; the relation between international and municipal law, particularly the question whether and to what extent the *lex loci* is relevant to a charge of a war crime or a crime against humanity; the committing of a war crime or a crime against humanity by enacting legislation which orders or permits such crimes; the responsibility of commanders for offences committed by their subordinates and of administrators of occupied territory; the responsibility of persons holding key positions in the political, military, and economic life of Germany and of Japan; racial discrimination in food allocation by the occupation authorities; compelling the inhabitants of occupied territory to work at places where military operations, as distinguished from military preparations, were being conducted; forced labour of civilians in general; the interpretation of the detailed provisions of the 1929 Prisoners of War Convention; the compulsory enlistment of the inhabitants of occupied territory in the armed forces of the occupant, particularly in connexion with Alsace-Lorraine, and the question of the responsibility of judges who sentenced to death, as deserters from the German army, Alsatians who had been drafted into the German army; the question whether voluntary recruitment of inhabitants of occupied territory for the armies of the occupant is permitted; the confiscation of property as a war crime; the seizure of means of transport by an occupying force; crimes committed in concentration camps; the responsibility of concentration camp personnel; membership in criminal organizations; responsibility for unjustified imprisonment, the taking of hostages, the killing of hostages; the responsibility of the commander of an Italian submarine who torpedoed a French merchant vessel on sight after the conclusion of the French-Italian armistice of 1940; the question whether a German officer who scuttled a German submarine

[1] Treaty Series no. 49 (1946), Cmd. 6958, p. 21.

after the German surrender, committed a war crime; the criminality of the use of Dutch uniforms, on 10 May 1940, by members of the German army; the implications of the war crime of 'usurpation of sovereignty'.

The proceedings leading up to the listing of a person are *ex parte* proceedings. A short time after the United Nations War Crimes Commission had been created, it recommended to its member Governments that National War Crimes Offices should be established to investigate, in the first instance, reports concerning war crimes and to submit to the Commission, in the prescribed form, charges concerning these offences. In response to the Commission's recommendation, such agencies have been set up by all member Governments. Representatives of the different National War Crimes Offices met at an International Conference, convened by the Commission, from 31 May to 2 June 1945.

In examining the charges submitted by the National Offices, the Commission decides whether there is a case justifying the arrest and handing over for trial of the person charged. The charges are examined in the presence of representatives of the Government (National Office) which submitted them. The Commission then reports to the member Government cases in which there appears to be either prima facie evidence that a war crime had been committed, sufficient to justify the apprehension and prosecution of the individual accused, or else sufficient grounds to consider the wanted persons as suspects or material witnesses. This is being done in the form of the Commission's lists of war criminals with which, in addition to the Governments, all apprehending authorities are currently supplied. The Commission itself has no executive power, no detective staff or agency; responsibility for the detective investigation and for the apprehension of the wanted person rests, therefore, with the military or other national or occupation authorities.

The Soviet Union not being a member of the Commission,[1] the most important authorities in charge of persons accused of war crimes were, in the earlier stages, Supreme Headquarters, Allied Expeditionary Force (S.H.A.E.F.), and, later, the Control Council for Germany, particularly the Commanders of the Western Zones. The allied military and occupation authorities have never treated as applicable to requests for the handing over of persons wanted for war crimes the technical provisions applicable in ordinary cases of extradition. The general principle has been that the respective commanders shall comply with requests for the handing over of wanted persons provided they have no reason to doubt the bona fides of the Allied request for the alleged war criminals in question and provided the persons wanted were not required as defendants or witnesses for trials before the International Military Tribunal or before the courts of the respective zones themselves. Persons listed as war criminals on the lists compiled by the United Nations War Crimes Commission were to be handed over without question, subject to the general requirements indicated.

For the territory of Germany the Control Council Law No. 10[2] eventually regulated the question of handing over of persons accused of war crimes on the following principles: when any person in a zone in Germany is alleged to have committed a crime, as defined in Article II (crimes against peace, war crimes, crimes against humanity, membership of a criminal group or organization in categories declared criminal by the International Military Tribunal), in a country other than Germany or in another zone, the Government of that nation or the commander of the latter zone,

[1] See, however, the quadripartite Agreement regarding Austria, quoted in note 1, p. 368.

[2] *Official Gazette of the Control Council for Germany*, no. 3, p. 50. *Military Government Gazette, Germany, British Zone of Control*, no. 5, p. 10, Art. IV.

as the case may be, may request the commander of the zone in which the person is located for his arrest and delivery for trial to the country or zone in which the crime was committed. Such request for delivery, it was provided, shall be granted by the commander receiving it, unless he believes such person is wanted for trial or as a witness by the International Military Tribunal, or in Germany, or by a nation other than the one making the request, or the commander is not satisfied that delivery should be made, in any of which cases he shall have the right to forward the said request to the Legal Directorate of the Allied Control Authority.

The listing of wanted persons by the Commission is relevant under this procedure because of the wide discretion granted to the zone commander to 'satisfy himself' that delivery should be made; the fact that a person is on the Commission's list is evidence of a prima facie case having been made against him. In Austria, only persons listed may be surrendered. In general, it may be said that the normal procedure is for accused persons to be surrendered for trial only when their names appear on the Commission's lists, though Commanding Officers have discretion to hand over a wanted person, not yet listed, as an exceptional measure and after careful examination of the case, while at the same time informing the Commission.

In addition to the listing of persons at the instance of one or more of its member Governments, the Commission has, in exceptional cases, also placed persons on its lists on its own initiative, acting on information collected by its own Research Office. The Commission does not cease to be interested in a case when the alleged criminal has been listed. Throughout, it has been in touch with, and has taken a great interest in, all investigating, prosecuting, and registering agencies established by the different Allied and inter-allied bodies in Germany and elsewhere, and has generally given advice, suggestions, and help in making the prosecution of persons suspected of war crimes effective. The Commission has also collected the transcripts, records, and judgments of courts dealing with persons accused of war crimes.

III. *The Advisory Functions of the Commission*

As will be shown presently, the Commission has adopted a great number of formal recommendations for transmission to its member Governments, a great part of which have, in one form or another, been accepted and acted upon. These formal recommendations did not, however, exhaust either the activities of the Commission or the influence exercised by it in this field. When the Commission was established in 1943, many questions both of principle and of practical application were still unsettled and, in the beginning, opinions on some of the controversial questions were divided even within the Commission; indeed, to a certain extent they have remained divided among lawyers even after the practical aspects were settled by the Four-Power Agreement, the Nuremberg proceedings, and the subsequent trials. But even in respect of highly controversial questions on which the Commission did not adopt any recommendations, such as, e.g., whether the initiation of a war of aggression is a crime, its discussions and the reasoning and opinions expressed in them exercised a great influence on the actual decisions which eventually were taken by the Governments of the Allied Nations.

1. *Preparations for Armistice Conventions and Peace Treaties.* Among the earlier recommendations which the Commission made to its member Governments were proposals for draft articles to be inserted in the Armistice Conventions to be concluded both with Germany and the other Axis Powers. These recommendations were, in general, based on the provisions which had been inserted in the Peace Treaties at the

conclusion of the First World War, but they tried to embody additional provisions which seemed appropriate in view of the experience gained in the unsuccessful attempts to apply the 1919 provisions, and in view of the changed and, to a great extent, aggravated conditions under which the Second World War was being waged. It was also suggested to insert in the Armistice documents provisions making impossible such sabotage of the Armistice stipulations as had been experienced after the First World War.

The actual Armistice Instruments with the smaller Axis countries which were eventually adopted imposed on the defeated states the obligation to collaborate with the Allied authorities in the apprehension and trial of persons accused of war crimes.[1] The Italian Armistice conditions contained Italy's obligation to apprehend and surrender into the hands of the United Nations Benito Mussolini, his chief fascist associates, and all persons suspected of having committed war crimes or analogous offences, whose names appear on lists to be communicated by the United Nations. Italy undertook to comply with any instructions given by the United Nations for this purpose.[2] Similar provisions were inserted in the Four-Power Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany of 5 June 1945,[3] and repeated in Control Council Proclamation No. 2 to the people of Germany of 20 September 1945, Section I, paragraphs 36 and 37.[4] The duty was imposed upon the German authorities to furnish any information and documents and to secure the attendance of any witnesses required by the Allied representatives for the trial of the principal Nazi leaders, as specified by the Allied representatives, and all persons from time to time named or designated by rank or employment by the Allied representatives as being suspected of having committed, ordered, or abetted war crimes or analogous offences and to give all other aid and assistance for these purposes. The German authorities were further obliged to comply with any instructions given by the Allied representatives in regard to the property of any such person. The provisions were extended to cover also nationals of any of the United Nations who are alleged to have committed an offence against their national law. In the Proclamation to the Japanese people, made by the Potsdam Conference of 26 July 1945, the right of the Allied nations to mete out stern justice to all war criminals was expressly reserved.[5] When the Draft Peace Treaties with the Axis satellite countries were discussed in Paris in 1946, the Commission again presented recommendations for the inclusion of detailed provisions aimed at giving effect to the desire of the Allied nations to bring to justice the perpetrators of war crimes. By that time, of course, a considerable part of this task, both with regard to the principle and to its practical application, had been achieved by the setting up of the International Military Tribunal and in the hundreds of trials before municipal and occupation courts throughout Europe and the Far East. All the five Peace Treaties contain provisions regarding the surrender of persons accused of war crimes, crimes against peace, and crimes against humanity, and of collaborators of Allied nationality.[6]

[1] Armistice with Roumania, Cmd. 6585, Art. 14; Armistice with Finland, Cmd. 6586, Art. 13; Armistice with Bulgaria, Cmd. 6587, Art. 6; Armistice with Hungary, *Department of State Bulletin*, vol. xii, no. 291, 21 January 1945, p. 83, Art. XIV.

[2] Cmd. 6693, Protocol signed at Brindisi on 9 November 1943, amending Art. 29 of the Instrument of Surrender of 29 September 1943. [3] Cmd. 6648.

[4] *Official Gazette of the Control Council for Germany*, no. 1, p. 8; *Military Government Gazette, Germany, British Zone of Control*, no. 5, p. 27.

[5] *Department of State Bulletin*, vol. xiii, no. 318, 29 July 1945, p. 137.

[6] Miscellaneous no. 1 (1947), Cmd. 7022, Art. 45 of the Peace Treaty with Italy, Art. 6 of

2. *Draft Conventions for inter-allied surrender of war criminals.* In addition to the provisions regarding the handing over by the enemy of persons accused of war crimes (see *supra* under (1)), the Commission also suggested the conclusion of a Convention for the surrender of war criminals and other war offenders between the Allied states themselves. The Draft Convention which the Commission submitted to its member Governments was an adaptation of a draft prepared in London by the Ministers of Justice of some of the Allied Governments. The Commission's draft provided for the surrender as a result of executive or administrative procedure and covered, in addition to persons suspected of war crimes, also nationals of the United Nations who had aided the enemy against their own country. The purpose of the Draft Convention was to make certain that the United Nations would reciprocally transfer to one another persons in their power who were wanted for trial as war criminals or 'quislings', or had already been convicted on such charges, and to secure this result in the simplest possible way and, in particular, a way which would exclude the possibility of the refusal of surrender on the ground that the acts charged had the character of political offences.

Although some Governments expressed their readiness to sign and ratify the Draft Convention, it did not materialize in the proposed form because some members, particularly the Great Powers, maintained that since the persons wanted would be prisoners of war in the hands of the armed forces of the requested state, or refugees present in its territory without legal authorization, everything could be done by executive action, and there was no need for treaty provisions. In actual practice, the most important part of the problem, the handing over of enemy personnel and collaborators found in Germany, has been solved without difficulty, the surrender of these persons having been granted by military commanders and by the zone and control authorities under the provisions of Article IV of the Control Council Law No. 10, which has already been mentioned.[1]

3. *Recommendations for the establishment of inter-allied joint courts and military tribunals.* In a number of recommendations and draft conventions, the United Nations War Crimes Commission tried to contribute towards the establishment of the necessary judicial machinery capable of dealing swiftly with the great number of persons which it was foreseen would be accused of war crimes. In particular the Commission recommended the creation of a United Nations War Crimes Court or Tribunal and the employment of military tribunals, where necessary of an inter-allied or mixed character. These recommendations influenced not only the creation of the International Military Tribunal by the Four-Power Agreement of 8 August 1945, but also the establishment of numerous national and mixed inter-allied military tribunals invested with jurisdiction over war crimes, including the International Military Tribunal for the Far East, in Tokyo, established for the trial of the major Japanese war criminals.

The British Royal Warrant of 14 June 1945[2] gives power to the Convening Officer, in a case where he considers it desirable so to do, to appoint as a member of the Court, but not as President, one or more officers of an Allied Force serving under his command or placed at his disposal for the purpose. Similar provisions have been inserted in the analogous Canadian enactment[3] and in some of the Regulations made by the United States military authorities in the Far Eastern theatres of war. The latter provide for 'International Military Commissions' consisting of representatives of other

the Peace Treaty with Roumania, Art. 6 of the Peace Treaty with Hungary, Art. 5 of the Peace Treaty with Bulgaria, Art. 9 of the Peace Treaty with Finland.

[1] See *supra*, p. 369, note 2.

[2] Army Order 81/1945, Regulation 5 (3).

[3] War Crimes Act, 1946, 10 George VI, c. 73, Schedule, Regulation 7 (4).

nations or of each nation concerned, appointed to try cases involving offences against two or more nations.[1]

4. *Establishment of offices of the Commission in occupied enemy territory. Investigating teams.* Before the war ended, the Commission made recommendations dealing with various measures to ensure the capture of suspected persons and the establishment of offices of the Commission in occupied enemy territory. The substance of these proposals was, to a certain extent, realized by the appointment of Allied investigating teams to operate in liaison with the Allied military authorities in occupied Germany.

5. *Extension of the scope of the retributive action.* From the very beginning, the United Nations War Crimes Commission has been advocating the extension of the scope of retributive action of the United Nations beyond the traditional notion of war crimes in the technical sense, i.e. of violations of the laws and customs of war. The Commission's endeavours in this respect were twofold: on the one hand, they concerned the interpretation of its own terms of reference; on the other, they consisted in recommendations concerning the trial and punishment of crimes committed in territories occupied before the actual outbreak of war, or on Axis territory against Axis nationals and stateless persons. The great controversial question whether the initiation of a war of aggression was a crime was much discussed within the Commission, with outside assistance from academic circles.

The Commission's deliberations and proposals had considerable influence on the inclusion, in the Charter of the International Military Tribunal, in the documents modelled after it, and in the Draft Peace Treaties, of provisions for the punishment of 'crimes against humanity',[2] and the discussions within the Commission were one of the factors which contributed to the inclusion in the different agreements and instruments of provisions against crimes against peace.

6. *The defence of superior orders.* Soon after its establishment, the Commission closely investigated that pivotal problem in the treatment of war crimes, namely, whether and to what extent the plea of superior orders is a defence.

The statement of the law as contained in earlier editions of Oppenheim, in chapter xiv of the British *Manual of Military Law*[3], and in the United States Basic Field Manual, *Rules of Land Warfare*,[4] had been challenged in many quarters.[5] Members of the United Nations War Crimes Commission also strongly advocated a reconsideration of the sweeping assumption that the plea of superior orders was a defence in charges for war crimes. Eventually, the statements of the law were amended both in the British *Manual of Military Law* and in the United States Basic Field Manual, in the former to the effect that 'the question . . . is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity'.[6] The amendment to the latter now contains the ruling that the fact that acts violating the accepted laws and customs of war 'were done pursuant to order of a superior or government sanction may be taken into consideration in determining the

[1] *Law Reports of Trials of War Criminals*, selected and prepared by the United Nations War Crimes Commission, published for the Commission by H.M. Stationery Office, vol. i (1947), Annex II, p. 114.

[2] See article 'Crimes against Humanity', above, p. 212.

[3] Para. 443.

[4] F.M. 27/10, para. 345.

[5] See, e.g., Lauterpacht, op. cit., p. 69 f.; Oppenheim–Lauterpacht, vol. ii, 6th ed. (1940), and revised ed. (1944), para. 253, p. 453; Sack, *Law Quarterly Review*, 60 (1944), p. 225.

[6] Amendment No. 34 to the British Manual of Military Law No. 29, April 1944; see Rowson in *Law Quarterly Review*, 60 (1944), p. 225.

culpability either by way of defence or in mitigation of punishment'.[1] The two Manuals are, of course, not legislative instruments, but only publications setting out the law. The amendments to the British and American Manuals are, therefore, not alterations of the law, but corrections of opinions on existing law which, as is stated in a footnote to the British Amendment, had been shown to be 'inconsistent with the view of most writers upon the subject and also with the decision of the German Supreme Court in the case of the *Llandovery Castle*'.[2]

Recent positive municipal enactments bearing on the plea of superior orders, and either excluding or restricting it, are to be found, *inter alia*, in the French Ordinance concerning the suppression of war crimes of 28 August 1944,[3] in the Czechoslovak Retribution Decree,[4] in the Norwegian War Crimes legislation,[5] in the Danish Act on the Punishment of War Crimes,[6] and in some United States Regulations for the trial of war criminals.[7]

The Charter of the International Military Tribunal and the documents which were drafted with the Charter as their model provide that the fact that the defendants acted pursuant to an order of their government or of a superior shall not free them from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.[8] The Judgment of the International Military Tribunal very succinctly summed up the law by stating that the true test which is found in varying degrees in the criminal law of most nations is not the existence of the order but whether moral choice was, in fact, possible.[9]

7. *Criminal groups and organizations.* The United Nations War Crimes Commission devoted much attention to the phenomenon of mass criminality for which certain organizations were responsible. 'Having ascertained that countless crimes have been committed during the war by organised gangs, Gestapo groups, S.S., or Military units, sometimes entire formations', the Commission made the following recommendations to the member Governments:

(*a*) to seek out the leading criminals responsible for the organization of criminal enterprises including systematic terrorism, planned looting, and the general policy of atrocities against the peoples of the occupied states, in order to punish all the organizers of such crimes;

(*b*) to commit for trial either jointly or individually all those who, as members of these criminal gangs, have taken part in any way in the carrying out of crimes committed collectively by groups, formations, or units.

Such recommendations and the preparatory work and discussions preceding them have influenced both municipal and international enactments which were subsequently made. The problem was not entirely new: both the French[10] and the Belgian[11] Criminal Codes contain provisions against what is called *associations de malfaiteurs*. An example

[1] Changes No. 1 of the Rules of Land Warfare dated 15 November 1944, FM. 27/10, C. 1.

[2] See the Note on the *Peleus* Trial in *Law Reports of Trials of War Criminals*, vol. i, p. 19, and Note on the *Dostler* trial, ibid., p. 32.

[3] Art. 3.

[4] No. 16 of 1945, Section 13 (3).

[5] Provisional Decree of 4 May 1945, Section 5; re-enacted by the Act of the Storthing of 13 December 1946, 'Norsk Lovtidend', no. 44.

[6] Of 12 July 1946, Section 4.

[7] See *Law Reports of Trials of War Criminals*, n. 2 (*supra*), vol. i, Annex II, p. 120.

[8] Art. 8 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945; Art. 6 of the Charter of the International Military Tribunal for the Far East; Art. II (4) (*b*) of Control Council Law No. 10.

[9] Cmd. 6964, p. 42. [10] Arts. 265–7. [11] Arts. 322–6.

of legislation based on similar considerations is a statute enacted in India for the suppression of thuggery in 1836.[1]

The British Royal Warrant of 18 June 1945[2] made provision for speeding up the trial of members of units or groups implicated in criminal activities by providing in Regulation 8 (ii):

'Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as *prima facie* evidence of the responsibility of each member of that unit or group for that crime.'

Later, the following provision was added:

'In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court.'[3]

Similar provisions were adopted by the Commonwealth of Australia,[4] and by the Dominion of Canada.[5] The United States Military Authorities issued various Regulations and Directives for Europe and for the Far East, which also contain provisions covering the trial of offences involving concerted criminal action on the part of units, groups, and organizations, and mass atrocities.[6] The Charter of the International Military Tribunal contains far-reaching provisions of a novel character concerning groups or organizations to be declared criminal in its Articles 9 and 10; these provisions have also been made part of the local law of Germany by the Control Council Law No. 10. The Judgment of the International Military Tribunal placed a restrictive interpretation on these provisions and made important recommendations with regard to them.[7]

8. *Proposals regarding the codification of international law.* On the eve of the San Francisco Conference, the Commission proposed the embodying in the Charter of the United Nations of provisions to the effect that 'any person in the service of any State who has violated any rule of international law forbidding the threat or use of force, or any rule concerning warfare, especially the obligation to respect the generally recognised principles of humanity, shall be held individually responsible for these acts and may be brought to trial before the civil or military tribunals of any State, which may secure custody of his person, and be punished by death or any lesser penalty'.

These recommendations were not embodied in the Charter of the United Nations in so many words, but the provisions of the Charter concerning the measures for the prevention and removal of threats to peace and for the suppression of acts of aggression,[8] and those dealing with promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion,[9] show that the Commission's recommendations were in line with the general trend of Allied opinion. Subsequent events within the United Nations Assembly and within the United Nations Economic and Social Council, particularly the Assembly Resolution on the affirmation of the principles of international law, recognized by the

[1] Act no. 30 of 1836, cf. Goodhart, *Juridical Review*, 58 (April 1946), p. 18.
[2] Army Order 81/1945.
[3] Army Order 127/1945, Amendment No. 1 to the Royal Warrant A.O. 81/1945.
[4] Statutory Rules 1945, no. 164, Rule 12.
[5] War Crimes Act, 1946, Schedule, Regulations 10 (3).
[6] See the paragraph on crimes committed by units or groups in Annex II of the publication mentioned in n. 1, p. 373.
[7] Cmd. 6964, p. 67.
[8] Art. 1 (1).
[9] Art. 1 (3); Art. 13 (1) (*b*); Art. 55 (*c*); Art. 62 (2); Art. 68; Art. 76 (*c*).

Charter of the Nuremberg Tribunal,[1] and on the so-called crime of Genocide[2] show that the United Nations are proceeding on the lines recommended by the Commission early in 1945.

When the Four-Power Agreement of 8 August 1945 was concluded, the Commission welcomed it and recommended that the Governments represented on the Commission which were not Signatories to the Agreement should adhere to it. Eventually all Member Governments of the Commission with the exception of two adhered to the London Agreement.[3]

IV. *Legal Publications*

The proceedings, judgments, and other records of the trials for war crimes conducted by national (military, or occupation) courts of the different countries are being collected by the Commission. Reports on these trials, giving summaries of the proceedings, and provided with explanatory commentaries, are being published by it. When this note went to press the first volume of the *Law Reports of Trials of War Criminals* had appeared. Further volumes containing reports on cases tried in British, United States, French, Canadian, Norwegian, and other courts are in preparation. The Commission is also publishing a volume, or volumes, containing the texts of international agreements and municipal enactments by both Allied and former enemy states, touching on the problem of war crimes in the wider sense.

The comprehensive official Report on the Commission's work will contain, *inter alia*, a record and explanation of its decisions on questions of law, its recommendations, discussions, and opinions, and will show how the activities of the Commission have influenced the development of the law and practice regarding war crimes.

EGON SCHWELB[4]

CAMBRIDGE CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION, 1946

THE International Law Association held its 41st Conference, the first after the recent war, at Cambridge from 19 to 24 August 1946. About 300 persons attended, and a dozen national Branch Associations, besides Headquarters, were represented. The Conference was welcomed by Lady Bragg, Mayor of Cambridge, and Professor H. A. Hollond on behalf of the Vice-Chancellor of the University and as Chairman of the Faculty Board of Law. The Master and Fellows of Trinity College gave an evening reception.

The Conference was presided over by the Right Hon. Lord Porter, P.C., Lord of Appeal, President of the Association, assisted by the outgoing President, Dr. J. A. van Hamel, and by the following Vice-Presidents: Judge Algot Bagge, Prof. A. L. Goodhart, K.C., Sir Lynden Macassey, K.C., and Professors A. and G. de La Pradelle.

Mr. Trygve Lie, Secretary-General of the United Nations, was elected an Honorary Vice-President of the Association.

The time available for the preparation of Reports was inevitably limited, and the number of Reports discussed was less than usual. The following Papers were read and were followed by some stimulating discussions: by Professor de La Pradelle and the

[1] Doc. A/236, adopted 11 December 1946.
[2] *United Nations Weekly Bulletin*, vol. i, no. 20 (17 December 1946).
[3] Nuremberg Judgment, Cmd. 6964, p. 1.
[4] Legal Officer of the United Nations War Crimes Commission.

Hon. William S. Culbertson on 'The Present Structure of the United Nations Charter and the Direction of Desirable Changes'; by Mr. William Latey on 'Divorce Jurisdiction and the Mutual Recognition of Decrees'; by Mr. Robert Burrell, K.C., on 'Trade Marks'; by Mr. C. G. Dehn on 'The Effect of the United Nations Charter on the Development of International Law, with special reference to the Status of Neutrality and the Hague and Geneva Conventions'; by Judge Bagge and Sir Lynden Macassey, K.C., on 'Uniform Legislation in the Field of Commerce'; by Professor D. J. Offerhaus on 'The Conflict of Laws concerning the Formation of Contracts'; by Dr. J. A. van Hamel and Professor A. L. Goodhart, K.C., on 'Methods of Curbing the Aggressive Spirit'; and by Professor Paul Coppens on 'Trusteeship under the Charter'.

A number of Resolutions were passed, including one expressing the fullest support of the United Nations, and some new Committees were appointed. Particulars will be found in the forthcoming official record of the Conference.

A special discussion was devoted to the Constitution and the Administration of the Association, and a new Policy Committee was appointed to examine and make recommendations upon these matters.

The arrangements were in the hands of Mr. Arthur Jaffé and Mr. W. Harvey Moore, Joint Hon. Secretaries, and Mr. R. Y. Jennings, Fellow of Jesus College, as local Hon. Secretary.

The Conference was noteworthy for an excellent spirit and a determination to increase the contribution of the Association to the strengthening and development of the rule of law in international relations.

ADMIRALTY REPORTS, 1744–5

On p. 436 of volume ii of his *Law and Custom of the Sea* Marsden cites, to illustrate the Rule of War of 1756, a note on the case of *The Ceres* from a document in the Public Record Office.[1] This is a small manuscript volume of 'reports, or rather notes, of cases arising out of the war of 1744–5'. Marsden remarks that though 'the name of the reporter does not appear . . . from internal evidence it is clear that he was an advocate engaged in some of the cases'. The 'internal evidence' is obviously the note-taker's use of personal pronouns—'we', 'our', 'they', 'their', and (once) 'my'—in recording proceedings and arguments of contestants in ten of the cases cited. Investigation, however, shows that no 'advocate', in the Admiralty Court use of that term, was consistently, or even generally, engaged on 'our' side. 'We' and 'they', therefore, must have been not advocates but proctors. Of proctors, Everard Sayer, Admiralty Proctor, was at least five times on 'our' side, and the records show that it was he who took the one step (a claim in *The Ceres* case itself) described in the notes as 'my'; but he was also once on 'their' side, and 'we' continue to appear in notes on proceedings after his death. His successor as Admiralty Proctor, however, Philip Champion de Crespigny, was on 'our' side twice, if not oftener, *with* him, once *against* him, and was *never* on 'their' side.

It can hardly be doubted, therefore, that the little 'Admiralty Reports 1744–5' (actually, it includes a case of 1740 and three cases of 1746) is a Crespigny compilation, though it may comprise something of Sayer's work. But, judging by the handwriting, the notes (which are by no means in strict chronological order) were probably copied for him by a clerk from earlier manuscripts.

C. J. B. Gaskoin

[1] Now in bundle H.C.A. 30.875. Cf. Mootham in this *Year Book*, 8 (1927), p. 63, and Pares, *Colonial Blockade and Neutral Rights, 1739–1763* (1938), *passim*.

DECISIONS IN THE ENGLISH COURTS SINCE THE BEGINNING OF 1945 INVOLVING PUBLIC AND PRIVATE INTERNATIONAL LAW

A. Public International Law

I. *The National Status of German and Austrian Refugees*

1. The disabilities of enemy aliens were considered in *Rex* v. *Home Secretary, ex parte L.*, [1945] 1 K.B. 7. In this case the applicants who applied for a writ of habeas corpus were formerly Austrian nationals but had become German nationals by reason of a German decree of 3 July 1938, the effect of which was recognized by Great Britain. In November 1941 a decree[1] was promulgated in Germany under which any Jew, having his ordinary residence outside Germany in circumstances which made it clear that his residence abroad was not really temporary, ceased to be a German national. The applicants, who were Jews within the meaning of the decree, left Austria for France in 1938, and France for South America in 1941; on their arrival at the Port of Spain, Trinidad, an Order for Detention was made in respect of them under Defence Regulation 18 BA[2] and they were brought to the United Kingdom and interned. They applied for a writ of habeas corpus on the ground that the Order for Detention was not lawfully made.

Lord Caldecote, giving the judgment of the Court, said 'if effect must be given to the German decree, so as to deprive these people of their German nationality and to make them stateless, they would, of course, no longer be enemy aliens and they would not come under the disabilities which fall on enemy aliens'. He cited the judgment of Wills J. in *Rex* v. *Lynch*, as illustrating the necessity of caution in treating of changes of nationality. He concluded that 'to recognise changes of nationality in time of war which might operate to the prejudice of this country is to do something which, even if it is necessary to put it on the grounds of public policy, ought not to be done'; and that there was an impediment at the very outset of the applicants' motion, namely, that they were enemy aliens and retained this status notwithstanding the German decree; the application for the writ was, therefore, refused.

2. It is submitted that the judgment of the Divisional Court is open to the following criticisms: First, the reasoning of the judgment confuses the substantive status of the applicants with their procedural status. It can hardly be denied that an alien of hostile origin, whether stateless or an enemy national, may be detained under the prerogative in time of war; but there is no authority for the proposition that a stateless person who is detained is not entitled to a writ of habeas corpus, though probably he is not. But the Court appears to have assumed that to have granted the applicants a writ would in itself have called in question the right of the Crown to detain them, and the judgment is directed rather to the validity of the Detention Order than to the grant of a writ, which was the issue before it. Secondly, the judgment implies that the applicants were to be regarded not only as enemy aliens but also as German nationals. To purport to determine the national status of an alien by any rules of law other than those of the country of which he is deemed to be a national is contrary to all principles. To refuse to recognize the German decree as taking away the applicant's German nationality was to confuse the change of national status which it brought about with the consequences of that change of status. *Rex* v. *Lynch* was cited, but in that case the change of status essential to Lynch's defence

[1] This decree (*Verordnung*) was equivalent to a Statutory Rule or Order, and was made under exercise of powers given by an earlier general law dealing with German race and nationality.

[2] The fact that the applicants were detained under this Regulation was not disclosed in the reports of the proceedings, in which these applicants were involved, until *Hirsch* v. *Somervell*, [1946] 62 T.L.R. 592.

was not the acquisition of Transvaal nationality under Transvaal law, which was not disputed, but the loss of British nationality under English law. Since Lynch's voluntary act of naturalization was an act of treason, no change of status in this sense took place and it was unnecessary for the Court to consider the consequences of any such change of status, for which consequences the Naturalization Act, 1870, Section 6, provides.[1]

But in the instant case the change of status was brought about by operation not of English law, but of the German decree; further, denationalization by decree is entirely different from a voluntary act of naturalization. The change of nationality of the applicants is, therefore, in quite a different category from that of Lynch. But the Divisional Court did not adopt the principle underlying *Rex* v. *Lynch* which is really relevant to this case, namely, that in determining whether a change of national status has taken place, the appropriate national law must be applied. In Lynch's case the Court insisted rightly that his change of national status must be determined by English law; conversely, the Divisional Court should have determined the change of status of the applicants in accordance with German law, but at the same time refusing to recognize, upon grounds of public policy, that such change of status had any consequences in English law.

3. The reason the court considered itself bound to find that the applicants were enemy aliens lay doubtless in the fact that the past decisions on the title of a civilian internee in time of war to a writ of habeas corpus have invariably been given in respect of persons who were in fact enemy aliens. The only cases in which an applicant had pleaded that he was stateless were *Ex parte Liebmann* and *Ex parte Weber*,[2] and in those cases the court found against the applicants on the question of fact involved in that plea.

4. It is submitted that the following considerations show that it was open to the Court in *Rex* v. *Home Secretary, ex parte L.* to hold both that the applicants had become stateless persons by operation of the German decree and that they were, nevertheless, still under some or all of the disabilities which are imposed on enemy aliens:

(i) The protection which the King gives to aliens resident in this country under licence is given under the comity of nations, and the principle that the King is not obliged either to admit an alien or to retain him after admission is not one of English constitutional law (as stated by Scott L.J. in his judgment in *Ex parte Kuchenmeister*), but one of international law; this is clearly shown in Lord Atkinson's judgment in *Attorney-General for Canada* v. *Cain*, [1906] A.C. 542. It is also by the comity of nations that a friendly alien resident here under licence enjoys largely the same rights and protection as a British subject, and effect has been given to this both by Statute and by the courts. But the right of the King to withdraw his licence to remain here at any time cannot be challenged either in the English courts or in international law. The practice has grown up, in recent wars, of internment by belligerents of enemy aliens in their territory; and this is now recognized as an undoubted right in international law. The English courts will therefore not interfere with the exercise of this right by the Crown as belligerent.

(ii) The arguments adduced to show that an alien resident in this country under licence may be expelled by withdrawal of that licence apply equally to all aliens whether they are friendly or hostile, foreign nationals, or stateless persons; where therefore the Crown as belligerent resorts to the internment rather than the expulsion of aliens in time of war, there appears to be no ground for distinction between these classes of aliens. With regard to detention under the prerogative or Defence Regulations in time of war, enemy aliens and stateless persons must lie under equal disability.

(iii) The detention of an enemy alien for the greater safety of the state in time of war is

[1] Channell J.: 'The section is not dealing with the circumstances under which naturalisation may be legal or illegal, but the consequences of the naturalisation.'

[2] In the former case ([1910] K.B. 268) the Court, having regard to German law, decided that the applicant had certain rights appertaining to German citizenship. In the latter case the Court of Appeal appears to have proceeded on the assumption that a person cannot be stateless, though there was some evidence of German law which enabled the House of Lords to find that he was still a German national ([1916] 1 A.C. 421).

an Act of State, of which he cannot complain by the habeas corpus procedure; is there any reason for giving a stateless person, who has been detained upon the same grounds, a greater right? It may be that the only difference between an enemy alien and a stateless person who may be seeking a writ of habeas corpus is that the Home Secretary has a greater burden to discharge in satisfying the court that the detention complained of is justifiable as an Act of State;[1] and that if he discharges that burden a stateless person is not entitled to a writ. But the question whether or not a stateless person is entitled to a writ of habeas corpus is in any case distinct from the question in what circumstances the Crown as belligerent may intern him.

5. The applicants, having failed in this case to obtain a writ of habeas corpus, claimed relief against the Attorney-General and the Home Secretaries, Mr. Morrison and Mr. Ede, for arrest, detention, and threatened deportation. In interlocutory proceedings in the Chancery Division the defendants applied for the statement of claim to be struck out and the action dismissed. Roxburgh J. decided that the pleading could not possibly stand with the decision in the case of *Rex* v. *Home Secretary, ex parte L.*, and 'that their form of action was obviously and almost incontestably bad'. He drew the full implications from the words quoted above from Lord Caldecote's judgment that the applicants were to be deemed to be German nationals, and not merely enemy aliens. The applicants appealed against the decision of Roxburgh J. and the appeal was allowed.[2]

6. In *Rex* v. *Bottrill, ex parte Kuchenmeister*,[3] Kuchenmeister applied for a writ of habeas corpus. The Divisional Court dismissed the application and Kuchenmeister appealed.

This case is sharply distinguished from *Rex* v. *Home Secretary, ex parte L.*, by the fact that Kuchenmeister pleaded not that he had ceased to be a German national, but that, though he was a German national, he had ceased to be an enemy national and an enemy alien in this country, because the state of war between this country and Germany had been brought to an end. However, this plea failed and the court had no alternative but to regard him as an enemy alien and was bound by authority to refuse him a writ of habeas corpus. The judgment of the Court of Appeal, which is discussed in another connexion in Section II below, is relevant here only in the observations of Scott L.J. that an enemy alien when interned becomes *ipso facto* a prisoner of war. It has the support of some authority,[4] but rests upon a failure to distinguish between international and municipal law. An interned enemy civilian is not a prisoner of war within the meaning of the Geneva Convention of 1929, whether he is interned in this country or any other country signatory to that Convention. The term 'prisoner of war' is a term of international law, and whether an enemy alien is a prisoner of war must be determined by reference to the rules of war, as embodied in The Hague Regulations, and other relevant conventions and customary international law. An enemy civilian may be capable, as Bailhache J. pointed out, in certain circumstances of activities which would make him a combatant or spy, but he cannot, it is submitted, be deemed to be a prisoner of war until he has in fact acted in

[1] See *Netz* v. *Ede*, [1946] 1 Ch. 224.

[2] *Hirsch* v. *Somervell*, [1946] 62 T.L.R. 592; the Court of Appeal held that the case was not one in which it is so plain and obvious that the statement of claim discloses no reasonable cause of action that the Court should strike it out under Order 25, rule 4, or the inherent jurisdiction of the Court. The Court was studious not to indicate any opinion it might have formed upon the main issues of the case, and it is not altogether clear from the judgment what aspect of the appellants' case they considered arguable, but it is probably the plea that Defence Regulation 18 BA was not applicable to the appellants and that, if this was so, the Crown was not entitled to change its ground and argue that the detention of appellants was lawful as an exercise of its prerogative powers.

[3] [1946] All E.R. 635 (Original Court); [1946] W.N. 177.

[4] Judgment of Bailhache J. in *Ex parte Liebmann*, [1916] 1 K.B. 268 (he puts the cart before the horse, for he says in effect that the mere fact of internment of an enemy alien, who *may* act as a combatant or spy if left at large, puts him into the class of enemies who *have* so acted, i.e. prisoners of war); and concluding words of Darling J. in *R.* v. *Knockaloe Camp Commandant*, [1918] 34 T.L.R. 4.

a combatant capacity; and mere internment, to deprive him of the opportunity of so acting, cannot, of itself, make him a prisoner of war.

7. The consequences of the ruling that German-Jewish refugees in this country, who were affected by the German Denationalization Decree, are not stateless persons but German nationals is both inconvenient and unjust; for example, British-born women who have married them in this country since 1941 may find that, though they had supposed they were marrying stateless persons and had, therefore, retained their British nationality, are, after all, aliens. Further, a class of people who have been domiciled in this country, and established themselves here, become liable to deportation to Germany and to a denial of certain rights such as those given under the Patents and Designs Acts, which is quite inconsistent with their position as aliens living here under licence and free from restraint.

II. *The Belligerent Status of Germany in 1945*

1. In *Rex* v. *Bottrill, ex parte Kuchenmeister*,[1] the Court accepted the Foreign Office certificate as the ground of its decision in the case, since it was binding upon the Court. Counsel for the Appellant had argued that the Four-Power Declaration[2] of 5 June 1945 in fact brought to an end the state of war not only between this country and Germany, but between Germany and all those members of the United Nations who were at war with her, with the consequence that the appellant was no longer an enemy alien after the date of the Declaration; and Scott L.J. declared that this contention had much theoretical support in international law and that, had not a certificate of the Foreign Secretary been binding upon the King's courts, he would have been 'disposed to hold that the authority of the Secretary of State for Foreign Affairs on any date subsequent to His Majesty's Declaration made through his Plenipotentiaries at Berlin in June 1945 was limited by that Declaration'.

He did not cite any precedent or authority which would constitute such support but relied rather for his view upon the contradictions into which, according to the argument of Counsel for the Appellant, paragraph 3 of the Foreign Office certificate led. These were that there is no such thing as a sovereign state without a sovereign government; and that a state which has no national government cannot wage a war or be at war.

The argument really consists of two propositions: that the Four-Power Declaration had in fact brought the war to an end, so that the Crown was, as it were, estopped from declaring at a later date that the war was still continuing; and that in any case the situation in Germany since the date of the Declaration has been such that the German state must be regarded as in abeyance if not extinguished, and that therefore a state of war cannot exist between Germany and this country. It is submitted that neither of these propositions can be maintained.

2. The Act of Military Surrender,[3] despite its unprecedented form, has the effect of an Armistice, imposing upon the German High Command the obligation to cease hostilities, but providing for their resumption in case of a breach of this obligation; further, it looks forward to a more general instrument to be imposed upon Germany as a whole.

This Act, as its title implies, contains military clauses only and there was no devolution under it of the general authority of government by the Four Powers; it did not therefore have any wider consequence than the cessation of hostilities. It did not terminate the state of war, nor did it define the status of Germany or of the Doenitz administration.

3. The motivation and occasion of the Four-Power Declaration was the complete occupation of Germany, the unconditional surrender of its armed forces, and the disappearance of any form of central government in the country.[4]

[1] *Ubi supra.*

[2] On 5 June 1945 the Four Powers made 'a declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany'. For the text of the Declaration see above, p. 113.

[3] See above, p. 112, n. 1.

[4] Doenitz, the members of his administration, and numerous officers of the Wehrmacht were arrested by the Four Powers on or about 24 May 1945.

But nowhere in the Declaration is it stated that Germany[1] has ceased to exist as a state or that the state of war has been brought to an end. Is there any part of the Declaration from which either of these propositions can be implied?

A state of war is an expression of international law defining a certain relationship between two or more states; it is a legal concept, and whether a state of war exists is therefore a question of law and not of fact. It is the function of the Crown, as representative of the United Kingdom in international relations, to determine whether there is a state of war between it and another state, and the Declaration of War or Peace by the Crown is binding in English municipal law and conclusive upon the matter in the courts. Therefore, in the absence of any express Declaration that the state of war has been brought to an end, only the clearest implication from the terms of the Declaration could be accepted in its place. Normally a state of war is brought to an end only by the conclusion of a Treaty of Peace.[2]

4. The disappearance of the German state, if it had taken place, would no doubt give rise to such an implication. But the German state, though shorn of much of its sovereignty,[3] continues, since the assumption of supreme authority by the Four Powers has been expressly declared not to have effected the annexation of Germany.

It is true that part of the territory of eastern Germany has been annexed *de facto* by Poland, but a partial loss of territory does not affect the sovereignty of the state and there has been no other extinction of the German state which could be recognized as such in international law. Further, paragraph 6[4] of the Proclamation of 20 September 1945 contemplates not only the revival of treaties to which Germany is a party but also the bringing into force of treaties to which Germany may become a party in the future; this would be impossible in respect of a non-existent state. To suggest that the German state is in abeyance until some such international act by the Control Council as the revival of a treaty on Germany's behalf recreates its personality, is entirely artificial; a state may lose many instances of its sovereignty; but its legal personality remains[5] and cannot be regarded

[1] Though in the fourth paragraph of the preamble it is said that the status of Germany will be determined hereby, i.e., in the terms of the Declaration.

[2] *Kotzias* v. *Tyser*, [1920] 2 K.B. 69; Roche J. said 'the authorities show that in the absence of any specific statutory or contractual provision to the contrary, the general rule of international law is that as between civilised Powers who have been at war, peace is not concluded until a Treaty of Peace is finally binding upon the belligerents and that that stage is not reached until ratifications of the Treaty of Peace have been exchanged between them'. The Supreme Court of the United States has more than once declared that a war does not end at the date of the Armistice but continues until peace is declared. It is hard to see, therefore, what theoretical support in international law Scott L.J. had in mind for the argument that the Declaration had terminated the state of war. It may even be argued that the only form of Declaration that a state of war has come to an end, which could be accepted in an English court, is a royal proclamation, a certificate from the Foreign Secretary, or a Treaty of Peace Act of Parliament.

[3] Paragraph 7 of the Proclamation of 20 September 1945 by the Control Council carries the diminution of German sovereignty to an extreme point. It reads:

7. (*a*) 'In virtue of the unconditional surrender of Germany, and as of the date of such surrender, the diplomatic, consular, commercial and other relations of the German state with other States have ceased to exist.

(*b*) 'Diplomatic, consular, commercial and other officials and members of service missions in Germany of countries at war with any of the four Powers will be dealt with as the Allied Representatives may prescribe. The Allied Representatives may require the withdrawal from Germany of neutral diplomatic, consular, commercial and other officials and members of neutral service missions.'

Paragraph (*a*) is not only false in itself but is in contradiction with paragraph 7 (*b*) and paragraph 6, and cannot be cited with any confidence on either side of the argument.

[4] 'The Allied Representatives will give directions concerning the abrogation, bringing into force, revival or application of any treaty, convention or other international agreement, or any part or provision thereof, to which Germany is or has been a party.'

[5] *Duff Development Company* v. *Government of Kelantan*, [1924] A.C. 797.

as in abeyance, whatever that means, merely because its sovereignty has been diminished. It may be concluded then that there is nothing in the Declaration which implies that the Crown, as one of the Declarant Powers, intended it to have the effect of extinguishing or placing in abeyance the German state.

5. Is there anything in the Proclamations of the Control Council, made after June 1945, from which it may be inferred that the state of war has come to an end? These Proclamations are, of course, distinct from the Declaration, which was the only instrument cited before the court, but they represent to some extent the interpretation of that Declaration by the four Powers constituting the Control Council. It is true that the Control Council has derived from the supreme authority conferred upon it powers which go far beyond those allowed by international law to a belligerent in military occupation of enemy territory or even those given to victorious powers by some treaties of peace.[1] But the situation in Germany is anomalous; the administration of the country by the Control Council retains and must retain the character of a military government, even though it has exceptionally wide powers; further, the control of commercial relations between this country and Germany must be preserved under Trading with the Enemy legislation. For these reasons alone the legal relationship of a state of war must be maintained. The powers taken by the Control Council are directed to this end, and to hold that the state of war is at an end at the present time would largely nullify them. It is therefore impossible to say that any of the Proclamations or laws promulgated by the Control Council imply that the state of war had been terminated.

6. It was pointed out that the argument adopted by Counsel for the Appellant consisted of two propositions; of which the second suggested that the present state of Germany is such as to make any declaration by this or other countries which are still at war with her a contradiction in terms, that there is no such thing as a sovereign state without a sovereign government and that a state that has no national government cannot wage a war and be at war. Neither of these alleged contradictions is borne out by historical facts; there are several countries at the present time under a régime of a Constituent Assembly and a provisional government, but it is not suggested that they have ceased to exist as states merely because the government is not fully sovereign. Further, there have been frequent cases in which the military occupation of enemy territory displacing the national government of that territory has not been held by the courts to have terminated the state of war between the two countries.

7. It is submitted in conclusion that in 1945 the legal position was as follows:

(*a*) Germany continues to exist as a state but with its sovereignty greatly diminished;

(*b*) the Declaration of 5 June 1945 did not and probably could not terminate a state of war between this country and Germany so as to be effective in English law;

(*c*) the state of war continues until it has been terminated by a declaration of the Crown to that effect;

(*d*) the Control Council exercises all the power and authority, in both internal and external affairs, of a German government and is the *de facto* government of Ger-

[1] Paragraph 3 (*a*) of the Proclamation of 20 September 1945 requires the withdrawal of German authorities and officials from the territories outside the frontiers of Germany as they existed on 31 December 1937. This, being followed by the occupation of those territories by other Powers, is in fact a redrawing of Germany's frontiers, which, even if it must await the Peace Treaty for confirmation, has at least prejudged it. In Paragraph 12 the four Powers assert their right to control the entire German economy; in Paragraph 14 (*a*) and in Article 3 of Law No. 5 jurisdiction is asserted over German public and private property, rights, and interests outside Germany; under powers taken in Paragraph 41 German legislation has been widely repealed and the legal and judicial system reorganized; it cannot be pretended that this interference with the existing German law and judiciary is justified solely by the needs of the military occupation; in Paragraph 44 the supremacy of Control Council legislation is stated in the widest terms, since it provides that where German law and Control Council Proclamations, letters, or ordinances are inconsistent with one another the latter shall prevail in all judicial or administrative proceedings in Germany.

many, and is recognized as such by implication from the fact that the Four Powers administer Germany on behalf of and with the consent of the members of the United Nations at war with Germany.

III. *The Merger of Estonia with the Soviet Union*

The extinction of the former Republic of Estonia and its effect upon the property in this country of an Estonian shipping company had to be considered in *Tallinna Laevauhisus Ltd.* v. *Nationalised Tallinna Laevauhisus and Estonia State Shipping Line*, [1946] 78 Lloyd's Law Reports. The facts were as follows, set out in order of events, this being of some importance:

Tallinna Laevauhisus Ltd. carried on business at Tallinn owning and managing ships. On 17 February 1939 the Board of the Company decided to buy a ship called the *Pilcot* for £20,000: under Estonian law ownership of a ship was divided into 200 shares, the shareholders forming a 'shipping association' which was a separate legal person; in the event of the ship becoming a total loss the shipping association came to an end and its disponent was bound to wind up its affairs. The ship was purchased and re-named *Vapper*. On 3 October 1939 the Company was appointed at a meeting of the shareholders in the Vapper Association as manager and disponent of the ship, and at a meeting of the Board of the Company the Managing Director, Neuhaus, was given a general power of attorney in the widest terms to conduct the business of the Board on its behalf. The hull, machinery, and freight were insured with underwriters for £137,000. On and after 30 December 1939 all the practical business of the Company, including chartering and insurance and the raising of crews, was carried on by Neuhaus in Stockholm. On 21 June 1940, after the occupation of the country by Russian forces, a new Estonian Government was formed friendly to the Soviet Union. On 6 July 1940 the *Vapper* was sunk near the Scilly Isles. On the same day a presidential decree in Estonia provided for the election of a new Chamber of Deputies and National Council, and amended the existing electoral law in several important respects. No National Council was in fact elected in the ensuing elections, and the old one was not reconvened. On 21 July 1940 the newly elected Chamber of Deputies, now called the Estonian State Duma, declared Estonia a Soviet Socialist Republic and on the next day applied for admission into the Soviet Union. Soon afterwards the Duma declared that banks and large industries, including 'all transport and enterprises', should be nationalized and charged the Government to draw up a list of such enterprises, which it did on 28 July 1940, such list including the Tallinna Laevauhisus Ltd. On 6 August 1940 the Soviet Union accepted Estonia's request for admission and on 25 August a new constitution was published, of which Article 6 declared that 'the mines, railways, water and air transport, banks, means of communication are state property'. A subsequent decree of the Presidium of the Provisional Supreme Council of the Estonian S.S.R. provided that 'in conformity with Article 6 of the constitution . . . the shipping enterprises of corporate bodies and physical persons, such as joint stock companies, partnerships and individual large employers with all their property whatever it should consist of and wherever it should happen to be, including deposits and current accounts in the banks in the Republic and abroad, as well as all claims belonging to these enterprises, *including claims to insurance sums*, are to be nationalised'. On 9 October 1940 a list of enterprises coming within the above decree was approved by the new Estonian Government and included the Tallinna Laevauhisus Ltd. and the Shipping Association Vapper. On 23 October 1940 a further decree was issued ordering the transfer of all nationalized sea transport and facilities to the Sea Transport Centre and two days later the Council of People's Commissars of the U.S.S.R., having decided to establish the Estonian State Steamship Line at Tallinn, purported to vest all this nationalized property in the Estonian State Steamship Line. In July 1941 Germany occupied Estonia and Tallinn. In May 1942 and October 1944 general meetings of Tallinna

Laevauhisus Ltd. were held in Stockholm confirming Neuhaus's powers of attorney and deciding to establish the Board of the Company in Stockholm.

The proceedings in the English courts by way of interpleader issue commenced on 30 October 1941, when the underwriters took out a summons against the Company's agent in this country and others, asking for an order that they should appear and state their claims to the insurance sum of £137,000 which was paid into court. In December 1941 a claim was made by the Anglo-Soviet Shipping Co. Ltd., registered in England and carrying on business here as agents for the Nationalized Tallinna Laevauhisus Ltd. On 1 December 1942 an order was made that an issue should be tried in which Velvi, as attorney for Tallinna Laevauhisus Ltd., and other named claimants were to be plaintiffs and the Nationalised Tallinna Laevauhisus Ltd. were to be defendants. In March 1944 the Estonian State Steamship Line appeared as claimants to the money and were added as defendants; they disputed the right to the money of Tallinna Laevauhisus Ltd. and counter-claimed that it was theirs. The Nationalised Tallinna Laevauhisus Ltd. took no further part and disappeared from the case. The Foreign Office sent to the Court the following certificate:

1. H.M.G. recognize the Government of the Estonian S.S.R. to be the *de facto* government of Estonia, but do not recognize it as the *de jure* government of Estonia.
2. H.M.G. recognize that Estonia has *de facto* entered the U.S.S.R. but have not recognized this *de jure*.
3. H.M.G. recognize that the Republic of Estonia as constituted prior to June 1940 has ceased *de facto* to have any effective existence; the effect of such recognition and in particular the date to which it should be deemed to relate back appear to me to be questions for the Court to decide in the light of the statements set out above and of the evidence before it.
4. H.M.G. recognize the Republic of Estonia as constituted prior to June 1940 to be neutral; and after 22 June 1941 recognize the U.S.S.R. to be belligerent. The territory of Estonia came under German military occupation which began early in July 1941 and terminated towards the end of September 1944.

Leave to withdraw the counter-claim of the Estonian State Steamship Line was refused and judgment given for the plaintiff Company on their claim to the sum of £137,000 to be paid into court, with costs to be paid by the Estonian State Steamship Line; and judgment was given for the plaintiff on the counter-claim with costs. Leave to appeal granted.

Atkinson J.'s reasoning which led him to this conclusion may be set out as follows:

(*a*) Decrees purporting to nationalize a Company and its property do not *ipso facto* dissolve a Company but operate as an Order for its liquidation. The Company survives as a juridical person, and persons representing it in this country continue to exercise rights over assets of the Company within the jurisdiction.[1]

In *Russian Commercial and Industrial Bank* v. *The Comptoir d'Escompte de Mulhouse*, [1925] A.C. 112, Lord Wrenbury said at p. 149—"The question which arises is whether the association of persons which is in the foreign country bound together by a nexus of corporation, is not in this country an association of neutral persons bound together by a nexus of partnership but not corporate. No objection arises by reason of the association consisting of more than ten persons [he referred to the Companies Act, 1908, Section 1]. . . . The question is whether the association is not to be treated here as an association or partnership of natural persons whose relations *inter se* are to be found in the Articles of Association of the Company and are ascertained no doubt with reference to the *lex loci contractus*, but continues for the purpose of winding-up its affairs so far as this country has control over persons and the assets within its jurisdiction. The neutral persons form-

[1] *Employers' Liability Assurance Corporation Ltd.* v. *Sedgwick, Collins & Co. Ltd.*, [1927] A.C. 95, the judgment of Viscount Cave, p. 102. See also *Luetchig and Cheshire Ltd.* v. *Huth & Co.*, reported in this *Year Book*, 11 (1930) at p. 235.

ing such an association are not dead even if the Corporation is.' See also *Luetchig and Cheshire Ltd.* v. *Huth & Co.*, reported only in this *Year Book*, 11 (1930).

The Estonian decrees had, therefore, not put an end to the existence of the plaintiff Company, and its representatives in England, whose powers of attorney Atkinson J. held to be valid and continuing, had not lost their rights and powers to act as disponents and liquidators, in accordance with the provisions of Estonian law, of the assets of the dissolved Vapper Shipping Association.

(*b*) The continued existence of the plaintiff Company as a legal entity and the full capacity of its representatives to act on its behalf having been established, the only question then was whether the decree of the Presidium of the Estonian S.S.R., purporting to be made under Article 6 of the new Constitution of 25 August 1940, had the effect[1] of vesting assets in this country belonging to the Vapper Shipping Association in the Estonia State Steamship Line, which by reason of that decree had become the successors in Estonia of the Nationalised Tallinna Laevauhisus Ltd.

Atkinson J. answered this question in the negative and upon the grounds that none of the decrees or laws relied upon by the defendants, the Estonia State Steamship Line, were legal as judged by the old Estonian Constitution, being laws imposed by a *de facto* government but not by a government existing *de jure*; that these decrees and laws were confiscatory in character; and that in any case the decree of the Presidium which purported to nationalize *choses in action* situated outside Estonia was bad in that it was outside the scope of Article 6, under which it was made.

3. The first of these grounds rests upon a misapprehension of the nature of *de facto* recognition of a foreign government, and must be rejected. The effect of *de facto* recognition has been described as follows, and the weight of authority and practice supports the statement:[2] 'Where in an already existing state a new government establishes itself by revolution . . . it is probably true to say that *de facto* recognition produces full legal consequences and that the difference between it and *de jure* recognition is nothing more than a difference of political attitude towards the new Government.'

Therefore, the Foreign Office Certificate bound the Court to treat the acts and legislation of the new Estonian Government, done or enacted in Estonia in their programme of nationalization, as fully valid in so far as they affected persons or property within the territory of the Estonian S.S.R.[3]

It was a consequence of the *de facto* recognition by His Majesty's Government of the fact that the Republic of Estonia had ceased to have effective existence, that Estonian law, in so far as it was derived from the old Constitution, was no longer applicable; and the fact that *de jure* recognition had not been accorded to the Estonian S.S.R. did not entitle the Court to go behind the new Constitution to the old. Further, since the powers of attorney[4] which authorized Neuhaus and Velvi to act for the plaintiff Company were

[1] The status of the insurance moneys in issue under Estonian law and the effect, if any, of the new Estonian legislation upon them were matters of fact to be found by the court in the light of evidence by expert witnesses with knowledge of Estonian law; *The Jupiter*, [1927] P. 122 *per* Hill J., 'the Act of State (i.e. the foreign state) must be proved by lawyers . . . the meaning of the application of the Act of State must also be proved by lawyers'. No expert witness of Estonian law appears to have been called by the defendants, the Estonian State Steamship Line.

[2] This *Year Book*, 19 (1938), p. 238.

[3] *Bank of Ethiopia* v. *National Bank of Egypt*, [1937] 1 Ch. 513, where Clauson J. held that after recognition by His Majesty's Government of the Italian Government as the *de facto* government of those parts of Ethiopia which it in fact controlled, the acts and legislation of the Italian Government in Ethiopia had to be regarded as having full legal effect, and that this principle applied to all acts or legislation done or enacted after the Italian Government had in fact become the government of the country even if His Majesty's Government had not then recognized it as such.

[4] In two decisions in the United States—*Silberberg* v. '*The Kotkas*', decided in a District Court of New York (*Annual Digest*, 1941–2, Case no. 19), and *Tiedemann* v. '*The Signe*', decided in a District Court at Louisiana (*Annual Digest*, 1941–2, Case no. 16), where the facts were closely

granted in Tallinn in December 1939 and confirmed in Stockholm in 1942, and since the insurance moneys which the decree of the Presidium purported to nationalize lay not in Estonia but in this country, it was sufficient to find either that the decree was confiscatory or that it was in Estonian law *ultra vires* the new Constitution, and Atkinson J.'s painstaking inquiry into the validity of the Estonian elections, and into the foundation of the new government and Constitution, would appear to have been to no purpose.

The third ground rested upon the interpretation of the new Estonian Constitution by Dr. Rei, the expert witness for the plaintiff Company; he gave it as his opinion, and it was accepted by the Court in the absence of any contrary evidence put in by the defendants, that Article 6 of the new Constitution, in declaring that 'water and air transport are state property', did not contemplate claims to moneys which were lying in another country as within its scope; and that the decree of the Presidium was *ultra vires* the Article in purporting to nationalize insurance moneys lying abroad.

Two comments may be made on this third ground: first, the reason for holding that the decree was *ultra vires* appears to have depended not upon any particular rule of Estonian law but upon a bare comparison of the language of the decree with that of Article 6, and it is not clear why the nationalization of water transport, contemplated in the Article, would not touch the assets of transport companies whatever their form and so empower the Presidium to promulgate a decree covering them. Secondly, the question does not appear to have been asked whether the constitutional relationship between the Estonian S.S.R. and the U.S.S.R. is not relevant. Article 14 of the Constitution of the U.S.S.R. provides: 'The jurisdiction of the U.S.S.R. as represented by its highest organs of state authority and organs of government covers . . . (*m*) administration of transport and communications.' Article 15 provides that 'the sovereignty of the Union Republics is limited only within the provisions set forth in Article 14 of the U.S.S.R. . . .'.

Was it not then arguable that the decree was *ultra vires* not because it was legislation outside the scope of Article 6 but because it encroached upon a field reserved to the Government of the U.S.S.R.? It could be argued that Article 6 of the Constitution of the Estonian S.S.R. was declaratory only (of the basic principles of nationalization of property) and that it was for the Government of the U.S.S.R. to give effect to these principles so far as they concerned water transport, and this in fact the Government of the U.S.S.R. did when it brought about the creation of the Estonia State Steamship Line.

But, in any case, the second ground remains; it is well settled that the English courts will not give effect to what undoubtedly was confiscatory legislation and it is submitted that this ground should be accepted as the *ratio decidendi* of the case.

B. Private International Law

Marriages at Common Law and under the Foreign Marriage Act, 1892

1. Before 1753 a marriage was valid in England if contracted between two persons, who

similar to those of the instant case, the powers of attorney held by the plaintiffs were executed in Estonia at the instance of the New Estonian Government; since the United States of America had not recognized the merger of Estonia with the Soviet Union, either *de facto* or *de jure*, the District Courts were able to find upon the evidence before them that the powers of attorney were executed under duress and, though acts of the Estonian authorities, they were not to be treated as lawful for the purposes of litigation in the United States. But in *The Denny* (*Annual Digest*, 1941–2, Case no. 18) the Circuit Court of Appeals, Third Circuit, did not regard itself as bound by the fact that the U.S. Government had not recognized the admission of the Lithuanian S.S.R. into the Soviet Union, so as to refuse to treat as valid the decrees of the new Lithuanian Government and powers of attorney granted in Lithuania. The Court said: 'The rights of American citizens or residents are not involved. We may not ignore the fact that the Socialist Soviet government did actually exercise governmental authority in Lithuania at the time the decrees in question were made and the powers of attorney were given, but must treat its acts within its own territory as valid and binding upon its nationals domiciled therein.'

were competent to marry, and took each other for man and wife *per verba de praesenti* for life and to the exclusion of all others. This common-law form of marriage rested upon the teaching of the Church: that, as regards form, consent and consent only make a marriage. Neither a religious ceremony[1] nor the presence of witnesses appears to have been essential.

The Council of Trent, 1563, invalidated by decree all marriages not celebrated in the presence of at least three witnesses, one of which must be a priest; but this decree was not operative in England, where the breach with Rome had already occurred. The system of banns had been in use since the thirteenth century in this country to prevent clandestine marriages, but prior publication of banns had not been essential to the validity of the marriage, and had not been by any means effective in preventing such marriages. Therefore in 1753 Lord Hardwicke's Act (26 Geo. II, c. 33) was enacted, known as the Clandestine Marriage Act. It declared invalid all marriages which were not celebrated in a parish church after due publication of banns.[2] Later statutes, of which the most important were the Marriage Acts, 1823–36, further defined the conditions governing the formalities of marriage in England.

The effect of these statutes was to render invalid any form of marriage in England not solemnized in religious form in a parish church or *per verba de praesenti* in the presence of witnesses in certain registered buildings.[3] What then were the rules governing formalities of marriages outside this country?[4]

2. There are two cases in which English law prevails in territories abroad: first, where British subjects settled and colonized territory overseas, they were deemed to take with them so much of English law as was suitable to the territory and their conditions there; this may be called the colonial principle. Secondly, where under a treaty or a system of capitulations His Majesty has jurisdiction over British subjects in foreign territory or where British subjects in foreign territory are for some other reason exempt from the jurisdiction of the local courts or in part from the operation of the local law, they are

[1] In *The Queen* v. *Millis* (1841), 10 C.L. Fin. 534, the House of Lords was equally divided on the question whether the common-law form of marriage in Ireland, where the Marriage Act, 1753, was not operative, required the presence of an episcopally ordained priest. The unanimous opinion of the judges, who were called to advise their Lordships, was that the presence of an episcopally ordained priest was so required; but there had been sharp divergences of opinion among them. Since the members of the House of Lords hearing the appeal were equally divided the decision went in favour of the defendant, who, upon a charge of bigamy arising out of a second marriage in England, had pleaded that his marriage in Ireland in common-law form was invalid by reason of the fact that it had been celebrated by a Presbyterian minister. The Lord Chancellor, in an elaborate judgment surveying both the history and authorities on the matter, concluded that a marriage *per verba de praesenti* was an inchoate marriage and a species of contract under which either party could compel the other to complete the marriage by going through a further ceremony in the face of the Church. Lord Denman, who, with Lord Brougham and Lord Campbell, took the opposite opinion to the Lord Chancellor, cast considerable doubt on the correctness of the inference which the Lord Chancellor had drawn from the ancient authorities which he had quoted; and the main criticism which may be made of the reasoning of the Lord Chancellor and those who agreed with him is that, if before 1753 a marriage contracted *per verba de praesenti* was an inchoate marriage only, there would have been no social evil in their being celebrated clandestinely. While clandestine marriages were undoubtedly socially irregular it does not seem possible that they should have been generally regarded as invalid.

The rule in *The Queen* v. *Millis* that a marriage celebrated in common-law form in England or Ireland will be valid only if it is celebrated by an episcopally ordained priest, though it is undoubtedly now part of our law, is to be considered as historically unsound (see Cheshire, *Private International Law* (2nd ed., 1938), p. 329).

[2] An archbishop could permit by licence the celebration of a marriage elsewhere than in a parish church, and a bishop might be licensed to dispense from the necessity of banns.

[3] Special provisions were made for the marriages of Nonconformists, Jews, and Quakers.

[4] In Scotland the form of marriage *per verba de praesenti* in the presence of witnesses obtained until its abolition by the Marriage (Scotland) Act, 1939.

subject again to so much of English law as is suitable and applicable to their condition; this may be called the exterritorial principle.

The latter principle is exemplified in the decision in *Wolfenden* v. *Wolfenden*, [1946] P. 61, and also in the form of marriage known as a marriage within the lines under s. 22 of the Foreign Marriage Act, 1892.

3. In *Wolfenden* v. *Wolfenden*, [1946] P. 61, the validity of a marriage celebrated in China during the exterritorial régime was in question. H., born in Canada of Canadian parents, decided to make his home in England in 1930, but he was still serving in the Chinese Maritime Customs at Shanghai in 1938 and in that year he married W. at Ichang, the ceremony being performed by a minister of the Church of Scotland Mission at Ichang; the Church was the only one of any denomination in the district, and the minister the only available one. No form giving notice of marriage was filled up, no licence was obtained, and no banns were published. H. had been informed that the consular officers in that area had no powers to perform a marriage under the Foreign Marriage Act, 1892.

Lord Merriman's reasoning in the case was as follows: First, the exterritorial régime in China, under which British subjects were governed by English law, was not abolished until 1943 and therefore the marriage of British subjects in China in 1938 was governed by English law; secondly, by the exterritorial principle (Lord Merriman called it quasi-colonial) the rule in *The Queen* v. *Millis*, requiring the presence of an episcopally ordained priest, is applicable in colonies or under exterritorial régimes if suitable to local conditions; it is plainly unsuitable where access to an episcopally ordained priest is probably impossible;[1] thirdly, therefore, the common law, unqualified by the rule in *The Queen* v. *Millis*, prevails with regard to marriages in such territories, provided that it is not excluded by local enactments. Since the China Order in Council, 1925, directed that 'English law for the time being in force' be applied without qualification to British subjects in China, Lord Merriman was able to hold that the China Order in Council did not exclude the operation in common law and that it was therefore applicable to the marriage before him.

He held that the marriage was valid at common law.

There is nothing in the *ratio decidendi* of this case to suggest that the presence of the minister was essential, and the conclusion which may be drawn is that if a man and woman, one of whom is a British subject, have the capacity to marry and are in a foreign country, where English law governs the transactions of British subjects or where the *lex loci* form of marriage is impossible, and take each other for man and wife *per verba de praesenti* and the fact of this declaration can be sufficient, it will constitute a valid marriage in common-law form.

4. There is little authority for determining in what sense the *lex loci* marriage must be impossible in order that the common law may prevail. But the fortunes of war have brought about the celebration of many marriages in forms not recognized by the *lex loci*. Two hypothetical examples may be given: H., a British subject, while a prisoner of war in Germany, wishes to marry W., a German woman. The German military authorities refuse any facilities for the marriage to be solemnized; H. and W. go to the local church where the pastor marries them in Christian form, and signs a declaration which he gives to them that he has performed the ceremony.

H., a British subject, marries W., a Polish woman, by Jewish rites in Warsaw during the German occupation of Poland; the German military authorities forbid by decree the civil registration of Jewish marriages, such registration being essential to the validity of the marriage; H. produces the original certificate signed by the Rabbi who performed the ceremony in accordance with the provisions of Polish law relating to Jewish marriages.

It is submitted that both these marriages will be valid by the common law of England,

[1] In *Catterall* v. *Catterall* (1847), 1 Rob. Ecc. 580, and *Maclean* v. *Cristall* (1849), Perry's Oriental Cases 75, it was held that the rule did not apply in New South Wales and India respectively as being unsuitable to conditions there, and that marriages contracted in common-law form there were valid.

provided that the first was not contracted merely for the purpose of conferring British nationality on the wife.

5. The exterritorial principle, by which British subjects are governed in certain foreign territories by English law, is applicable to British armies serving abroad:[1] the members of the British army occupying enemy territory are, by the very function they perform, exempt from the jurisdiction of the local courts and in part at least from the operation of the local law.[2]

A marriage solemnized in common-law form within the lines of a British army serving abroad was, therefore, always valid, and this rule was embodied in 4 Geo. IV, c. 91, 1823.[3]

This provision was repealed by the Foreign Marriage Act, 1892, and Section 22 of that Act substituted for it.[4]

Both the provisions of the Act of 1823 and Section 22 of the Foreign Marriage Act, 1892, appear to be declaratory of the common law, though the Act of 1823 uses the word 'enacted'. (They must be enactments and not declarations of the common law in those territories such as Southern Rhodesia where the common law is not English in origin.)

Certain questions of interpretation arise upon Section 22.

First, must at least one party to the marriage be a British subject? The Section provides for 'all marriages' which interpreted literally would include marriages to which both parties are aliens. On the other hand, the Act is entitled 'An Act to consolidate enactments relating to the marriage of British subjects outside the United Kingdom'; further, in so far as the section is declaratory of the common law[5] a marriage between aliens abroad cannot *a priori* be governed by it; finally, British forces in military occupation of enemy territory or stationed in friendly territory under treaty have no jurisdiction over aliens to the exclusion of the local law for purposes not connected with the tasks of occupation; civil marriage of aliens would be plainly no concern of the British military authorities, at any rate if they were nationals of the territory in which the British forces were stationed.[6]

The matter must remain in doubt owing to the unqualified wording of the section, but it may be said that it would be more in conformity with principle to limit the operation of the section to marriages to which one party at least is a British subject.[7]

[1] *Rex* v. *Brampton* (1808), 10 East 282: the marriage in question was celebrated in San Domingo in 1796. Lord Ellenborough said: 'I may suppose in the absence of any evidence to the contrary that the law of England, ecclesiastical and civil, was recognised by subjects of England in a place occupied by the King's troops who would impliedly carry that law with them.' But the Court did not exclude the possibility that the marriage was valid under the *lex loci*, and all four judgments tend to validate the marriage on both grounds by the law and by *lex loci*; Grose J. preferred the latter.

[2] If stationed in friendly territory similar exemption will normally be secured by treaty.

[3] The relevant part of this Act provided as follows: 'Whereas it is expedient to relieve the minds of all His Majesty's subjects from any possibility of doubt concerning the validity of marriages solemnised within the British lines by any chaplain or officer or other person officiating under the orders of the commanding officer of a British army serving abroad; be it declared and enacted that all marriages as aforesaid shall be deemed and held to be as valid in law as if the same had been solemnised within His Majesty's Dominions, with a due observance of all forms required by law.'

[4] 'It is hereby declared that all marriages solemnised within British lines by any chaplain or officer or other person officiating under orders of the commanding officer of a British army serving abroad shall be as valid in law as if the ceremony had been solemnised within the United Kingdom with all due observance of all forms required by law.'

[5] Parliament must be held, in the absence of expressed contrary intention, to have intended that the English rule of law that the *lex loci* governs the formalities of a marriage should apply; the *lex loci* should therefore be taken to be excluded here in favour of British subjects only.

[6] Qu. if they are members of the British Forces? Under the colonial principle all persons in the territory concerned are governed by English law, but under the exterritorial principle only British subjects; but it may be that under the latter principle English law governs also aliens who are members of the British Forces, because they are under military jurisdiction.

[7] *Ruding* v. *Smith* (1821), 2 Hagg. Cons. 371. In this case H., a British subject serving in the

It is in any case certain that neither party to a marriage under Section 22 need be a member of the British forces.

Secondly, what is the meaning of the expression 'within the British lines'? It was laid down in the *Waldegrave Peerage* case[1] that the existence of British lines does not depend upon there being local hostilities; nor is the section as a whole confined in its operation to time of war. The stationing of British troops in enemy countries, and in friendly countries under treaty on a wide scale, has made it necessary to employ the form of marriage provided by Section 22 rather than the consular marriage, in order that the military authorities might exercise some control over marriages contracted by members of the services.[2]

Thirdly, what authority is required from the commanding officer concerned? The words 'officiating under the orders of' appear to qualify 'chaplain, officer or other person'. In the *Waldegrave Peerage* case the Lord Chancellor, having reserved judgment on the interpretation of the same words in the Act of 1823, held that a marriage within the lines celebrated by a British chaplain did not require the authority of the commanding officer. But he gave no reasons and it is not clear whether he took the view (i) that the words 'officiating under the orders of' qualify only the words 'other person', and that a chaplain or officer are competent themselves to celebrate the marriage at common law; or (ii) that the chaplain appointed to serve in the British army, within the lines of which the marriage in question had been celebrated, was by that very appointment officiating under the orders of the commanding officer.

It is submitted that 'orders' are more precise and limited than 'authority' or 'consent' and must be interpreted in their strict military sense, and that a marriage within the lines cannot be celebrated by any person not in fact serving under the command of the commanding officer or expressly ordered by him to celebrate it.

Fourthly, does the expression 'abroad' mean territory outside H.M. dominions or outside the United Kingdom?

In the Act of 1823 the words 'as if the ceremony had been solemnized within His Majesty's dominions' make it clear that 'abroad' there means foreign territory in contrast to His Majesty's dominions; but the substitution of the words 'as if the ceremony had been solemnised in the United Kingdom' raises a doubt. It is submitted that 'abroad' in Section 22 of the Act of 1892 also means foreign territory for the following reasons:

British army, married W., a British subject, at the Cape of Good Hope one year after its surrender, in 1796. W. was aged 19, and the Dutch *lex loci* required parental consent as essential to the validity of the marriage. H. sought a declaration of nullity, alleged on the *lex loci* of Holland. Lord Stowell rested his decision, refusing a decree, upon (1) the distinct British character of the parties; (2) their independence of Dutch law in their own British transactions; (3) the insuperable difficulties of obtaining any marriage at that time conforming to Dutch law; (4) the whole country being under British dominion and British transactions of this kind being recognized by the British authorities.

[1] (1837), 4 Cl. and Fin. 649, where the evidence of the Duke of Wellington was accepted by the court to the effect that it is an area which is controlled and directed by the lines and outposts of British troops under the command of an officer of the British army.

[2] The Foreign Marriages (Egypt, Iran, and Iraq) Order in Council, 1944, made under the Foreign Marriages Act, 1892, provides *inter alia* that 'whereas it appears that without the exercise of their powers under the said Act by marriage officers in Egypt, Iran and Iraq, sufficient facilities exist under section 22 of the said Act for marriages in Iran and Iraq of British subjects who are serving in Iran and Iraq in any of the services set out in the schedule to this Order: . . . 2. No marriage officer in Egypt, Iran or Iraq shall, without special permission of the Secretary of State, solemnise any marriage between parties either at home or serving in Egypt, Iran or Iraq in any of the services set out in the schedule of this Order.' The services set out in the schedule include the Army, Navy, and the Air Force, the Women's Services, and certain auxiliary medical and nursing services. It should be noted that (i) since the Order is manifestly concerned only with marriages of serving members of the Forces, it should not be treated as an exclusive interpretation of Section 22; (ii) the Order brings not only naval personnel, but auxiliary medical and nursing services, within the scope of Section 22. This is undoubtedly correct in principle.

(i) The term 'British' did not in the Act of 1892 denote the United Kingdom only and, therefore, an army, whether raised in the United Kingdom or in a British possession, is a British army, irrespective of its origin, and could not, while serving in some part of British territory other than that in which it was raised, be regarded as serving abroad;

(ii) The title of the Act indicates that its purpose is to provide for marriages in foreign territory, and under Section 1, the words 'in any foreign country or place' are represented in the marginal note to the section by the term 'abroad'. The peculiar wording of Section 23, which relates to marriages 'solemnized beyond the seas', arises out of the purpose of that section which is to preserve the principle that British subjects carry the common law with them into overseas territory, and that marriages are, therefore, valid if celebrated there in accordance with common law.

6. Two questions remain: Is the Foreign Marriage Act, 1892, or its predecessor the Act of 1823 in force in the Dominions as an imperial statute? Would an English court recognize as valid a marriage celebrated within the lines of an Allied or enemy army?

There are certain limitations in the Act itself to the United Kingdom,[1] but it is expressed to apply to British subjects without qualification, and parts of the Dominions, at least in their administrative practice, treated the Foreign Marriage Act, 1892, or its predecessor, as being in force in their territory.

Suppose that X., a British subject, marries an Italian woman within the British lines in Italy; the marriage though void in Italian law is valid in the United Kingdom by reason of the Foreign Marriage Act, 1892. Where the Act of 1823 is still in force, for example in New Zealand[2] and the State of Victoria in Australia, the marriage must be regarded as valid, since the Act provides that such a marriage is as valid as if performed in any part of His Majesty's dominions, which *a fortiori* includes those parts of His Majesty's dominions where the Act is in force. Where the Foreign Marriage Act, 1892, is in force, e.g. in Queensland and the Northern Territory of Australia and in Southern Rhodesia and Newfoundland, a marriage will presumably be valid if marriages valid in the United Kingdom, to which a marriage within the lines is assimilated by Section 22, are recognized as valid in the territory concerned.

Thus it appears that while in some Dominions the Foreign Marriage Act, 1892, is regarded as limited in its operation to the United Kingdom, either this Act or the earlier Act is in force throughout the Dominions and, therefore, marriages within the lines of a British army are recognized as valid in them.[3]

With regard to the question of the recognition in an English court of marriages within the lines of a foreign army, it is suggested that, since it is an accepted principle of international law that members of an army in military occupation of enemy territory are governed exterritorially by their national law and are exempt from the jurisdiction of the local law, it follows that transactions to which they are parties, such as marriage, should also be recognized as governed by that national law, which must govern the formalities of

[1] The title of the Act itself, the fact that there is no provision, usual in Acts made to be effective in the colonies, for action by the local Attorney-General or the Governor in place of the equivalent authorities in this country, that trial for perjury is to take place under Section 15 in any 'County in England', and Section 22 itself, all suggest that the Act is not of general application outside this country.

[2] It may be noted that New Zealand has instructed its military authorities not to give facilities for marriage under the Act of 1823 to members of the New Zealand forces serving overseas.

[3] The Foreign Marriage Act, 1892, has been expressly adopted in Queensland and the Northern Territory of Australia. In so far as one of the two Acts is in force in the Dominions as an imperial Statute, it presumably validates all marriages within the lines of a British army, to which at any rate one British subject is a party; but there may be a tendency in parts of the Dominions to regard as valid under the Acts only those marriages within the lines to which one of their own nationals is a party; they would presumably then apply rules of private international law to determine the validity of such marriages to which a British subject domiciled in another part of the Commonwealth was a party.

the marriage to the exclusion of the local law. It would be unreasonable to refuse to apply to foreign marriages a principle which under statute governs the marriages of British subjects. Thus, for example, W., a British-born woman, goes through a form of marriage with a German army officer in Paris during its occupation by the German army; the marriage is concluded before the appointed military authority (Heeresjustizinspektor) in accordance with the provisions of German law relating to such military marriages. It is submitted that this should be recognized as a valid marriage, being in principle a marriage within the lines, and that W. loses her British nationality as a consequence.

J. E. S. F

DOCUMENTARY SECTION

CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS

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INTRODUCTORY NOTE

IT is intended in this section to set out, as far as possible in full, the constitutions of those international organizations which have recently come into being or which have undergone constitutional change as a result of the impetus given to world organization by what may be termed the United Nations movement. To the actual documents collected there are appended a number of notes upon the principal features of the constitutions treated and some references to the literature upon them. The notes and bibliographical references, however, are intended to be no more than a mere guide to further study. For what is proposed is rather a chronicle of international organizations, which, it is hoped, will be a permanent feature of this *Year Book*, than a complete commentary upon the relevant texts.

In view of the well-known difficulty of classifying international organizations, there has been adopted for the purposes of this survey a convenient though incomplete method of classification adumbrated by the Charter of the United Nations. Article 57 of that document provides that:

'1. The various specialised agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63 (i.e. by means of agreements concluded with such agencies by the Economic and Social Council, subject to approval by the General Assembly);

'2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialised agencies.'[1]

In the light of this provision the following classification seems to be indicated:

I. General International Organizations and Specialized International Organizations (or Agencies); both of these groups being further divisible into: Global Organizations and Regional Organizations.

II. Permanent and Temporary International Organizations.

III. Inter-state and Inter-governmental Organizations.

IV. Organizations brought into (or established in) relationship with the United Nations and Organizations independent of the United Nations.

These classifications are apt to overlap and the organizations here treated are therefore arranged solely according to the second of them, the other categories to which they are assignable being used merely as pegs upon which to hang a preliminary notice of their more obvious features.

General and specialized organizations. In spite of limits to its sphere of operation alleged to arise from the very nature of political law, the history of the modern state indicates that it may arrogate to itself as many aims and activities as the unconquerable ingenuity of man can devise. And if the sphere of action of state government may thus be infinite, so too may that of inter-state government. But, save perhaps in so far as it may comprehend the full 'Union' of distinct states or their alliance, the term 'General International Organization' does not connote the combination of different states for all governmental purposes. It is a term the significance of which rather emerges by contrast.

[1] Text in Misc. no. 9 (1945), Cmd. 6666.

It is a convenient designation of such international organizations as do not have categorically limited aims and which do not, in consequence, come within the description of 'specialised agencies' contained in Article 57 of the Charter of the United Nations. As such, it is applicable to the United Nations itself. Whether it may properly be used in connexion with any other body than that 'general international organization' referred to in the constitutions of various specialized agencies set up before the United Nations was born or named, but by which description is clearly meant none other than the United Nations, is more doubtful. It might be held to apply to the International Court of Justice, but that body is excluded from examination here by reason of the circumstance that its Statute constitutes an Appendix to the Charter. It might, with little less justification, be applied to the International Labour Organization. But that is clearly not the intention of the Charter, whose failure to endow with a special status that deservedly reputable body must to the minds of some seem a mistake.[1]

What sphere of activity shall within the state be dignified by its assignment to a distinct Department seems largely to be a matter of tradition or of accident. The coexistence in the United Kingdom of Foreign, Scottish, and War Offices and of Labour, Air, and Transport Ministries indicates a catholicity of British opinion as to how governmental functions are divisible.[2] No other state appears to be any more logical, and there is thus no reason why the framers of international constitutions should observe a stricter 'separation of powers'. But a reading of Article 57 of the Charter and of the references to it, express or implied, in other documents in their respective context would appear to permit of the conclusion that by the classification of international organizations into such as are general and such as are specialized there is intended the drawing of a distinction between 'general governmental' or 'political' functions on the one hand and 'departmental' activities not involving the total personality of each member state on the other. It is as though the Presidential (or Prime Ministerial) 'personal representative' would be the appropriate delegate to be sent to a meeting of a general organization and the departmental representative, the 'man from the Ministry', the right man to send to the specialized organization. But in so far as, consistently with the doctrine that the state shall speak with only one voice in international law, the totality of the foreign relations of the state is commonly confided to a single Foreign Department, the Foreign Minister would be no less an appropriate delegate to the general organization. The requirement of Article 28 of the Charter that each Member of the Security Council of the United Nations shall be permanently represented at the seat of that Organization, would thus be suitably complied with by the accrediting of ambassadors of the sort familiar in diplomatic intercourse. For one of such a class is '. . . the point of a pyramid, a small specialized culmination representing the government, parliament, people, which sustain it',[3] notwithstanding that he is as much a departmental official as a tax-inspector. On the other hand, the constitution of a delegation on the bi-partisan principle, or the creation of an office similar to that of the former British Minister for League of Nations Affairs, would be equally permissible.

Nevertheless, the distinction between general and specialized international organizations is not the same as that which is customarily made between 'general' and 'technical' unions.[4] The technical international union is, or was, of a rigidly limited character, representing an alliance of departments rather than of states in their plenitude of function. The permanent official of the Post Office or other technical branch is allowed to go abroad to the technical conference because, although it is a 'conference' and thus primarily the business of the Foreign Office, it has to do with merely technical matters in which not even the political head of the branch concerned is necessarily qualified, let alone the ambassador on the spot. But a notable feature of what has been termed the

[1] Cf. *British Official Commentary on the Charter*, Misc. no. 9 (1945), Cmd. 6666, para. 46.

[2] Cf. Smellie, *A Hundred Years of English Government* (1935).

[3] Stark, *East is West* (1945), p. 162.

[4] Upon the classification of unions in general see Eagleton, *International Government* (1932).

United Nations movement has been a broadening of the aims of international organizations with a view to the closing of any gaps which may exist between the areas for which each is responsible. Typical of this movement is the re-casting in very wide terms in the Declaration of Philadelphia of the purposes of the International Labour Organization, already defined with a remarkable breadth and nobility of view and phrase in the Preamble and Annex to the Labour Part of the Treaty of Versailles.

The result of the recent tendency towards more generous definition of the responsibilities of international organizations and towards a closer integration of each with the others is to render the always unsatisfactory method of classification of them by function quite useless. The International Labour Organization cannot any longer be usefully labelled a 'Social' organization, since its functions are now as much economic as social. Certain heads of classification are indeed given in Article 57 of the Charter but if, following its text, the United Nations Educational, Scientific, and Cultural Organization (U.N.E.S.C.O.) is to be described as a 'Cultural and Educational' organization, with a cross-reference to a possible 'Scientific' category, its name may as well be written in full.

A distinction between such organizations as are regional and such as are more general or 'global' still seems, however, to be justifiable. For there is perpetuated in Chapter VIII of the Charter that doctrine of the compatibility of a world organization with the continued existence or new creation of similar organizations of less spatial scope which lies behind the wording of Article 21 of the Covenant. It is to be noticed, however, that the proposal of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice for regional judicial chambers did not find favour with the framers of the new Statute of the International Court.[1]

The distinction between global and regional organizations would appear to be equally applicable to specialized organizations and to those which may be called 'general' in the sense explained already. Thus, amongst specialized organizations, U.N.E.S.C.O. is global whilst the Anglo-American Caribbean Commission, which exists 'for the purpose of encouraging and strengthening social and economic co-operation between the United States of America and its possessions and bases in the area known geographically and politically as the Caribbean and the United Kingdom and the British colonies in the same area',[2] is clearly regional. Similarly, whilst the United Nations is the global general organization, *par excellence*, the Pan-American Union is a regional general organization. But the distinction is clearly to be applied only with discretion. Its inherent dangers are brought into relief when it is sought to classify the European Advisory Commission by reference to it. Was that a regional organization because it was confined in its functions to Europe or was it a global organization because it contained one, if not two, non-European Powers and because all its members acted in a sense as representatives of a vast alliance? A similar question, of course, arises in connexion with the body which has succeeded the European Advisory Commission, the Council of the Foreign Ministers, made up of a majority of non-European states and yet concerned exclusively with European matters.[3] In this connexion it must suffice to remark that, though on the one hand Europe can claim no more than America to be anything but a 'region', on the other hand it is obvious that membership of a geographically distant state in an organization for an essentially local purpose does not erect the latter into a global organization; thus the projected Russian and United States participation in the future administration of Tangier will not derogate from the exclusively regional character of the arrangements to be made in regard to that territory.[3]

Permanent and temporary international organizations. A fairly clear line is apparent between international organizations which are intended to endure permanently and those which are given a strictly limited life. The distinction between them is worth making

[1] *Report of the Informal Inter-Allied Committee*, Misc. no. 2 (1944), Cmd. 6531.

[2] *Infra*, p. 482.

[3] Cf. *Final Act of the Conference Concerning the Re-establishment of the International Régime in Tangier*, Morocco no. 1 (1945), Cmd. 6678.

because obviously temporary organizations do not call for detailed study of their constitutional aspects. But it is to be borne in mind that temporary organizations may well be invested with functions which are intended to endure. This is the case, for instance, with the United Nations Relief and Rehabilitation Administration (U.N.R.R.A.) which, under the International Sanitary Convention, 1944, and the International Sanitary Convention for Aerial Navigation, 1944, is entrusted with powers which it is intended ultimately to give to the International Office of Public Health when the latter body is able again effectively to operate.[1] And it is also to be remembered that a temporary organization created for a particular purpose may be the forerunner of a more permanent creation. This may well be the case with the United Maritime Authority,[2] as it certainly is with the Inter-governmental Committee on Refugees.[3]

Inter-state and inter-governmental organizations. This distinction is unnoticed by the framers of the Charter, Article 57 of which speaks only of 'specialised agencies, established by intergovernmental agreement'. The common method of establishing international organizations is by inter-state agreement, and the constituent documents of such organizations commonly specify that membership of them shall be confined at least primarily to states. This method was followed in so far as concerns the United Nations itself. But a not unremarkable feature of the United Nations movement has been the resort from time to time to the device of inter-governmental agreement for the creation of international organizations. Thus, whilst U.N.E.S.C.O. and the projected International Civil Aviation Organization are expressed to be inter-state bodies, U.N.R.R.A. and, naturally enough, the Inter-governmental Committee of Refugees, besides the United Maritime Authority, are in terms inter-governmental organizations. Further, both U.N.E.S.C.O. and the International Civil Aviation Organization and, what is more remarkable, the United Nations itself, though established as inter-state bodies, are in fact set up by instruments cast in the inter-governmental form.[4]

The question of the respective merits of the inter-state and inter-governmental form of treaty is a different one from that of the superiority or inferiority of the inter-state to the inter-governmental form of organization. So far as treaties are concerned, both forms are permissible and alike produce an international obligation binding on the state. In British practice both forms are used, though the inter-governmental form is commonly adopted only for instruments of secondary importance or non-political character, which are styled 'agreements' rather than 'treaties'. Because of the ambiguity which attends the phrase 'His Majesty's [or the British] Government', the United Kingdom has sought to make prevail the practice of expressing treaties as made between heads of states rather than governments or states by name. But neither conclusions nor even tendencies are to be collected from international practice.[5]

An international organization considered as a 'continuing obligation', a living treaty, may clearly consist with equal propriety either of states or of governments. But there is perhaps something in the view that, in relation to organizations considered as something other than *traités organisés*, 'the difference is not one of technical form but of fundamental conception' because 'the distinguishing characteristic of an international as contrasted with an inter-governmental organisation is that it embraces in its membership the totality of the institutions of its member States and not merely their executive agencies'.[6] It is indeed desirable that international organizations should be something more than associations of executive bodies. In this connexion it may be observed that, whether or not the limitations and imperfections of the system of non-governmental representation obtaining in the International Labour Organization have been somewhat obscured by the devotion and loyalty of those closest to it, it is a matter for regret that those responsible for the

[1] *Infra*, p. 495. [2] *Infra*, p. 493. [3] *Infra*, p. 496.

[4] Cf. the various documents printed below.

[5] McNair, *Law of Treaties* (1938), p. 54.

[6] Jenks, 'Some Constitutional Problems of International Organizations', in this *Year Book*, 22 (1945), pp. 11, 18.

constitution of U.N.E.S.C.O. did not take the opportunity to apply that method in a field where it would have been no less appropriate than in that of labour.[1] In general, however, the tendency has been to cast temporary organizations in the inter-governmental and permanent ones in the inter-state form.

It has been suggested that one reason for the emergence of the inter-governmental organization has been that 'in certain countries the question of the procedure for the acceptance of international engagements has an important political aspect which sometimes preoccupies those responsible for framing instruments to such an extent that relatively little consideration is given to matters of long-range international institutional policy'.[2] That may well be, although this question of procedure would appear to relate rather to the treaties which contain the constitutions of international organizations than to those constitutions themselves and would appear to be capable of evasion by the incorporation of the latter in, rather than their identification with, the former. But it is certain that a more immediate reason for the emergence of the perhaps regrettable inter-governmental type of international organization is the imprecision with which international instruments continue to be drafted. That this is so is illustrated, if not by the wording of Article 57 of the Charter itself, by the texts of the constitutions of the International Bank for Reconstruction and Development and of the International Monetary Fund, in which the terms 'country' and 'government' are used interchangeably. If this be mere accident, and the distinctions resulting from it merely fortuitous, then there is no more difference between inter-governmental and inter-state organizations than there is between the various forms of treaties.

Relationship between the United Nations and specialized organizations. One elementary difficulty which arises when it is sought to ascertain or to forecast the relationship between the United Nations and the various international organizations now in existence or about to come into existence is that the term 'United Nations' has at least two meanings. In the primary sense it is used to denote the general international organization whose Charter was drafted at San Francisco. For some short time after its creation that organization was known, at least popularly, as the United Nations *Organization* in spite of the precise provision of the second paragraph of the Preamble to the Charter whereby the parties 'establish an international organisation to be known as the United Nations'. But the error was pardonable inasmuch as there was already familiar, though what precisely it was is not easy to see, something bearing the same name. That this is so is confessed in the first paragraph to the same Preamble, where the parties to the Charter are expressed to be '[the respective governments of] the peoples of the United Nations'. This earlier and looser usage of the term seems to originate with the *Declaration by United Nations*, done at Washington on 1 January 1942, whereby twenty-six parties—they are described variously as governments and as states in the text—having subscribed to the principles laid down in the Atlantic Charter, pledged themselves to the full use of their individual resources and to full mutual co-operation for war purposes and engaged not to conclude a separate peace.[3] The same Declaration recited that it might be 'adhered to by other nations which are, or which may be, rendering material assistance and contributions in the struggle for victory over Hitlerism'. The reprint of the Declaration in the British Treaty Series notes that Mexico and the Philippine Commonwealth adhered in accordance with this provision within the year 1942.[4] On 5 January 1942 the U.S. Department of State published a statement to the effect that: 'In order that liberty-loving peoples silenced by military force may have an opportunity to support the principles of the Declaration by United Nations, the Government of the United States, as depositary for the Declaration, will receive statements of adherence to its principles from appropriate authorities which are not governments.'[5]

[1] See *infra*, p. 423.
[2] Jenks, op. cit., p. 20.
[3] Treaty Series no. 5 (1942), Cmd. 6388.
[4] Ibid.
[5] *Department of State Bulletin*, 10 January 1942, no. 133, p. 44.

What is the significance of the omission of the word *the* in the title of the *Declaration by United Nations* is not apparent. At all events, soon after the making of the Declaration, the phrase 'the United Nations' became common. Thus, in the Final Act of the United Nations Conference on Food and Agriculture held at Hot Springs in May–June 1943, the forty-two contracting governments and 'the French representatives' described themselves as 'Having accepted the invitation extended to them by the Government of the United States of America to be represented at a United Nations Conference on Food and Agriculture'.[1] The phrase became current among writers simultaneously.[2] It continued to be used in international instruments. Thus the Italian Military Armistice was concluded on 3 September 1943 by General Eisenhower 'acting by authority of the Governments of the United States and Great Britain in the interest of the United Nations'.[3] In the Agreement for [*sic*] United Nations Relief and Rehabilitation Administration, signed at Washington on 9 November 1943, the 'Governments or Authorities' whose representatives were signatory thereto were described as 'Being United Nations or being associated with the United Nations in this war'.[4] Any attempt to establish on the basis of this wording a distinction between United Nations and nations associated with the United Nations akin to that between Principal Allied and Associated Powers which was established in the Peace Treaties of 1919 falls down when the lists of signatories to the Agreement and to the Final Act of the Food and Agriculture Conference are compared. For they are identical in effect. They both include at least one state not then formally at war with the common enemy, a circumstance which makes it clear that the qualifications for membership of previous United Nations Conferences were not identical with those imposed at the San Francisco Conference which drew up the Charter.[5]

It follows from the foregoing that the name United Nations was not originally a very precise one. It was in general, however, a loose description of the alliance later to be victorious. And after victory it was adopted as the name of the general international organization set up by the victors and for the moment confined to them although not intended always to be so. The perpetuation in this manner of the description given to the victorious alliance is a step the expediency of which is debated in a fashion reminiscent of the manner in which the appropriateness of the word 'League' in the title of the League of Nations was formerly disputed.[6] Whatever the merits of the dispute, the event which has given rise to it, namely, the attribution to the new general international organization of a name with already existing and different associations, has created a possible source of confusion in the classification of other international organizations. For it is the intention, and indeed the duty, of the United Nations (in the sense of the general organization) to set up other organs besides its General Assembly and its Security Council for the discharge of its functions. Some of these are expressly provided for by name in the Charter, such as the Economic and Social Council and the Military Staffs Committee. Others, whether they serve a merely temporary purpose such as the War Crimes Commission or a permanent one such as the Information Organization, are not so specifically mentioned in the Charter. And it is further the intention of the United Nations, in the words of Articles 57 and 63 of the Charter, to bring 'into relationship with the United Nations . . . various specialised agencies' by means of agreements concluded between such agencies and the Economic and Social Council and approved by the General Assembly. It might be thought that in strictness the phrase 'United Nations' might be used adjectivally only in relation to the first class of agencies mentioned, that is, organs of the United Nations itself. Certainly it should not be used in respect of independent agencies unless and until they

[1] Misc. no. 3 (1943), Cmd. 6451.

[2] Cf. Index to *American Journal of International Law*, 36 (1942) and 37 (1943).

[3] Italy no. 1 (1945), Cmd. 6693.

[4] Treaty Series no. 3 (1943), Cmd. 6491.

[5] Participation in the San Francisco Conference was confined to states declaring war on the enemy before 1 March 1945.

[6] Cf. Ray, *Commentaire du pacte de la Société des Nations* (1930), p. 55.

are brought into relationship with the United Nations in accordance with the Charter. But the fact is that, because the name United Nations is older than the institution which now bears it, the same name is applied to wholly independent bodies which were neither established by nor brought into relationship with the United Nations *qua* institution but which were merely set up by some or all of the states of the loose alliance also known as the United Nations. This is true, for instance, of the Food and Agriculture Organization (F.A.O.), the Relief and Rehabilitation Administration, and even, it would seem, of the International Fund and the International Bank.[1] No doubt this is a state of affairs which will be remedied when Articles 57 and 63 are put into effect, but for the moment it is one pregnant with obscurity and confusion.

The wording of Article 57 of the Charter would not appear to sustain the interpretation that all subordinate international organizations are to be brought into relationship with the United Nations. It is hard, when examining the possibility of this, to resist a certain sentimental argument that the 'identity' of such old and famous organizations as the Universal Postal Union merits preservation. But the argument is untenable when it is recollected that the membership of organizations both old and new is broadly the same and that there is no real question of the new general organization expropriating the older minor bodies, but merely one of a recasting of existing arrangements by the same parties.[2] What the projected change amounts to is nothing but a centralization of the hitherto separate organs of international government. Whereas there were formerly many 'world capitals', with the embryonic 'Ministry of Justice' at The Hague, several other 'Ministries' at Geneva, at Berne, and so forth, there is now to be a smaller number—though it is still not intended that there shall be complete concentration in one spot. The advantages and disadvantages of such a movement towards centralization are obvious. On the one hand it may be said that it will bring about a greater degree of departmental co-operation and perhaps a greater sense of the reality and extent of world government, and on the other it may be argued that too intimate an integration of organs may mean that the failure of one will involve all the rest. It remains to be seen whether the fate of Article 57 of the Charter will be different from that of Article 24 of the Covenant.

The scope of Article 57 is prima facie narrower than that of the corresponding provision of the Covenant. Its wording would not seem to indicate an intention to bring all existing and future public international organizations into relationship with the United Nations—merely those 'specialised agencies, established by intergovernmental agreement, and having wide international responsibilities . . . in economic, social, cultural, educational, health and related fields'. This language could indeed be interpreted so as to embrace any international activity capable of being carried on. But that it was not intended by the framers of the Charter to do so is shown by the Report of Committee 11/3 of the San Francisco Conference, where it is indicated that the article should not be regarded as precluding the Economic and Social Council from 'negotiating at its discretion, subject to the approval of the General Assembly, agreements bringing other types of inter-governmental agencies into relationship with' the United Nations.[3] This passage in the Report was interpreted by Committee 8 of the Executive Committee of the Preparatory Commission as establishing a distinction, for the purposes of the Charter, between 'inter-governmental agencies'—all agencies set up by inter-governmental agreement, including inter-state agencies—and 'specialised agencies', a sub-category of the former, having wide responsibilities as defined in the basic instrument. Committee 8 by implica-

[1] Cf. the various documents printed *infra*.

[2] The recommended winding up of the International Institute of Agriculture and the Comité des Bois may be noted as an example of mere redistribution of international functions.

[3] Cf. 'Observations on Relationships with Specialised Agencies of Committee 8 of the Executive Committee', para. 2, printed in *Report by the Executive Committee to the Preparatory Commission of the United Nations*, London, H.M.S.O., November 1945.

tion placed regional organizations outside the sub-category but evidently did not contemplate that they were the only type excluded therefrom.[1] But a certain imprecision appears to have pervaded the discussion of the matter at all stages. It is, however, fair to deduce that Article 57 imposes no positive obligation upon either the United Nations or its members to effect or allow the bringing into relationship with the latter of organizations of the type of the Universal Postal Union, whose responsibilities are 'wide' in not every sense. On the other hand, the Economic and Social Council is not debarred from negotiating to this end. To this extent, therefore, Article 57 is formally narrower and less mandatory than was Article 24 of the Covenant, which provided that 'all international bureaux already established by general treaties if the parties to such treaties consent' should be placed under the direction of the League and that any similar organs later created, besides any 'commissions for the regulation of matters of international interest', should likewise fall under the League.

Article 57, however, unlike Article 24 of the Covenant, does not stand alone. At least thirteen other articles of the Charter contain provisions designed to bring about a degree of co-ordination and integration between the United Nations and other international organizations. This circumstance alone must not, however, be taken to imply that things either will or may be very different from what they were in the time of the League. For the Charter is a rather more detailed and, be it said, rather more verbose document than the Covenant. Thus whereas Article 64 contains provisions for the exchange of information and documents between the United Nations and the specialized agencies, Articles 63 and 68 contemplate the creation of a co-ordination commission of the Economic and Social Council to co-ordinate the activities of the specialized agencies with those of itself, Article 64 empowers the Economic and Social Council to require reports of the specialized agencies, and Articles 58, 62, and 63 empower the United Nations to make recommendations to them. All this was perhaps implicit in the single Article 24 of the Covenant. The same is to be said in relation to the provisions of Articles 48 (2) and 91 whereunder assistance to the Security Council and to the Trusteeship Council may be required of the specialized agencies. The power to include the expenses of specialized agencies in the budget of the general organization which is to be implied from Article 17 (3) of the Charter was indeed expressed in the Covenant. What is new is the provision made for reciprocal representation between the general and the specialized organizations, and for reciprocal aid between the latter and the International Court. The first of these matters is dealt with in Article 70 of the Charter, where it is provided that the Economic and Social Council may make arrangements for representatives of the specialized agencies to participate without vote in its deliberations and in those of the commissions established by it, and for its own representatives to participate in the deliberations of the specialized agencies. But this provision is not an isolated one and stands between an article containing the now common-form stipulation that the participation without vote of any Member of the United Nations in the deliberations of the Economic and Social Council shall be invited when any matter of particular concern to that Member is discussed (Art. 69), and another empowering the Council to make suitable arrangements for consultation with non-governmental agencies, international or national, which are concerned with matters within its competence (Art. 71). The provision in question is thus designed to facilitate the functioning of the Economic and Social Council rather than to secure the co-ordination of the specialized agencies.

This matter of reciprocal representation has, however, a curious history which well illustrates the difficulties attendant upon the execution of any measure such as Article 24 of the Covenant or Article 57 of the Charter designed to bring specialized international organizations within the orbit of a general organization. In 1927 the Postal Union Congress received a request from the League Transit Organization that the latter should be permitted to be represented at the former's deliberations on the subject of civil aviation.

[1] Ibid.

The request was refused on the ground that the General Postal Convention of 1874 allowed the participation only of postal organizations—the same ground on which similar requests from private bodies interested in aviation had previously been refused. Though it came before the Council, the League showed a certain reluctance to pursue the question. Article 24 notwithstanding, the Council by resolution merely expressed confidence that 'direct relations' would without delay be established between the Transit Organization and the Congress in the same manner as they had already been arranged between it and other technical unions.[1] But in truth these last relations were not exactly intimate: though the different unions concerned with telephones and telegraphs showed themselves more liberal, co-operation with them was achieved only slowly and in laborious if ingenious fashion by the interposition of intermediate bodies and by resort to those scarcely potent expedients, *vœux*, recommendations, and suggestions of amendments. Neither in relation to the organizations mentioned nor to others of similar status and type did the League press the provisions of Article 24 to their logical conclusions.[2] This may well seem strange when it is remembered that there was considerable suspicion in League circles that the not unvigorous defence of the 'individuality' of the older international bodies, whose maintenance of separate staffs was both remarkable and remarked upon already before the First World War,[3] was prompted by the efforts of 'placemen' for whom the profusion and confusion of Bureaux and Offices provided indeed many places. It seems even more curious that the League should have, as early as 1921, envisaged its role in relation to these bodies as 'in reality confined to giving [them] the moral support which attaches to official affiliation with the League except in cases where abuses are revealed such as, for example, encroachment by an officer upon the sphere of action of some other international organisation or an unjustifiable refusal on the part of a Bureau to co-operate with other bodies or in the event of an insufficient degree of activity . . . '.[4] For those present when the Covenant was framed seem to have assumed that Article 24 would operate automatically to place 'Bureaux already established by general treaties' under the League in a real sense, and upon this supposition to have advocated differential treatment of such bodies and of others not so established, holding that the express acceptance of a stringent control ought to be the price of the affiliation of the latter.[5] The unions themselves appear to have held the very opposite view—that only 'international bureaux . . . hereafter constituted' fell automatically under League control in virtue of Article 24, this peril being adduced as a reason for not merging the radiotelegraphic and telegraphic unions into a single, and consequently new, body.[6] Whatever the true construction may have been, both parties shied away from Article 24 and by 1928 the Assembly so far retreated from the mild interpretation of 1921 as to adopt a committee report declaring that there was no intention of bringing the variety of organizations directly within the framework of the League or of encroaching on their internal economy or statutory provisions regarding headquarters, and that the League's authority 'might be defined as the exercise by [it] of a general mission in regard to examination and coordination of the various manifestations of international life'. It is true that such a mission was held to import the right to call for full information as to the work of affiliated unions, the power to co-ordinate the latter *inter se*, and the right of the Secretary-General or his delegate to be present in an advisory capacity at their meetings. But at the same time it was laid down

[1] *Official Journal of the League of Nations* (1931), p. 2265. Cf. Ray, op. cit., Suppl. 11, p. 106; Boisson, *Société des Nations et Unions Postale et Télégraphique* (1932), pp. 80 ff.

[2] Eagleton, op. cit., p. 271.

[3] Cf. Schücking, *Der Staatenverband der Haager Konferenzen* (1912), cited in Rapisardi-Mirabelli, *Théorie Générale des Unions Internationales*, *Recueil des Cours*, 7 (1925), pp. 345, 385.

[4] Report by M. Hanotaux, approved by the League Council on 27 June 1921, *Official Journal of the League of Nations* (1921), pp. 759, 760.

[5] Miller, *The Drafting of the Covenant* (1928), vol. i, *passim*.

[6] Boisson, op. cit., p. 75.

that the 'direction' by the League of such bodies had to be established by a 'definite legal Act'.[1]

Whatever the explanation of the failure of the League to assume such leadership of the diverse unions as Article 24 of the Covenant would seem to require of it, it certainly justified the change of attitude of the United Kingdom Government in the matter. The presence of Article 24 in the text of the Covenant was due to the action of that Government. Already mooted by private individuals before the First World War, the plan to integrate the many international organs found a place in the Smuts Plan. The League Commission omitted the relevant clause, but it was restored by the drafting committee of the Peace Conference at Paris at the instance of the British delegation.[2] In subsequent years, however, United Kingdom and Dominions delegations were foremost in opposition to any extension of the technical services of the League and have in consequence been accused of a lack of consistency.[3] But the fact was that the League's tentative moves in the direction of contact with the technical unions was leading to an expensive duplication of organs. Both this, and the failure to make Article 24 work, are perhaps attributable to a faulty conception underlying that provision. The authors of it appear to have conceived of the various international bureaux as the central organs of their respective unions whereas in reality, in the case certainly of such bodies as the telegraphic and postal unions, it is the 'unions' themselves, acting through their Congresses or Conferences, which are masters of their actions and their destinies. The misconception was perhaps permissible inasmuch as there were also in existence some international bureaux with special autonomous functions under their constituent conventions, such as the International Office of Weights and Measures, which was responsible for the manufacture and custody of standards. And it was perhaps also natural in that the authors of the Covenant were the authors also of the constituent instrument of the International Labour Office, an Office composed not of functionaries like the Bureau of the Postal Union but of representatives of interested governments, and endowed with peculiar powers and functions. That the misconception was indeed there is shown by the assimilation in Article 24 of 'bureaux' to 'commissions regulating international affairs', i.e. exercising a proper power. But the organ of a union comparable with a commission exercising regulatory functions is the plenary conference—the 'Union' itself, which commonly possesses neither juridical personality nor more than intermittent existence.[4]

Whether the attempt of the United Nations to co-ordinate with itself other public international organizations is any better conceived than that of the League must remain to be seen. The way in which it is to be made is indicated in two documents which have already appeared; the Observations on Relationships with Specialized Agencies of the Eighth Committee of the Preparatory Commission,[5] and the Report of the Committee (of the Economic and Social Council) on Negotiations with Specialized Agencies.[6] The former Observations were, by resolution of its Executive Committee, transmitted by the Preparatory Commission to the General Assembly without either approval or disapproval, it not being required of the Commission by its constituent instrument that it should make recommendations on this topic.[7] The Third Committee of the First General Assembly accepted them without change.[8] The observations run to forty-two paragraphs, but are

[1] *Report of the IInd Committee*, adopted by the Assembly on 27 September 1928, *Official Journal of the League of Nations* (1928), pp. 898 ff. Concerning the 'acceptance' of the Institute of Intellectual Co-operation by the League, see ibid. (1932), p. 1752; Ray, op. cit., Suppl. III, p. 92.

[2] Boisson, op. cit., p. 67.

[3] Cf. Ray, op. cit., p. 668; Greaves, *The League Committees and World Order* (1931), p. 8.

[4] Boisson, op. cit., pp. 108 ff.

[5] Cited *supra*, p. 400, n. 3.

[6] *Journal of the Economic and Social Council*, 1st Year, no. 29, pp. 486 ff.

[7] Recommendation no. viii, *Report*, p. 14.

[8] *Proceedings of the General Assembly, First Part of First Session*, London, H.M.S.O., 1946, para. 75.

concerned primarily with the development of certain general principles, the details of the matter being left to the separate agreements to be negotiated with the various agencies in accordance with Article 63 of the Charter. In particular there is discussed the subjects which are deemed appropriate for inclusion in the agreements or for general regulation by the United Nations. These are: (*a*) items derived from the Charter: reciprocal representation, exchange of information, co-ordination of agencies *inter se*, the power of the United Nations to make recommendations to the specialized agencies, the relationship of the latter to the Security and Trusteeship Councils, and to the International Court, and budgetary and financial relationships; and (*b*) other items considered important: liaison of headquarters, proposals of agenda, rules of procedure, common fiscal services, personnel arrangements, privileges and immunities and the question of an administrative tribunal, technical services, a central statistical service, and the location of headquarters. It is recommended that all or most of these items should figure in agreements with those specialized agencies with a wide range of functions, but that not all should necessarily find a place in arrangements with agencies of less extensive responsibilities.

As to the second document mentioned, by resolution dated 15 February 1946 the Economic and Social Council set up a committee to negotiate with the I.L.O., the F.A.O., U.N.E.S.C.O., and the International Fund and the International Bank with a view to bringing these organizations into relationship with the United Nations. By a further resolution dated 21 June 1946 the Council approved the report of the committee and the draft agreements entered into with the first three of the organizations named, negotiations with the Bank and the Fund having been postponed at the request of the latter on account of their present preoccupation with problems of internal organization. These agreements will enter into force upon their approval by the General Assembly and by appropriate organs of the organizations they respectively concern. They touch upon most of the matters recommended in the Observations to be mentioned. They are for the most part identical in terms. They provide, firstly, that the United Nations recognizes each organization concerned as a specialized agency responsible for taking such action as may be appropriate under its basic instrument for the accomplishment of the purposes set forth therein. Upon the subject of reciprocal representation they provide that representatives of the United Nations shall be invited to attend the meetings of the representative organs of the agencies specified and of committees of the same, and such general, regional, or other special meetings as each organization may convene, and to participate without vote in the deliberations thereof. In return, representatives of each organization are to be invited to attend meetings of the Economic and Social Council, its commissions and committees, and to participate without vote in the deliberations thereof with respect to any item on the agenda in which the organization concerned has indicated it has an interest or which falls within the scope of its activities. Such representatives shall also be invited to attend in a consultative capacity meetings of the General Assembly (and, in the case of the I.L.O., be afforded full opportunity for presenting thereto the views of that Organization on questions within the scope of its activities). Like participation in the meetings of the main committees of the General Assembly and in those of the Trusteeship Council is similarly assured. The organizations concerned, the Economic and Social Council and its commissions and the Trusteeship Council are enabled to place items on each others' agenda. The organizations agree to submit to their appropriate organs recommendations made to them by the United Nations under Articles 58 and 63 of the Charter (i.e. respecting the co-ordination of the activities and policies of the specialized agencies *inter se*), to consult concerning any such recommendations, and to report upon the results of their consideration. The 'fullest and promptest exchange of information and documents'—subject to any considerations for the safeguarding of confidential material—between the United Nations and the specialized agencies, co-operation of the latter with the Security and Trusteeship Councils and with the International Court, and with the United Nations in giving effect to the principles and obligations of Chapter XI of the Charter regarding non-self-governing

territories, close association of regional or branch offices, co-ordination of statistical and of administrative and technical services are likewise provided for. In particular, it is further provided that each specialized agency shall consult the United Nations before deciding the location of its permanent headquarters. That they shall consult with the United Nations with a view to the creation of a single, unified international civil service by the adoption of common personnel methods and arrangements through an International Civil Service Commission. That the specialized agencies shall inform the Economic and Social Council in advance of any formal agreement with any other specialized agency or inter-governmental organization. That this liaison shall apply also to branch and regional offices. That the Secretary-General and the Director of each organization concerned shall enter into any supplementary arrangements for the implementing of the principal agreement which may be found desirable in the course of common working experience.

In one or two minor respects the three agreements differ. Thus, in the matter of relations with the International Court, the agreement with the I.L.O. stipulates that the Conference, or on its authorization the Governing Body of the latter organization, may request an advisory opinion on any legal question arising within the scope of its activities, other than a question concerned with relationships with the United Nations or with other specialized agencies, informing the Economic and Social Council of the fact of such request. The agreement with U.N.E.S.C.O., on the other hand, provides that that body may, under Article 96 of the Charter, submit any request for an opinion [*sic*] on any like question on prior notice to the Economic and Social Council, which shall have the right to declare that in its judgment any such request should not have been made, whereupon, if it be not withdrawn, the General Assembly shall determine whether it is in fact to be submitted to the Court. The F.A.O. desired to have included in the agreement to which it was to become a party a formula identical with that obtained by the I.L.O., but the negotiating committee of the Council was prepared only to offer the same rights as had been accorded to U.N.E.S.C.O. Failing any immediate compromise the matter was reserved for further negotiation. It may be observed that, since Article 96 enables only those specialized agencies which are so authorized by the General Assembly to request advisory opinions of the Court, the difference between the two clauses is merely that between a general and a special licence to that end.[1]

The inclusion of the budgets of the specialized agencies within a general United Nations budget is to be achieved by means of supplementary agreements, pending the conclusion of which U.N.E.S.C.O. and the F.A.O. are to consult the United Nations in the preparation of their respective budgets. The United Nations may make recommendations concerning such budgets and may undertake to collect the contributions due from members. The I.L.O., however, is expressed to be bound only to consult concerning the desirability of similar arrangements. U.N.E.S.C.O. undertakes to transmit to the Economic and Social Council applications for membership made by states which are not Members of the United Nations. The Council may recommend rejection of such applications, which recommendations shall be binding upon the Organization. But if in any particular case no such recommendation is made within six months of the transmission of the application, the latter may be dealt with exclusively by the Organization in accordance with the provisions of its constitution. Finally, a subsidiary agreement is to be concluded with U.N.E.S.C.O. regarding the latter's functions of collaboration in the work of advancing the mutual knowledge and understanding of nations through all means of mass communication and of generally contributing to the maintenance, increase, and diffusion of knowledge, in particular with a view to the co-ordination of the Organization's activities in these spheres with the operations of information services of the United Nations.

It is clear that the documents discussed provide evidence of a very real endeavour on the part of the United Nations to achieve a much greater measure of integration of the

[1] Art. 65 of the Statute of the Court contains a provision complementary with Art. 96 of the Charter.

various international organizations in existence than was attempted at any time during the life of the League. The task, it must be said, has been greatly facilitated by the anticipation of its undertaking by the framers of the constitutions of those organizations which, although new, are anterior to the United Nations, and by the making of due allowance for it in constitutions drafted subsequently to the Charter. For the constituent instruments of all the organizations inspired by what has been termed here the United Nations movement without exception make provision for their entry into suitable relationships either with the United Nations *eo nomine* or, in the case of those constitutions which antedate the Charter, with the 'general international organization' to be set up. And the I.L.O., which is of course a much older body, has not failed at any time during the years in which the formation of the United Nations has been under consideration to declare its intention of so modifying its constitution as to fit into the general scheme and has now taken material steps to that end. Thus, though a 'definite legal act' is still necessary to effect the affiliation of the special international organization to the general, the task is somewhat easier than it was in the time of the League. But it is easier for the very reason that it is undertaken, as has been shown, in relation to a very different class of organization than that to which Article 24 of the Covenant was designed to apply, in relation, that is to say, to organizations with representative central organs rather than mere bureaux or offices.

Privileges and immunities of international organizations. The topic of the privileges and immunities of international organizations is dealt with exhaustively elsewhere.[1] It is, however, impossible to omit all mention of it here. For the conclusion that the unification of the privileges and immunities of the specialized agencies with those of the United Nations itself would contribute most materially to the process of their mutual integration was reached independently by the committee of the Preparatory Commission which examined the question of privileges[2] and by that which dealt with the problem of relationships with the specialized agencies.[3] The achievement of a common scheme of privileges and immunities has in consequence become a major item in the plan for general coordination of international administration. That this would be the case was, again, to some extent anticipated or allowed for in the constitutions of the newer international organizations. Thus the Constitution of U.N.E.S.C.O. lays down that the provisions of Articles 104 and 105 of the Charter concerning the legal status of the United Nations, its privileges and immunities, shall apply 'in the same way to that' Organization.[4] No such precise reference to the Charter was, in the nature of things, capable of insertion in the constitutions which ante-dated that document, and in those there was merely a more or less common form provision that the particular organization should have juridical personality and such privileges and immunities as are necessary for the fulfilment of its functions.[5] These provisions might or might not be accompanied by a proviso that the constitution—and thus those of its stipulations relating to privileges—might be modified by arrangements defining the relationship of the organization in question to any general world organization,[6] or that, in the event of the conclusion of a general international agreement on the privileges and immunities of international civil servants, the privileges

[1] See in particular Secrétan in this *Year Book*, 16 (1935), p. 56, Rey, *Les Immunités des fonctionnaires internationaux* (1928), Preuss in *American Journal of International Law*, 40 (1946), p. 332, and Parry in *Modern Law Review*, 10 (1947), p. 97.

[2] *Report*, pp. 69, 70.

[3] Ibid., pp. 103, 107.

[4] Art. XII; *infra*, p. 429.

[5] Cf. constitution of the European Coal Organization (in fact drafted after the Charter but before the setting up of the Economic and Social Council), Art. 8, *infra*, p. 491. But see the constitutions of the International Fund and the International Bank which contain (in Arts. IX and VII respectively) highly specific provisions respecting privileges; *infra*, p. 442. And for a comment on the 'great diversity' of the privileges of the specialized agencies see *Proceedings of the General Assembly, First Part of First Session*, App. 16.

[6] Constitution of the F.A.O., Art. XIII (2), *infra*, p. 420.

of the organization should be those accorded by such agreement.[1] But the difference in effect between these different formulae is slight. For Articles 104 and 105 of the Charter merely provide that the United Nations shall be accorded such legal status, privileges, and immunities as are necessary for the exercise of its functions and the fulfilment of its purposes.

Those articles provide further, however, that the General Assembly may make recommendations with a view to determining the details of their application or may propose conventions to the Members for this purpose. In conformity therewith the General Assembly at its First Session proposed to Members a General Convention on the Privileges and Immunities of the United Nations.[2] This related only to the status of the United Nations itself but was accompanied by certain Resolutions respecting that of other international organizations. By the terms of these the International Court was invited at its first Session to consider the question of its privileges and to inform the Secretary-General of its views thereon, it being recommended that until further action was taken the rules applied to the old Permanent Court should be observed in relation to the new institution.[3] As to the specialized agencies, the General Assembly took the view that there were many advantages in the unification as far as possible of the privileges to be enjoyed by them and by the United Nations itself. It was, however, expressly recognized that not all of them would require all the privileges needed by others and that some of them might stand in need of such as the United Nations did not require. But it was laid down that the régime of the General Convention should be regarded as a general rule as a maximum and that no privileges or immunities strictly unnecessary ought to be asked for by the specialized agencies. The Secretary-General was instructed to open negotiations with a view to the reconsideration in the light both of the General Convention and of these considerations of the provisions under which the specialized agencies at present enjoy privileges.[4] This action by the General Assembly is in conformity with the conclusions of the various committees charged with the preliminary exploration of the matter. But the lines of the ultimate settlement of the matter are of course at present still unclear.

International organizations in English law. A final note is necessary upon the provisions of the law of the United Kingdom concerning international organizations. A convenient subdivision of the points of contact between the constitutions of international organizations and municipal legal systems into the provisions of which the texts of international conventions are not incorporated verbatim by some process of so-called constitutional or legislative ratification, is into those which relate to the status of the organization in question under the particular municipal law and those which arise from the imposition by such constitutions, or by instruments such as draft conventions concluded under their provisions, of other, and usually more general, obligations necessitating for their implementing some change of municipal law. Concerning the first of these, the Government of the United Kingdom had provided in advance for the new international organizations by procuring from Parliament the Diplomatic Privileges (Extension) Act, 1944.[5] Part of that enactment empowered the Secretary of State to remove doubts concerning the diplomatic immunities of foreign delegations attending international conferences held in the United Kingdom by the inclusion of the names of members of such delegations in lists the publication of which in the *Gazette* should be conclusive evidence of the diplomatic status of the persons named therein.[6] This constituted a permanent change in the law. The Act also provided for the conferment upon international organizations of which the

[1] Constitution of the International Civil Aviation Organization, Art. 60, *infra*, p. 464.

[2] Misc. no. 6 (1946), Cmd. 6753.

[3] Ibid. Further on the question of the privileges of the Court see *Report by the Executive Committee to the Preparatory Commission*, p. 71.

[4] Ibid.

[5] 7 & 8 Geo. VI, c. 44; cf. Schwelb in *Modern Law Review*, 8 (1945), p. 50.

[6] S. 3.

Government of the United Kingdom should be a member, and upon the officers of, and the representatives of Governments in, such organizations, of certain privileges and immunities. As to organizations themselves, those designated by Order in Council, being organizations of which the Government of the United Kingdom and at least one foreign Government were members, might under the Act be granted, to the extent any particular Order should specify, the legal capacities of bodies corporate, immunity from suit and legal process, the like inviolability of official archives and premises, and the like exemption from taxes and rates (other than taxes on importation of goods) as are accorded to diplomatic envoys; and, subject to compliance with conditions imposed for the protection of the Revenue, exemption from taxes on importation of goods for official use or for re-exportation.[1] As to government representatives in the governing bodies or committees of such organizations and high officers thereof, the Act provided for the conferment on such numbers of them as might be specified by Order, and to the extent so specified, of the like immunity from suit and legal process, inviolability of residence and exemption from taxes and rates as are accorded to diplomatic envoys.[2] As to other classes of officers of organizations, it was provided that they might by Order have conferred upon them immunity from suit in respect of official acts and exemption from income-tax in respect of official emoluments.[3] But British subjects were excepted from the operation of these provisions, which were in any case temporary, being expressed to expire in five years in default of an address from both Houses to the Crown praying their continuance.[4] However, as regards Dominions citizens who might be high officers of organizations to which the Act applied, it was stipulated that they might be granted the like exemption from rates and taxes as is accorded to diplomatic envoys,[5] provided their usual place of abode was outside the United Kingdom.[6]

In conformity with the Act, Orders in Council were made applying its provisions to U.N.R.R.A.,[7] the United Nations Information Organization (U.N.I.O.), the Intergovernmental Committee for Refugees and the European Advisory Commission,[8] the Provisional Organization for European Inland Transport and the United Nations War Crimes Commission,[9] the United Nations Organization [*sic*] and the Preparatory Commission,[10] and the European Coal Organization.[11] These Orders are virtually identical in terms. Article 1 of each (and, as respects the European Advisory Commission, also Article 8 of Order No. 84 of 1945) declares the Organization(s) affected to be organizations within the sense of the Act. The articles next following confer upon each of them (except the European Advisory Commission, the United Nations Organization (U.N.O.), and the Preparatory Commission) the status of bodies corporate; and also upon each of them all other privileges capable of grant under the Act to organizations (except, in the case of the European Advisory Commission, exemption from taxes upon importations). Article 3 of each Order (save of Order No. 1539 of 1945), and Article 10 of Order No. 84 of 1945, confer upon representatives of foreign Governments in the appropriate organs of the Organizations concerned, not being British subjects, all the privileges capable of conferment upon them under the Act for such time as their names shall be upon the list of such persons entitled maintainable by the Secretary of State in accordance with S. 1 (3) of the Act. But the Orders here follow the Act exactly in reciting that the privileges so conferred shall be without prejudice to any other privileges enjoyable by individual representatives in virtue of other offices (e.g. of diplomatic envoy accredited to the United Kingdom). The number of such representatives is limited to one per country, except that in the cases of U.N.R.R.A., the Refugees Committee, and the Provisional Organization for European Inland Transport it is two; in the case of the last-named

[1] S. 1 (2) (*a*) and Part I of Schedule.
[2] S. 1 (2) (*b*) and Part II of Schedule.
[3] S. 1 (2) (*c*) and Part III of Schedule.
[4] S. 1 (6).
[5] S. 1 (2) (*c*) and Part III of Schedule.
[6] Cf. Proviso to S. 1 (2).
[7] S.R. & O., 1945, no. 79.
[8] Ibid., no. 84.
[9] Ibid., no. 1211.
[10] Ibid., no. 1539.
[11] S.R. & O., 1946, no. 895.

Organization the five members of the Provisional Executive qualify also as representatives; but there is no provision for representatives in the cases of U.N.O. and the Preparatory Commission. The same articles provide also, subject to the same limitation regarding nationality, for the grant of the same privileges to holders of the highest offices in the Organizations concerned. There is in every case a limitation on the numbers of such persons eligible: it is two in the cases of U.N.I.O., the Refugees Committee, and the War Crimes Commission, in that of U.N.R.R.A. eight, of the European Advisory Commission six, of the Coal and Transport Organizations five, and of U.N.O. and the Preparatory Commission together, ten. The Orders then go on to confer on persons who would have been eligible for the privileges of government representatives or holders of the highest offices in Organizations but for their British nationality, immunity from suit in respect of official acts and from income-tax upon official emoluments, provided always that they do not belong to the United Kingdom and that no tax exemption shall apply if their usual place of abode is therein. Upon the higher, as distinct from the highest, officials of the Organizations, that is to say upon persons of ranks between those of Secretaries and Directors-General and their deputies and down to those of Heads and Members of Section, &c., the same immunities are then conferred without distinction of nationality except that tax immunity shall not benefit British subjects usually resident in the United Kingdom. And, finally, but subject to the same exception, income-tax exemption is conferred on all other officers. In all cases the enjoyment of privileges is expressed to be subject to the right of waiver by the foreign government or the Organization, as may be appropriate.

In consequence of the proposal to the Members of the United Nations of the General Convention on the Privileges and Immunities of that body the enactment already discussed was amended by the Diplomatic Privileges (Extension) Act, 1946.[1] The changes effected thereby were of two sorts. In the first place, certain additions were made to the list of privileges capable of conferment on organizations as distinct from individuals. These were: exemption from taxation upon the direct importation of their own publications and from prohibitions or restrictions on the direct import or export of publications and of goods for official use; and the right to send telegraphic matter intended for publication or broadcasting at press rates. The classes of individuals eligible for the like privileges as are accorded to diplomatic envoys were simultaneously added to, a new category, that of persons employed on missions on behalf of international organizations, being created. It was also provided that the conferment of these privileges upon one of the two classes previously eligible therefore, namely the highest officers of international organizations, should import their enjoyment, save to the extent that any Order made under the Act might exclude this result, by the spouses and infant children of such officers to the same extent that the spouses and children of diplomatic envoys are entitled to partake of the privileges of such envoys. In regard to the remaining class—representatives of governments upon the governing bodies or any committees of international envoys—it was further enacted that their official staffs should, subject to the same possible limitation, likewise partake of the privileges of their principals to the same extent as do the retinues of diplomatic envoys. There are thus now three categories of persons capable of assimilation to diplomatic envoys in virtue of the Act: the highest officers of organizations, whose families qualify also but whose staffs of course do not; representatives of governments in such organizations, whose staffs may also receive privileges but whose families do not; and emissaries of organizations, whose status benefits neither their staffs nor their families.[2] In regard to the second category named, the later Act made another change. For it provided that, in relation to the United Nations, the General Assembly and any council or other organ thereof should be regarded as representative bodies the members of which might be granted full diplomatic privilege.[3] This was a most reasonable amendment since clearly a relatively subordinate organ of the United Nations may

[1] 9 & 10 Geo. VI, c. 66.

[2] S. 1 (1).

[3] S. 2 (*a*).

be superior in importance to the governing body of some autonomous lesser organization and thus certainly not less deserving of privilege. The amendment was presumably necessary because a council, &c., is not necessarily a 'committee'. Equally reasonable was another general provision to the effect that the powers conferred by the principal Act should be construed to include power to confer on the judges and registrars of the International Court, and on suitors thereto and their agents, counsel, and advocates, such privileges as might be required to give effect to any resolution or convention approved by the General Assembly.[1] For the constitution of a court is *sui generis* and cannot necessarily be brought within provisions designed to deal with international organizations generally.

But in the second place the Act of 1946 produced an infinitely more significant change in regard to individual privilege. This was the excision of the provisions of the principal Act discriminating against British subjects and their replacement by a mere proviso that no privilege or immunity should be capable of conferment upon any person as the representative of the Government of the United Kingdom or as the member of the staff of such a representative. To a certain extent the change was in conformity with the views of the various international commissions and committees charged with the examination of the whole matter of the privileges of international organizations. The General Convention, indeed, expressly excluded any national discrimination, especially in regard to taxation and to national service obligations.[2] But the Act of 1946 went a good deal farther than the Convention in that it did not apply only to the United Nations as did the latter. It is of course highly probable that whatever agreement is reached upon the subject of the privileges of the specialized agencies will follow the general lines of the Convention in this regard. But for the moment the situation remains that it is legally competent to the Crown in Council to confer upon such agencies privileges in excess of what their constitutions prescribe. The Government has, accordingly, given an undertaking to procure no Orders under the new Act in relation either to the International Court or to the specialized agencies until such time as the general settlement of their status is achieved by international action.[3] Therefore, whilst the Act of 1944 has been transformed from a temporary into a permanent enactment,[4] special provision has been made to ensure that the amendments to it effected by the later Act shall not affect Orders made before the commencement thereof.[5]

The International Fund and the International Bank were not dealt with under the Diplomatic Privileges (Extension) Act, the Bretton Woods Agreements Act, 1945,[6] providing, without prejudice to the power of the Crown in Council to proceed under the former enactment, that steps considered reasonably necessary to carry into effect any of the provisions of the Agreements establishing those organizations relating to their status, immunities, and privileges, or those of their respective governors, executive directors and staff, might be taken by Order made under that Act.[7] In accordance with this provision there was made the Bretton Woods Agreements Order in Council, 1946,[8] whereby certain parts of the Agreements in question are expressed 'to have force of law'. These parts comprise the operative stipulations of the article in each agreement devoted to the subject of privileges. As respects the Fund, the relevant article provides that that institution itself shall have in the territory of each of its members full juridical personality, immunity from judicial process subject to the right of waiver, immunity from any sort of legislative or executive process, immunity in respect of its archives, freedom from all restrictions in respect of its assets, immunity from taxation and customs duties, and the same treatment for its official communications as is accorded to the official communications of other Members. Its governors, directors, and staff are to be immune from legal

[1] S. 2 (*b*).
[2] Art. V, s. 18.
[3] *Official Report* (*Hansard*), vol. 425, col. 801.
[4] 9 & 10 Geo. VI, c. 66, s. 1 (3).
[5] Ibid., s. 1 (2).
[6] 9 & 10 Geo. VI, c. 19.
[7] S. 3.
[8] S.R. & O., 1946, no. 36.

process in respect of official acts and to be granted the same treatment in respect of travel facilities as representatives and officials of other members of comparable rank and, so long as they are not local nationals, to be immune from taxation upon official emoluments and from national service obligations and immigration and alien registration requirements.[1] The provisions in regard to the Bank are virtually the same except that it may be sued by persons other than members or deriving claims from members in courts of competent jurisdiction in territories in which it has an office or other representation.[2] In virtue of the Order mentioned above most of these provisions now have the force of law in the United Kingdom, and indeed in any part of His Majesty's dominions save Dominions within the sense of the Statute of Westminster, territories administered thereby, and British India, and in all places where His Majesty has extra-territorial jurisdiction save Dominion mandated territories and territories in British India. But the Order omits from the list of privileges contained in the Agreements the right to the same treatment for official communications as is accorded to the official communications of foreign governments, the right of individuals to the same treatment in respect of travel facilities as is accorded to foreign government representatives and officials, and the immunity from national service obligations, immigration, and alien registration requirements.[3] The Order constitutes an interesting instance of the rare, though not unknown, phenomenon of incorporation of the text of a treaty in an English enactment.

As respects legislation implementing provisions of international constitutions relating to matters other than privileges and immunities, there is but a single example arising out of the creation of the new specialized agencies. That is the Bretton Woods Agreements Act, 1945,[4] already mentioned. S. 2 (1) thereof authorizes the payment out of the Consolidated Fund of any sums required in respect of subscriptions to the International Fund and to the International Bank,[5] payments due to either institution in consequence of a change in the par value of sterling,[6] the implementing of the government guarantee to the Bank of any losses due to the default of designated depositaries,[7] or any compensation due upon withdrawal from, or the liquidation of, the Bank.[8] Sub-sections 2 and 3 of the same section authorize the dealing by the Treasury with any sums receivable under the Fund and Bank Agreements and sub-section 4 empowers the Treasury to create and issue to the Bank or Fund securities charged on the Consolidated Fund.[9] S. 3 of the Act empowers the Crown in Council to make such provision as may seem reasonably necessary to give effect to the stipulations of the Fund

[1] Art. IX of the Fund Agreement, *infra*, p. 442.

[2] Art. VII of the Bank Agreement.

[3] Presumably because these matters, in so far as they are susceptible of legislative treatment, are dealt with in special orders. Cf. *Direction* (of the Secretary of State) under Art. 14 of the Aliens Order, 1920, as amended, exempting government representatives in, and higher officials of, international organizations designated under the Diplomatic Privileges Act, 1944, and also the wives and children (of whatsoever age) of such representatives or officials living with them, from the provisions of the principal Order, and further of *inter alios* lesser officials of such organizations and their wives and children under 18 from compliance with the registration provisions thereof (S.R. & O., 1945, no. 1054).

It is to be noted that the Bretton Woods Agreements Order was in a second regard more restrictive than the Agreements: in that it provided that nothing in s. 9 of the article in either Agreement dealing with privileges should be construed as entitling the Fund or Bank to import goods duty-free without any restriction on subsequent sale in the country to which they might be imported, or as conferring on those bodies any exemptions from duties or taxes which form part of the price of goods sold or which are in fact no more than charges for services rendered.

[4] 9 & 10 Geo. VI, c. 19.

[5] Art. III, s. 3 (*a*), of the Fund Agreement, Art. II, s. 3 (*a*), of the Bank Agreement.

[6] Art. IV, s. 8, of the Fund Agreement, Art. II, s. 9, of the Bank Agreement.

[7] Art. XIII, s. 3, of the Fund Agreement.

[8] Ibid., Schedules D and E.

[9] Art. III, s. 5, of the Fund Agreement and Art. V of the Bank Agreement.

Agreement regarding the unenforceability of exchange contracts which are contrary to exchange control regulations imposed consistently with that Agreement.[1] The power thus granted was exercised in such a manner as to give the relevant portion of the text of the Agreement the force of law.[2]

The specialized agencies apart, it is appropriate to mention here by way of conclusion the United Nations Act, 1946.[3] That enactment, which consists in a single operative section, gives power to the Crown in Council by Order to make such provision as may appear necessary or expedient for enabling the effective application of any measures called for from His Majesty's Government under S. 41 of the Charter to give effect to any decision of the Security Council. The measures referred to are measures not involving the use of armed force. The Act provides, without prejudice to the generality of the power it confers, that any Order made under it may legislate for the apprehension, trial, and punishment of persons offending against its provisions.

A. *PERMANENT ORGANIZATIONS*

I. *Food and Agriculture Organization of the United Nations*

In May–June 1943 the representatives of forty-two Governments and 'the French Representatives' met at Hot Springs, Virginia, at the invitation of the Government of the United States of America in a United Nations Food and Agriculture Conference. It became clear at a comparatively early stage of the proceedings that there was general agreement that there should be established a permanent international organization to act as a centre of information on agricultural and nutrition questions and to maintain a statistical service.[4] Accordingly there was included in the Final Act of the Conference a Resolution whereby the establishment of such an organization was recommended and an Interim Commission was set up to formulate a specific plan of the institution contemplated.[5] The Commission was convened in Washington on 15 July 1943 and some time thereafter presented to the Governments represented therein a First Report, of which the greater part consists in a commentary on the draft constitution annexed to it.[6] Article XXI (3) of the draft provided for its signature in a single copy by diplomatic representatives of nations notifying their acceptance of it upon the receipt by the Commission of twenty notifications of acceptance and for its entry into force immediately thereafter. By 16 October 1945 twenty-three acceptances had been deposited and the Constitution was in consequence signed and brought into force at Quebec on that day.[7] Seven more Governments signed *ad referendum*. The First Session of the Conference, the principal organ of the Organization, was immediately convened by the Commission under powers conferred by Article XXII. That session closed on 1 November 1945 and during its course ten other Governments accepted the Constitution, being Governments of nations eligible for original membership of the Organization in virtue of their being named in Annex I.[8] In addition there were then admitted, in conformity with Article II (2) of the Constitution, Syria and Lebanon, so that the Organization had forty-two Members when the First Session of its Conference ended.[9]

[1] Art. VIII, s. 2 (*b*).

[2] The Bretton Woods Agreements Order, 1946, *ubi cit., supra*, p. 410, n. 6.

[3] 9 & 10 Geo. VI, c. 44.

[4] *Summation of the Work of the Conference by the Secretary-General*, Misc. no. 3 (1943), Cmd. 6451, pp. 2, 5.

[5] *Final Act*, Resolution No. II, ibid., pp. 5, 17–18.

[6] The *Constitution*, the *First Report of the Interim Commission*, and the British *Instrument of Acceptance* are published as Misc. no. 4 (1945), Cmd. 6590.

[7] Ibid., *Documents relating to the First Session of the Food and Agricultural Conference of the United Nations*, Misc. no. 3 (1946), Cmd. 6731, pp. 4–5.

[8] Ibid.

[9] Cf. Art. III (1) and Annex I of the Constitution.

The Constitution of the Food and Agriculture Organization (F.A.O.), the first permanent specialized agency to be created as a result of the United Nations movement, is modelled on that of the International Labour Organization and is therefore of a familiar type.[1] In it is reflected what has been termed the 'parliamentary conception' of the relationship between the permanent staff of an international institution and its representative organs.[2] Its main characteristics are the confiding of the duty of determining policy to a Conference of all the member nations, which body discharges its principal tasks by the submission of 'draft conventions'[3] and the making of recommendations to Members with a view to the implementing or adoption of these by municipal procedures (Art. IV); the institution of a small Executive Committee to advise the Director-General on matters of policy and administration and to exercise a general supervision over him, and generally to perform any functions delegated to it by the parent Conference; and the creation of a Directorship-General for the direction of the work of the Organization, and in particular for the formulation of proposals for action, subject to a general supervision by the representative organs (Art. VII).

The F.A.O. is a specialized agency in that its purposes are limited to the organization of research, the promotion of national and international action, and the furnishing of technical assistance to Governments in matters lying within the fields of nutrition, food, and agriculture (Art. I)—the term agriculture, however, being given a sufficiently broad interpretation to bring within it fisheries, marine products, forestry, and primary forest products (Art. XVI). But it is capable of comprehending all states. For not only was each of the forty-three[4] Governments represented at Hot Springs entitled to nominate a represenative upon the Interim Commission which framed the Constitution,[5] but the latter body was specifically directed to give full consideration to provision for membership in the Organization of Governments not represented upon it.[6] As a consequence of this original membership was accorded by the Constitution to all the nations represented at Hot Springs (Art. III (1) and Annex I) and provision was further made for the admission of yet other states by a two-thirds majority vote of the Conference (Art. III (2)). Indeed, so far from being a regional organization, the Organization contemplates in its Constitution the creation of subordinate regional offices of the Director-General (Art. X). In conformity with this provision the First Session of the Conference, by Resolution No. 8, has requested the Director-General and the Executive Committee to study the number and location of the regional offices which will be required and has authorized the former to establish on a provisional basis such regional offices as he considers necessary.[7]

The Constitution further contains far-reaching provisions for the co-ordination of the F.A.O. with other international (and national) agencies. Thus Article XII contemplates agreements 'with other public international organizations with related responsibilities' defining respective responsibilities, and devising method of co-operation, and permitting, in particular, the maintenance of common services. And Article XIV empowers the

[1] The Interim Commission desired 'particularly . . . to record its appreciation of the assistance rendered by Mr. C. Wilfred Jenks, Legal Adviser of the International Labour Organization, who has contributed unstintingly of his experience and skill in the preparation of the Constitution'. *First Report*, para. 5, loc. cit., pp. 12, 15.

[2] Jenks in this *Year Book*, 22 (1945), pp. 11, 42.

[3] The term actually used in the Constitution is *conventions*; cf. the remarks of the I.L.O. Conference Delegation on Constitutional Questions disapproving the use of the expression *draft convention* in Art. 19 of the Constitution of the I.L.O. (Art. 405 Treaty of Versailles) as implying an instrument which has not been signed: *Report on the Work of the First Session* (1946), para. 52 (p. 38).

[4] Cf. *supra*, p. 412.

[5] *Final Act*, Resolution No. 11 (2), Misc. no. 3 (1943), Cmd. 6451, pp. 5, 17.

[6] Resolution No. 11 (5) (*b*), ibid.

[7] *Resolutions and Recommendations of the Conference* (*First Session*), Misc. no. 3 (1946), Cmd. 6731, pp. 15, 17.

Conference to approve arrangements placing other organizations 'dealing with questions relating to food and agriculture' under its general authority. In pursuance of these general provisions the First Session of the Conference has, by its Recommendations Nos. 10 and 11, advised the member nations to effect the winding up of the International Institute of Agriculture at Rome and the Comité international des Bois, and the transfer of their assets and functions to the Organization.[1]

The F.A.O., as has been seen, was planned and came into existence before the United Nations. Thus it bears the title 'United Nations . . . Organisation' independently of the latter institution and solely in virtue of its creation by signatories to the Declaration by United Nations of 1942.[2] Nevertheless, the integration of the Organization with the general international organization which then still lay in the future was contemplated almost from the start. Thus, although the Hot Springs Conference did not attempt to lay down in detail what should be its relationship to other international bodies,[3] it at least directed the Interim Commission responsible for the Constitution to give full consideration to methods of associating the new Organization with other institutions, national as well as international,[4] and to explore fully the possibility of enlisting the co-operation of existing national and international agencies concerned with food, health, and nutrition.[5] And the Interim Commission so did its work as to permit the Organization 'to fit into any future general framework of international authorities that may be agreed upon'.[6] Following up the work of the Commission, the Conference in its First Session exercised the discretion given it by Article IX to fix the seat of the Organization by providing that it shall be 'at the same place as the headquarters of the United Nations Organisation [*sic*]'[7] on the assumption that 'the headquarters of the United Nations Organisation will include the headquarters of the Economic and Social Council, that part of the United Nations Organisation with which the Food and Agriculture Organisation will be most closely associated'.[8] Likewise the Conference, by its Third Recommendation, advised that there should be included in any agreement made under Article XIII (3) of the Constitution and Article 63 of the Charter provisions empowering the United Nations 'to carry out on behalf of the Food and Agriculture Organisation those financial services which are the more effective if carried out in common by the United Nations on behalf of the specialised agencies'[9]—in particular the collection of contributions, performance of external audit services, and also provisions for the exercise of advisory functions regarding the budget of the F.A.O. by the General Assembly of the United Nations, and the inclusion of that budget within that of the United Nations. Most of these points are covered by the draft agreement between the F.A.O. and the United Nations which was approved by the Economic and Social Council on 21 June 1946—and which thus needs but the approval of the General Assembly before entry into force, but a supplementary agreement is to be concluded concerning the inclusion of the F.A.O.'s budget within that of the United Nations.[10]

[1] *Documents, &c.*, Misc. no. 3 (1946), Cmd. 6731, pp. 18–19.
[2] Treaty Series no. 5 (1942), Cmd. 6388.
[3] *Summation*, loc. cit.
[4] *Final Act*, Resolution No. 2 (5) (*a*).
[5] *Final Act*, Resolution No. 10.
[6] *First Report*, para. 111.
[7] *Permanent Rules of Procedure*, r. xxxii (i), Misc. no. 3 (1946), pp. 37, 47.
[8] Ibid., p. 47, note 2. Cf. the recital in Resolution No. 8 of the Conference's recognition that as far as possible the regional offices of the F.A.O. should be established in co-operation with other regional offices of the United Nations and should, if convenient, be located in the same buildings. Cf. also the draft agreement between the F.A.O. and the United Nations, whereby it is provided that the former shall be located at the headquarters of the latter subject to that arrangement being effective and economical and to satisfactory arrangements regarding a precise site being arrived at in a subsequent agreement. *Journal of the Economic and Social Council*, 1st Year, no. 29, p. 486.
[9] Resolution No. 3.
[10] *Journal of the Economic and Social Council*, 1st Year, no. 29, pp. 486 ff.

To record these steps, however, is not to exhaust the tale of the measures taken by the architects of the F.A.O. for the securing of co-operation with other international institutions. For, by Article III (5) of the Constitution the Conference is empowered to invite any public international organization having responsibilities related to those of the Organization to appoint a representative who may participate without vote in its meetings. The privilege extends in general to participation also in committees and commissions of the Conference and gives the right to speak.[1] Far-reaching stipulations for reciprocal representation form a conspicuous part also of the agreement between the Organization and the United Nations to which reference has been made.[2]

In the words of the Report of Commission B (on Organization and Procedure) of the First Session of the Conference, 'The Interim Commission built well'.[3] The Constitution it produced is an exceptionally wise and statesmanlike document. It is, moreover, accompanied by an authoritative commentary in some 142 paragraphs by its authors.[4] In view of the existence of this there is little profit in proceeding to a minute examination of the actual provisions of the Constitution. It is sufficient to record two facts. The first is that detailed rules of procedure and financial regulations both permanent and temporary were drawn up and adopted by the First Session of the Conference.[5] The second is that, whilst the functions of the Organization and the obligations of its Members are at present confined respectively to research, the dissemination of knowledge, and the giving of advice,[6] and to the making of reports, contributing to expenses, granting privileges to and respecting the international character of the Organization,[7] as time goes on these functions and obligations are likely to become gradually more extensive. For the Interim Commission recognized that the administration of international agricultural credit would be one of the major concerns of the Organization and recommended the establishment of a special international authority with the provision of such credit amongst its functions.[8] The establishment of the International Bank for Reconstruction and Development would seem to have met in part the need thus pointed out. But clearly, if agricultural loans are to be made upon any considerable scale, the F.A.O. will have much to do with them. The Interim Commission, though of opinion that international commodity arrangements for both agricultural and non-agricultural products should be co-ordinated under the supervision and direction of a single international authority, similarly recommended that the Organization should ultimately concern itself with problems of commodity control and should be represented both at any conference held to formulate principles of such control and upon the directorate of any authority set up thereby.[9] Further the Commission pointed out that the Organization, being already habituated to administrative work, might well undertake the performance or organization of services of an international character such as the control of pests. Its Report concludes with the reminder that these recommendations regarding extension of functions were made on the assumption that other international authorities would be set up with administrative responsibilities in related fields and that, in default of these, there would be a case for the F.A.O.'s undertaking yet further executive functions.[10]

There remain also to be mentioned two matters arising out of the proceedings of the First Session of the Conference. As to the first of these, the Constitution containing no provision of this sort, it was recommended that there should be considered at the next Session a draft amendment the effect of which would be to restrict the voting rights of

[1] *Permanent Rules of Procedure, ubi cit.*, r. xviii (i).
[2] *Supra*, p. 404.
[3] *Documents, &c.*, Misc. no. 3 (1946), Cmd. 6731, pp. 35, 36.
[4] Misc. no. 4 (1945), Cmd. 6590, Appendix No. 2.
[5] *Documents, &c.*, Misc. no. 3 (1946), Cmd. 6731, Appendix 6.
[6] *First Report*, loc. cit., para. 22.
[7] Ibid., para. 90.
[8] Ibid., paras. 65–8.
[9] *First Report*, paras. 70–3.
[10] Ibid., paras. 74–83.

Members in arrears with their contributions.[1] As to the second, the Constitution, presumably because it was drawn up at a time when the future of the Permanent Court of International Justice was still uncertain, provided merely that questions or disputes concerning its interpretation, or that of any convention adopted in pursuance of it, should be referred to 'an appropriate international court or arbitral tribunal' in the manner prescribed by rules to be adopted by the Conference (Art. XVII). Commission B of the First Session of the Conference adopted the principle that as a matter of general practice the appropriate court should be the International Court of Justice,[2] and the Conference endorsed this opinion.[3] Incidentally, in the course of the negotiations between the United Nations and the specialized agencies concerning their mutual relations, the I.L.O. secured recognition of its right, fettered only by the obligation to inform the General Assembly of its exercise, to request from the International Court advisory opinions on any legal questions arising within the scope of its activities, other than questions regarding its relationship to the United Nation or to any other specialized agency. U.N.E.S.C.O., on the other hand, obtained only the privilege of requesting 'opinions' on prior notice to the Council, which shall have the right to declare that in its judgment any such request should not be made, whereupon, if the request be not withdrawn, the General Assembly shall decide whether the request is to go forward. The F.A.O. desired to have the same right as had been accorded to the I.L.O., but the negotiating committee of the Economic and Social Council was prepared to offer only the same privilege as had been given to U.N.E.S.C.O. No compromise being immediately forthcoming, the matter was reserved for further consideration and the relevant clause omitted from the draft agreement.[4] It may be observed that the difference between the two formulae is merely that between a general and a special licence to refer to the Court, since, under Article 96 of the Charter and Article 65 of the Statute, the right of a specialized agency to request an advisory opinion is always dependent upon the authorization of the General Assembly.

CONSTITUTION OF THE FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

PREAMBLE

The Nations accepting this Constitution, being determined to promote the common welfare by furthering separate and collective action on their part for the purposes of—

raising levels of nutrition and standards of living of the peoples under their respective jurisdictions,

securing improvements in the efficiency of the production and distribution of all food and agricultural products,

bettering the condition of rural populations,

and thus contributing towards an expanding world economy.

hereby establish the Food and Agriculture Organization of the United Nations, hereinafter referred to as the 'Organization,' through which the Members will report to one another on the measures taken and the progress achieved in the fields of action set forth above.

ARTICLE I. *Functions of the Organization*

1. The Organization shall collect, analyze, interpret, and disseminate information relating to nutrition, food and agriculture.

2. The Organization shall promote and, where appropriate, shall recommend national and international action with respect to—

[1] Resolution No. 13 (1) (*a*).

[2] *Documents, &c.*, Misc. no. 3 (1946), Cmd. 6731, Appendix 5 (VI).

[3] Resolution No. 12.

[4] *Journal of the Economic and Social Council*, 1st Year, no. 29, pp. 486 ff.

(*a*) scientific, technological, social, and economic research relating to nutrition, food and agriculture;
(*b*) the improvement of education and administration relating to nutrition, food and agriculture, and the spread of public knowledge of nutritional and agricultural science and practice;
(*c*) the conservation of natural resources and the adoption of improved methods of agricultural production;
(*d*) the improvement of the processing, marketing, and distribution of food and agricultural products;
(*e*) the adoption of policies for the provision of adequate agricultural credit, national and international;
(*f*) the adoption of international policies with respect to agricultural commodity arrangements.

3. It shall also be the function of the Organization—
(*a*) to furnish such technical assistance as governments may request;
(*b*) to organize, in cooperation with the governments concerned, such missions as may be needed to assist them to fulfil the obligations arising from their acceptance of the recommendations of the United Nations Conference on Food and Agriculture; and
(*c*) generally to take all necessary and appropriate action to implement the purposes of the Organization as set forth in the Preamble.

ARTICLE II. *Membership*

1. The original Members of the Organization shall be such of the nations specified in Annex I[1] as accept this Constitution in accordance with the provisions of Article XXI.

2. Additional Members may be admitted to the Organization by a vote concurred in by a two-thirds majority of all the members of the Conference and upon acceptance of this Constitution as in force at the time of admission.

ARTICLE III. *The Conference*

1. There shall be a Conference of the Organization in which each Member nation shall be represented by one member.

2. Each Member nation may appoint an alternate, associates, and advisers to its member of the Conference. The Conference may make rules concerning the participation of alternates, associates, and advisers in its proceedings, but any such participation shall be without the right to vote except in the case of an alternate or associate participating in the place of a member.

3. No member of the Conference may represent more than one Member nation.

4. Each Member nation shall have only one vote.

5. The Conference may invite any public international organization which has responsibilities related to those of the Organization to appoint a representative who shall participate in its meetings on the conditions prescribed by the Conference. No such representative shall have the right to vote.

6. The Conference shall meet at least once in every year.

7. The Conference shall elect its own officers, regulate its own procedure, and make rules governing the convocation of sessions and the determination of agenda.

8. Except as otherwise expressly provided in this Constitution or by rules made by the Conference, all matters shall be decided by the Conference by a simple majority of the votes cast.

ARTICLE IV. *Functions of the Conference*

1. The Conference shall determine the policy and approve the budget of the Organization and shall exercise the other powers conferred upon it by this Constitution.

[1] Omitted.

2. The Conference may by a two-thirds majority of the votes cast make recommendations concerning questions relating to food and agriculture to be submitted to Member nations for consideration with a view to implementation by national action.

3. The Conference may by a two-thirds majority of the votes cast submit conventions concerning questions relating to food and agriculture to Member nations for consideration with a view to their acceptance by the appropriate constitutional procedure.

4. The Conference shall make rules laying down the procedure to be followed to secure—

(*a*) proper consultation with governments and adequate technical preparation prior to consideration by the Conference of proposed recommendations and conventions; and

(*b*) proper consultation with governments in regard to relations between the Organization and national institutions or private persons.

5. The Conference may make recommendations to any public international organization regarding any matter pertaining to the purpose of the Organization.

6. The Conference may by a two-thirds majority of the votes cast agree to discharge any other functions consistent with the purposes of the Organization which may be assigned to it by governments or provided for by any arrangement between the Organization and any other public international organization.

ARTICLE V. *The Executive Committee*

1. The Conference shall appoint an Executive Committee consisting of not less than nine or more than fifteen members or alternate or associate members of the Conference or their advisers who are qualified by administrative experience or other special qualifications to contribute to the attainment of the purpose of the Organization. There shall be not more than one member from any Member nation. The tenure and other conditions of office of the members of the Executive Committee shall be subject to rules to be made by the Conference.

2. Subject to the provisions of paragraph 1 of this Article, the Conference shall have regard in appointing the Executive Committee to the desirability that its membership should reflect as varied as possible an experience of different types of economy in relation to food and agriculture.

3. The Conference may delegate to the Executive Committee such powers as it may determine, with the exception of the powers set forth in paragraph 2 of Article II, Article IV, paragraph 1 of Article VII, Article XIII, and Article XX of this Constitution.

4. The members of the Executive Committee shall exercise the powers delegated to them by the Conference on behalf of the whole Conference and not as representatives of their respective governments.

5. The Executive Committee shall appoint its own officers and, subject to any decisions of the Conference, shall regulate its own procedure.

ARTICLE VI. *Other Committees and Conferences*

1. The Conference may establish technical and regional standing committees and may appoint committees to study and report on any matter pertaining to the purpose of the Organization.

2. The Conference may convene general, technical, regional, or other special conferences and may provide for the representation at such conferences, in such manner as it may determine, of national and international bodies concerned with nutrition, food and agriculture.

ARTICLE VII. *The Director-General*

1. There shall be a Director-General of the Organization who shall be appointed by the Conference by such procedure and on such terms as it may determine.

2. Subject to the general supervision of the Conference and its Executive Committee,

the Director-General shall have full power and authority to direct the work of the Organization.

3. The Director-General or a representative designated by him shall participate, without the right to vote, in all meetings of the Conference and of its Executive Committee and shall formulate for consideration by the Conference and the Executive Committee proposals for appropriate action in regard to matters coming before them.

ARTICLE VIII. *Staff*

1. The staff of the Organization shall be appointed by the Director-General in accordance with such procedure as may be determined by rules made by the Conference.

2. The staff of the Organization shall be responsible to the Director-General. Their responsibilities shall be exclusively international in character and they shall not seek or receive instructions in regard to the discharge thereof from any authority external to the Organization. The Member nations undertake fully to respect the international character of the responsibilities of the staff and not to seek to influence any of their nationals in the discharge of such responsibilities.

3. In appointing the staff the Director-General shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of selecting personnel recruited on as wide a geographical basis as is possible.

4. Each Member nation undertakes in so far as it may be possible under its constitutional procedure, to accord to the Director-General and senior staff diplomatic privileges and immunities and to accord to other members of the staff all facilities and immunities accorded to non-diplomatic personnel attached to diplomatic missions, or alternatively to accord to such other members of the staff the immunities and facilities which may hereafter be accorded to equivalent members of the staffs of other public international organizations.

ARTICLE IX. *Seat*

The seat of the Organization shall be determined by the Conference.

ARTICLE X. *Regional and Liaison Offices*

1. There shall be such regional offices as the Director-General with the approval of the Conference may decide.

2. The Director-General may appoint officials for liaison with particular countries or areas subject to the agreement of the government concerned.

ARTICLE XI. *Reports by Members*

1. Each Member nation shall communicate periodically to the Organization reports on the progress made toward achieving the purpose of the Organization set forth in the Preamble and on the action taken on the basis of recommendations made and conventions submitted by the Conference.

2. These reports shall be made at such times and in such form and shall contain such particulars as the Conference may request.

3. The Director-General shall submit these reports, together with analyses thereof, to the Conference and shall publish such reports and analyses as may be approved for publication by the Conference together with any reports relating thereto adopted by the Conference.

4. The Director-General may request any Member nation to submit information relating to the purpose of the Organization.

5. Each Member nation shall, on request, communicate to the Organization, on publication, all laws and regulations and official reports and statistics concerning nutrition, food and agriculture.

ARTICLE XII. *Cooperation with Other Organizations*

1. In order to provide for close cooperation between the Organization and other public international organizations with related responsibilities, the Conference may, subject to the provisions of Article XIII, enter into agreements with the competent authorities of such organizations defining the distribution of responsibilities and methods of cooperation.

2. The Director-General may, subject to any decisions of the Conference, enter into agreements with other public international organizations for the maintenance of common services, for common arrangements in regard to recruitment, training, conditions of service, and other related matters, and for interchanges of staff.

ARTICLE XIII. *Relation to Any General World Organization*

1. The Organization shall, in accordance with the procedure provided for in the following paragraph, constitute a part of any general international organization to which may be entrusted the coordination of the activities of international organizations with specialized responsibilities.

2. Arrangements for defining the relations between the Organization and any such general organization shall be subject to the approval of the Conference. Notwithstanding the provisions of Article XX, such arrangements may, if approved by the Conference by a two-thirds majority of the votes cast, involve modification of the provisions of this Constitution: Provided that no such arrangements shall modify the purposes and limitations of the Organization as set forth in this Constitution.

ARTICLE XIV. *Supervision of Other Organizations*

The Conference may approve arrangements placing other public international organizations dealing with questions relating to food and agriculture under the general authority of the Organization on such terms as may be agreed with the competent authorities of the organization concerned.

ARTICLE XV. *Legal Status*

1. The Organization shall have the capacity of a legal person to perform any legal act appropriate to its purpose which is not beyond the powers granted to it by this Constitution.

2. Each Member nation undertakes, in so far as it may be possible under its constitutional procedure, to accord to the Organization all the immunities and facilities which it accords to diplomatic missions, including inviolability of premises and archives, immunity from suit, and exemptions from taxation.

3. The Conference shall make provision for the determination by an administrative tribunal of disputes relating to the conditions and terms of appointment of members of the staff.

ARTICLE XVI. *Fish and Forest Products*

In this Constitution the term 'agriculture' and its derivatives include fisheries, marine products, forestry, and primary forestry products.

ARTICLE XVII. *Interpretation of Constitution*

Any question or dispute concerning the interpretation of this Constitution or any international convention adopted thereunder shall be referred for determination to an appropriate international court or arbitral tribunal in the manner prescribed by rules to be adopted by the Conference.

ARTICLE XVIII. *Expenses*

1. Subject to the provisions of Article XXV, the Director-General shall submit to the Conference an annual budget covering the anticipated expenses of the Organization.

Upon approval of a budget the total amount approved shall be allocated among the Member nations in proportions determined, from time to time, by the Conference. Each Member nation undertakes, subject to the requirements of its constitutional procedure, to contribute to the Organization promptly its share of the expenses so determined.

2. Each Member nation shall, upon its acceptance of this Constitution, pay as its first contribution its proportion of the annual budget for the current financial year.

3. The financial year of the Organization shall be July 1 to June 30 unless the Conference should otherwise determine.

ARTICLE XIX. *Withdrawal*

Any Member nation may give notice of withdrawal from the Organization at any time after the expiration of four years from the date of its acceptance of this Constitution. Such notice shall take effect one year after the date of its communication to the Director-General of the Organization subject to the Member nation's having at that time paid its annual contribution for each year of its membership including the financial year following the date of such notice.

ARTICLE XX. *Amendment of Constitution*

1. Amendments to this Constitution involving new obligations for Member nations shall require the approval of the Conference by a vote concurred in by a two-thirds majority of all the members of the Conference and shall take effect on acceptance by two-thirds of the Member nations for each Member nation accepting the amendment and thereafter for each remaining Member nation on acceptance by it.

2. Other amendments shall take effect on adoption by the Conference by a vote concurred in by a two-thirds majority of all the members of the Conference.

ARTICLE XXI. *Entry into Force of Constitution.*

1. This Constitution shall be open to acceptance by the nations specified in Annex I.... [Omitted.]

ARTICLE XXII. *First Session of the Conference.* [Omitted.]

ARTICLE XXIII. *Languages.*

Pending the adoption by the Conference of any rules regarding languages, the business of the Conference shall be transacted in English.

ARTICLE XXIV. *Temporary Seat.*

ARTICLE XXV. *First Financial Year.*

ARTICLE XXVI. *Dissolution of the Interim Commission.*

Annex I. Nations eligible for original membership.

Annex II. Budget for the First Financial Year.

[Omitted.]

II. *The United Nations Educational, Scientific and Cultural Organization*

A Conference of Allied Ministers of Education held in London in July 1945 requested the Government of the United Kingdom to invite on its behalf the Governments of the United Nations to send delegates to a conference to consider the creation of an Educational, Scientific and Cultural Organization of the United Nations in accordance with the recommendations of the San Francisco Conference and with Article 57 of the Charter. As the French Government had been instrumental in proposing at San Francisco the setting up of such an organization, France was requested, and agreed, to be specially associated with Great Britain as the inviting Power. The Conference met in London in November 1945 and was attended by representatives of forty-three countries and by an observer on behalf of yet another (Venezuela). Observers also attended on behalf of seven public

international organizations, including the League of Nations Secretariat, the Institute of Intellectual Co-operation, and the International Bureau of Education. The Conference had before it and adopted as the basis of its discussions a draft Constitution prepared by the Conference of the Ministers of Education; a similar draft prepared by the French Government and a number of proposals from other Governments and from various organizations were also put before it. After consideration of these the Conference drew up the Constitution the English text of which is printed below, together with an Instrument establishing a Preparatory Educational, Scientific and Cultural Commission. It further adopted a Resolution fixing—subject to the Constitution—the seat of the proposed Organization at Paris.[1]

This Constitution would be interesting if only for the reason that it is that of the first 'specialized agency' to be set up after the actual drafting of the Charter of the United Nations. Because it is posterior to that document its references to the United Nations are considerably more precise than those to a 'general international organization' which appear in, for instance, the Constitution of the Food and Agriculture Organization. Thus original membership of U.N.E.S.C.O. is linked to membership of the United Nations (Art. II); the General Conference is given the function of advising the United Nations Organization [*sic*] on matters within its province (Art. IV (5)); specific directions are given that Articles 57 and 63 of the Charter shall, in relation to U.N.E.S.C.O., be implemented as soon as may be practicable (Art. X); and Articles 104–5 of the Charter, relating to the legal status, privileges and immunities of the United Nations, are made to apply, *mutatis mutandis*, to U.N.E.S.C.O. by a process of incorporation by reference (Art. XII).

As has been indicated, the Constitution provides that membership of the United Nations shall carry with it the right to membership of U.N.E.S.C.O.[2] Indeed, the link between the two organizations is so close that it is laid down that Members of the United Nations suspended from the exercise of their rights and privileges[3] shall also, upon the request of that body, be suspended from their rights and privileges as Members of U.N.E.S.C.O.[4] Membership of the Organization automatically ceases upon expulsion from the United Nations.[5] But, subject to the provisions of the special agreement which is to govern the relations of the United Nations and U.N.E.S.C.O., there may be admitted to the latter states which are not Members of the former by means of a two-thirds majority vote of the General Conference upon a recommendation of the Executive Board.[6] It is to be collected from the terms of the draft thereof which has been already approved by the Economic and Social Council of the United Nations and which thus, in virtue of Article 63 of the Charter, needs but the endorsement of the General Assembly that such special agreement will provide as follows: that any application for membership by a non-Member of the United Nations shall be transmitted by U.N.E.S.C.O. to the Economic and Social Council, which may recommend its rejection, whereupon U.N.E.S.C.O. shall accept such recommendation; but that if within six months no such recommendation be made the decision shall rest entirely with U.N.E.S.C.O.[7] No state, in any event, becomes a Member of U.N.E.S.C.O. until it has deposited an acceptance of the Constitution and has, either before or after that event, signed the same.[8] The Constitution is expressed to come into force upon acceptance by twenty signatories. The Preparatory Commission, whose principal function is preparation for the First Session of the General Conference, is expressed to cease to exist upon the acceptance of office by the first Director-General.[9]

[1] *Final Act*, Misc. no. 16 (1945), Cmd. 6711.

[2] Art. II (1). Cf. the relationship between the I.L.O. and the League of Nations and the United Nations.

[3] Cf. Art. 5 of the Charter. [4] Art. II (3).

[5] Art. II (4); cf. Art. 6 of the Charter. [6] Art. II (2).

[7] Cf. *supra*, p. 404. [8] Art. XV.

[9] *Instrument establishing a Preparatory Commission, &c.*, para. 12, Misc. no. 16 (1945), Cmd. 6711, pp. 11, 13.

The principal organ of the Organization is the General Conference, to which each state Member may appoint not more than five delegates, to be selected in consultation with its professional educationalists, scientists, &c., and which is to determine the policies and the main lines of work of the Organization (Art. IV). It is sufficient to say of this body that it is closely akin in conception to the International Labour Conference, having, for instance, the function of submitting recommendations and conventions to the Member states, which must in turn submit them to their own 'competent authorities' within the space of a year. Each Member state shall make such arrangements as suit its particular conditions for associating its own particular educational and like organizations with the work of U.N.E.S.C.O., but the formation of a National Commission 'broadly representative of the Government and such bodies' is recommended; and the secondment of officials of the Secretariat to such Commissions to assist in their development is authorized (Art. VII). But there is apparently no obligation upon states Members to select their delegations to the General Conference in agreement with their National Commissions which, where they exist, will merely act in an advisory capacity towards both Governments and delegations. The link between the Organization and the class of individuals most directly affected by, or expert in, its work is thus weaker than in the case of the I.L.O., whose Members undertake, as is well known, to nominate two of their delegates to the Conference in agreement with representative industrial organizations where these exist.[1] No doubt the fact that education is less exclusively the concern of educational organizations than is labour of industrial organizations and that education is so much more often a state concern than is industry made it difficult for the framers of the Constitution of U.N.E.S.C.O. to go as far in the direction of the immediate representation of individual or professional interests as did the architects of the I.L.O.[2] But it is to be remembered that the aims of the former Organization, as recited in Article I of its Constitution, are very wide indeed. They include, as the designation of the Organization indicates, besides 'education' also 'science' and 'culture', realms less susceptible to nationalization. And, in view of the great international tradition in all these fields, it is, apprehended, regrettable that more effort to secure direct representation of specialists was not made.[3]

In addition to the General Conference there is set up an Executive Board, very similar in composition and function to the Executive Committee of the Food and Agriculture Organization. The Board, acting under the authority of the General Conference, is responsible for the execution of programmes adopted by the Conference and prepares its agenda and programme of work (Art. V). And, finally, there is a Director-General, who is the chief administrative officer of the Organization and who may have an appropriate staff—the Secretariat (Art. VI). But the part of the Secretariat within the Organization is comparatively small, the Director-General being given no other independent function than that of formulating policies for appropriate action by the Conference and the Board. Concerning the Board it should be said—and the remark applies equally to the Executive Committee of the F.A.O.—that it is composed not of states but essentially of individuals, albeit individuals chosen from among the delegates of the states Members. In both cases the Members of these bodies are chosen primarily on grounds of personal qualifications and experience.[4] Though in either case due regard is had to the expediency of having represented upon them in the persons of suitably qualified individuals the diversity of societies which the existence of different nations

[1] For an interesting account of the problem of representation of state enterprise in technical international organizations see *Report of the Conference Delegation on Constitutional Questions*, I.L.O., Montreal, 1946, pp. 78–89.

[2] *Constitution of the I.L.O.*, Art. 3 (Art. 389, Treaty of Versailles), para. 3.

[3] But the failure of the Institute of Intellectual Co-operation ever to concern itself with primary education—invariably a state concern—is to be borne in mind. Upon the whole matter see Greaves, *The League Committees and World Order* (1931), Part I, ch. v.

[4] Art. V (1–2); cf. Art. V (1–2) of the *Constitution of the F.A.O.*, *supra*, p. 418.

imports,[1] these bodies, because they are made up of individual experts rather than delegates of states, are each representative rather of the planning conferences of their parent Organization as a whole, than of certain states within them. That this is the case is expressly laid down in the Constitution of the F.A.O. though not in that of U.N.E.S.C.O.[2] There is thus discernible in relation to these organs a subtle difference between them and the inner circles of such bodies as the League of Nations and the United Nations, which are representative of certain states rather than of the totality of the appropriate organization itself and whose conception is based on an attempt to reconcile the doctrine of the equality of states with the practical balance of power. Midway between the two types of organ intermediate between the plenary and the central organs of international institutions stands the Governing Body of the I.L.O., in whose composition is reflected the doctrine of respect for the balance of power as well as the principle of representation both of organizational, as opposed to national, and of technical as opposed to diplomatic, interests.[3] The difference between the three arrangements no doubt arises in some measure from the difference between the tasks each is designed to facilitate. But a consideration of the dates and histories of the instruments in which each is embodied gives reasonable ground for the view that the internal construction of international organizations is coming to be influenced more by functional and less by political considerations as time goes by. This is but consistent with the whole new philosophy of world government as reflected in the United Nations scheme, in particular in the contrast in the composition of the Security and the Economic and Social Councils.[4]

CONSTITUTION OF THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

THE Governments of the States parties to this Constitution on behalf of their peoples declare,

that since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed;

that ignorance of each other's ways and lives has been a common cause, throughout the history of mankind, of that suspicion and mistrust between the peoples of the world through which their differences have all too often broken into war;

that the great and terrible war which has now ended was a war made possible by the denial of the democratic principles of the dignity, equality and mutual respect of men, and by the propagation, in their place, through ignorance and prejudice, of the doctrine of the inequality of men and races;

that the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern;

that a peace based exclusively upon the political and economic arrangements of governments would not be a peace which could secure the unanimous, lasting and sincere support of the peoples of the world, and that the peace must therefore be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind.

For these reasons, the States parties to this Constitution, believing in full and equal opportunities for education for all, in the unrestricted pursuit of objective truth, and in the free exchange of ideas and knowledge, are agreed and determined to develop and to increase the means of communication between their peoples and to employ these means for the purposes of mutual understanding and a truer and more perfect knowledge of each other's lives;

In consequence whereof they do hereby create the United Nations Educational,

[1] Art. V (2). [2] Ibid. (4).
[3] *Constitution of the I.L.O.*, Art. 7 (Art. 393, Treaty of Versailles).
[4] Cf. Arts. 23 and 61 of the Charter.

Scientific and Cultural Organization for the purpose of advancing, through the educational and scientific and cultural relations of the peoples of the world, the objectives of international peace and of the common welfare of mankind for which the United Nations Organization was established and which its Charter proclaims.

ARTICLE I. *Purposes and Functions*

1. The purpose of the Organization is to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.

2. To realize this purpose the Organization will:

(*a*) collaborate in the work of advancing the mutual knowledge and understanding of peoples, through all means of mass communication and to that end recommend such international agreements as may be necessary to promote the free flow of ideas by word and image;

(*b*) give fresh impulse to popular education and to the spread of culture;
by collaborating with Members, at their request, in the development of educational activities;
by instituting collaboration among the nations to advance the ideal of equality of educational opportunity without regard to race, sex or any distinctions, economic or social;
by suggesting educational methods best suited to prepare the children of the world for the responsibilities of freedom;

(*c*) maintain, increase and diffuse knowledge;
by assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions;
by encouraging co-operation among the nations in all branches of intellectual activity, including the international exchange of persons active in the fields of education, science and culture and the exchange of publications, objects of artistic and scientific interest and other materials of information;
by initiating methods of international co-operation calculated to give the people of all countries access to the printed and published materials produced by any of them.

3. With a view to preserving the independence, integrity and fruitful diversity of the cultures and educational systems of the States Members of this Organization, the Organization is prohibited from intervening in matters which are essentially within their domestic jurisdiction.

ARTICLE II. *Membership*

1. Membership of the United Nations Organization shall carry with it the right to membership of the United Nations Educational, Scientific and Cultural Organization.

2. Subject to the conditions of the agreement between this Organization and the United Nations Organization, approved pursuant to Article X of this Constitution, States not members of the United Nations Organization may be admitted to membership of the Organization, upon recommendation of the Executive Board, by a two-thirds majority vote of the General Conference.

3. Members of the Organization which are suspended from the exercise of the rights and privileges of membership of the United Nations Organization shall, upon the request of the latter, be suspended from the rights and privileges of this Organization.

4. Members of the Organization which are expelled from the United Nations Organization shall automatically cease to be members of this Organization.

ARTICLE III. *Organs*

The Organization shall include a General Conference, an Executive Board and a Secretariat.

ARTICLE IV. *The General Conference*

A. *Composition.*

1. The General Conference shall consist of the representatives of the States Members of the Organization. The Government of each Member State shall appoint not more than five delegates, who shall be selected after consultation with the National Commission, if established, or with educational, scientific and cultural bodies.

B. *Functions.*

2. The General Conference shall determine the policies and the main lines of work of the Organization. It shall take decisions on programmes drawn up by the Executive Board.

3. The General Conference shall, when it deems it desirable, summon international conferences on education, the sciences and humanities and the dissemination of knowledge.

4. The General Conference shall, in adopting proposals for submission to the Member States, distinguish between recommendations and international conventions submitted for their approval. In the former case a majority vote shall suffice; in the latter case a two-thirds majority shall be required. Each of the Member States shall submit recommendations or conventions to its competent authorities within a period of one year from the close of the session of the General Conference at which they were adopted.

5. The General Conference shall advise the United Nations Organization on the educational, scientific and cultural aspects of matters of concern to the latter, in accordance with the terms and procedure agreed upon between the appropriate authorities of the two Organizations.

6. The General Conference shall receive and consider the reports submitted periodically by Member States as provided by Article VIII.

7. The General Conference shall elect the members of the Executive Board and, on the recommendation of the Board, shall appoint the Director-General.

C. *Voting.*

8. Each Member State shall have one vote in the General Conference. Decisions shall be made by a simple majority except in cases in which a two-thirds majority is required by the provisions of this Constitution. A majority shall be a majority of the Members present and voting.

D. *Procedure.*

9. The General Conference shall meet annually in ordinary session; it may meet in extraordinary session on the call of the Executive Board. At each session the location of its next session shall be designated by the General Conference and shall vary from year to year.

10. The General Conference shall, at each session, elect a President and other officers and adopt rules of procedure.

11. The General Conference shall set up special and technical committees and such other subordinate bodies as may be necessary for its purposes.

12. The General Conference shall cause arrangements to be made for public access to meetings, subject to such regulations as it shall prescribe.

E. *Observers.*

13. The General Conference, on the recommendation of the Executive Board and by a two-thirds majority, may, subject to its rules of procedure, invite as observers at

specified sessions of the Conference or of its commissions representatives of international organizations, such as those referred to in Article XI, paragraph 4.

ARTICLE V. *Executive Board*

A. *Composition.*

1. The Executive Board shall consist of eighteen members elected by the General Conference from among the delegates appointed by the Member States, together with the President of the Conference who shall sit *ex officio* in an advisory capacity.

2. In electing the members of the Executive Board the General Conference shall endeavour to include persons competent in the arts, the humanities, the sciences, education and the diffusion of ideas, and qualified by their experience and capacity to fulfil the administrative and executive duties of the Board. It shall also have regard to the diversity of cultures and a balanced geographical distribution. Not more than one national of any Member State shall serve on the Board at any one time, the President of the Conference excepted.

3. The elected members of the Executive Board shall serve for a term of three years, and shall be immediately eligible for a second term, but shall not serve consecutively for more than two terms. At the first election eighteen members shall be elected of whom one-third shall retire at the end of the first year and one-third at the end of the second year, the order of retirement being determined immediately after the election by the drawing of lots. Thereafter six members shall be elected each year.

4. In the event of the death or resignation of one of its members, the Executive Board shall appoint, from among the delegates of the Member State concerned, a substitute, who shall serve until the next session of the General Conference which shall elect a member for the remainder of the term.

B. *Functions.*

5. The Executive Board, acting under the authority of the General Conference, shall be responsible for the execution of the programme adopted by the Conference and shall prepare its agenda and programme of work.

6. The Executive Board shall recommend to the General Conference the admission of new Members to the Organization.

7. Subject to decisions of the General Conference, the Executive Board shall adopt its own rules of procedure. It shall elect its officers from among its members.

8. The Executive Board shall meet in regular session at least twice a year and may meet in special session if convoked by the Chairman on his own initiative or upon the request of six members of the Board.

9. The Chairman of the Executive Board shall present to the General Conference, with or without comment, the annual report of the Director-General on the activities of the Organization, which shall have been previously submitted to the Board.

10. The Executive Board shall make all necessary arrangements to consult the representatives of international organizations or qualified persons concerned with questions within its competence.

11. The members of the Executive Board shall exercise the powers delegated to them by the General Conference on behalf of the Conference as a whole and not as representatives of their respective Governments.

ARTICLE VI. *Secretariat*

1. The Secretariat shall consist of a Director-General and such staff as may be required.

2. The Director-General shall be nominated by the Executive Board and appointed by the General Conference for a period of six years, under such conditions as the Conference may approve, and shall be eligible for reappointment. He shall be the chief administrative officer of the Organization.

3. The Director-General, or a deputy designated by him, shall participate, without the right to vote, in all meetings of the General Conference, of the Executive Board, and of the committees of the Organization. He shall formulate proposals for appropriate action by the Conference and the Board.

4. The Director-General shall appoint the staff of the Secretariat in accordance with staff regulations to be approved by the General Conference. Subject to the paramount consideration of securing the highest standards of integrity, efficiency and technical competence, appointment to the staff shall be on as wide a geographical basis as possible.

5. The responsibilities of the Director-General and of the staff shall be exclusively international in character. In the discharge of their duties they shall not seek or receive instructions from any Government or from any authority external to the Organization. They shall refrain from any action which might prejudice their position as international officials. Each State Member of the Organization undertakes to respect the international character of the responsibilities of the Director-General and the staff, and not to seek to influence them in the discharge of their duties.

6. Nothing in this Article shall preclude the Organization from entering into special arrangements within the United Nations Organization for common services and staff and for the interchange of personnel.

ARTICLE VII. *National Co-operating Bodies*

1. Each Member State shall make such arrangements as suit its particular conditions for the purpose of associating its principal bodies interested in educational, scientific and cultural matters with the work of the Organization, preferably by the formation of a National Commission broadly representative of the Government and such bodies.

2. National Commissions or national co-operating bodies, where they exist, shall act in an advisory capacity to their respective delegations to the General Conference and to their Governments in matters relating to the Organization and shall function as agencies of liaison in all matters of interest to it.

3. The Organization may, on the request of a Member State, delegate, either temporarily or permanently, a member of its Secretariat to serve on the National Commission of that State, in order to assist in the development of its work.

ARTICLE VIII. *Reports by Member States*

Each Member State shall report periodically to the Organization, in a manner to be determined by the General Conference, on its laws, regulations and statistics relating to educational, scientific and cultural life and institutions, and on the action taken upon the recommendations and conventions referred to in Article IV, paragraph 4.

ARTICLE IX. *Budget*

1. The budget shall be administered by the Organization.

2. The General Conference shall approve and give final effect to the budget and to the apportionment of financial responsibility among the States Members of the Organization subject to such arrangement with the United Nations as may be provided in the agreement to be entered into pursuant to Article X.

3. The Director-General, with the approval of the Executive Board may receive gifts, bequests, and subventions directly from Governments, public and private institutions, associations and private persons.

ARTICLE X. *Relations with the United Nations Organization*

This Organization shall be brought into relation with the United Nations Organization, as soon as practicable, as one of the specialized agencies referred to in Article 57 of the Charter of the United Nations. This relationship shall be effected through an agreement with the United Nations Organization under Article 63 of the Charter, which agreement shall be subject to the approval of the General Conference of this Organization.

The Agreement shall provide for effective co-operation between the two Organizations in the pursuit of their common purposes, and at the same time shall recognize the autonomy of this Organization, within the fields of its competence as defined in this Constitution. Such agreement may, among other matters, provide for the approval and financing of the budget of the Organization by the General Assembly of the United Nations.

ARTICLE XI. *Relations with other Specialized International Organizations and Agencies*

1. This Organization may co-operate with other specialized inter-governmental organizations and agencies whose interests and activities are related to its purposes. To this end the Director-General, acting under the general authority of the Executive Board, may establish effective working relationships with such organizations and agencies and establish such joint committees as may be necessary to assure effective co-operation. Any formal arrangements entered into with such organizations or agencies shall be subject to the approval of the Executive Board.

2. Whenever the General Conference of this Organization and the competent authorities of any other specialized inter-governmental organizations or agencies whose purposes and functions lie within the competence of this Organization, deem it desirable to effect a transfer of their resources and activities to this Organization, the Director-General, subject to the approval of the Conference, may enter into mutually acceptable arrangements for this purpose.

3. This Organization may make appropriate arrangements with other inter-governmental organizations for reciprocal representation at meetings.

4. The United Nations Educational, Scientific and Cultural Organization may make suitable arrangements for consultation and co-operation with non-governmental international organizations concerned with matters within its competence, and may invite them to undertake specific tasks. Such co-operation may also include appropriate participation by representatives of such organizations on advisory committees set up by the General Conference.

ARTICLE XII. *Legal Status of the Organization*

The provisions of Articles 104 and 105 of the Charter of the United Nations Organization concerning the legal status of that Organization, its privileges and immunities shall apply in the same way to this Organization.

ARTICLE XIII. *Amendments*

1. Proposals for amendments to this Constitution shall become effective upon receiving the approval of the General Conference by a two-thirds majority; provided, however, that those amendments which involve fundamental alterations in the aims of the Organization or new obligations for the Member States shall require subsequent acceptance on the part of two-thirds of the Member States before they come into force. The draft texts of proposed amendments shall be communicated by the Director-General to the Member States at least six months in advance of their consideration by the General Conference.

2. The General Conference shall have power to adopt by a two-thirds majority rules of procedure for carrying out the provisions of this Article.

ARTICLE XIV. *Interpretation*

1. The English and French texts of this Constitution shall be regarded as equally authoritative.

2. Any question or dispute concerning the interpretation of this Constitution shall be referred for determination to the International Court of Justice or to an arbitral tribunal, as the General Conference may determine under its rules of procedure.

ARTICLE XV. *Entry into force.* [Omitted.]

(Here follow the signatures of representatives of 37 Governments.)

III. *The International Monetary Fund*

In April 1943 there were published by the Government of the United Kingdom certain Proposals, for which the late Lord Keynes was chiefly responsible, for an International Clearing Union.[1] The underlying idea, that of a universal international currency which would permit of the orderly adjustment of exchanges, was simultaneously developed by a number of American economic experts. The United States Treasury displayed an interest in the rival Keynes and White Plans thus produced and undertook in relation to them a series of informal discussions with officials of other Governments. As a result there was found to exist a considerable measure of agreement upon the desirability of putting some such scheme into operation. The outcome of further discussions was published in a *Joint Statement by Experts* in the service of the British and American Governments.[2] President Roosevelt thereupon took the initiative in the calling of a United Nations Monetary and Financial Conference, in which representatives of forty-three Governments, together with a French delegation and the Danish Minister to the United States in his personal capacity, met at Bretton Woods, New Hampshire, in July 1944. The Conference drew up Articles of Agreement not only for an International Monetary Fund, which was a modification of the International Clearing Union previously proposed, but also for an International Bank for Reconstruction and Development, a device for the reconstruction of international trade of far-reaching scope and wholly novel in conception.[3] The Constitution of the Fund is printed below but that of the Bank, though described in outline,[4] is held over for inclusion in this section of the *Year Book* next year. This arrangement has been adopted because of the fundamental similarity between the purely constitutional stipulations of the two agreements. The circumstance that the relationship of the Bank and the Fund to the United Nations is now under consideration also militates in favour of this arrangement.

Many of the provisions of both constitutions are of a highly technical nature and no comment is offered upon these.[5] But, before passing to a consideration of the details of the Constitution of the Monetary Fund, it is desirable for the sake of completeness to mention that the making of provision for the Fund and the Bank was not the only work of the Bretton Woods Conference, the Final Act whereof contains also certain other recommendations concerning international financial and monetary co-operation including a recommendation that the Bank of International Settlements shall be liquidated at the earliest possible moment.[6]

The constitution of the International Monetary Fund is cast in a form intermediate between the inter-state and the inter-governmental, original Members being those 'countries' represented at the Bretton Woods Conference accepting membership before 1946, and the 'governments of other countries' being also eligible for membership upon conditions to be prescribed (Art. 11). The purposes of the Fund emerge sufficiently from the Preamble to its Constitution.[7] The general scheme envisaged is as follows: Member countries shall subscribe, in gold or U.S. currency as to not more than 25 per cent. and in their own currencies as to the balance, 'quotas' amounting in the aggregate to about $10 billions. They may buy from the Fund in exchange for their own currencies those of other countries needed for the purpose of international payments. And they must be

[1] Cmd. 6437.

[2] Cmd. 6519.

[3] *Final Act*, Cmd. 6546. The Agreements are also published as Treaty Series no. 21 (1946), Cmd. 6885.

[4] *Infra*, p. 432.

[5] The technical provisions of the Agreements have already been discussed to some extent in these pages: cf. 'International Monetary Cooperation' by Mann, in this *Year Book*, 22 (1945), p. 251.

[6] *Final Act*, Fourth Resolution, Cmd. 6546, p. 12.

[7] *Final Act*, Annex A, printed *infra*; cf. also Annex C.

prepared to repurchase their own currencies from others in the currencies of those others. In this manner the maintenance of orderly exchange arrangements is to be secured. But the scheme does not apply to large-scale capital transfers, nor during the post-war transitional period, and is in addition subject to many safeguards. All powers of the Fund are vested in a Board of Governors appointed quinquennially and representative of all the Members upon terms of equality (Art. XII, s. 2). The voting power of states is not, however, equal. Each state has 250 initial votes plus one additional vote for each part of its quota equivalent to $100,000 (Art. XII, s. 5 (*a*)). All decisions of the Fund are to be made in the normal case by a majority of the votes cast (Art. XII, s. 5 (*d*)). But a special procedure for the adjustment of voting power is provided in connexion with the taking of certain decisions relating to the use of the Fund's resources (Art. XII, s. 5 (*b*)). And amendments of the Agreement require normally the consent of three-fifths of the Members having themselves four-fifths of the total voting power, and unanimity where the proposed amendment touches the right to withdraw from the Fund, the provision that no change shall be made in the quota of a Member without the consent thereof, and the provision that no change in the par value of the currency of a Member shall be made except upon the proposal thereof (Art. XVII).

In addition to the Board of Governors there is a number of Executive Directors responsible for the conduct of the general operations of the Fund and capable of exercising all powers delegated to them by the Board (Art. XII, s. 3). Any powers of the Board may be so delegated save certain specified ones, notably those of admitting new Members, revising quotas, making formal arrangements for co-operation with other international organizations, and deciding to liquidate the Fund (Art. XII, s. 2 (*b*)). The Executive Directors may be not less than twelve in number, appointed biennially in accordance with the provisions of Schedule C to the Articles of Agreement, as to five of their number by the five Members having the largest quotas, as to two by the American Republics other than the United States, and as to the rest by other states not otherwise entitled to appoint directors (Art. XII, s. 3 (*b*), (*c*), (*d*)). The Executive Directors are required to function in continuous session (Art. XII, s. 3 (*g*)) and are each empowered to cast as a unit the votes of the Members appointing them (Art. XII, s. 3 (*i*)). They are to select as their President (who has no voting power) and as chief of the operating staff responsible under their authority for the ordinary business of the Fund a Managing Director (Art. XII, s. 4 (*a*), (*b*)). The Managing Director and staff owe allegiance exclusively to the Fund (ibid. (*c*)).

Any Member may withdraw from the Fund by notice in writing effective immediately (Art. XV, s. 1). If a Member fails to fulfil any of its obligations under the Agreement the Fund may declare such Member ineligible to use its resources. In the event of persistent failure in this regard after a reasonable period, or of a difference between a Member and the Fund respecting the par value of its currency, such Member may be required to withdraw from membership by a decision of a majority of the Board of Governors representing a majority of the voting power (ibid., s. 2).

Interpretation of the Agreement rests with the Executive Directors subject to a right of appeal by any Member to the Board of Governors, whose decision is final. Disagreements between the Fund and a Member who has withdrawn, or arising on liquidation of the Fund, are to be arbitrated (Art. XVIII).

The Agreement is expressed to come into force upon signature on behalf of Governments having 65 per cent. of the total of the quotas set out in Schedule A and upon deposit by each Government concerned of an instrument reciting that it has procured the changes in its national law necessary to enable it to carry out its obligations under the Agreement (Art. XX, ss. 1–2). The Government of the United Kingdom in accordance with this provision procured from Parliament the Bretton Woods Agreements Act, 1945, whereunder are authorized the payments out of the Consolidated Fund required from time to time by the Agreement and the dealing by the Treasury with the sums receivable thereunder, and the Crown in Council is empowered to make provision respecting the

status, immunities, and privileges of the Fund as provided for in Article IX and regarding the unenforceability of exchange contracts incompatible with the Agreement.[1]

The International Bank for Reconstruction and Development, whose constitution forms Annex B to the Final Act of the Bretton Woods Conference,[2] is an international institution of which the original Members are those Members of the International Monetary Fund accepting membership of the Bank also before 1946 but which is, like the Fund, open in addition to other states upon conditions to be prescribed, provided, however, that such states have first accepted membership of the Fund (Art. II, s. 1). Its title of 'Bank' is purely accidental and somewhat misleading. It is rather an international finance corporation with an authorized capital of $10 billions divided into shares of $100,000 each, capable of being taken up only by states who will be called upon only in respect of some 20 per cent. of the value of the shares for which they subscribe. This fund is to be used to finance or to guarantee the financing of development and reconstruction projects, public and private, within the territories of Members. A minimum allotment of shares is made to each Member (Art. II, ss. 3–5). All powers of the Bank are vested in a Board of Governors composed and voting in a manner virtually identical with that in which the Board of Governors of the International Monetary Fund is made up and acts (Art. V). The Bank, like the Fund, has further twelve Executive Directors, appointed in the same manner as are those of the Fund though here there is no reservation of two directorships to the American states (Art. V, s. 4, and Schedule B). There is also a President appointed otherwise than from among the Governors and Directors and acting as the chief of the operating staff (Art. V, s. 5). And there is an Advisory Committee of not less than seven persons, including representatives of banking, commercial, industrial, labour, and agricultural interests and with as wide a national representation as possible, selected by the Board of Governors in agreement with specialized international organizations existing within the fields concerned, which shall advise the Bank on matters of general policy (ibid., s. 6). The Bank will set up, in addition, Loan Committees to report on any projects in respect of which loans are solicited, each of which shall include an expert selected by the Governor representing the Member in whose territory any such project is located and shall likewise include one or more Members of the technical staff of the Bank (ibid., s. 7).

The Articles of Agreement contain provisions relating to withdrawal and expulsion of Members from the Bank and to the amendment of its constitution virtually identical with those of the Fund Agreement already discussed (Arts. VI and VIII). By an interesting general stipulation the Bank Agreement provides that wherever the approval of any Member is required before any act may be done by the Bank (except in regard to the acceptance of amendments to its constitution), such approval shall be presumed in the absence of objection within a reasonable time fixed upon notification of the proposal to act (Art. X).

It is obvious that the constitutions of the Fund and the Bank are highly complicated documents the full meaning of which will become clear only when these bodies have been functioning for some time. It is unprofitable to pronounce this early upon their effect and scope. Two features which distinguish them may, however, be selected for comment. In the first place, it is to be remarked that the Fund and Bank are unlike the generality of modern international organizations in that powers of immediate withdrawal and of expulsion from membership are provided in relating to them. Their special character, and notably the relatively profound effect upon its internal life which membership will involve for any particular state, of course accounts for this. The arrangements regarding voting upon the representative organs of the two bodies are, again, of high interest, but are directly related to the special character of these two institutions and are unlikely to be

[1] 10 Geo. VI, c. 19. For a fuller account of this enactment and of the steps taken thereunder see *supra*, p. 410. See also Jessup in *American Journal of International Law*, 38 (1944), p. 658, and Kuhn in ibid., p. 662.

[2] Omitted.

acceptable in relation to organizations of different or wider character. In general in these two instruments the known techniques of monetary control and of finance have been imported into the sphere of international organization for the sake of attaining upon a wider scale the same ends as they serve within the state. The experiment is one of great ingenuity but it is unlikely to have much influence upon the general theory and practice of international government.

ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND

The Governments on whose behalf the present Agreement is signed agree as follows:

INTRODUCTORY ARTICLE

The International Monetary Fund is established and shall operate in accordance with the following provisions:

ARTICLE I. *Purposes*

The purposes of the International Monetary Fund are:

(i) To promote international monetary co-operation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems.

(ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.

(iii) To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.

(iv) To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade.

(v) To give confidence to members by making the Fund's resources available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.

(vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.

The Fund shall be guided in all its decisions by the purposes set forth in this Article.

ARTICLE II. *Membership*

Section 1. *Original members*

The original members of the Fund shall be those of the countries represented at the United Nations Monetary and Financial Conference whose governments accept membership before the date specified in Article XX, Section 2 (*e*).

Section 2. *Other members*

Membership shall be open to the governments of other countries at such times and in accordance with such terms as may be prescribed by the Fund.

ARTICLE III. *Quotas and Subscriptions*

Section 1. *Quotas*

Each member shall be assigned a quota. The quotas of the members represented at the United Nations Monetary and Financial Conference which accept membership before the date specified in Article XX, Section 2 (*e*), shall be those set forth in Schedule A. The quotas of other members shall be determined by the Fund.

Section 2. *Adjustment of quotas*

The Fund shall at intervals of five years review, and if it deems it appropriate propose an adjustment of, the quotas of the members. It may also, if it thinks fit, consider at any other time the adjustment of any particular quota at the request of the member concerned. A four-fifths majority of the total voting power shall be required for any change in quotas and no quota shall be changed without the consent of the member concerned.

Section 3. *Subscriptions: time, place, and form of payment*

(*a*) The subscription of each member shall be equal to its quota and shall be paid in full to the Fund at the appropriate depository on or before the date when the member becomes eligible under Article XX, Section 4 (*c*) or (*d*), to buy currencies from the Fund.

(*b*) Each member shall pay in gold, as a minimum, the smaller of—

(i) twenty-five per cent. of its quota; or

(ii) ten per cent. of its net official holdings of gold and United States dollars as at the date when the Fund notifies members under Article XX, Section 4 (*a*) that it will shortly be in a position to begin exchange transactions.

Each member shall furnish to the Fund the data necessary to determine its net official holdings of gold and United States dollars.

(*c*) Each member shall pay the balance of its quota in its own currency.

(*d*) If the net official holdings of gold and United States dollars of any member as at the date referred to in (*b*) (ii) above are not ascertainable because its territories have been occupied by the enemy, the Fund shall fix an appropriate alternative date for determining such holdings. If such date is later than that on which the country becomes eligible under Article XX, Section 4 (*c*) or (*d*), to buy currencies from the Fund, the Fund and the member shall agree on a provisional gold payment to be made under (*b*) above, and the balance of the member's subscription shall be paid in the member's currency, subject to appropriate adjustment between the member and the Fund when the net official holdings have been ascertained.

Section 4. *Payments when quotas are changed*

(*a*) Each member which consents to an increase in its quota shall, within thirty days after the date of its consent, pay to the Fund twenty-five per cent. of the increase in gold and the balance in its own currency. If, however, on the date when the member consents to an increase, its monetary reserves are less than its new quota, the Fund may reduce the proportion of the increase to be paid in gold.

(*b*) If a member consents to a reduction in its quota, the Fund shall, within thirty days after the date of the consent, pay to the member an amount equal to the reduction. The payment shall be made in the member's currency and in such amount of gold as may be necessary to prevent reducing the Fund's holdings of the currency below seventy-five per cent. of the new quota.

Section 5. *Substitution of securities for currency*

The Fund shall accept from any member in place of any part of the member's currency which in the judgment of the Fund is not needed for its operations, notes or similar obligations issued by the member or the depository designated by the member under Article XIII, Section 2, which shall be non-negotiable, non-interest bearing, and payable at their par value on demand by crediting the account of the Fund in the designated depository. This Section shall apply not only to currency subscribed by members but also to any currency otherwise due to, or acquired by, the Fund.

ARTICLE IV. *Par Values of Currencies*

Section 1. *Expression of par values*

(*a*) The par value of the currency of each member shall be expressed in terms of gold as a common denominator or in terms of the United States dollar of the weight and fineness in effect on the 1st July 1944.

(*b*) All computations relating to currencies of members for the purpose of applying the provisions of this Agreement shall be on the basis of their par values.

Section 2. *Gold purchases based on par values*

The Fund shall prescribe a margin above and below par value for transactions in gold by members, and no member shall buy gold at a price above par value plus the prescribed margin, or sell gold at a price below par value minus the prescribed margin.

Section 3. *Foreign exchange dealings based on parity*

The maximum and the minimum rates for exchange transactions between the currencies of members taking place within their territories shall not differ from parity—

(i) in the case of spot exchange transactions, by more than one per cent.; and

(ii) in the case of other exchange transactions, by a margin which exceeds the margin for spot exchange transactions by more than the Fund considers reasonable.

Section 4. *Obligations regarding exchange stability*

(*a*) Each member undertakes to collaborate with the Fund to promote exchange stability, to maintain orderly exchange arrangements with other members, and to avoid competitive exchange alterations.

(*b*) Each member undertakes, through appropriate measures consistent with this Agreement, to permit within its territories exchange transactions between its currency and the currencies of other members only within the limits prescribed under Section 3 of this Article. A member whose monetary authorities, for the settlement of international transactions, in fact freely buy and sell gold within the limits prescribed by the Fund under Section 2 of this Article shall be deemed to be fulfilling this undertaking.

Section 5. *Changes in par values*

(*a*) A member shall not propose a change in the par value of its currency except to correct a fundamental disequilibrium.

(*b*) A change in the par value of a member's currency may be made only on the proposal of the member and only after consultation with the Fund.

(*c*) When a change is proposed, the Fund shall first take into account the changes, if any, which have already taken place in the initial par value of the member's currency as determined under Article XX, Section 4. If the proposed change, together with all previous changes, whether increases or decreases—

(i) does not exceed ten per cent. of the initial par value, the Fund shall raise no objection,

(ii) does not exceed a further ten per cent. of the initial par value, the Fund may either concur or object, but shall declare its attitude within seventy-two hours if the member so requests,

(iii) is not within (i) or (ii) above, the Fund may either concur or object, but shall be entitled to a longer period in which to declare its attitude.

(*d*) Uniform changes in par values made under Section 7 of this Article shall not be taken into account in determining whether a proposed change falls within (i), (ii), or (iii) of (*c*) above.

(*e*) A member may change the par value of its currency without the concurrence of the Fund if the change does not affect the international transactions of members of the Fund.

(*f*) The Fund shall concur in a proposed change which is within the terms of (*c*) (ii) or (*c*) (iii) above if it is satsified that the change is necessary to correct a fundamental disequilibrium. In particular, provided it is so satisfied, it shall not object to a proposed change because of the domestic social or political policies of the member proposing the change.

Section 6. *Effect of unauthorized changes*

If a member changes the par value of its currency despite the objection of the Fund,

in cases where the Fund is entitled to object, the member shall be ineligible to use the resources of the Fund unless the Fund otherwise determines; and if, after the expiration of a reasonable period, the difference between the member and the Fund continues, the matter shall be subject to the provisions of Article XV, Section 2 (*b*).

Section 7. *Uniform changes in par values*

Notwithstanding the provisions of Section 5 (*b*) of this Article, the Fund by a majority of the total voting power may make uniform proportionate changes in the par values of the currencies of all members, provided each such change is approved by every member which has 10 per cent. or more of the total of the quotas. The par value of a member's currency shall, however, not be changed under this provision if, within seventy-two hours of the Fund's action, the member informs the Fund that it does not wish the par value of its currency to be changed by such action.

Section 8. *Maintenance of gold value of the Fund's assets*

(*a*) The gold value of the Fund's assets shall be maintained notwithstanding changes in the par or foreign exchange value of the currency of any member.

(*b*) Whenever (i) the par value of a member's currency is reduced, or (ii) the foreign exchange value of a member's currency has, in the opinion of the Fund, depreciated to a significant extent within that member's territories, the member shall pay to the Fund within a reasonable time an amount of its own currency equal to the reduction in the gold value of its currency held by the Fund.

(*c*) Whenever the par value of a member's currency is increased, the Fund shall return to such member within a reasonable time an amount in its currency equal to the increase in the gold value of its currency held by the Fund.

(*d*) The provisions of this Section shall apply to a uniform proportionate change in the par values of the currencies of all members, unless at the time when such a change is proposed the Fund decides otherwise.

Section 9. *Separate currencies within a member's territories*

A member proposing a change in the par value of its currency shall be deemed, unless it declares otherwise, to be proposing a corresponding change in the par value of the separate currencies of all territories in respect of which it has accepted this agreement under Article XX, Section 2 (*g*). It shall, however, be open to a member to declare that its proposal relates either to the metropolitan currency alone, or only to one or more specified separate currencies, or to the metropolitan currency and one or more specified separate currencies.

ARTICLE V. *Transactions with the Fund*

Section 1. *Agencies dealing with the Fund*

Each member shall deal with the Fund only through its Treasury, central bank, stabilization fund, or other similar fiscal agency and the Fund shall deal only with or through the same agencies.

Section 2. *Limitation on the Fund's operations*

Except as otherwise provided in this Agreement, operations on the account of the Fund shall be limited to transactions for the purpose of supplying a member, on the initiative of such member, with the currency of another member in exchange for gold or for the currency of the member desiring to make the purchase.

Section 3. *Conditions governing use of the Fund's resources*

(*a*) A member shall be entitled to buy the currency of another member from the Fund in exchange for its own currency subject to the following conditions:

(i) The member desiring to purchase the currency represents that it is presently

needed for making in that currency payments which are consistent with the provisions of this Agreement.

(ii) The Fund has not given notice under Article VII, Section 3, that its holdings of the currency desired have become scarce.

(iii) The proposed purchase would not cause the Fund's holdings of the purchasing member's currency to increase by more than twenty-five per cent. of its quota during the period of twelve months ending on the date of the purchase nor to exceed two hundred per cent. of its quota, but the twenty-five per cent. limitation shall apply only to the extent that the Fund's holdings of the member's currency have been brought above seventy-five per cent. of its quota if they had been below that amount.

(iv) The Fund has not previously declared under Section 5 of this Article, Article IV, Section 6, Article VI, Section 1, or Article XV, Section 2 (*a*), that the member desiring to purchase is ineligible to use the resources of the Fund.

(*b*) A member shall not be entitled without the permission of the Fund to use the Fund's resources to acquire currency to hold against forward exchange transactions.

Section 4. *Waiver of conditions*

The Fund may in its discretion, and on terms which safeguard its interests, waive any of the conditions prescribed in Section 3 (*a*) of this Article, especially in the case of members with a record of avoiding large or continuous use of the Fund's resources. In making a waiver it shall take into consideration periodic or exceptional requirements of the member requesting the waiver. The Fund shall also take into consideration a member's willingness to pledge as collateral security gold, silver, securities, or other acceptable assets having a value sufficient in the opinion of the Fund to protect its interests and may require as a condition of waiver the pledge of such collateral security.

Section 5. *Ineligibility to use the Fund's resources*

Whenever the Fund is of the opinion that any member is using the resources of the Fund in a manner contrary to the purposes of the Fund, it shall present to the member a report setting forth the views of the Fund and prescribing a suitable time for reply. After presenting such a report to a member, the Fund may limit the use of its resources by the member. If no reply to the report is received from the member within the prescribed time, or if the reply received is unsatisfactory, the Fund may continue to limit the member's use of the Fund's resources or may, after giving reasonable notice to the member, declare it ineligible to use the resources of the Fund.

Section 6. *Purchases of currencies from the Fund for gold*

(*a*) Any member desiring to obtain, directly or indirectly, the currency of another member for gold shall, provided that it can do so with equal advantage, acquire it by the sale of gold to the Fund.

(*b*) Nothing in this Section shall be deemed to preclude any member from selling in any market gold newly produced from mines located within its territories.

Section 7. *Repurchase by a member of its currency held by the Fund*

(*a*) A member may repurchase from the Fund and the Fund shall sell for gold any part of the Fund's holdings of its currency in excess of its quota.

(*b*) At the end of each financial year of the Fund, a member shall repurchase from the Fund with gold or convertible currencies, as determined in accordance with Schedule B, part of the Fund's holdings of its currency under the following conditions:

(i) Each member shall use in repurchases of its own currency from the Fund an amount of its monetary reserves equal in value to one-half of any increase that has occurred during the year in the Fund's holdings of its currency plus one-half of any increase, or minus one-half of any decrease, that has occurred during the year in the member's monetary reserves. This rule shall not apply when a member's

monetary reserves have decreased during the year by more than the Fund's holdings of its currency have increased.

(ii) If after the repurchase described in (i) above (if required) has been made, a member's holdings of another member's currency (or of gold acquired from that member) are found to have increased by reason of transactions in terms of that currency with other members or persons in their territories, the member whose holdings of such currency (or gold) have thus increased shall use the increase to repurchase its own currency from the Fund.

(*c*) None of the adjustments described in (*b*) above shall be carried to a point at which—

(i) the member's monetary reserves are below its quota, or

(ii) the Fund's holdings of its currency are below seventy-five per cent. of its quota, or

(iii) the Fund's holdings of any currency required to be used are above seventy-five per cent. of the quota of the member concerned.

Section 8. *Charges*

(*a*) Any member buying the currency of another member from the Fund in exchange for its own currency shall pay a service charge uniform for all members of three-fourths per cent. in addition to the parity price. The Fund in its discretion may increase this service charge to not more than one per cent. or reduce it to not less than one-half per cent.

(*b*) The Fund may levy a reasonable handling charge on any member buying gold from the Fund or selling gold to the Fund.

(*c*) The Fund shall levy charges uniform for all members which shall be payable by any member on the average daily balances of its currency held by the Fund in excess of its quota. These charges shall be at the following rates:

(i) *On amounts not more than twenty-five per cent. in excess of the quota*: no charge for the first three months; one-half per cent. per annum for the next nine months; and thereafter an increase in the charge of one-half per cent. for each subsequent year.

(ii) *On amounts more than twenty-five per cent. and not more than fifty per cent. in excess of the quota*: an additional one-half per cent. for the first year; and an additional one-half per cent. for each subsequent year.

(iii) *On each additional bracket of twenty-five per cent. in excess of the quota*: an additional one-half per cent. for the first year; and an additional one-half per cent. for each subsequent year.

(*d*) Whenever the Fund's holdings of a member's currency are such that the charge applicable to any bracket for any period has reached the rate of four per cent. per annum, the Fund and the member shall consider means by which the Fund's holdings of the currency can be reduced. Thereafter, the charges shall rise in accordance with the provisions of (*c*) above until they reach five per cent. and, failing agreement, the Fund may then impose such charges as it deems appropriate.

(*e*) The rates referred to in (*c*) and (*d*) above may be changed by a three-fourths majority of the total voting power.

(*f*) All charges shall be paid in gold. If, however, the member's monetary reserves are less than one-half of its quota, it shall pay in gold only that proportion of the charges due which such reserves bear to one-half of its quota, and shall pay the balance in its own currency.

ARTICLE VI. *Capital Transfers*

Section 1. *Use of the Fund's resources for capital transfers*

(*a*) A member may not make net use of the Fund's resources to meet a large or sustained outflow of capital, and the Fund may request a member to exercise controls to prevent such use of the resources of the Fund. If, after receiving such a request, a member fails to exercise appropriate controls, the Fund may declare the member ineligible to use the resources of the Fund.

(*b*) Nothing in this Section shall be deemed—

(i) to prevent the use of the resources of the Fund for capital transactions of reasonable amount required for the expansion of exports or in the ordinary course of trade, banking, or other business, or

(ii) to affect capital movements which are met out of a member's own resources of gold and foreign exchange, but members undertake that such capital movements will be in accordance with the purposes of the Fund.

Section 2. *Special provisions for capital transfers*

If the Fund's holdings of the currency of a member have remained below seventy-five per cent. of its quota for an immediately preceding period of not less than six months, such member, if it has not been declared ineligible to use the resources of the Fund under Section 1 of this Article, Article IV, Section 6, Article V, Section 5, or Article XV, Section 2 (*a*), shall be entitled, notwithstanding the provisions of Section 1 (*a*) of this Article, to buy the currency of another member from the Fund with its own currency for any purpose, including capital transfers. Purchases for capital transfers under this Section shall not, however, be permitted if they have the effect of raising the Fund's holdings of the currency of the member desiring to purchase above seventy-five per cent. of its quota, or of reducing the Fund's holdings of the currency desired below seventy-five per cent. of the quota of the member whose currency is desired.

Section 3. *Controls of capital transfers*

Members may exercise such controls as are necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Article VII, Section 3 (*b*), and in Article XIV, Section 2.

ARTICLE VII. *Scarce Currencies*

Section 1. *General scarcity of currency*

If the Fund finds that a general scarcity of a particular currency is developing, the Fund may so inform members and may issue a report setting forth the causes of the scarcity and containing recommendations designed to bring it to an end. A representative of the member whose currency is involved shall participate in the preparation of the report.

Section 2. *Measures to replenish the Fund's holdings of scarce currencies*

The Fund may, if it deems such action appropriate to replenish its holdings of any member's currency, take either or both of the following steps:

(i) Propose to the member that, on terms and conditions agreed between the Fund and the member, the latter lend its currency to the Fund or that, with the approval of the member, the Fund borrow such currency from some other source either within or outside the territories of the member, but no member shall be under any obligation to make such loans to the Fund or to approve the borrowing of its currency by the Fund from any other source.

(ii) Require the member to sell its currency to the Fund for gold

Section 3. *Scarcity of the Fund's holdings*

(*a*) If it becomes evident to the Fund that the demand for a member's currency seriously threatens the Fund's ability to supply that currency, the Fund, whether or not it has issued a report under Section 1 of this Article, shall formally declare such currency scarce and shall thenceforth apportion its existing and accruing supply of the scarce currency with due regard to the relative needs of members, the general international economic situation, and any other pertinent considerations. The Fund shall also issue a report concerning its action.

(*b*) A formal declaration under (*a*) above shall operate as an authorization to any member after consultation, with the Fund, temporarily to impose limitations on the freedom of exchange operations in the scarce currency. Subject to the provisions of Article IV, Sections 3 and 4, the member shall have complete jurisdiction in determining the nature of such limitations, but they shall be no more restrictive than is necessary to limit the demand for the scarce currency to the supply held by, or accruing to, the member in question; and they shall be relaxed and removed as rapidly as conditions permit.

(*c*) The authorization under (*b*) above shall expire whenever the Fund formally declares the currency in question to be no longer scarce.

Section 4. *Administration of restrictions*

Any member imposing restrictions in respect of the currency of any other member pursuant to the provisions of Section 3 (*b*) of this Article shall give sympathetic consideration to any representations by the other member regarding the administration of such restrictions.

Section 5. *Effect of other international agreements on restrictions*

Members agree not to invoke the obligations of any engagements entered into with other members prior to this Agreement in such a manner as will prevent the operation of the provisions of this Article.

ARTICLE VIII. *General Obligations of Members*

Section 1. *Introduction*

In addition to the obligations assumed under other articles of this Agreement, each member undertakes the obligations set out in this Article.

Section 2. *Avoidance of restrictions on current payments*

(*a*) Subject to the provisions of Article VII, Section 3 (*b*), and Article XIV, Section 2, no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions.

(*b*) Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, co-operate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.

Section 3. *Avoidance of discriminatory currency practices*

No member shall engage in, or permit any of its fiscal agencies referred to in Article V, Section 1, to engage in, any discriminatory currency arrangements or multiple currency practices except as authorized under this Agreement or approved by the Fund. If such arrangements and practices are engaged in at the date when this Agreement enters into force the member concerned shall consult with the Fund as to their progressive removal unless they are maintained or imposed under Article XIV, Section 2, in which case the provisions of Section 4 of that Article shall apply.

Section 4. *Convertibility of foreign-held balances*

(*a*) Each member shall buy balances of its currency held by another member if the latter, in requesting the purchase, represents

(i) that the balances to be bought have been recently acquired as a result of current transactions; or

(ii) that their conversion is needed for making payments for current transactions.

The buying member shall have the option to pay either in the currency of the member making the request or in gold.

(*b*) The obligation in (*a*) above shall not apply

(i) when the convertibility of the balances has been restricted consistently with Section 2 of this Article, or Article VI, Section 3; or

(ii) when the balances have accumulated as a result of transactions effected before the removal by a member of restrictions maintained or imposed under Article XIV, Section 2; or

(iii) when the balances have been acquired contrary to the exchange regulations of the member which is asked to buy them; or

(iv) when the currency of the member requesting the purchase has been declared scarce under Article VII, Section 3 (*a*); or

(v) when the member requested to make the purchase is for any reason not entitled to buy currencies of other members from the Fund for its own currency.

Section 5. *Furnishing of information*

(*a*) The Fund may require members to furnish it with such information as it deems necessary for its operations, including, as the minimum necessary for the effective discharge of the Fund's duties, national data on the following matters:

(i) Official holdings at home and abroad, of (1) gold, (2) foreign exchange.

(ii) Holdings at home and abroad by banking and financial agencies, other than official agencies, of (1) gold, (2) foreign exchange.

(iii) Production of gold.

(iv) Gold exports and imports according to countries of destination and origin.

(v) Total exports and imports of merchandise, in terms of local currency values, according to countries of destination and origin.

(vi) International balance of payments, including (1) trade in goods and services, (2) gold transactions, (3) known capital transactions, and (4) other items.

(vii) International investment position, i.e., investments within the territories of the member owned abroad and investments abroad owned by persons in its territories so far as it is possible to furnish this information.

(viii) National income.

(ix) Price indices, i.e., indices of commodity prices in wholesale and retail markets and of export and import prices.

(x) Buying and selling rates for foreign currencies.

(xi) Exchange controls, i.e., a comprehensive statement of exchange controls in effect at the time of assuming membership in the Fund and details of subsequent changes as they occur.

(xii) Where official clearing arrangements exist, details of amounts awaiting clearance in respect of commercial and financial transactions and of the length of time during which such arrears have been outstanding.

(*b*) In requesting information the Fund shall take into consideration the varying ability of members to furnish the data requested. Members shall be under no obligation to furnish information in such detail that the affairs of individuals or corporations are disclosed. Members undertake, however, to furnish the desired information in as detailed and accurate a manner as is practicable, and, so far as possible, to avoid mere estimates.

(*c*) The Fund may arrange to obtain further information by agreement with members. It shall act as a centre for the collection and exchange of information on monetary and financial problems, thus facilitating the preparation of studies designed to assist members in developing policies which further the purposes of the Fund.

Section 6. *Consultation between members regarding existing international agreements*

Where under this Agreement a member is authorized in the special or temporary circumstances specified in the Agreement to maintain or establish restrictions on exchange transactions, and there are other engagements between members entered into prior to this Agreement which conflict with the application of such restrictions, the parties to such

engagements will consult with one another with a view to making such mutually acceptable adjustments as may be necessary. The provisions of this Article shall be without prejudice to the operation of Article VII, Section 5.

ARTICLE IX. *Status, Immunities, and Privileges*

Section 1. *Purposes of Article*

To enable the Fund to fulfil the functions with which it is entrusted, the status, immunities, and privileges set forth in this Article shall be accorded to the Fund in the territories of each member.

Section 2. *Status of the Fund*

The Fund shall possess full juridical personality, and, in particular, the capacity—

(i) to contract;
(ii) to acquire and dispose of immovable and movable property;
(iii) to institute legal proceedings.

Section 3. *Immunity from judicial process*

The Fund, its property, and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.

Section 4. *Immunity from other action*

Property and assets of the Fund, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation, or any other form of seizure by executive or legislative action.

Section 5. *Immunity of archives*

The archives of the Fund shall be inviolable.

Section 6. *Freedom of assets from restrictions*

To the extent necessary to carry out the operations provided for in this Agreement, all property and assets of the Fund shall be free from restrictions, regulations, controls, and moratoria of any nature.

Section 7. *Privilege for communications*

The official communications of the Fund shall be accorded by members the same treatment as the official communications of other members.

Section 8. *Immunities and privileges of officers and employees*

All governors, executive directors, alternates, officers, and employees of the Fund—

(i) shall be immune from legal process with respect to acts performed by them in their official capacity except when the Fund waives this immunity;
(ii) not being local nationals, shall be granted the same immunities from immigration restrictions, alien registration requirements, and national service obligations and the same facilities as regards exchange restrictions as are accorded by members to the representatives, officials, and employees of comparable rank of other members;
(iii) shall be granted the same treatment in respect of travelling facilities as is accorded by members to representatives, officials, and employees of comparable rank of other members.

Section 9. *Immunities from taxation*

(*a*) The Fund, its assets, property, income, and its operations and transactions authorized by this Agreement, shall be immune from all taxation and from all customs duties. The Fund shall also be immune from liability for the collection or payment of any tax or duty.

(*b*) No tax shall be levied on or in respect of salaries and emoluments paid by the Fund to executive directors, alternates, officers, or employees of the Fund who are not local citizens, local subjects, or other local nationals.

(*c*) No taxation of any kind shall be levied on any obligation or security issued by the Fund, including any dividend or interest thereon, by whomsoever held—

(i) which discriminates against such obligation or security solely because of its origin; or

(ii) if the sole jurisdictional basis for such taxation is the place or currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the Fund

Section 10. *Application of Article*

Each member shall take such action as is necessary in its own territories for the purpose of making effective in terms of its own law the principles set forth in this Article and shall inform the Fund of the detailed action which it has taken.

ARTICLE X. *Relations with other International Organizations*

The Fund shall co-operate within the terms of this Agreement with any general international organization and with public international organizations having specialized responsibilities in related fields. Any arrangements for such co-operation which would involve a modification of any provision of this Agreement may be effected only after amendment to this Agreement under Article XVII.

ARTICLE XI. *Relations with Non-member Countries*

Section 1. *Undertakings regarding relations with non-member countries*

Each member undertakes—

(i) Not to engage in, nor to permit any of its fiscal agencies referred to in Article V, Section 1, to engage in, any transactions with a non-member or with persons in a non-member's territories which would be contrary to the provisions of this Agreement or the purposes of the Fund;

(ii) Not to co-operate with a non-member or with persons in a non-member's territories in practices which would be contrary to the provisions of this Agreement or the purposes of the Fund; and

(iii) To co-operate with the Fund with a view to the application in its territories of appropriate measures to prevent transactions with non-members or with persons in their territories which would be contrary to the provisions of this Agreement or the purposes of the Fund.

Section 2. *Restrictions on transactions with non-member countries*

Nothing in this Agreement shall affect the right of any member to impose restrictions on exchange transactions with non-members or with persons in their territories unless the Fund finds that such restrictions prejudice the interests of members and are contrary to the purposes of the Fund.

ARTICLE XII. *Organization and Management*

Section 1. *Structure of the Fund*

The Fund shall have a Board of Governors, Executive Directors, a Managing Director, and a staff.

Section 2. *Board of Governors*

(*a*) All powers of the Fund shall be vested in the Board of Governors, consisting of one governor and one alternate appointed by each member in such manner as it may determine. Each governor and each alternate shall serve for five years, subject to the pleasure of the

member appointing him, and may be reappointed. No alternate may vote except in the absence of his principal. The Board shall select one of the governors as chairman.

(*b*) The Board of Governors may delegate to the Executive Directors authority to exercise any powers of the Board, except the power to—

(i) Admit new members and determine the conditions of their admission.
(ii) Approve a revision of quotas.
(iii) Approve a uniform change in the par value of the currencies of all members.
(iv) Make arrangements to co-operate with other international organizations (other than informal arrangements of a temporary or administrative character).
(v) Determine the distribution of the net income of the Fund.
(vi) Require a member to withdraw.
(vii) Decide to liquidate the Fund.
(viii) Decide appeals from interpretations of this Agreement given by the Executive Directors.

(*c*) The Board of Governors shall hold an annual meeting and such other meetings as may be provided for by the Board or called by the Executive Directors. Meetings of the Board shall be called by the Directors whenever requested by five members or by members having one-quarter of the total voting power.

(*d*) A quorum for any meeting of the Board of Governors shall be a majority of the governors exercising not less than two-thirds of the total voting power.

(*e*) Each governor shall be entitled to cast the number of votes allotted under Section 5 of this Article to the member appointing him.

(*f*) The Board of Governors may by regulation establish a procedure whereby the Executive Directors, when they deem such action to be in the best interests of the Fund, may obtain a vote of the governors on a specific question without calling a meeting of the Board.

(*g*) The Board of Governors, and the Executive Directors to the extent authorized, may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Fund.

(*h*) Governors and alternates shall serve as such without compensation from the Fund, but the Fund shall pay them reasonable expenses incurred in attending meetings.

(*i*) The Board of Governors shall determine the remuneration to be paid to the Executive Directors and the salary and terms of the contract of service of the Managing Director.

Section 3. *Executive Directors*

(*a*) The Executive Directors shall be responsible for the conduct of the general operations of the Fund, and for this purpose shall exercise all the powers delegated to them by the Board of Governors.

(*b*) There shall be not less than twelve directors who need not be governors, and of whom—

(i) Five shall be appointed by the five members having the largest quotas;
(ii) not more than two shall be appointed when the provisions of (*c*) below apply;
(iii) five shall be elected by the members not entitled to appoint directors, other than the American Republics; and
(iv) two shall be elected by the American Republics not entitled to appoint directors.

For the purposes of this paragraph, members means governments of countries whose names are set forth in Schedule A, whether they become members in accordance with Article XX or in accordance with Article II, Section 2. When governments of other countries become members, the Board of Governors may, by a four-fifths majority of the total voting power, increase the number of directors to be elected.

(*c*) If, at the second regular election of directors and thereafter, the members entitled to appoint directors under (*b*) (i) above do not include the two members, the holdings of whose currencies by the Fund have been, on the average over the preceding two years,

reduced below their quotas by the largest absolute amounts in terms of gold as a common denominator, either one or both of such members, as the case may be, shall be entitled to appoint a director.

(*d*) Subject to Article XX, Section 3 (*b*), elections of elective directors shall be conducted at intervals of two years in accordance with the provisions of Schedule C, supplemented by such regulations as the Fund deems appropriate. Whenever the Board of Governors increases the number of directors to be elected under (*b*) above, it shall issue regulations making appropriate changes in the proportion of votes required to elect directors under the provisions of Schedule C.

(*e*) Each director shall appoint an alternate with full power to act for him when he is not present. When the directors appointing them are present, alternates may participate in meetings but may not vote.

(*f*) Directors shall continue in office until their successors are appointed or elected. If the office of an elected director becomes vacant more than ninety days before the end of his term, another director shall be elected for the remainder of the term by the members who elected the former director. A majority of the votes cast shall be required for election. While the office remains vacant, the alternate of the former director shall exercise his powers, except that of appointing an alternate.

(*g*) The Executive Directors shall function in continuous session at the principal office of the Fund and shall meet as often as the business of the Fund may require.

(*h*) A quorum for any meeting of the Executive Directors shall be a majority of the directors representing not less than one-half of the voting power.

(*i*) Each appointed director shall be entitled to cast the number of votes allotted under Section 5 of this Article to the member appointing him. Each elected director shall be entitled to cast the number of votes which counted towards his election. When the provisions of Section 5 (*b*) of this Article are applicable, the votes which a director would otherwise be entitled to cast shall be increased or decreased correspondingly. All the votes which a director is entitled to cast shall be cast as a unit.

(*j*) The Board of Governors shall adopt regulations under which a member not entitled to appoint a director under (*b*) above may send a representative to attend any meeting of the Executive Directors when a request made by, or a matter particularly affecting, that member is under consideration.

(*k*) The Executive Directors may appoint such committees as they deem advisable. Membership of committees need not be limited to governors or directors or their alternates.

Section 4. *Managing Director and staff*

(*a*) The Executive Directors shall select a Managing Director who shall not be a governor or an executive director. The Managing Director shall be chairman of the Executive Directors, but shall have no vote except a deciding vote in case of an equal division. He may participate in meetings of the Board of Governors, but shall not vote at such meetings. The Managing Director shall cease to hold office when the Executive Directors so decide.

(*b*) The Managing Director shall be chief of the operating staff of the Fund and shall conduct, under the direction of the Executive Directors, the ordinary business of the Fund. Subject to the general control of the Executive Directors, he shall be responsible for the organization, appointment, and dismissal of the staff of the Fund.

(*c*) The Managing Director and the staff of the Fund, in the discharge of their functions, shall owe their duty entirely to the Fund and to no other authority. Each member of the Fund shall respect the international character of this duty and shall refrain from all attempts to influence any of the staff in the discharge of his functions.

(*d*) In appointing the staff the Managing Director shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competence,

pay due regard to the importance of recruiting personnel on as wide a geographical basis as possible.

Section 5. *Voting*

(*a*) Each member shall have two hundred and fifty votes plus one additional vote for each part of its quota equivalent to one hundred thousand United States dollars.

(*b*) Whenever voting is required under Article V, Section 4 or 5, each member shall have the number of votes to which it is entitled under (*a*) above, adjusted—

(i) by the addition of one vote for the equivalent of each 400,000 United States dollars of net sales of its currency up to the date when the vote is taken, or

(ii) by the subtraction of one vote for the equivalent of each 400,000 United States dollars of its net purchases of the currencies of other members up to the date when the vote is taken

provided, that neither net purchases nor net sales shall be deemed at any time to exceed an amount equal to the quota of the member involved.

(*c*) For the purpose of all computations under this Section, United States dollars shall be deemed to be of the weight and fineness in effect on the 1st July, 1944, adjusted for any uniform change under Article IV, Section 7, if a waiver is made under Section 8 (*d*) of that Article.

(*d*) Except as otherwise specifically provided, all decisions of the Fund shall be made by a majority of the votes cast.

Section 6. *Distribution of net income*

(*a*) The Board of Governors shall determine annually what part of the Fund's net income shall be placed to reserve and what part, if any, shall be distributed.

(*b*) If any distribution is made, there shall first be distributed a two per cent. non-cumulative payment to each member on the amount by which seventy-five per cent. of its quota exceeded the Fund's average holdings of its currency during that year. The balance shall be paid to all members in proportion to their quotas. Payments to each member shall be made in its own currency.

Section 7. *Publication of reports*

(*a*) The Fund shall publish an annual report containing an audited statement of its accounts, and shall issue, at intervals of three months or less, a summary statement of its transaction and its holdings of gold and currencies of members.

(*b*) The Fund may publish such other reports as it deems desirable for carrying out its purposes.

Section 8. *Communication of views to members*

The Fund shall at all times have the right to communicate its views informally to any member on any matter arising under this Agreement. The Fund may, by a two-thirds majority of the total voting power, decide to publish a report made to a member regarding its monetary or economic conditions and developments which directly tend to produce a serious disequilibrium in the international balance of payments of members. If the member is not entitled to appoint an executive director, it shall be entitled to representation in accordance with Section 3 (*j*) of this Article. The Fund shall not publish a report involving changes in the fundamental structure of the economic organization of members.

Article XIII. *Offices and Depositories*

Section 1. *Location of offices*

The principal office of the Fund shall be located in the territory of the member having the largest quota, and agencies or branch offices may be established in the territories of other members.

Section 2. *Depositories*

(*a*) Each member country shall designate its central bank as a depository for all the Fund's holdings of its currency, or if it has no central bank it shall designate such other institution as may be acceptable to the Fund.

(*b*) The Fund may hold other assets, including gold, in the depositories designated by the five members having the largest quotas and in such other designated depositories as the Fund may select. Initially, at least one-half of the holdings of the Fund shall be held in the depository designated by the member in whose territories the Fund has its principal office and at least forty per cent. shall be held in the depositories designated by the remaining four members referred to above. However, all transfers of gold by the Fund shall be made with due regard to the costs of transport and anticipated requirements of the Fund. In an emergency the Executive Directors may transfer all or any part of the Fund's gold holdings to any place where they can be adequately protected.

Section 3. *Guarantee of the Fund's assets*

Each member guarantees all assets of the Fund against loss resulting from failure or default on the part of the depository designated by it.

ARTICLE XIV. *Transitional Period*

Section 1. *Introduction*

The Fund is not intended to provide facilities for relief or reconstruction or to deal with international indebtedness arising out of the war.

Section 2. *Exchange restrictions*

In the post-war transitional period members may, notwithstanding the provisions of any other articles of this Agreement, maintain and adapt to changing circumstances (and, in the case of members whose territories have been occupied by the enemy, introduce where necessary) restrictions on payments and transfers for current international transactions. Members shall, however, have continuous regard in their foreign exchange policies to the purposes of the Fund; and, as soon as conditions permit, they shall take all possible measures to develop such commercial and financial arrangements with other members as will facilitate international payments and the maintenance of exchange stability. In particular, members shall withdraw restrictions maintained or imposed under this Section as soon as they are satisfied that they will be able, in the absence of such restrictions, to settle their balance of payments in a manner which will not unduly encumber their access to the resources of the Fund.

Section 3. *Notification to the Fund*

Each member shall notify the Fund before it becomes eligible under Article XX, Section 4 (*c*) or (*d*), to buy currency from the Fund, whether it intends to avail itself of the transitional arrangements in Section 2 of this Article, or whether it is prepared to accept the obligations of Article VIII, Sections 2, 3, and 4. A member availing itself of the transitional arrangements shall notify the Fund as soon thereafter as it is prepared to accept the above-mentioned obligations.

Section 4. *Action of the Fund relating to restrictions*

Not later than three years after the date on which the Fund begins operations and in each year thereafter, the Fund shall report on the restrictions still in force under Section 2 of this Article. Five years after the date on which the Fund begins operations, and in each year thereafter, any member still retaining any restrictions inconsistent with Article VIII, Sections 2, 3, or 4, shall consult the Fund as to their further retention. The Fund may, if it deems such action necessary in exceptional circumstances, make representations to any member that conditions are favourable for the withdrawal of any particular restriction, or for the general abandonment of restrictions, inconsistent with

the provisions of any other article of this Agreement. The member shall be given a suitable time to reply to such representations. If the Fund finds that the member persists in maintaining restrictions which are inconsistent with the purposes of the Fund, the member shall be subject to Article XV, Section 2 (*a*).

Section 5. *Nature of transitional period*

In its relations with members, the Fund shall recognize that the post-war transitional period will be one of change and adjustment and in making decisions on requests occasioned thereby which are presented by any member it shall give the member the benefit of any reasonable doubt.

ARTICLE XV. *Withdrawal from Membership*

Section 1. *Right of members to withdraw*

Any member may withdraw from the Fund at any time by transmitting a notice in writing to the Fund at its principal office. Withdrawal shall become effective on the date such notice is received.

Section 2. *Compulsory withdrawal*

(*a*) If a member fails to fulfil any of its obligations under this Agreement, the Fund may declare the member ineligible to use the resources of the Fund. Nothing in this Section shall be deemed to limit the provisions of Article IV, Section 6, Article V, Section 5, or Article VI, Section 1.

(*b*) If, after the expiration of a reasonable period the member persists in its failure to fulfil any of its obligations under this Agreement, or a difference between a member and the Fund under Article IV, Section 6, continues, that member may be required to withdraw from membership in the Fund by a decision of the Board of Governors carried by a majority of the governors representing a majority of the total voting power.

(*c*) Regulations shall be adopted to ensure that before action is taken against any member under (*a*) or (*b*) above, the member shall be informed in reasonable time of the complaint against it and given an adequate opportunity for stating its case, both orally and in writing.

Section 3. *Settlement of accounts with members withdrawing*

When a member withdraws from the Fund, normal transactions of the Fund in its currency shall cease and settlement of all accounts between it and the Fund shall be made with reasonable dispatch by agreement between it and the Fund. If agreement is not reached promptly, the provisions of Schedule D shall apply to the settlement of accounts.

ARTICLE XVI. *Emergency Provisions*

Section 1. *Temporary Suspension*

(*a*) In the event of an emergency or the development of unforeseen circumstances threatening the operations of the Fund, the Executive Directors by unanimous vote may suspend for a period of not more than one hundred and twenty days the operation of any of the following provisions:

(i) Article IV, Sections 3 and 4 (*b*).
(ii) Article V, Sections 2, 3, 7, 8 (*a*) and (*f*).
(iii) Article VI, Section 2.
(iv) Article XI, Section 1.

(*b*) Simultaneously with any decision to suspend the operation of any of the foregoing provisions, the Executive Directors shall call a meeting of the Board of Governors for the earliest practicable date.

(*c*) The Executive Directors may not extend any suspension beyond one hundred and twenty days. Such suspension may be extended, however, for an additional period of not

more than two hundred and forty days, if the Board of Governors by a four-fifths majority of the total voting power so decides, but it may not be further extended except by amendment of this Agreement pursuant to Article XVII.

(*d*) The Executive Directors may, by a majority of the total voting power, terminate such suspension at any time.

Section 2. *Liquidation of the Fund*

(*a*) The Fund may not be liquidated except by decision of the Board of Governors. In an emergency, if the Executive Directors decide that liquidation of the Fund may be necessary, they may temporarily suspend all transactions, pending decision by the Board.

(*b*) If the Board of Governors decides to liquidate the Fund, the Fund shall forthwith cease to engage in any activities except those incidental to the orderly collection and liquidation of its assets and the settlement of its liabilities, and all obligations of members under this Agreement shall cease except those set out in this Article, in Article XVIII, paragraph (*c*), in Schedule D, paragraph 7, and in Schedule E.

(*c*) Liquidation shall be administered in accordance with the provisions of Schedule E.

ARTICLE XVII. *Amendments*

(*a*) Any proposal to introduce modifications in this Agreement, whether emanating from a member, a governor or the Executive Directors, shall be communicated to the chairman of the Board of Governors who shall bring the proposal before the Board. If the proposed amendment is approved by the Board the Fund shall, by circular letter or telegram, ask all members whether they accept the proposed amendment. When three-fifths of the members, having four-fifths of the total voting power, have accepted the proposed amendment, the Fund shall certify the fact by a formal communication addressed to all members.

(*b*) Notwithstanding (*a*) above, acceptance by all members is required in the case of any amendment modifying—

(i) the right to withdraw from the Fund (Article XV, Section 1);

(ii) the provision that no change in a member's quota shall be made without its consent (Article III, Section 2);

(iii) the provision that no change may be made in the par value of a member's currency except on the proposal of that member (Article IV, Section 5 (*b*)).

(*c*) Amendments shall enter into force for all members three months after the date of the formal communication unless a shorter period is specified in the circular letter or telegram.

ARTICLE XVIII. *Interpretation*

(*a*) Any question of interpretation of the provisions of this Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to the Executive Directors for their decision. If the question particularly affects any member not entitled to appoint an executive director it shall be entitled to representation in accordance with Article XII, Section 3 (*j*).

(*b*) In any case where the Executive Directors have given a decision under (*a*) above, any member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the result of the reference to the Board the Fund may, so far as it deems necessary, act on the basis of the decision of the Executive Directors.

(*c*) Whenever a disagreement arises between the Fund and a member which has withdrawn, or between the Fund and any member during the liquidation of the Fund, such disagreement shall be submitted to arbitration by a tribunal of three arbitrators, one appointed by the Fund, another by the member or withdrawing member, and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the Permanent Court of International Justice or such other authority as may have been prescribed

by regulation adopted by the Fund. The umpire shall have full power to settle all questions of procedure in any case where the parties are in disagreement with respect thereto.

ARTICLE XIX. *Explanation of Terms*

In interpreting the provisions of this Agreement the Fund and its members shall be guided by the following:

(*a*) A member's monetary reserves means its net official holdings of gold, of convertible currencies of other members, and of the currencies of such non-members as the Fund may specify.

(*b*) The official holdings of a member means central holdings (that is, the holdings of its Treasury, central bank, stabilization fund, or similar fiscal agency).

(*c*) The holdings of other official institutions or other banks within its territories may, in any particular case, be deemed by the Fund, after consultation with the member, to be official holdings to the extent that they are substantially in excess of working balances; provided that for the purpose of determining whether, in a particular case, holdings are in excess of working balances, there shall be deducted from such holdings amounts of currency due to official institutions and banks in the territories of members or non-members specified under (*d*) below.

(*d*) A member's holdings of convertible currencies means its holdings of the currencies of other members which are not availing themselves of the transitional arrangements under Article XIV, Section 2, together with its holdings of the currencies of such non-members as the Fund may from time to time specify. The term currency for this purpose includes without limitation coins, paper money, bank balances, bank acceptances, and government obligations issued with a maturity not exceeding twelve months.

(*e*) A member's monetary reserves shall be calculated by deducting from its central holdings the currency liabilities to the Treasuries, central banks, stabilization funds, or similar fiscal agencies of other members or non-members specified under (*d*) above, together with similar liabilities to other official institutions and other banks in the territories of members, or non-members specified under (*d*) above. To these net holdings shall be added the sums deemed to be official holdings of other official institutions and other banks under (*c*) above.

(*f*) The Fund's holdings of the currency of a member shall include any securities accepted by the Fund under Article III, Section 5.

(*g*) The Fund, after consultation with a member which is availing itself of the transitional arrangements under Article XIV, Section 2, may deem holdings of the currency of that member which carry specified rights of conversion into another currency or into gold to be holdings of convertible currency for the purpose of the calculation of monetary reserves.

(*h*) For the purpose of calculating gold subscriptions under Article III, Section 3, a member's net official holdings of gold and United States dollars shall consist of its official holdings of gold and United States currency after deducting central holdings of its currency by other countries and holdings of its currency by other official institutions and other banks if these holdings carry specified rights of conversion into gold or United States currency.

(*i*) Payments for current transactions means payments which are not for the purpose of transferring capital, and includes, without limitation—

(1) all payments due in connexion with foreign trade, other current business, including services, and normal short-term banking and credit facilities;

(2) payments due as interest on loans and as net income from other investments;

(3) payments of moderate amount for amortization of loans or for depreciation of direct investments;

(4) moderate remittances for family living expenses.

The Fund may, after consultation with the members concerned, determine whether

certain specific transactions are to be considered current transactions or capital transactions.

ARTICLE XX. *Final Provisions*

Section 1. *Entry into force*

This Agreement shall enter into force when it has been signed on behalf of governments having sixty-five per cent. of the total of the quotas set forth in Schedule A and when the instruments referred to in Section 2 (*a*) of this Article have been deposited on their behalf; but in no event shall this Agreement enter into force before the 1st May, 1945.

Section 2. *Signature*

(*a*) Each government on whose behalf this Agreement is signed shall deposit with the Government of the United States of America an instrument setting forth that it has accepted this Agreement in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under this Agreement.

(*b*) Each government shall become a member of the Fund as from the date of the deposit on its behalf of the instrument referred to in (*a*) above, except that no government shall become a member before this Agreement enters into force under Section 1 of this Article.

(*c*) The Government of the United States of America shall inform the governments of all countries whose names are set forth in Schedule A, and all governments whose membership is approved in accordance with Article II, Section 2, of all signatures of this Agreement and of the deposit of all instruments referred to in (*a*) above.

(*d*) At the time this Agreement is signed on its behalf, each government shall transmit to the Government of the United States of America one one-hundredth of one per cent. of its total subscription in gold or United States dollars for the purpose of meeting administrative expenses of the Fund. The Government of the United States of America shall hold such funds in a special deposit account and shall transmit them to the Board of Governors of the Fund when the initial meeting has been called under Section 3 of this Article. If this Agreement has not come into force by the 31st December, 1945, the Government of the United States of America shall return such funds to the governments that transmitted them.

(*e*) This Agreement shall remain open for signature at Washington on behalf of the governments of the countries whose names are set forth in Schedule A until the 31st December, 1945.

(*f*) After the 31st December, 1945, this Agreement shall be open for signature on behalf of the government of any country whose membership has been approved in accordance with Article II, Section 2.

(*g*) By their signature of this Agreement, all governments accept it both on their own behalf and in respect of all their colonies, overseas territories, all territories under their protection, suzerainty, or authority, and all territories in respect of which they exercise a mandate.

(*h*) In the case of governments whose metropolitan territories have been under enemy occupation, the deposit of the instrument referred to in (*a*) above may be delayed until one hundred and eighty days after the date on which these territories have been liberated. If, however, it is not deposited by any such government before the expiration of this period the signature affixed on behalf of that government shall become void and the portion of its subscription paid under (*d*) above shall be returned to it.

(*i*) Paragraphs (*d*) and (*h*) shall come into force with regard to each signatory government as from the date of its signature.

Section 3. *Inauguration of the Fund*

(*a*) As soon as this Agreement enters into force under Section 1 of this Article, each member shall appoint a governor, and the member having the largest quota shall call the first meeting of the Board of Governors.

(*b*) At the first meeting of the Board of Governors, arrangements shall be made for the selection of provisional executive directors. The governments of the five countries for which the largest quotas are set forth in Schedule A shall appoint provisional executive directors. If one or more of such governments have not become members, the executive directorships they would be entitled to fill shall remain vacant until they become members, or until the 1st January, 1946, whichever is the earlier. Seven provisional executive directors shall be elected in accordance with the provisions of Schedule C and shall remain in office until the date of the first regular election of executive directors which shall be held as soon as practicable after the 1st January, 1946.

(*c*) The Board of Governors may delegate to the provisional executive directors any powers except those which may not be delegated to the Executive Directors.

Section 4. *Initial determination of par values*

(*a*) When the Fund is of the opinion that it will shortly be in a position to begin exchange transactions, it shall so notify the members and shall request each member to communicate within thirty days the par value of its currency based on the rates of exchange prevailing on the sixtieth day before the entry into force of this Agreement. No member whose metropolitan territory has been occupied by the enemy shall be required to make such a communication while that territory is a theatre of major hostilities or for such period thereafter as the Fund may determine. When such a member communicates the par value of its currency the provisions of (*d*) below shall apply.

(*b*) The par value communicated by a member whose metropolitan territory has not been occupied by the enemy shall be the par value of that member's currency for the purposes of this Agreement unless, within ninety days after the request referred to in (*a*) above has been received, (i) the member notifies the Fund that it regards the par value as unsatisfactory, or (ii) the Fund notifies the member that in its opinion the par value cannot be maintained without causing recourse to the Fund on the part of that member or others on a scale prejudicial to the Fund and to members. When notification is given under (i) or (ii) above, the Fund and the member shall, within a period determined by the Fund in the light of all relevant circumstances, agree upon a suitable par value for that currency. If the Fund and the member do not agree within the period so determined, the member shall be deemed to have withdrawn from the Fund on the date when the period expires.

(*c*) When the par value of a member's currency has been established under (*b*) above, either by the expiration of ninety days without notification, or by agreement after notification, the member shall be eligible to buy from the Fund the currencies of other members to the full extent permitted in this Agreement, provided that the Fund has begun exchange transactions.

(*d*) In the case of a member whose metropolitan territory has been occupied by the enemy, the provisions of (*b*) above shall apply, subject to the following modifications:

(i) The period of ninety days shall be extended so as to end on a date to be fixed by agreement between the Fund and the member.

(ii) Within the extended period the member may, if the Fund has begun exchange transactions, buy from the Fund with its currency the currencies of other members, but only under such conditions and in such amounts as may be prescribed by the Fund.

(iii) At any time before the date fixed under (i) above, changes may be made by agreement with the Fund in the par value communicated under (*a*) above.

(*e*) If a member whose metropolitan territory has been occupied by the enemy adopts a new monetary unit before the date to be fixed under (*d*) (i) above, the par value fixed by that member for the new unit shall be communicated to the Fund and the provisions of (*d*) above shall apply.

(*f*) Changes in par values agreed with the Fund under this Section shall not be taken

into account in determining whether a proposed change falls within (i), (ii), or (iii) of Article IV, Section 5 (*c*).

(*g*) A member communicating to the Fund a par value for the currency of its metropolitan territory shall simultaneously communicate a value, in terms of that currency, for each separate currency, where such exists, in the territories in respect of which it has accepted this Agreement under Section 2 (*g*) of this Article, but no member shall be required to make a communication for the separate currency of a territory which has been occupied by the enemy while that territory is a theatre of major hostilities or for such period thereafter as the Fund may determine. On the basis of the par value so communicated, the Fund shall compute the par value of each separate currency. A communication or notification to the Fund under (*a*), (*b*), or (*d*) above regarding the par value of a currency shall also be deemed, unless the contrary is stated, to be a communication or notification regarding the par value of all the separate currencies referred to above. Any member may, however, make a communication or notification relating to the metropolitan or any of the separate currencies alone. If the member does so, the provisions of the preceding paragraphs (including (*d*) above, if a territory where a separate currency exists has been occupied by the enemy) shall apply to each of these currencies separately.

(*h*) The Fund shall begin exchange transactions at such date as it may determine after members having sixty-five per cent. of the total of the quotas set forth in Schedule A have become eligible, in accordance with the preceding paragraphs of this Section, to purchase the currencies of other members, but in no event until after major hostilities in Europe have ceased.

(*i*) The Fund may postpone exchange transactions with any member if its circumstances are such that, in the opinion of the Fund, they would lead to use of the resources of the Fund in a manner contrary to the purposes of this Agreement or prejudicial to the Fund or the members.

(*j*) The par values of the currencies of governments which indicate their desire to become members after the 31st December, 1945, shall be determined in accordance with the provisions of Article II, Section 2.

Done at Washington. . . .

SCHEDULE A

QUOTAS

	(*In millions of United States dollars*)		(*In millions of United States dollars*)
Australia	200	Egypt	45
Belgium	225	El Salvador	2·5
Bolivia	10	Ethiopia	6
Brazil	150	France	450
Canada	300	Greece	40
Chile	50	Guatemala	5
China	550	Haiti	5
Colombia	50	Honduras	2·5
Costa Rica	5	Iceland	1
Cuba	50	India	400
Czechoslovakia	125	Iran	25
Denmark*	*	Iraq	8
Dominican Republic	5	Liberia	·5
Ecuador	5	Luxembourg	10

* The quota of Denmark shall be determined by the Fund after the Danish Government has declared its readiness to sign this Agreement, but before signature takes place.

SCHEDULE A (*cont.*)

QUOTAS (*cont.*)

	(*In millions of United States dollars*)		(*In millions of United States dollars*)
Mexico	90	Poland	125
Netherlands	275	Union of South Africa	100
New Zealand	50	Union of Soviet Socialist Republics	1,200
Nicaragua	2	United Kingdom	1,300
Norway	50	United States	2,750
Panamá	·5	Uruguay	15
Paraguay	2	Venezuela	15
Peru	25	Yugoslavia	60
Philippine Commonwealth	15		

SCHEDULE B

PROVISIONS WITH RESPECT TO REPURCHASE BY A MEMBER OF ITS CURRENCY HELD BY THE FUND

1. In determining the extent to which repurchase of a member's currency from the Fund under Article V, Section 7 (*b*), shall be made with each type of monetary reserve, that is, with gold and with each convertible currency, the following rule, subject to 2 below, shall apply:

(*a*) If the member's monetary reserves have not increased during the year, the amount payable to the Fund shall be distributed among all types of reserves in proportion to the member's holdings thereof at the end of the year.

(*b*) If the member's monetary reserves have increased during the year, a part of the amount payable to the Fund equal to one-half of the increase shall be distributed among those types of reserves which have increased in proportion to the amount by which each of them has increased. The remainder of the sum payable to the Fund shall be distributed among all types of reserves in proportion to the member's remaining holdings thereof.

(*c*) If after all the repurchases required under Article V, Section 7 (*b*), had been made, the result would exceed any of the limits specified in Article V, Section 7 (*c*), the Fund shall require such repurchases to be made by the members proportionately in such manner that the limits will not be exceeded.

2. The Fund shall not acquire the currency of any non-member under Article V, Section 7 (*b*) and (*c*).

3. In calculating monetary reserves and the increase in monetary reserves during any year for the purpose of Article V, Section 7 (*b*) and (*c*), no account shall be taken, unless deductions have otherwise been made by the member for such holdings, of any increase in those monetary reserves which is due to currency previously inconvertible having become convertible during the year; or to holdings which are the proceeds of a long-term or medium-term loan contracted during the year; or to holdings which have been transferred or set aside for repayment of a loan during the subsequent year.

4. In the case of members whose metropolitan territories have been occupied by the enemy, gold newly produced during the five years after the entry into force of this Agreement, from mines located within their metropolitan territories, shall not be included in computations of their monetary reserves or of increases in their monetary reserves.

SCHEDULE C

ELECTION OF EXECUTIVE DIRECTORS

1. The election of the elective executive directors shall be by ballot of the governors eligible to vote under Article XII, Section 3 (*b*) (iii) and (iv).

2. In balloting for the five directors to be elected under Article XII, Section 3 (*b*) (iii), each of the governors eligible to vote shall cast for one person all of the votes to which he is entitled under Article XII, Section 5 (*a*). The five persons receiving the greatest number of votes shall be directors, provided that no person who received less than nineteen per cent. of the total number of votes that can be cast (eligible votes) shall be considered elected.

3. When five persons are not elected in the first ballot, a second ballot shall be held in which the person who received the lowest number of votes shall be ineligible for election and in which there shall vote only (*a*) those governors who voted in the first ballot for a person not elected, and (*b*) those governors whose votes for a person elected are deemed under 4 below to have raised the votes cast for that person above twenty per cent. of the eligible votes.

4. In determining whether the votes cast by a governor are to be deemed to have raised the total of any person above twenty per cent. of the eligible votes the twenty per cent. shall be deemed to include, first, the votes of the governor casting the largest number of votes for such person, then the votes of the governor casting the next largest number, and so on until twenty per cent. is reached.

5. Any governor, part of whose votes must be counted in order to raise the total of any such person above nineteen per cent., shall be considered as casting all of his votes for such person even if the total votes for such person thereby exceed twenty per cent.

6. If, after the second ballot, five persons have not been elected, further ballots shall be held on the same principles until five persons have been elected, provided that after four persons are elected, the fifth may be elected by a simple majority of the remaining votes and shall be deemed to have been elected by all such votes.

7. The directors to be elected by the American Republics under Article XII, Section 3 (*b*) (iv), shall be elected as follows:

(*a*) Each of the directors shall be elected separately.

(*b*) In the election of the first director, each governor representing an American Republic eligible to participate in the election shall cast for one person all the votes to which he is entitled. The person receiving the largest number of votes shall be elected provided that he has received not less than forty-five per cent. of the total votes.

(*c*) If no person is elected on the first ballot further ballots shall be held, in each of which the person receiving the lowest number of votes shall be eliminated, until one person receives a number of votes sufficient for election under (*b*) above.

(*d*) Governors whose votes contributed to the election of the first director shall take no part in the election of the second director.

(*e*) Persons who did not succeed in the first election shall not be ineligible for election as the second director.

(*f*) A majority of the votes which can be cast shall be required for election of the second director. If at the first ballot no person receives a majority, further ballots shall be held, in each of which the person receiving the lowest number of votes shall be eliminated, until some person obtains a majority.

(*g*) The second director shall be deemed to have been elected by all the votes which could have been cast in the ballot securing his election.

SCHEDULE D

Settlement of Accounts with Members Withdrawing

1. The Fund shall be obligated to pay to a member withdrawing an amount equal to its quota, plus any other amounts due to it from the Fund, less any amounts due to the Fund, including charges accruing after the date of its withdrawal; but no payment shall be made until six months after the date of withdrawal. Payments shall be made in the currency of the withdrawing member.

2. If the Fund's holdings of the currency of the withdrawing member are not

sufficient to pay the net amount due from the Fund, the balance shall be paid in gold, or in such other manner as may be agreed. If the Fund and the withdrawing member do not reach agreement within six months of the date of withdrawal, the currency in question held by the Fund shall be paid forthwith to the withdrawing member. Any balance due shall be paid in ten half-yearly instalments during the ensuing five years. Each such instalment shall be paid, at the option of the Fund, either in the currency of the withdrawing member acquired after its withdrawal or by the delivery of gold.

3. If the Fund fails to meet any instalment which is due in accordance with the preceding paragraphs, the withdrawing member shall be entitled to require the Fund to pay the instalment in any currency held by the Fund with the exception of any currency which has been declared scarce under Article VII, Section 3.

4. If the Fund's holdings of the currency of a withdrawing member exceed the amount due to it, and if agreement on the method of settling accounts is not reached within six months of the date of withdrawal, the former member shall be obligated to redeem such excess currency in gold or, at its option, in the currencies of members which at the time of redemption are convertible. Redemption shall be made at the parity existing at the time of withdrawal from the Fund. The withdrawing member shall complete redemption within five years of the date of withdrawal, or within such longer period as may be fixed by the Fund, but shall not be required to redeem in any half-yearly period more than one-tenth of the Fund's excess holdings of its currency at the date of withdrawal plus further acquisitions of the currency during such half-yearly period. If the withdrawing member does not fulfil this obligation, the Fund may in an orderly manner liquidate in any market the amount of currency which should have been redeemed.

5. Any member desiring to obtain the currency of a member which has withdrawn shall acquire it by purchase from the Fund, to the extent that such member has access to the resources of the Fund and that such currency is available under 4 above.

6. The withdrawing member guarantees the unrestricted use at all times of the currency disposed of under 4 and 5 above for the purchase of goods or for payment of sums due to it or to persons within its territories. It shall compensate the Fund for any loss resulting from the difference between the par value of its currency on the date of withdrawal and the value realized by the Fund on disposal under 4 and 5 above.

7. In the event of the Fund going into liquidation under Article XVI, Section 2, within six months of the date on which the member withdraws, the account between the Fund and that Government shall be settled in accordance with Article XVI, Section 2, and Schedule E.

SCHEDULE E

Administration of Liquidation

1. In the event of liquidation the liabilities of the Fund other than the repayment of subscriptions shall have priority in the distribution of the assets of the Fund. In meeting each such liability the Fund shall use its assets in the following order:

(*a*) the currency in which the liability is payable;

(*b*) gold;

(*c*) all other currencies in proportion, so far as may be practicable, to the quotas of the members.

2. After the discharge of the Fund's liabilities in accordance with 1 above, the balance of the Fund's assets shall be distributed and apportioned as follows:

(*a*) The Fund shall distribute its holdings of gold among the members whose currencies are held by the Fund in amounts less than their quotas. These members shall share the gold so distributed in the proportions of the amounts by which their quotas exceed the Fund's holdings of their currencies.

(*b*) The Fund shall distribute to each member one-half the Fund's holdings of its currency, but such distribution shall not exceed fifty per cent. of its quota.

(*c*) The Fund shall apportion the remainder of its holdings of each currency among all

the members in proportion to the amounts due to each member after the distributions under (*a*) and (*b*) above.

3. Each member shall redeem the holdings of its currency apportioned to other members under 2 (*c*) above, and shall agree with the Fund within three months after a decision to liquidate upon an orderly procedure for such redemption.

4. If a member has not reached agreement with the Fund within the three-month period referred to in 3 above, the Fund shall use the currencies of other members apportioned to that member under 2 (*c*) above to redeem the currency of that member apportioned to other members. Each currency apportioned to a member which has not reached agreement shall be used, so far as possible, to redeem its currency apportioned to the members which have made agreements with the Fund under 3 above.

5. If a member has reached agreement with the Fund in accordance with 3 above, the Fund shall use the currencies of other members apportioned to that member under 2 (*c*) above to redeem the currency of that member apportioned to other members which have made agreements with the Fund under 3 above. Each amount so redeemed shall be redeemed in the currency of the member to which it was apportioned.

6. After carrying out the preceding paragraphs, the Fund shall pay to each member the remaining currencies held for its account.

7. Each member whose currency has been distributed to other members under 6 above shall redeem such currency in gold or, at its option, in the currency of the member requesting redemption, or in such other manner as may be agreed between them. If the members involved do not otherwise agree, the member obligated to redeem shall complete redemption within five years of the date of distribution, but shall not be required to redeem in any half-yearly period more than one-tenth of the amount distributed to each other member. If the member does not fulfil this obligation, the amount of currency which should have been redeemed may be liquidated in an orderly manner in any market.

8. Each member whose currency has been distributed to other members under 6 above guarantees the unrestricted use of such currency at all times for the purchase of goods or for payment of sums due to it or to persons in its territories. Each member so obligated agrees to compensate other members for any loss resulting from the difference between the par value of its currency on the date of the decision to liquidate the Fund and the value realized by such members on disposal of its currency.

IV. *The International Civil Aviation Organization*

In December 1944 the representatives of fifty-two Governments, together with the Danish and Thai (Siamese) Ministers to the United States, met at Chicago in an International Civil Aviation Conference convened by the Government of the United States. The Conference was not confined to the United Nations and the only significant absentee, apart from the enemy states, was the U.S.S.R. Forty-two of the delegations, and the two Ministers, signed an Interim Agreement on International Civil Aviation drawn up by the Conference whereby the Provisional International Civil Aviation Organization (P.I.C.A.O.) was provided for.[1] Thirty-eight delegations, and the two Ministers, signed further a definitive Convention on International Civil Aviation,[2] Part II of which makes provision for a permanent Organization. The Provisional Organization, whose seat is in Canada—and whose principal organs are an Assembly and a Council, is to endure for an interim period until the Convention shall have come into force or other arrangements shall have been agreed on by another conference, but in no case for longer than three years. The Convention, by its terms, comes into force thirty days after the deposit of the twenty-sixth instrument of ratification in the archives of the United States Government.[3] This event has not yet come about. But in anticipation of the ultimate inauguration of the proposed permanent Organization, that part of the Convention (Part II,

[1] *Final Act*, Appendix I, Misc. no. 6 (1945), Cmd. 6614.

[2] Ibid., Appendix II.

[3] Art. 91 (*b*).

Arts. 43–67) which relates to its constitution is printed here. As to the temporary body, which is already in existence, it may be mentioned that its composition and functions are broadly the same as those of the projected permanent Organization.

The constitution of the latter must inevitably be read to some extent in the light of the rest of the Convention of which it forms a part. That Convention is designed to replace the Paris Convention of 1919,[1] which many states and notably the United States, the U.S.S.R., and China did not support, and also the Havana Convention of 1928,[2] to which the United States, Chile, and eight Central American states were parties. The first of these instruments, which had been ratified by thirty-three states, whilst embodying the doctrine of national sovereignty of the air, provided for a high degree of uniformity in technical matters and for a conventional right of innocent passage and of freedom of access to airports. The Havana Convention, though broadly comparable in scope, was limited in application to the American continent and made no provision for technical uniformity. Both were clearly out of date, having regard to mechanical advances which have increased enormously the range and carrying capacity of transport aircraft. And neither made provision for international regulation in the economic, as opposed to the technical, field. Further, such rules as they did lay down did not go very far and the practical details of commercial air navigation, including those of all regular services, were left to be settled by more comprehensive bipartite agreements or by the so-called 'line agreements' regulating scheduled services. In the absence of more general provisions the situation thus was that any country on an international air route could hold operators of other countries to ransom even if they wished only to fly over or re-fuel in its territory, that there was no means of controlling the heavy subsidization of air lines for reasons of national prestige or as a war potential, and that bargaining for transit and commercial rights introduced extraneous considerations giving rise to international jealousy and mistrust. The aim of the Chicago Conference was to end this aerial anarchy by the formulation of a legal régime based on all or some of the so-called 'Five Freedoms', which amounted together to a more or less complete negation of the doctrine of sovereignty of the air. The extent to which the several states were prepared to go in this direction was indicated in various statements of policy published before the Conference met.[3] No agreement, however, was reached and the transit and landing clauses of the Convention produced do not differ radically from those of the Paris Convention, although the Conference also drew up two supplementary agreements to be left open for signature, embodying respectively two and all of the 'Five Freedoms'. Under the new Convention, therefore, the doctrine of the closed air still reigns supreme and scheduled air services are still permissible only with the express authorization of the states concerned.[4]

Among the principal features of the permanent Organization contemplated by the Convention there may be mentioned the device adopted to decide the composition of its Council or inner body. This consists in a combination of the principle, which originated in the constitution of the I.L.O. and which has found a place also in the constitutions of more recently created organizations, that is to say, the principle of inclusion of states of preponderating influence in the specialized field occupied by the particular organization, and of the principle of representation of all the major geographical areas of the world. The interaction of the two principles is not, however, worked out; but presumably this was unnecessary as no less than twenty-one states are represented in all (Art. 50). Unlike the Assembly, which is the plenary organ, the Council is a permanent body. But though, like the former, it is expressed to be made up of states, the latter would appear rather to consist of individuals. Thus it is provided that no representative of a contracting state upon the Council shall be actively associated with or financially interested in the opera-

[1] Treaty Series no. 2 (1922), Cmd. 266.

[2] Hudson, *International Legislation*, vol. iv, p. 2354.

[3] Cf. *International Air Transport* (statement of policy of the United Kingdom Government, October 1944), Cmd. 6561.

[4] Cf. Jennings, 'International Civil Aviation and the Law', in this *Year Book*, 22 (1945), p. 181.

tion of an international air service—a limitation plainly referring to individuals. Again, it is provided that the Assembly shall in the event of a vacancy on the Council elect to it a state to hold office for the remainder of the unexpired term of three years of such state's predecessor. It is a little difficult to see how such a vacancy could come about save through the death or resignation of an individual unless the provision is meant to refer to the possibility of denunciation of the Convention which, after a preliminary period of three years, may take effect upon the expiry of one year from its notification by any state.[1] The Council has a permanent President without voting rights, elected by that body but not necessarily from amongst its own members. In the event of the election as President of a member of the Council there occurs a vacancy to be filled by the state whose representative the person elected originally was (Art. 51). The President, who is to receive a salary (Art. 54 (*g*)), is the representative of the Council and its functions may be delegated to him. In addition, there is provision for a Secretary-General or chief executive officer and such staff as he may deem necessary (Arts. 54 (*h*) and 58).

The aims and purposes of the Organization are set forth in Article 44 of the Convention in terms so broad as to be of little assistance for an understanding of its powers and functions. To its Assembly are assigned certain functions relating to internal economy, such as voting the budget and entering 'into appropriate relations with any general organization set up by the nations of the world to preserve peace', and also those of considering proposals for the modification or amendment of the Convention and of dealing with any matter within the sphere of activity of the Organization not specifically assigned to the Council (Art. 49). But it is upon the Council that the main share of the duties of the Organization devolves. This body has a number of mandatory functions which are set out in Article 54. They include the setting up of the Air Navigation Commission, the technical commission provided for in Articles 56 and 57 and charged with the duty of amending the technical annexes to the Convention. They include likewise the appointment of an Air Transport Committee. And they comprehend the maintenance of manifold reporting and information services in connexion with aviation generally and the provisions of the Convention in particular. Further the Council has certain permissive functions, mostly relating to research and investigation, which are defined in Article 55. It is a little difficult, however, to form an estimate of the extent of the Organization's activities, or of those of its Council, even from these comparatively detailed provisions. For the whole Convention abounds with references to the one or the other organ. Thus within Part I thereof, which relates to air navigation, the Organization is directed or empowered to collect and circulate information regarding designated customs airports (Art. 10), airport charges (Art. 15), the ownership and control of aircraft habitually engaged in international air navigation (Art. 21), to make recommendations concerning accident investigation procedure (Art. 26), and restrictions upon the carriage of munitions of war as cargo (Art. 35), to adopt international standards and recommended procedures respecting many aspects of air traffic (Art. 37), and to collect and circulate information regarding departures from such standards and procedures (Art. 38). Similarly in Part III of the Convention (International Air Transport) the Council of the Organization is empowered or directed to collect traffic reports, costs statistics, and financial statements (Art. 67), to consult with a view to improving particular air navigation facilities which are not in its opinion reasonably adequate (Art. 69), to contribute to or bear the whole cost of effecting improvements in such a case, or to provide and maintain such improvements itself (Arts. 70–6); to determine the application of the provisions of the Convention relating to nationality of aircraft to joint operating organizations (Art. 77), and to suggest to states the formation of such organizations (Art. 78); to register existing or future aeronautical agreements between states (Arts. 81 and 83); to decide, subject to appeal to an *ad hoc* arbitration tribunal or to the Permanent Court of International Justice [*sic*], disagreements between states relating to the application or interpretation of the Convention (Art. 84), and to perform certain ministerial

[1] Art. 95.

functions in regard to the settlement of such disagreements (Arts. 85–7). But the lengthy list of the functions and powers of the Organization should not be allowed to conceal the fact that the settlement effected at Chicago went only a very little way towards the solution of the great and pressing problems of international air navigation.

In some sense the new Convention marks indeed a retrograde step. Thus it contains peculiarly restrictive stipulations concerning the membership of the Organization. These do not appear in Part II (Constitution of the Organization) but in Part IV (Final Provisions). They are to the effect that, whilst in addition to being of course open for ratification by any signatory (Art. 91 (*a*)) the Convention is open for adherence by 'members of the United Nations and States associated with them, and States which remained neutral during the present world conflict' (Art. 92 (*a*)), other states may:

> 'subject to the approval of any general international organization set up by the nations of the world to preserve peace, be admitted to participation in this Convention by means of a four-fifths vote of the Assembly and on such conditions as the Assembly may prescribe; provided that in each case the assent of any State [*scil.* member] invaded or attacked during the present war by the State seeking admission shall be necessary' (Art. 93).

There is, of course, some present justification for this provision, which seems to have been inserted in the hope of attracting the U.S.S.R. towards the Organization. But any tendency towards exclusiveness in the field of international organization is obviously to be deplored. It is to be remarked that there is no provision for expulsion from the Organization. But it is competent to the Assembly to suspend the voting power both in the Assembly and in the Council of any contracting state in default under the provisions of the Convention concerning disputes and their settlement (Art. 88).

Perhaps more regrettable than the feature of the Convention last discussed are those of its provisions which relate to its amendment and the amendment of the Annexes. Amendments of the Convention proper require approval by a two-thirds vote of the Assembly and then come into force in respect of such states as have ratified them when ratified by such numbers of states, not being less than two-thirds of the total number of contracting states, as the Assembly shall specify (Art. 94 (*a*)). This requirement is unexceptionable and is reinforced by a provision that, if in its opinion the amendment is of such a nature as to justify this course, the Assembly may in its resolution recommending adoption provide that any state which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of the Organization and a party to the Convention (Art. 94 (*b*)). But though the amendment or adoption of the technical Annexes requires merely a two-thirds majority vote of the Council, such Annexes or amendments to them, in spite of having been accepted by the Council, can be defeated if within three months disapproval of them is registered with the Council by a majority of the contracting states (Art. 90). The relative restrictiveness of this arrangement will be realized when it is recalled that the technical Annexes to the Paris Convention were capable of effective or final amendment by the Commission for Aerial Navigation alone.[1] Incidentally, it may be mentioned that contracting states who are parties also to the Paris or Havana Conventions undertake to give notice of denunciation of those agreements upon the coming into force of the new Convention (Art. 80).

CONVENTION ON INTERNATIONAL CIVIL AVIATION

[PREAMBLE and PART I, AIR NAVIGATION, omitted.]

PART II. THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

CHAPTER VII. THE ORGANIZATION

ARTICLE 43. *Name and Composition*

An organization to be named the International Civil Aviation Organization is formed by

[1] Art. 34 (*c*) of the Paris Convention.

the Convention. It is made up of an Assembly, a Council, and such other bodies as may be necessary.

ARTICLE 44. *Objectives*

The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:

(*a*) Ensure the safe and orderly growth of international civil aviation throughout the world;
(*b*) Encourage the arts of aircraft design and operation for peaceful purposes;
(*c*) Encourage the development of airways, airports, and air navigation facilities for international civil aviation;
(*d*) Meet the needs of the peoples of the world for safe, regular, efficient, and economical air transport;
(*e*) Prevent economic waste caused by unreasonable competition;
(*f*) Ensure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;
(*g*) Avoid discrimination between contracting States;
(*h*) Promote safety of flight in international air navigation;
(*i*) Promote generally the development of all aspects of international civil aeronautics.

ARTICLE 45

The permanent seat of the Organization shall be at such place as shall be determined at the final meeting of the Interim Assembly of the Provisional International Civil Aviation Organization set up by the Interim Agreement on International Civil Aviation signed at Chicago on December 7, 1944. The seat may be temporarily transferred elsewhere by decision of the Council.

ARTICLE 46. *First Meeting of Assembly*

The first meeting of the Assembly shall be summoned by the Interim Council of the above-mentioned Provisional Organization as soon as the Convention has come into force, to meet at a time and place to be decided by the Interim Council.

ARTICLE 47. *Legal Capacity*

The Organization shall enjoy in the territory of each contracting State such legal capacity as may be necessary for the performance of its function. Full juridical personality shall be granted wherever compatible with the constitution and laws of the State concerned.

CHAPTER VIII. THE ASSEMBLY

ARTICLE 48. *Meetings of Assembly and Voting*

(*a*) The Assembly shall meet annually and shall be convened by the Council at a suitable time and place. Extraordinary meetings of the Assembly may be held at any time upon the call of the Council or at the request of any ten contracting States addressed to the Secretary General.

(*b*) All contracting States shall have an equal right to be represented at the meetings of the Assembly and each contracting State shall be entitled to one vote. Delegates representing contracting States may be assisted by technical advisers who may participate in the meetings but shall have no vote.

(*c*) A majority of the contracting States is required to constitute a quorum for the meetings of the Assembly. Unless otherwise provided in this Convention, decisions of the Assembly shall be taken by a majority of the votes cast.

ARTICLE 49. *Powers and Duties of Assembly*

The powers and duties of the Assembly shall be to:

(*a*) Elect at each meeting its President and other officers;

(*b*) Elect the contracting States to be represented on the Council, in accordance with the provisions of Chapter IX;

(*c*) Examine and take appropriate action on the reports of the Council and decide on any matter referred to it by the Council;

(*d*) Determine its own rules of procedure and establish such subsidiary commissions as it may consider to be necessary or desirable;

(*e*) Vote an annual budget and determine the financial arrangements of the Organization, in accordance with the provisions of Chapter XII;

(*f*) Review expenditures and approve the accounts of the Organization;

(*g*) Refer, at its discretion, to the Council, to subsidiary commissions, or to any other body any matter within its sphere of action;

(*h*) Delegate to the Council the powers and authority necessary or desirable for the discharge of the duties of the Organization and revoke or modify the delegations of authority at any time;

(*i*) Carry out the appropriate provisions of Chapter XIII;

(*j*) Consider proposals for the modification or amendment of the provisions of this Convention and, if it approves of the proposals, recommend them to the contracting States in accordance with the provisions of Chapter XXI;

(*k*) Deal with any matter within the sphere of action of the Organization not specifically assigned to the Council.

CHAPTER IX. THE COUNCIL

ARTICLE 50. *Composition and Election of Council*

(*a*) The Council shall be a permanent body responsible to the Assembly. It shall be composed of 21 contracting States elected by the Assembly. An election shall be held at the first meeting of the Assembly and thereafter every three years, and the members of the Council so elected shall hold office until the next following election.

(*b*) In electing the members of the Council, the Assembly shall give adequate representation to (1) the States of chief importance in air transport; (2) the States not otherwise included which make the largest contribution to the provision of facilities for international civil air navigation; and (3) the States not otherwise included whose designation will ensure that all the major geographic areas of the world are represented on the Council. Any vacancy on the Council shall be filled by the Assembly as soon as possible; any contracting State so elected to the Council shall hold office for the unexpired portion of its predecessor's term of office.

(*c*) No representative of a contracting State on the Council shall be actively associated with the operation of an international air service or financially interested in such a service.

ARTICLE 51. *President of Council*

The Council shall elect its President for a term of three years. He may be re-elected. He shall have no vote. The Council shall elect from among its members one or more Vice-Presidents who shall retain their right to vote when serving as acting President. The President need not be selected from among the representatives of the members of the Council but, if a representative is elected, his seat shall be deemed vacant and it shall be filled by the State which he represented. The duties of the President shall be to:

(*a*) Convene meetings of the Council, the Air Transport Committee, and the Air Navigation Commission;

(*b*) Serve as representative of the Council; and

(*c*) Carry out on behalf of Council the functions which the Council assigns to him.

ARTICLE 52. *Voting in Council*

Decisions by the Council shall require approval by a majority of its members. The Council may delegate authority with respect to any particular matter to a committee of its members. Decisions of any committee of the Council may be appealed to the Council by any interested contracting State.

ARTICLE 53. *Participation without a Vote*

Any contracting State may participate, without a vote, in the consideration by the Council and by its committees and commissions of any question which especially affects its interests. No member of the Council shall vote in the consideration by the Council of a dispute to which it is a party.

ARTICLE 54. *Mandatory Functions of Council*

The Council shall:

(*a*) Submit annual reports to the Assembly;
(*b*) Carry out the directions of the Assembly and discharge the duties and obligations which are laid on it by this Convention;
(*c*) Determine its organization and rules of procedure;
(*d*) Appoint and define the duties of an Air Transport Committee, which shall be chosen from among the representatives of the members of the Council, and which shall be responsible to it;
(*e*) Establish an Air Navigation Commission, in accordance with the provisions of Chapter X;
(*f*) Administer the finances of the Organization in accordance with the provisions of Chapters XII and XV;
(*g*) Determine the emoluments of the President of the Council;
(*h*) Appoint a chief executive officer who shall be called the Secretary General, and make provision for the appointment of such other personnel as may be necessary, in accordance with the provisions of Chapter XI;
(*i*) Request, collect, examine, and publish information relating to the advancement of air navigation and the operation of international air services, including information about the costs of operation and particulars of subsidies paid to airlines from public funds;
(*j*) Report to contracting States any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council;
(*k*) Report to the Assembly any infraction of this Covention where a contracting State has failed to take appropriate action within a reasonable time after notice of the infraction;
(*l*) Adopt, in accordance with the provisions of Chapter VI of this Convention, international standards and recommended practices; for convenience designate them as Annexes to this Convention; and notify all contracting States of the action taken;
(*m*) Consider recommendations of the Air Navigation Commission for amendment of the Annexes and take action in accordance with the provisions of Chapter XX;
(*n*) Consider any matter relating to the Convention which any contracting State refers to it.

ARTICLE 55. *Permissive Functions of Council*

The Council may:

(*a*) Where appropriate and as experience may show to be desirable, create subordinate air transport commissions on a regional or other basis and define groups of States or airlines with or through which it may deal to facilitate the carrying out of the aims of this Convention;
(*b*) Delegate to the Air Navigation Commission duties additional to those set forth in the Convention and revoke or modify such delegations of authority at any time;

(*c*) Conduct research into all aspects of air transport and air navigation which are of international importance, communicate the results of its research to the contracting States, and facilitate the exchange of information between contracting States on air transport and air navigation matters;

(*d*) Study any matters affecting the organization and operation of international air transport, including the international ownership and operation of international air services on trunk routes, and submit to the Assembly plans in relation thereto;

(*e*) Investigate, at the request of any contracting State, any situation which may appear to present avoidable obstacles to the development of international air navigation; and, after such investigation, issue such reports as may appear to it desirable.

CHAPTER X. THE AIR NAVIGATION COMMISSION

ARTICLE 56. *Nomination and Appointment of Commission*

The Air Navigation Commission shall be composed of twelve members appointed by the Council from among persons nominated by contracting States. These persons shall have suitable qualifications and experience in the science and practice of aeronautics. The Council shall request all contracting States to submit nominations. The President of the Air Navigation Commission shall be appointed by the Council.

ARTICLE 57. *Duties of Commission*

The Air Navigation Commission shall:

(*a*) Consider, and recommend to the Council for adoption, modifications of the Annexes to this Convention;

(*b*) Establish technical sub-commissions on which any contracting State may be represented, if it so desires;

(*c*) Advise the Council concerning the collection and communication to the contracting States of all information which it considers necessary and useful for the advancement of air navigation.

CHAPTER XI. PERSONNEL

ARTICLE 58. *Appointment of Personnel*

Subject to any rules laid down by the Assembly and to the provisions of this Convention, the Council shall determine the method of appointment and of termination of appointment, the training, and the salaries, allowances, and conditions of service of the Secretary General and other personnel of the Organization, and may employ or make use of the services of nationals of any contracting State.

ARTICLE 59. *International Character of Personnel*

The President of the Council, the Secretary General, and other personnel shall not seek or receive instructions in regard to the discharge of their responsibilities from any authority external to the Organization. Each contracting State undertakes fully to respect the international character of the responsibilities of the personnel and not to seek to influence any of its nations in the discharge of their responsibilities.

ARTICLE 60. *Immunities and Privileges of Personnel*

Each contracting State undertakes, so far as possible under its constitutional procedure, to accord to the President of the Council, the Secretary General, and the other personnel of the Organization, the immunities and privileges which are accorded to corresponding personnel of other public international organizations. If a general international agreement on the immunities and privileges of international civil servants is arrived at, the immunities and privileges accorded to the President, the Secretary General, and the other personnel of the Organization shall be the immunities and privileges accorded under that general international agreement.

CHAPTER XII. FINANCE

ARTICLE 61. *Budget and Apportionment of Expenses*

The Council shall submit to the Assembly an annual budget, annual statements of accounts, and estimates of all receipts and expenditures. The Assembly shall vote the budget with whatever modification it sees fit to prescribe, and, with the exception of assessments under Chapter XV to States consenting thereto, shall apportion the expenses of the Organization among the contracting States on the basis which it shall from time to time determine.

ARTICLE 62. *Suspension of Voting Power*

The Assembly may suspend the voting power in the Assembly and in the Council of any contracting State that fails to discharge within a reasonable period its financial obligations to the Organization.

ARTICLE 63. *Expenses of Delegations and Other Representatives*

Each contracting State shall bear the expenses of its own delegation to the Assembly and the remuneration, travel, and other expenses of any person whom it appoints to serve on the Council, and of its nominees or representatives on any subsidiary committees or commissions of the Organization.

CHAPTER XIII. OTHER INTERNATIONAL ARRANGEMENTS

ARTICLE 64. *Security Arrangements*

The Organization may, with respect to air matters within its competence directly affecting world security, by vote of the Assembly enter into appropriate arrangements with any general organization set up by the nations of the world to preserve peace.

ARTICLE 65. *Arrangements with Other International Bodies*

The Council, on behalf of the Organization, may enter into agreements with other international bodies for the maintenance of common services and for common arrangements concerning personnel and, with the approval of the Assembly, may enter into such other arrangements as may facilitate the work of the Organization.

ARTICLE 66. *Functions relating to Other Agreements*

(*a*) The Organization shall also carry out the functions placed upon it by the International Air Services Transit Agreement and by the International Air Transport Agreement drawn up at Chicago on December 7, 1944, in accordance with the terms and conditions therein set forth.

(*b*) Members of the Assembly and the Council who have not accepted the International Air Services Transit Agreement or the International Air Transport Agreement drawn up at Chicago on December 7, 1944, shall not have the right to vote on any questions referred to the Assembly or Council under the provisions of the relevant Agreement.

[PART III. INTERNATIONAL AIR TRANSPORT and PART IV. FINAL PROVISIONS omitted.]

V. *The European Central Inland Transport Organization*

Representatives of the Governments of Belgium, France, Luxemburg, the Netherlands, Norway, the United Kingdom, and the United States signed in London on 8 May 1945 an Agreement for the establishment of a Provisional Organization for European Central Inland Transport, to which was annexed a draft agreement for the establishment of a permanent organization in the same field.[1] The effect of the Agreement was to bring the

[1] Treaty Series no. 2 (1945), Cmd. 6640.

draft provisionally into force in respect of the territories in continental Europe under the authority of the signatory Governments, this arrangement being designed to cease upon the establishment of the definitive organization, that is to say upon the signature of the draft. The latter was signed, after some modification of its text largely occasioned by the termination of the war, by the Governments named and also by those of Czechoslovakia, Greece, Poland, the U.S.S.R., and Yugoslavia on 27 September 1945 and 'E.C.I.T.O.' accordingly came into existence.[1] The purposes of this Organization, whose constitution is of the inter-governmental type, are strictly regional, being confined to the co-ordination of traffic and the allocation of transport equipment in the interests of the armies of occupation, the civil population generally, and the speedy repatriation of displaced persons. It is established for an initial period of two years, at the end of which time any Member Government may withdraw upon the giving of six months' notice (Art. XIV). Its objects are not confined to the sphere of land transport and there is annexed to the Agreement by which it is established a Protocol relating to Traffic on Inland Waterways expressed to be open for signature on behalf of any Member Government and already signed in fact by representatives of the existing Members other than Czechoslovakia, France, and Norway. The main effect of this instrument is to impose upon signatories the obligation to establish appropriate machinery for the application of the obligations assumed in Article VIII (5) and (6) of the principal Agreement to traffic on inland waterways and to empower and require E.C.I.T.O., in agreement with the Governments concerned, to determine the allocation of inland shipping and the terms of remuneration to be paid by users of inland vessels for traffic of common concern.

The organs of E.C.I.T.O. are a Council of representatives of all the member Governments, an Executive Board of seven persons appointed annually by the Council and containing one representative appointed by each of the Governments of France, the U.S.S.R., the United Kingdom, and the United States, and a Chief Officer. The Council is the authority determining the broad policy of the Organization and supervising generally its operations (Art. III (4)). It is the Council which primarily enjoys the capacity conferred on the Organization to acquire, hold, and convey property, to contract, to designate or create subordinate organs (Art. IV (1)). The Executive Board, whose members appear to serve both the Council and the Governments they respectively represent,[2] is the bearer of the comprehensive executive functions performable by the Organization in virtue of Article VII of the Agreement (Art. III (6)). It appoints and acts through the Chief Officer in the direction of the technical and administrative work of the Organization (Art. III (7)). It is responsible to the Council for the upkeep and administration of any property owned by the Organization (Art. LV (2)). Each Member Government must appoint at least one representative for consultation and communication with the Executive Board and the Chief Officer (Art. III (8)).

The Agreement is interesting as a piece of draftsmanship in that the constitution of the Organization is contained in a single article (Art. III) and that other and separate articles are devoted respectively to its powers (Art. IV), scope (Art. VI), and executive functions (Art. VII), whilst the obligations of Members arising from its establishment are recapitulated in yet another article (Art. VIII). It contains further a noteworthy provision that no amendment to it may be made without the unanimous vote of the Council for the space of two years, at the end of which time a vote of a mere two-thirds majority will suffice, subject to the proviso that the obligations of any Member Government cannot be extended without its consent (Art. XIII). Unanimous vote of the Council is also required for the acquisition of transport equipment or material (Art. IV (1)).[3]

[1] Misc. no. 13 (1945), Cmd. 6685. The transfer of the records, assets, and liabilities of the Provisional Organization to its permanent counterpart was effected by a Protocol annexed to the Agreement setting up the latter.

[2] Cf. Jenks in this *Year Book*, 22 (1945), pp. 11, 28.

[3] The Diplomatic Privileges (Extension) Act, 1944, was applied to the Provisional Organization by S.R. & O., 1945, no. 1211.

AGREEMENT CONCERNING THE ESTABLISHMENT OF A EUROPEAN CENTRAL INLAND TRANSPORT ORGANIZATION

Whereas, upon the liberation of the territories of the United Nations in Europe, and upon the occupation of the territories of the enemy in Europe, it is expedient for the fulfilment of the common military needs of the United Nations and in the interests of the social and economic progress of Europe, to provide for co-ordination both in the movement of traffic and in the allocation of transport equipment and material with a view to ensuring the best possible movement of supplies both for military forces and the civil population and the speedy repatriation of displaced persons, and also with a view to creating conditions in which the normal movement of traffic can be more rapidly resumed;

The Governments whose duly authorized representatives have signed the present Agreement

Have agreed as follows:—

ARTICLE I

There is hereby established the European Central Inland Transport Organization, hereinafter called 'the Organization', which shall act in accordance with the provisions of the following Articles. The Organization is established as a co-ordinating and consultative organ. Having regard to the successful completion of the war, it shall co-ordinate efforts to utilize all means of transport for the improvement of communications so as to provide for the restoration of normal conditions of economic life. It shall also provide assistance to the Allied Commanders-in-Chief and to the Occupation Authorities set up by Governments of the United Nations to maintain and improve the carrying capacity of transport.

ARTICLE II. *Membership*

The members of the Organization shall be the Governments signatory hereto and such other Governments as may be admitted thereto by the Council.

ARTICLE III. *Constitution*

1. The Organization shall consist of a Council and an Executive Board with the necessary headquarters, regional and local staff. The Organization shall concert arrangements for the establishment of regional and local offices with the Member Governments in whose territory the offices are situated and/or in appropriate cases in agreement with the Allied Commander-in-Chief concerned.

The Council

2. Each member Government shall name one representative and such alternates as may be necessary upon the Council. The Council shall, for each of its sessions, select one of its members to preside. The Council shall determine its own rules of procedure. Unless otherwise provided in this Agreement or by action of the Council, the Council shall vote by simple majority.

3. The Council shall be convened in regular session not less than twice a year by the Executive Board. It may be convened in special session whenever the Executive Board shall deem necessary and shall be convened within thirty days after request by one-third of the members of the Council.

4. The Council shall perform the functions assigned to it under this Agreement and review the work of the Organization generally to ensure its conformity with the broad policies determined by the Council.

The Executive Board

5. The Executive Board shall consist of seven members who shall be appointed by the Council. These seven members shall include one member nominated by each of the following Governments: the Provisional Government of the French Republic and the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great

Britain and Northern Ireland, and the United States of America. Each member of the Executive Board shall be provided with an alternate similarly selected, who shall act only in the absence of the member of the Executive for whom he is the alternate. The members and their alternates shall be appointed for not longer than one year. The Executive Board shall choose its own Chairman, subject to confirmation by the Council.

6. The Executive Board shall perform the executive functions assigned to the Organization within the framework of the broad policies determined by the Council. It shall act in accordance with the ruling of the majority of its members. It shall present to the Council such reports on the performance of its functions as the Council may require.

7. The Executive Board shall appoint a chief officer who shall direct under its supervision the technical and administrative work of the Organization in conformity with the policies of the Council and the Executive Board as determined by their decisions. This officer shall appoint the staff at headquarters and at regional and local offices, subject to the approval of the Executive Board, taking into account the exigencies of the various branches of transport concerned. The responsibilities of the chief officer and staff shall be exclusively international in character.

8. Each member Government shall appoint one or more representatives for the purpose of consultation and communication with the Executive Board, and with the Chief Officer. Such representatives shall be fully informed by the Board and by the Chief Officer of all activities of the Organization. Each time that any important question concerning the interests of a member Government is discussed by the Board, the representatives of that Government shall be entitled to take part in the discussions without the right of vote.

ARTICLE IV

1. The Organization shall have the capacity to perform any legal act appropriate to its object and purposes, including the power to acquire, hold, and convey property, to enter into contracts and undertake obligations, to designate or create subordinate organs, and to review their activity. The Organization shall not, however, have power to own transport equipment and material other than for its own internal or demonstration purposes, except with the unanimous consent of the Council.

2. These powers are vested in the Council. Subject to the provisions of paragraph 2 of Article V, the Council may delegate such of these powers as it may deem necessary to the Executive Board, including the power of subdelegation. The Executive Board shall be responsible to the Council for the upkeep and administration of any property owned by the Organization.

ARTICLE V. *Finance*

1. The Executive Board shall submit to the Council an initial budget and from time to time such supplementary budgets as may be required, covering the administrative expenses of the Organization. Upon approval of a budget by the Council, the total amount approved shall be raised in such manner, or be allocated between member Governments in such proportions, as these Governments may agree. Each member Government undertakes, subject to the requirements of its constitutional procedure, promptly to contribute to the Organization, in such currency or currencies as may be agreed by such Government with the Executive Board, its share of these expenses. Each member Government shall also provide such facilities as are required for the transfer into other currencies of sums so contributed and held by the Organization in that Government's own currency.

2. The Organization shall not incur any expenses, other than administrative expenses, except under the authority of the Council. Proposals for such expenses shall be submitted by the Executive Board to the Council and, when approved by the Council, such expenses shall be met by contributions which one or more member Governments may agree to make or in such other manner as may be agreed between member Governments.

However, the obligation of transfer into foreign currencies, as defined in paragraph 1 of this Article, does not apply to these contributions.

3. Nothing in this Agreement shall require any member Government or transport administration under its authority to perform services without remuneration.

ARTICLE VI. *Scope of the Organization*

1. The Organization shall, after giving notice of its intention, exercise its functions in any territory in Continental Europe, upon the acceptance of this Agreement by the Government of that territory and/or, in appropriate cases, provided that the Allied Commander-in-Chief concerned is satisfied that military exigencies permit and subject to such conditions as he may deem necessary.

2. In respect of any territory in Continental Europe in which any Allied Commander-in-Chief retains responsibility for the direction of the transport system, the Organization shall on request give advice or assistance to the Allied Commander-in-Chief, and, in consultation with him, to any member Government or to other appropriate authorities of the United Nations, on any question with which it is empowered to deal under Article VII.

3. The Organization shall treat with any of the Occupation Authorities set up by Governments of the United Nations in respect of any territory in Continental Europe in which such Occupation Authorities are exercising authority.

ARTICLE VII. *Executive Functions of the Organization*

Introductory

1. The Organization shall carry out thorough studies of the technical and economic conditions affecting traffic of an international character and shall give to the Governments concerned with such traffic technical advice and recommendations directed to restoring and increasing the carrying capacity of the transport systems in Continental Europe and to co-ordinating the movement of traffic of common concern on these systems.

2. In case any member Government meets with difficulties in carrying out these recommendations owing to reasons of a material or economic character, the Organization shall investigate with member Governments concerned means of practical help.

Information on transport equipment and material

3. The Organization shall receive and collect information concerning the requirements of transport equipment and material for Continental Europe.

Realization of requirements for transport equipment and material

4. The Organization shall assist the realization of requirements of any member Government in Continental Europe for transport equipment and material.

Allocation and distribution for use of transport equipment and material

5. The Organization shall, within the framework of the priorities determined by the appropriate authorities of the United Nations, determine the allocation, or distribution for use, to Governments in Continental Europe, on such conditions as it may deem necessary, of such transport equipment and material as may be made available for this purpose by the Allied Commanders-in-Chief, by Occupation Authorities, or by agencies of any one or more of the United Nations. To enable the Organization to carry out this function effectively, it may consult with the Governments concerned on their export possibilities of, and import needs of, transport equipment and material for Continental Europe and will receive from such Governments notification of all arrangements made in respect thereto of which they have notice.

Arrangements to make mobile transport equipment and material available

6. In cases where temporary emergency requirements of mobile transport equipment for carrying traffic of common concern arise and the usual arrangements for the

interchange of such mobile transport equipment are inadequate, the Organization shall arrange with member Governments concerned to make available mobile transport equipment for the purpose of meeting such requirements. Such mobile transport equipment shall be made available under arrangements made between the member Governments concerned, with the assistance of the Organization.

Census of transport equipment and material

7. The Organization shall at the earliest practicable time arrange through the member Governments for a census of rolling-stock in Continental Europe and of such other transport equipment and material there as may appear necessary for the proper discharge of its functions.

Identification and restoration of transport equipment and material

8. The Organization shall arrange, as soon as practicable, to restore to any member Government transport equipment and material belonging to it or to its nationals, found outside the territories under its authority and outside its control. Should any difficulties of identification arise, the Organization shall arrange immediately for such special measures to be taken as may be necessary to meet them. Where such restoration would unduly prejudice the operation of essential transport, the Organization shall work out agreements with the Governments concerned for the temporary use of transport equipment pending its restoration. The arrangements for restoration shall be made on the basis of the ownership of the property which existed before any territorial changes in Europe, resulting from Axis policy, and in accordance with any general policies which may be determined by the appropriate authorities of the United Nations regarding restoration and restitution of the property removed by the enemy.

Traffic

9. The Organization may make such recommendations to the appropriate authorities as it deems necessary with respect to the method of carrying out projected movements of traffic of common concern, having regard to the transport facilities available for the movement of such traffic.

10. The Organization shall make recommendations to the Governments concerned in order to ensure the movement of traffic of common concern on all routes of transport in Continental Europe in accordance with the priorities determined by the appropriate authorities of the United Nations. In respect of traffic of military importance sponsored by the Allied Commanders-in-Chief, the appropriate authority for this purpose will be the Allied Commander-in-Chief concerned.

Charges

11. The Organization may work out the unification of tariffs, terms, and conditions of transport and the like, applicable to traffic of an international character. It shall recommend to the Governments concerned the principles by which reasonable transport charges for traffic of common concern in Continental Europe should be fixed by them in accordance with the provisions of paragraph 9 of Article VIII. This paragraph shall not apply to military traffic under the control of any Allied Commander-in-Chief except at his request.

Rehabilitation of transport systems

12. The Organization may study the conditions of transport affecting traffic of an international character in individual countries and make recommendations to the Governments concerned as to technical measures directed to the quickest restoration of transport facilities and their most effective use, and as to the priority in which works or projects in respect of the restoration or improvement of transport facilities shall be carried out.

Operation of transport

13. While it remains the task of each member Government to provide for the efficient operation of the transport systems in Continental Europe for which it is responsible, the Organization may exceptionally, at the request of any member Government, give any assistance in its power in the rehabilitation or operation of transport in any territory in Continental Europe under the authority of such Government on such conditions as may be agreed between it and the Organization, having due regard to the rights of other member Governments.

Co-ordination of European transport

14. The Organization shall work out and co-ordinate common action to secure the inauguration, maintenance, modification, resumption, or, where appropriate, suppression of international arrangements for through working of railways and exchange of rolling-stock of the Continental European countries for carrying out international transport. In particular, it shall ensure a unified clearing system for traffic operations between the different countries in Continental Europe. In general, it shall promote where necessary the establishment of appropriate machinery for co-operation between railway administrations.

15. The Organization shall place its services at the disposal of member Governments and make recommendations with a view to ensuring the most efficient movement of international traffic on waterways. It shall not, however, make recommendations with regard to questions concerning the régimes of the international inland waterways of Continental Europe.

16. The Organization shall take through the Governments concerned such steps as may be practicable to facilitate international traffic of common concern in lorries and other road vehicles and the co-ordination of road and other means of transport with a view to ensuring the movement of international traffic.

17. In carrying out the functions mentioned in paragraphs 14 and 16 of this Article and in placing its services at the disposal of member Governments as described in paragraph 15 of this Article, the Organization shall make use, to the extent practicable, of conventions in force between member Governments so as to obtain the greatest benefit therefrom for the fulfilment of this task, provided that the Organization shall act—

(*a*) in accordance with any general policies which may be determined by the appropriate authorities of the United Nations; and

(*b*) with due respect for existing rights and obligations.

18. The Organization shall make recommendations to the Governments concerned designed to promote adequate co-ordination of all European transport for the fulfilment of the common military needs of the United Nations or in the interests of traffic of an international character.

Relations with other agencies

19. The Organization shall co-operate as may be required with the appropriate authorities and agencies of any one or more of the United Nations and with international organizations.

20. The Organization shall provide all possible assistance to the Allied Commanders-in-Chief in meeting their needs for transport facilities and improving the use of these facilities for the successful fulfilment of military requirements.

21. The Organization shall arrange for consultation, through appropriate machinery, with representatives of persons employed in inland transport on international questions of mutual concern to the Organization and such representatives within the field of the Organization's activities.

Miscellaneous

22. The Organization may advise the Governments concerned and the appropriate authorities of the United Nations on the priority to be given, in the interests of the

rehabilitation of European transport, to the repatriation of displaced transport personnel and to workers required for the production, maintenance, or repair of transport equipment and material.

23. The Organization shall give all practicable assistance through the appropriate authorities to any member Government at its request in obtaining supplies of fuel, power, and lubricants to meet the needs of traffic of common concern, in order that that Government may fulfil its obligations under paragraph 7 of Article VIII.

ARTICLE VIII. *Obligations of Member Governments*

Information

1. Every member Government, in respect of any territory which is under its authority and in the field of activity of the Organization, shall, upon request of the Organization, provide it with such information as is essential for the performance of its functions.

Census of transport equipment and material

2. Every member Government undertakes to co-operate fully with the Organization in arranging any census for which provision is made in paragraph 7 of Article VII.

Identification and restoration of transport equipment and material

3. Every member Government, in respect of any territory which is under its authority and in the field of activity of the Organization, undertakes that—

(i) It will facilitate the execution of paragraph 8 of Article VII.

(ii) It will not seize:—

(*a*) transport equipment and material in Continental Europe found outside the territories under its authority, even though such equipment and material may belong to it or to any of its nationals;

(*b*) transport equipment and material found within territory under its authority but not belonging to it or any of its nationals;

(*c*) transport equipment and material coming within territory under its authority as the result of arrangements made under the auspices of the Organization for the movement of traffic of common concern;

provided, however:—

(i) that every member Government shall be permitted to use equipment defined under (*b*) and (*c*) above subject to the provisions of paragraphs 5 and 8 of Article VII and, in the case of enemy or ex-enemy transport equipment and material, without prejudice to its ultimate disposal by the appropriate authorities of the United Nations; and

(ii) that nothing in this paragraph shall debar any member Government or any of its nationals from continuing the management of its or his own inland vessels.

4. The provisions of paragraph 3 of this Article shall not affect the rights of the Allied Commanders-in-Chief within any territory in respect of which the Organization has not begun to exercise its functions under Article VII.

Traffic

5. Every member Government undertakes to ensure by any means in its power the best possible movement of traffic of common concern in accordance with the recommendations made by the Organization under paragraph 10 of Article VII.

6. Every member Government undertakes to provide inland vessels under its control in Continental Europe required for traffic of common concern,

(i) in accordance with the recommendations of the Organization generally, and

(ii) if signatory to the Annex to this Agreement, in accordance with its terms.

Provision of fuel, power, and lubricants

7. Every member Government shall take all measures necessary and practicable to

ensure, in respect of the territory in Continental Europe under its authority, that adequate supplies of fuel, power, and lubricants are available for traffic of common concern, provided that the Organization has made suitable arrangements with the Government concerned.

Charges

8. Every member Government undertakes not to levy or permit the levy of customs duties or other charges, other than transport charges, and admissible transit charges on traffic of common concern in transit through territories in Continental Europe under its authority. No discrimination shall be made in respect of import duties levied on goods of common concern, dependent on the route the goods have travelled prior to importation into the country concerned.

9. Every member Government undertakes to secure that transport charges made within territories in Continental Europe under its authority on traffic of common concern, including such traffic in transit through such territories, shall be as low and simple and as uniform with those in other territories, to which this Agreement applies, as is practicable. Every member Government shall give the fullest consideration to recommendations made by the Organization in accordance with paragraph 11 of Article VII and report to the Organization on the action taken.

Miscellaneous

10. Every member Government undertakes to co-operate with the Organization in the exercise of its functions under paragraphs 14 and 16 of Article VII.

11. Every member Government shall use its best endeavours in its relations with any other international organizations, agencies, or authorities to give effect to the provisions of this Agreement.

12. Every member Government shall give the fullest consideration to any recommendations made by the Organization in accordance with paragraphs 12, 15, and 18 of Article VII and report to the Organization on the action taken.

13. Every member Government shall recognize the international personality and legal capacity which the Organization possesses.

14. Every member Government shall respect the exclusively international character of the members of the Executive Board, the Chief Officer, and the staff of the Organization.

15. Every member Government shall accord to the Organization the privileges, immunities, and facilities which they grant to each other, including in particular—

(*a*) immunity from every form of legal process;
(*b*) exemption from taxation and customs duties; and
(*c*) inviolability of premises occupied by, and of the archives and communications of, the Organization.

16. Every member Government shall accord diplomatic privileges and immunities to persons appointed by other members as their representatives in or to the Organization, to the members of the Executive Board, and to the higher officials of the Organization not being their own nationals.

17. Every member Government shall accord to all officials and employees of the Organization—

(*a*) immunity from suit and legal process relating to acts performed by them in their official capacity;
(*b*) all such facilities for their movement, and for the execution of their functions, as are deemed necessary by the Organization for the speedy and effective fulfilment of their official duties; and
(*c*) except in the case of their own nationals, exemption from taxation of their official salaries and emoluments.

18. Every member Government shall in territory under its authority take all steps in its power to facilitate the exercise by the Organization of any of the powers referred to in Article IV.

ARTICLE IX

The Organization shall be related to any general international organization to which may be entrusted the co-ordination of the activities of international organizations with specialized responsibilities.

ARTICLE X

1. The functions of the Organization shall relate to all forms of transport by road, rail, or waterway, within the territories of the Continent of Europe in which the Organization operates, but not to sea-going shipping, except that the provisions of paragraph 10 of Article VII and paragraph 5 of Article VIII shall apply in respect of such shipping when employed in Continental Europe on inland waterways.

2. In regard to the handling of traffic in ports where sea-going vessels are discharged or loaded, the Organization shall co-operate with the appropriate authorities of the member Government concerned and any shipping organization set up by them to ensure—

(i) the rapid turn-round of ships;

(ii) the efficient use of port facilities in the best interests of the prompt clearance of common concern.

ARTICLE XI

In the event of there being any direct inconsistency between the provisions of this Agreement and the provisions of any agreement already existing between any of the member Governments, the provisions of this Agreement shall, as between such member Governments, be deemed to prevail, due respect being had to the provisions of paragraph 17 of Article VII, provided, however, that nothing in this Article shall be construed to prevent member Governments from entering into agreements to facilitate the working of traffic across national frontiers.

ARTICLE XII. *Definitions*

1. For the purpose of this Agreement and its Annex, the definitions given in this Article have been adopted.

2. The term 'inland transport' shall include all forms of transport as referred to in Article X of this Agreement.

3. The term 'Continental Europe' shall mean all territories in Europe under the authority or control of member Governments, but shall not extend to territory of the United Kingdom or of the Union of Soviet Socialist Republics.

4. The term 'territory under the authority of a member Government' shall be construed to mean territory in Continental Europe either under the sovereignty of a member Government or territory over which a member Government or member Governments is or are exercising authority or control.

5. The term 'transport equipment and material' shall include, so far as the Executive Board deems it necessary for the execution of the functions of the Organization:

(i) any items of fixed and mobile equipment, stores (other than fuel), plant, and spares and accessories of all kinds specifically intended and required for use of transport undertakings, including equipment required for use in ports, whether ashore or afloat;

(ii) equipment and material specifically intended and required for the rehabilitation, maintenance, or construction of roads, railways, bridges, ports, and inland waterways;

(iii) major plant and tools specifically required for the repair of transport equipment and material for use by transport authorities.

6. The term 'traffic of common concern' shall include—

(i) personnel, stores, supplies, or other traffic to be moved in accordance with the requirements of the Allied Commanders-in-Chief;

(ii) displaced and other persons to be moved in accordance with the priorities determined by the appropriate United Nations authorities;

(iii) supplies for civil needs to be moved in Continental Europe in accordance with the priorities determined by the appropriate United Nations authorities;

(iv) property removed by the enemy.

7. The term 'transport charges' shall include, in addition to freight or conveyance charges, any other incidental charges, such as tolls, port charges, charges for warehousing and handling goods in transit which may affect the cost of transport.

8. The term 'admissible transit charges' means dues intended solely to defray expenses of supervision and administration entailed by the transit traffic concerned.

9. The term 'Allied Commander-in-Chief' shall mean any Commander-in-Chief designated for commands on the Continent of Europe by the appropriate authorities of any of the following:

The French Republic.
The Union of Soviet Socialist Republics.
The United Kingdom of Great Britain and Northern Ireland.
The United States of America.

10. The term 'Government' includes any Provisional Government.

Article XIII

Until the expiry of the period of two years from this day's date, the provisions of this Agreement may be amended, suspended or terminated only by a unanimous vote of the Council. At any time after that date any provision of this Agreement may be amended, suspended, or terminated by a two-thirds majority of the Council, provided that no alteration shall be made in the provisions of this Agreement so as to extend the obligations or financial liability of any member Government without that Government's consent.

Article XIV

1. This Agreement shall come into force for each member Government on the date of signature on its behalf or of its admission to the Organization under Article II.

2. It shall remain in force for two years from this day's date. It shall thereafter remain in force, subject to the right of any member Government, after the expiry of eighteen months from this day's date, to give six months' notice in writing to the Council of its intention to withdraw from this Agreement.

In witness whereof the undersigned, duly authorized by their respective Governments, have signed the present Agreement.

Done in London on the 27th day of September, 1945, in English, French, and Russian, all three texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the United Kingdom of Great Britain and Northern Ireland, by whom certified copies shall be transmitted to all Signatory Governments.

(Here follow the signatures of representatives of the Governments referred to above.)

ANNEX

Protocol relating to Traffic on Inland Waterways

Preamble

With a view to fulfilling, in respect of traffic on inland waterways, the obligations assumed by the member Governments under the Agreement concerning the establishment of a European Central Inland Transport Organization (hereinafter referred to as the Agreement), and subject to the conditions set out therein, the Governments signatory hereto have agreed as follows:

Article I

Every Government signatory hereto undertakes to establish appropriate machinery

necessary for the application of all the obligations assumed in paragraphs 5 and 6 of Article VIII of the Agreement to traffic on inland waterways and to appoint persons or organizations entitled to treat with the Organization on questions of this nature.

ARTICLE II

The Governments signatory hereto, taking into account the geographical, technical, and other peculiarities connected with traffic on inland waterways and the needs of each of them in these respects, will nominate experts to be consulted by the Organization on questions of traffic on inland waterways within the various areas of such traffic.

ARTICLE III

For each waterways traffic area in Continental Europe, the allocation of inland shipping and, if necessary, shipping space for carrying traffic of common concern in accordance with approved programmes will be determined from time to time by the Organization in agreement with the Governments concerned. In determining this allocation, due account shall be taken of the particulars of the vessel, its equipment and crew, and of its normal traffic.

ARTICLE IV

The terms of remuneration to be paid by the users of inland vessels for traffic of common concern shall be worked out by the Organization in agreement with the Governments and/or the authorities concerned on a fair and reasonable basis in such a manner as to give effect to the following two principles:

(i) inland vessels of all flags performing the same services should receive the same freights;

(ii) freights with reference to paragraph 11 of Article VII shall be calculated so as to include, after providing for depreciation of the ship, a reasonable margin of profit.

ARTICLE V

1. This Protocol shall remain open for signature in London on behalf of any member Government of the European Central Inland Transport Organization.

2. This Protocol shall come into force for each Government signatory thereto as from the date of signature on its behalf. Any Government when signing the present Protocol may declare that its signature shall not become effective until this Protocol has been signed by certain other specified Governments.

3. This Protocol shall remain in force for two years from this day's date. It shall thereafter remain in force subject to the right of any signatory Government, after the expiry of eighteen months from this day's date, to give six months' notice in writing to the Council of the European Central Inland Transport Organization of its intention to withdraw from this Protocol.

In witness whereof the undersigned, duly authorized by their respective Governments, have signed the present Protocol.

Done in London on the 27th day of September, 1945, in English, French, and Russian, all three texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the United Kingdom of Great Britain and Northern Ireland, by whom certified copies shall be transmitted to all signatory Governments.

VI. *The Australian–New Zealand Affairs Secretariat*

On 21 January 1944 there was signed at Canberra a comprehensive Agreement for co-operation between the Governments of the Commonwealth of Australia and the Dominion of New Zealand.[1] Among the provisions of this Agreement are several designed

[1] Cmd. 6513.

to establish permanent machinery for collaboration and co-operation between the two countries (paras. 35–7). In particular it is stipulated that there shall be set up a permanent secretariat in each country under the control of the Ministry of External Affairs thereof (paras. 38–9). These are to be known jointly as the Australian–New Zealand Affairs Secretariat (para. 39). Each Government is to nominate representatives of the staff of its High Commissioner resident in the territory of the other to act in the closest co-operation with the branch of the Secretariat maintained by that other, wherein they shall have full access to all relevant sources of information (para. 41). In each country the Minister of External Affairs and the High Commissioner of the other country there resident are to have joint responsibility for the effective functioning of the Secretariat (para. 42). The prime function of the Secretariat is to take the initiative in ensuring that effect is given to the diverse provisions of the Agreement (para. 40 (*a*)).

Because of their great interest, the provisions governing the establishment of the Secretariat, together with all other provisions of the Agreement within the framework of which they stand and of which they comprise an essential part, are printed here in full. But upon them it is to be remarked that, quite apart from the question whether an agreement between two British Dominions is an instrument the effects of which are determinable by the law of nations, there is nothing in the text of this Agreement which is not consonant with the opinion that the two branches of the Secretariat are merely creatures of the constitutional law of each Dominion and that the legal basis of the nexus between them is parallel legislation rather than inter-governmental agreement. Thus, though the Minister of External Affairs and the resident High Commissioner in each country are expressed to have joint responsibility for the *functioning* of each branch, the branches are simultaneously declared to be under the *control* of the respective Ministries of External Affairs. As to the other question alluded to—that of the legal nature of an agreement between two parts of the British Commonwealth of Nations —attention may be drawn to the difference of view between the Governments of the United Kingdom and of Eire (then the Irish Free State) as to the possibility and propriety of registration of such an instrument in accordance with Article 18 of the Covenant of the League of Nations.[1]

The Agreement, however, contemplates further the establishment by the contracting parties in association with the Governments of the United Kingdom, the United States, and France of 'a regional organization with advisory powers, which could be called the South Seas Regional Commission' (para. 30). Should such an organization be brought into existence there could, of course, be no doubt of its fully international character.

AGREEMENT BETWEEN AUSTRALIA AND NEW ZEALAND, 21ST JANUARY, 1944

Definition of Objectives of Australian–New Zealand Co-operation

1. The two Governments agree that, as a preliminary, provision shall be made for fuller exchange of information regarding both the views of each Government and the facts in the possession of either bearing on matters of common interest.

2. The two Governments give mutual assurances that, on matters which appear to be of common concern, each Government will, so far as possible, be made acquainted with the mind of the other before views are expressed elsewhere by either.

3. In furtherance of the above provisions with respect to exchange of views and information, the two Governments agreed that there shall be the maximum degree of unity in the presentation, elsewhere, of the views of the two countries.

4. The two Governments agree to adopt an expeditious and continuous means of consultation by which each party will obtain directly the opinions of the other.

5. The two Governments agree to act together in matters of common concern in the South-West and South Pacific areas.

[1] Cf. Oppenheim, *International Law*, vol. i (5th ed. by Lauterpacht, 1937), p. 722, n. 1.

6. So far as compatible with the existence of separate military commands, the two Governments agree to co-ordinate their efforts for the purpose of prosecuting the war to a successful conclusion.

Armistice and Subsequent Arrangements

7. The two Governments declare that they have vital interests in all preparations for any armistice ending the present hostilities or any part thereof and also in arrangements subsequent to any such armistice, and agree that their interests should be protected by representation at the highest level on all armistice planning and executive bodies.

8. The two Governments are in agreement that the final peace settlement should be made in respect of all our enemies after hostilities with all of them are concluded.

9. Subject to the last two preceding clauses, the two Governments will seek agreement with each other on the terms of any armistice to be concluded.

10. The two Governments declare that they should actively participate in any Armistice Commission to be set up.

11. His Majesty's Government in the Commonwealth of Australia shall set up in Australia, and His Majesty's Government in the Dominion of New Zealand shall set up in New Zealand, Armistice and Post-Hostilities Planning Committees, and shall arrange for the work of these Committees to be co-ordinated in order to give effect to the views of the respective Governments.

12. The two Governments will collaborate generally with regard to the location of machinery set up under international organizations, such as the United Nations Relief and Rehabilitation Administration, and, in particular, with regard to the location of the Far Eastern Committee of that Administration.

Security and Defence

13. The two Governments agree that, within the framework of a general system of world security, a regional zone of defence comprising the South-West and South Pacific areas shall be established and that this zone should be based on Australia and New Zealand stretching through the arc of islands North and North-East of Australia to Western Samoa and the Cook Islands.

14. The two Governments regard it as a matter of cardinal importance that they should both be associated not only in the membership, but also in the planning and establishment, of the general international organization referred to in the Moscow Declaration of October, 1943, which organization is based on the principle of the sovereign equality of all peace-loving States and open to membership by all such States, large or small, for the maintenance of international peace and security.

15. Pending the re-establishment of law and order and the inauguration of a system of general security, the two Governments hereby declare their vital interest in the action on behalf of the community of nations, contemplated in Article V of the Moscow Declaration of October, 1943. For that purpose it is agreed that it would be proper for Australia and New Zealand to assume full responsibility for policing or sharing in policing such areas in the South-West and South Pacific as may from time to time be agreed upon.

16. The two Governments accept as a recognized principle of international practice that the construction and use, in time of war, by any Power of naval, military, or air installations, in any territory under the sovereignty or control of another Power, does not, in itself, afford any basis for territorial claims or rights of sovereignty or control after the conclusion of hostilities.

Civil Aviation

17. The two Governments agree that the regulation of all air transport services should be subject to the terms of a convention which will supersede the Convention relating to the Regulation of Aerial Navigation.

18. The two Governments declare that the air services using the international air trunk routes should be operated by an International Air Transport Authority.

19. The two Governments support the principles that:

(*a*) full control of the international air trunk routes and the ownership of all aircraft and ancillary equipment should be vested in the International Air Transport Authority; and

(*b*) the international air trunk routes should themselves be specified in the international agreement referred to in the next succeeding clause.

20. The two Governments agree that the creation of the International Air Transport Authority should be effected by an international agreement.

21. Within the framework of the system set up under any such international agreement, the two Governments support:

(*a*) the right of each country to conduct all air transport services within its own national jurisdiction, including its own contiguous territories, subject only to agreed international requirements regarding safety, facilities, landing, and transit rights for international services and exchange of mails;

(*b*) The right of Australia and New Zealand to utilize to the fullest extent their productive capacity in respect of aircraft and raw materials for the production of aircraft; and

(*c*) the right of Australia and New Zealand to use a fair proportion of their own personnel, agencies, and materials in operating and maintaining international air trunk routes.

22. In the event of failure to obtain a satisfactory international agreement to establish and govern the use of international air trunk routes, the two Governments will support a system of air trunk routes controlled and operated by Governments of the British Commonwealth of Nations under Government ownership.

23. The two Governments will act jointly in support of the above-mentioned principles with respect to civil aviation, and each will inform the other of its existing interests and commitments, as a basis of advancing the policy herein agreed upon.

Dependencies and Territories

24. Following the procedure adopted at the conference which has just concluded, the two Governments will regularly exchange information and views in regard to all developments in or affecting the islands of the Pacific.

25. The two Governments take note of the intention of the Australian Government to resume administration at the earliest possible moment of those parts of its territories which have not yet been reoccupied.

26. The two Governments declare that the interim administration and ultimate disposal of enemy territories in the Pacific is of vital importance to Australia and New Zealand, and that any such disposal should be effected only with their agreement and as part of a general Pacific settlement.

27. The two Governments declare that no change in the sovereignty or system of control of any of the islands of the Pacific should be effected except as a result of an agreement to which they are parties or in the terms of which they have both concurred.

Welfare and Advancement of Native Peoples of the Pacific

28. The two Governments declare that, in applying the principles of the Atlantic Charter to the Pacific, the doctrine of trusteeship (already applicable in the case of the mandated territories of which the two Governments are mandatory Powers) is applicable in broad principle to all colonial territories in the Pacific and elsewhere, and that the main purpose of the trust is the welfare of the native peoples and their social, economic, and political development.

29. The two Governments agree that the future of the various territories of the Pacific and the welfare of their inhabitants cannot be successfully promoted without a greater

measure of collaboration between the numerous authorities concerned in their control, and that such collaboration is particularly desirable in regard to health services and communications, matters of native education, anthropological investigation, assistance in native production, and material development generally.

30. The two Governments agree to promote the establishment, at the earliest possible date, of a regional organization with advisory powers, which could be called the South Seas Regional Commission, and on which, in addition to representatives of Australia and New Zealand, there might be accredited representatives of the Governments of the United Kingdom and the United States of America and of the French Committee of National Liberation.

31. The two Governments agree that it shall be the function of such South Seas Regional Commission as may be established to secure a common policy on social, economic, and political development directed towards the advancement and well-being of the native peoples themselves, and that, in particular, the Commission shall:

(*a*) recommend arrangements for the participation of natives in administration in increasing measure, with a view to promoting the ultimate attainment of self-government in the form most suited to the circumstances of the native peoples concerned;

(*b*) recommend arrangements for material development, including production, finance, communications, and marketing;

(*c*) recommend arrangements for co-ordination of health and medical services and education;

(*d*) recommend arrangements for maintenance and improved standards of native welfare in regard to labour conditions and social services;

(*e*) recommend arrangements for collaboration in economic, social, medical, and anthropological research; and

(*f*) make and publish periodical reviews of progress towards the development of self-governing institutions in the islands of the Pacific and in the improvement of standards of living, conditions of work, education, health, and general welfare.

Migration

32. In the peace settlement or other negotiations the two Governments will accord one another full support in maintaining the accepted principle that every government has the right to control immigration and emigration in regard to all territories within its jurisdiction.

33. The two Governments will collaborate, exchange full information, and render full assistance to one another in all matters concerning migration to their respective territories.

International Conference relating to the South-West and South Pacific

34. The two Governments agree that, as soon as practicable, there should be a frank exchange of views on the problems of security, post-war development, and native welfare between properly accredited representatives of the Governments with existing territorial interests in the South-West Pacific area or in the South Pacific area or in both, namely, in addition to the two Governments, His Majesty's Government in the United Kingdom, the Government of the United States of America, the Government of the Netherlands, the French Committee of National Liberation, and the Government of Portugal, and His Majesty's Government in the Commonwealth of Australia should take the necessary steps to call a conference of the Governments concerned.

Permanent Machinery for Collaboration and Co-operation between Australia and New Zealand

35. The two Governments agree that:

(*a*) their co-operation for defence should be developed by—

(i) continuous consultation in all defence matters of mutual interest;

(ii) the organization, equipment, training, and exercising of the armed forces under a common doctrine;
(iii) joint planning;
(iv) interchange of staff; and
(v) the co-ordination of policy for the production of munitions, aircraft, and supply items, and for shipping, to ensure the greatest possible degree of mutual aid consistent with the maintenance of the policy of self-sufficiency in local production;

(*b*) collaboration in external policy on all matters affecting the peace, welfare, and good government of the Pacific should be secured through the exchange of information and frequent Ministerial consultation;

(*c*) the development of commerce between Australia and New Zealand and their industrial development should be pursued by consultation and, in agreed cases, by joint planning;

(*d*) there should be co-operation in achieving full employment in Australia and New Zealand and the highest standards of social security both within their borders and throughout the islands of the Pacific and other territories for which they may jointly or severally be wholly or partly responsible; and

(*e*) there should be co-operation in encouraging missionary work and all other activities directed towards the improvement of the welfare of the native peoples in the islands and territories of the Pacific.

36. The two Governments declare their desire to have the adherence to the objectives et out in the last preceding clause of any other Government having or controlling erritories in the Pacific.

37. The two Governments agree that the methods to be used for carrying out the rovisions of Clause 35 of this Agreement and of other provisions of this Agreement shall e consultation, exchange of information, and, where applicable, joint planning. They urther agree that such methods shall include:

(*a*) conferences of Ministers of State to be held alternately in Canberra and Wellington, it being the aim of the two Governments that these conferences be held at least twice a year;

(*b*) conferences of departmental officers and technical experts;

(*c*) meetings of standing inter-Governmental committees on such subjects as are agreed to by the two Governments;

(*d*) the fullest use of the status and functions of the High Commissioner of the Commonwealth of Australia in New Zealand and of the High Commissioner of the Dominion of New Zealand in Australia;

(*e*) regular exchange of information;

(*f*) exchange of officers; and

(*g*) the development of institutions in either country serving the common purposes of both.

Permanent Secretariat

38. In order to ensure continuous collaboration on the lines set out in this Agreemen and to facilitate the carrying out of the duties and functions involved, the two Governments agree that a Permanent Secretariat shall be established in Australia and in New Zealand.

39. The Secretariat shall be known as the Australian–New Zealand Affairs Secretaria and shall consist of a Secretariat of the like name to be set up in Australia and a Secretaria of the like name to be set up in New Zealand, each under the control of the Ministry o External Affairs in the country concerned.

40. The functions of the Secretariat shall be:

(*a*) to take the initiative in ensuring that effect is given to the provisions of thi Agreement;

(*b*) to make arrangements as the occasion arises for the holding of conferences or meetings;

(*c*) to carry out the directions of those conferences in regard to further consultation, exchange of information, or the examination of particular questions;

(*d*) to co-ordinate all forms of collaboration between the two Governments;

(*e*) to raise for joint discussion and action such other matters as may seem from day to day to require attention by the two Governments; and

(*f*) generally to provide for more frequent and regular exchanges of information and views, these exchanges between the two Governments to take place normally through the respective High Commissioners.

41. His Majesty's Government in the Commonwealth of Australia and His Majesty's Government in the Dominion of New Zealand each shall nominate an officer or officers from the staff of their respective High Commissioners to act in closest collaboration with the Secretariat, in which they shall be accorded full access to all relevant sources of information.

42. In each country the Minister of State for External Affairs and the resident High Commissioner shall have joint responsibility for the effective functioning of the Secretariat.

Ratification and Title of Agreement

43. This Agreement is subject to ratification by the respective Governments and shall come into force as soon as both Governments have ratified the Agreement and have notified each other accordingly. It is intended that such notification will take place as soon as possible after the signing of this Agreement.

44. This Agreement shall be known as the Australian–New Zealand Agreement, 1944.

Note.—This Agreement was ratified by the Australian Government on the 24th January, 1944, and by the New Zealand Government on the 1st February, 1944.

VII. *The Caribbean Commission*

Attention was being paid to the serious political, social, and economic situation in the Caribbean by the principal Governments interested, those of the United Kingdom and the United States, already before the late war.[1] In 1940, through the American acquisition of leased areas in British territory for the construction of naval and military bases, the interest of the two Governments became a joint one. It was not, therefore, unnatural that they should in 1942 establish a Joint Commission for purposes connected with the area in question. The formation of the Commission was announced in a Joint Communiqué issued on 9 March of that year, the text of which is as follows:

'For the purpose of encouraging and strengthening social and economic co-operation between the United States of America and its possessions and bases in the area known geographically and politically as the Caribbean, and the United Kingdom and the British colonies in the same area, and to avoid unnecessary duplication of research in these fields, a commission, to be known as the Anglo-American Caribbean Commission, has been jointly created by the two Governments. The Commission will consist of six members; three from each country, to be appointed respectively by the President of the United States and His Majesty's Government in the United Kingdom—who will designate one member from each country as co-chairman.

'Members of the Commission will concern themselves primarily with matters pertaining to labour, housing, health, education, social welfare, finance, economics, and related subjects in the territories under the British and United States flags within this territory, and on these matters will advise their respective Governments.

'The Anglo-American Caribbean Commission in its studies and in the formulation of its recommendations will necessarily bear in mind the desirability of closer co-operation in social and economic matters between all regions adjacent to the Caribbean.'

[1] Cf. the appointment of the Royal Commission on the West Indies in 1939.

Here follow the details of nomination of the first members of the Commission.[1] Simultaneously with this communiqué, and in order to stress further the purely advisory nature of the Commission, there was published a statement by the President of the United States to the effect that the United States had no intention of requesting an indefinite prolongation of the 99-year lease of Caribbean bases nor of seeking sovereignty over the islands or colonies in which they were situated.[2]

The Commission held its first meeting in Trinidad in March 1942 and proceeded immediately to make the following recommendations concerning its organization:

'(A) A permanent secretariat should be established with American and British co-secretaries and offices for the time being in Washington.

'(B) Regional offices of the Commission should be established in American and British territory, the first in Puerto Rico and the second at the headquarters of the Comptroller for Development and Welfare in the British West Indies, which are at present in Barbados.

'(C) Each of the offices of the Commission should be furnished with copies of all administrative and departmental reports issued by the administrations of British and American territories in the Caribbean area.

'(D) The Secretariat should immediately study the machinery necessary to insure the interchange of Government publications and other available material on matters of mutual interest.

'(E) Meetings of the full Commission should be held at intervals as necessary.'[3]

Further consideration was given to the question of organization at the second plenary meeting of the Commission, held in Washington in May and June of the same year, the following conclusions being reached:

'1. It was agreed that meetings should be arranged normally at intervals of approximately three months.

'2. Secretariat—the main office of the Commission should be in Washington with joint American and British secretariat. The duties of the secretariat should be to keep the records of the Commission, prepare for and attend meetings, and take such action arising out of conclusions at such meetings as it may be instructed to take by the co-chairman of the Commission. The secretariat should also have the regular function of keeping in touch with other bodies which may undertake the carrying out of work recommended by the Commission and of receiving, and—if necessary—distributing information, e.g. publications and reports dealing with technical subjects and matters of social welfare.

'3. A British West Indian regional office should be established at the headquarters of the Comptroller for Development and Welfare in the West Indies and, so far as possible, matters other than supply be co-ordinated through the officer attached to this regional office.

'4. Executive functions in respect of Caribbean supply matters, including functions arising out of recommendations made by the Commission, should be discharged on the British side by the West Indian Supply Agency which is being established as part of the Colonial Supply Liaison, and on the American side by the Caribbean Office of the State Department or other appropriate agency as the general liaison with the various American departments concerned.

'5. Executive functions in respect of other work which may be undertaken on the recommendation of the Commission will similarly be discharged by appropriate bodies to be chosen as may be convenient.

'6. British West Indian Governments should be encouraged to use the secretariat of the Commission as a channel for enquiries which they may wish to have made in the

[1] Text in *Report of the Caribbean Commission* (to the Government of the United States and the United Kingdom), Years 1942–3.

[2] Ibid.

[3] Ibid.

United States on subjects within the Commission's terms of reference; the Government of American territories similarly to make use of the secretariat whenever convenient for enquiries of a similar character which they may desire to make of British official agencies.'[1]

At the Commission's fourth meeting, held at St. Thomas (U.S. Virgin Islands) in August 1943, there was set up by it a Caribbean Research Council to serve in an advisory capacity to its parent body for the promotion of scientific, technological, social, and economic research for the benefit of the peoples of the Caribbean area. The provisions respecting the constitution of the Council are as follows:

'*Objectives.*—The objectives of the Caribbean Research Council will be to survey needs, determine what research has been done, arrange for dissemination and exchange of the results of research, provide for conferences between research workers or extension workers and recommend what further research and co-operation shall be undertaken.

'*Membership and Centres of Activity.*—The members of the Council will be not less than 7 nor more than 15 persons to represent Great Britain, the Netherlands, and the United States and will be appointed by the Anglo-American Caribbean Commission, with the consent of the respective Governments, for such terms of office as the Commission may determine. Provision for the subsequent participation of representatives of other countries in this area is contemplated.

'The Chairman of the Council will be selected from among the members, who will be representative of institutes and organisations in the Caribbean, except that one of the members of the Council will serve as its representative in Washington to co-ordinate its work with the offices of the Anglo-American Caribbean Commission located in Washington. The centre of activity of the work of the Council will vary with the nature of the questions under consideration and the particular location that offers the best resources for the work contemplated. To the fullest possible extent the actual work done will be carried on within the Caribbean Area.

'*Sectional Committees within the Council.*—Because of the very special importance to the Caribbean Area of the problems considered by the United States Conference on Food and Agriculture and as a first step in implementing the findings of that conference, which apply to the Caribbean Area, the Anglo-American Caribbean Commission proposes to create as early as possible the first sectional committee of the Caribbean Research Council, which will be concerned with the subjects of nutrition, agriculture, fisheries and forestry. The membership of this sectional committee shall consist of such members of the Council as the Commission may nominate to it, and such other members (specialists in their own subjects) as the Commission may invite. The first Chairman shall be appointed by the Commission, but thereafter he shall be elected annually by the members of the sectional committee.

[Here follows a recital of the creation of a Provisional Committee to function until the appointment of the members of the Council and the Agricultural Committee.]

'As the need develops, committees similar to the agricultural committee will be created in other fields in which the Commission is concerned, including public health, economics, sociology, and industry.'[2]

A committee appointed by the West Indian Conference[3] to consider the affairs of the Research Council recommended the establishment of four new sectional committees thereof to deal respectively with public health and medicine, industries, building and engineering research, and social science, and to be preceded by provisional committees pending their creation. These four provisional committees were accordingly set up by the Commission on behalf of the Council and met at St. Thomas in September 1944 to recommend to the Commission the names of those who should serve on the definitive

[1] Text in *Report of the Caribbean Commission*, Year 1944.
[2] Ibid.
[3] See *infra*, p. 485.

committees and the precise scope of their work. The Provisional Committee of the Council met simultaneously and recommended appointments to the Research Council and the establishment of a central secretariat to serve all committees and to work in liaison with the executive secretaries of the Commission. The Commission at its Sixth Meeting held in Washington in March 1945 (the Fifth Meeting having been held at Barbados simultaneously with the West Indian Conference in March 1944) took the necessary steps to put the Research Council and its Committees on a permanent basis. No action appears to have been taken, however, in regard to the recommendation of the West Indian Conference that there should be set up a Statistical Unit to serve all Committees.[1]

Already at the Third Meeting of the Commission in January 1941 there was discussed a proposal that regional conferences should be held in the West Indies for the purpose of considering specific subjects, such conferences reporting through the Commission to the United Kingdom, United States, and the various West Indian Governments so as to preserve some equality of representation between the two nations. The first such Conference was held in Barbados in March 1944. It discussed the specific topics of nutrition, reabsorption into civil life of persons engaged in war-work, public works, health, industrial development, and, as has been seen, the possibilities for expansion of the Caribbean Research Council. The Governments of the United States and Great Britain subsequently issued a Joint Statement regarding the recommendations of the Conference.[2] The establishment in this manner of a standing conference was obviously a step calculated to enhance the importance of the Caribbean Commission. But the constitution of that organization has not yet reached its final form and it is therefore unprofitable at present to analyse it in detail.[3] It must suffice to say that so far the Commission possesses none but advisory powers and that it presents the appearance of a loose linking of national colonial administrations or of aspects of them rather than of a single, coherent international organization.

B. *TEMPORARY ORGANIZATIONS*

I. *The Inter-Allied Reparation Agency*

There met in Paris in November and December 1945 a Conference on Reparation at which were represented eighteen Governments. Its aim was to obtain an equitable distribution of the total assets declared or to be declared available as reparations in accordance with the tripartite Agreement of Potsdam of the preceding August (which regulated the division of reparations between the U.S.S.R. and the remainder of the Allied states). There was accordingly drawn up a draft agreement in three parts. Part I provided for the division of German reparations into two categories: Category B—industrial and other capital equipment removed from Germany, merchant ships, and inland water transport; and Category A—all other forms of reparation. Each signatory Government was allocated a percentage share of the total value of each category. Thus the shares of the United Kingdom, the United States, and France were respectively, in Category A, 28, 28, and 16 per cent., and in Category B, 27·80, 11·80, and 22·80 per cent. It was stipulated that the categories should be to a certain limited extent interchangeable and that the share of each Government should be regarded as covering all its claims, including those of its nationals, whether arising out of the war or from the occupation of Germany, but without prejudice to the ultimate determination of the total to be paid by Germany, to political or territorial demands to be made at the peace settlement, or to the obligation

[1] *Report of the West Indian Conference*, Colonial no. 187; *Report of the Caribbean Commission*, Year 1944.

[2] *Report of the Caribbean Commission*, Year 1945.

[3] In particular, the recruitment of France and the Netherlands to the Commission, which has been announced recently, will involve some measure of change.

of the German authorities to secure the eventual discharge of claims arising out of pre-war contracts. Provision was made for the charging by each signatory Government against its share of German assets seized within its jurisdiction. And, in recognition of the losses and needs of non-repatriable victims of Nazi oppression, it was provided that the Governments of the United Kingdom, United States, France, Czechoslovakia, and Jugoslavia should in consultation with the Inter-governmental Committee on Refugees elaborate a plan for the allocation to such persons of all non-monetary gold found in Germany plus a fund of not more than £25 millions to be derived from German assets in neutral countries. Neutral Governments are to be requested to add to this share the estates of victims of Nazi oppression dying without heirs. And the whole is to be administered either by a special United Nations agency or by the Inter-governmental Committee on Refugees.

Part III of the Agreement envisages the pooling of monetary gold found in Germany or removed by Germany to third states for the compensation of those countries whose gold reserves were looted by Germany. By a number of resolutions annexed to the agreement the Conference called for neutrals to be 'prevailed upon by all suitable means' to co-operate in the working of the reparations scheme and to recognize its justice and its importance for international security.

By Part II provision was made for the creation of an Inter-Allied Reparation Agency to be entrusted with the working of the complicated arrangements agreed upon. The text of this part of the draft agreement is printed here. One interesting minor feature of the constitution of the Agency is the clause therein providing for the perpetual presidency of one country, France (Art. 3 (*B*)). Another feature of high interest is the device of appeal (to arbitration) from the decision of the Assembly—the Agency's plenary organ—upon claims by Governments for the allocation of particular items by way of reparation (Arts. 7–8). For the rest, it may be remarked that the constitution reflects a certain welcome liberalism in the matter of voting procedure (cf. Arts. 6, 10, and 14). But the organization it sets up cannot obviously be of more than temporary importance, though its details may well serve as models for draftsmen of constituent documents of bodies with similar regulatory tasks, such as commodity control.

ARTICLE 1. *Establishment of the Agency*

The Governments Signatory to the present Agreement hereby establish an Inter-Allied Reparation Agency (hereinafter referred to as 'The Agency'). Each Government shall appoint a Delegate to the Agency and shall also be entitled to appoint an Alternate who, in the absence of the Delegate, shall be entitled to exercise all the functions and rights of the Delegate.

ARTICLE 2. *Functions of the Agency*

(*a*) The Agency shall allocate German reparation among the Signatory Governments in accordance with the provisions of this Agreement and of any other agreements from time to time in force among the Signatory Governments. For this purpose, the Agency shall be the medium through which the Signatory Governments receive information concerning, and express their wishes in regard to, items available as reparation.

(*b*) The Agency shall deal with all questions relating to the restitution to a Signatory Government of property situated in one of the Western Zones of Germany, which may be referred to it by the Commander of that Zone (acting on behalf of his Government), in agreement with the claimant Signatory Government or Governments, without prejudice, however, to the settlement of such questions by the Signatory Governments concerned either by agreement or arbitration.

ARTICLE 3. *Internal Organization of the Agency*

A. The organs of the Agency shall be the Assembly and the Secretariat.

B. The Assembly shall consist of the Delegates and shall be presided over by the

President of the Agency. The President of the Agency shall be the Delegate of the Government of France.

C. The Secretariat shall be under the direction of a Secretary-General, assisted by two Deputy Secretaries-General. The Secretary-General and the two Deputy Secretaries-General shall be appointed by the Governments of France, the United States of America, and the United Kingdom. The Secretariat shall be international in character. It shall act for the Agency and not for the individual Signatory Governments.

ARTICLE 4. *Functions of the Secretariat*

The Secretariat shall have the following functions:

A. To prepare and submit to the Assembly programmes for the allocation of German reparation;

B. To maintain detailed accounts of assets available for, and of assets distributed as, German reparation;

C. To prepare and submit to the Assembly the budget of the Agency;

D. To perform such other administrative functions as may be required.

ARTICLE 5. *Functions of the Assembly*

Subject to the provisions of Articles 4 and 7 of Part II of this Agreement, the Assembly shall allocate German reparation among the Signatory Governments in conformity with the provisions of this Agreement and of any other agreements from time to time in force among the Signatory Governments. It shall also approve the budget of the Agency and shall perform such other functions as are consistent with the provisions of this Agreement.

ARTICLE 6. *Voting in the Assembly*

Except as otherwise provided in this Agreement, each delegate shall have one vote. Decisions in the Assembly shall be taken by a majority of the votes cast.

ARTICLE 7. *Appeal from Decisions of the Assembly*

A. When the Assembly has not agreed to a claim presented by a Delegate that an item should be allocated to his Government, the Assembly shall, at the request of that Delegate and within the time limit prescribed by the Assembly, refer the question to arbitration. Such reference shall suspend the effect of the decision of the Assembly on that item.

B. The Delegates of the Governments claiming an item referred to arbitration under paragraph A above shall select an Arbitrator from among the other Delegates. If agreement cannot be reached upon the selection of an Arbitrator, the United States Delegate shall either act as Arbitrator or appoint as Arbitrator another Delegate from among the Delegates whose Governments are not claiming the item. If the United States Government is one of the claimant Governments, the President of the Agency shall appoint as Arbitrator a Delegate whose Government is not a claimant Government.

ARTICLE 8. *Powers of the Arbitrator*

When the question of the allocation of any item is referred to arbitration under Article 7 of Part II of this Agreement, the Arbitrator shall have authority to make final allocation of the item among the claimant Governments. The Arbitrator may, at his discretion, refer the item to the Secretariat for further study. He may also at his discretion require the Secretariat to resubmit the item to the Assembly.

ARTICLE 9. *Expenses*

A. The salaries and expenses of the Delegates and of their staffs shall be paid by their own Governments.

B. The common expenses of the Agency shall be met from the funds of the Agency. For the first two years from the date of the establishment of the Agency, these funds shall be contributed in proportion to the percentage shares of the Signatory Governments in Category B and thereafter in proportion to their percentage shares in Category A.

C. Each Signatory Government shall contribute its share in the budget of the Agency, for each budgetary period (as determined by the Assembly) at the beginning of that period; provided that each Government shall, when this Agreement is signed on its behalf, contribute a sum equivalent to not less than its Category B percentage share of £50,000 and shall, within three months thereafter, contribute the balance of its share in the budget of the Agency for the budgetary period in which this Agreement is signed on its behalf.

D. All contributions by the Signatory Governments shall be made in Belgian francs or such other currency or currencies as the Agency may require.

ARTICLE 10. *Voting on the Budget*

In considering the budget of the Agency for any budgetary period, the vote of each Delegate in the Assembly shall be proportional to the share of the budget for that period payable by his Government.

ARTICLE 11. *Official Languages*

The official languages of the Agency shall be English and French.

ARTICLE 12. *Offices of the Agency*

The seat of the Agency shall be in Brussels. The Agency shall maintain liaison offices in such other places as the Assembly, after obtaining the necessary consents, may decide.

ARTICLE 13. *Withdrawal*

Any Signatory Government, other than a Government which is responsible for the control of a part of German territory, may withdraw from the Agency after written notice to the Secretariat.

ARTICLE 14. *Amendments and Termination*

This Part II of the Agreement can be amended or the Agency terminated by a decision in the Assembly of the majority of the Delegates voting, provided that the Delegates forming the majority represent Governments whose shares constitute collectively not less than 80 per cent. of the aggregate of the percentage shares in Category A.

ARTICLE 15. *Legal Capacity. Immunities and Privileges*

The Agency shall enjoy in the territory of each Signatory Government such legal capacity and such privileges, immunities, and facilities, as may be necessary for the exercise of its functions and the fulfilment of its purpose. The representatives of the Signatory Governments and the officials of the Agency shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Agency.[1]

II. *The European Coal Organization*

The European Coal Organization was set up by means of an Agreement between the Governments of Belgium, Denmark, France, Greece, Luxembourg, the Netherlands, Norway, Turkey, the United Kingdom, and the United States, signed in London on

[1] Text from *Final Act of the Paris Conference on Reparation*, Misc. no. 1 (1946), Cmd. 6721.

4 January 1946.[1] Its purpose is essentially temporary—the co-ordination of demand for and supply of coal and certain types of mining equipment during the present period of general shortage. Thus the Agreement, which came into force on 1 January 1946, is expressed to endure for an initial period of only one year, though the member Governments or some of them may thereafter prolong its operation to the extent they may desire. Any Government may withdraw at the end of the initial year, or at any time thereafter, upon the giving of three months' notice to the depository Government, that of the United Kingdom (Art. 10). Despite its temporary character, the Agreement makes provision for the establishment of relations with 'national and international organisations, authorities and agencies' (Art. 6 (1)). But the Organization is bound by its Constitution to communicate with the Economic and Social Council of the United Nations, upon the establishment of that body, in order to determine what relationship it shall bear to the latter and whether its functions cannot or should not be taken over thereby (Art. 6 (2)).

The organs of this temporary, regional, specialized inter-governmental agency consist in a Council, composed of representatives of all the member Governments, and a Full-time Staff (Art. 3 (1)). The latter expression, which seems to be new in international constitutional practice, comprehends not merely a Secretary-General and his necessary subordinates but also a Chairman who shall preside in the Council (Art. 3 (4)). The device of an employed president of a deliberative body is of course not new. The Council may admit non-signatory Governments to membership (Art. 2).

The headquarters of the Organization is to be in London or such other place as the Council may from time to time decide (Art. 5). And it is stipulated that the Organization shall enjoy in the territories of the member Governments such privileges and immunities as are necessary for the fulfilment of its purpose, and that representatives of the member Governments and officials of the Organization shall likewise enjoy in those territories such privileges and immunities as are necessary for the independent exercise of their functions (Art. 8); the wording of this provision is clearly based on, and is indeed virtually identical with, that of Articles 104 and 105 of the Charter of the United Nations. An Order in Council has in consequence been made under the Diplomatic Privileges (Extension) Act, 1944,[2] applying that Act to the Organization, a circumstance which came in for some comment during the debate in the House of Commons on the Diplomatic Privileges (Extension) Bill, 1946.[3]

The Agreement was drawn up in French and in English, both texts being equally authoritative. It is the English text which is reproduced here.

AGREEMENT FOR THE ESTABLISHMENT OF THE EUROPEAN COAL ORGANIZATION

The Governments of Belgium, Denmark, France, Greece, Luxembourg, the Netherlands, Norway, Turkey, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, being convinced that, during the present period of general shortage of coal and of certain types of coal-mining supplies and equipment, effective co-ordination of the demand for and supply of these commodities in Europe will continue to be necessary, have agreed as follows:—

ARTICLE 1. *Establishment of a European Coal Organization*

The European Coal Organization, hereinafter referred to as the 'Organization', is hereby formally established.

[1] Text in Treaty Series no. 1 (1946), Cmd. 6731.
[2] S.R. & O. (1946), no. 845.
[3] Cf. *supra*, p. 408.

ARTICLE 2. *Membership of the Organization*

The members of the Organization shall be the Governments on whose behalf this Agreement is signed and those other Governments which accede to the Agreement at the invitation of the Council provided for in Article 3.

ARTICLE 3. *Structure of the Organization*

1. The Organization shall consist of a Council and a Full-time Staff.

2. The Council shall be composed of representatives of the member Governments. Each Government shall appoint one representative and may appoint an alternate representative and technical advisers.

3. The Council shall draw up its own rules of procedure and may establish such committees or other subordinate bodies as may be desirable.

4. The Full-time Staff shall consist of a Chairman, who shall preside in the Council, a Secretary-General, both appointed by the Council, and other necessary staff appointed by the Chairman with the approval of the Council and in accordance with conditions to be prescribed by the Council.

ARTICLE 4. *Purpose of the Organization*

1. The purpose of the Organization is to promote the supply and equitable distribution of coal and scarce items of coal-mining supplies and equipment while safeguarding, as far as possible, the interests of both producers and consumers. With this object the Council shall keep itself constantly acquainted with and, when necessary, discuss the situation in regard to such supply and distribution, disseminate information in regard thereto, and make appropriate recommendations to the Governments concerned and to any other competent authorities.

2. To these ends the member Governments shall—

(*a*) provide the Organization, at its request, with all relevant information, in particular, information regarding production, imports, exports, consumption, stocks, and requirements of coal and of coal-mining supplies and equipment, and

(*b*) give their full co-operation to the Organization in the accomplishment of its task.

ARTICLE 5. *Headquarters*

The Headquarters of the Organization shall be in London or such other place as the Council may from time to time decide.

ARTICLE 6. *Relations with other Organizations, Authorities, and Agencies*

1. The Organization may establish relations with national and international organizations, authorities, and agencies.

2. After the establishment of the Economic and Social Council of the United Nations, the Organization shall communicate with that Council with the view of determining what relationship should be created between it and the Council and, in particular, whether its functions can and should be taken over by the Council.

ARTICLE 7. *Administrative Expenses*

The Council shall consider and approve a budget covering the necessary administrative expenses of the Organization. Administrative expenses shall be apportioned between and borne by the member Governments in a manner to be determined by the Council. Each member Government undertakes, subject to the requirements of its constitutional procedure, to contribute to the Organization promptly its share of the administrative expenses so determined.

ARTICLE 8. *Privileges and Immunities*

1. The Organization shall enjoy in the territories of the member Governments such privileges and immunities as are necessary for the fulfilment of its purpose.

2. Representatives of the member Governments and officials of the Organization shall likewise enjoy in those territories such privileges and immunities as are necessary for the independent exercise of their functions.

ARTICLE 9. *Definitions*

For the purposes of this Agreement:

The word 'coal' shall mean all coal (whether anthracite, bituminous brown coal, lignite, or other species), coke (whether produced at gas works or coke ovens), briquettes, or other manufactured solid fuel and pitch for use in the manufacture of solid fuel.

The expression 'coal-mining supplies and equipment' shall mean such articles, including machinery and parts thereof, as are used in the production and treatment of coal.

ARTICLE 10. *Entry into Force and Duration of the Agreement*

This Agreement, which is drawn up in French and English, both texts being equally authoritative, shall enter into force on the 1st January, 1946, for an initial period of one year. The member Governments (or some of them) may prolong its operation for such further period as they may determine. On or after the 1st October, 1946, any member Government may give in writing to the Government of the United Kingdom notice of withdrawal from the Organization and the Agreement shall terminate in respect of any Government by whom such notice has been given three months after the date of the receipt of the notice by the Government of the United Kingdom.

[Here follow the signatures of representatives of the Governments referred to above.]

III. *The United Maritime Authority*

The close co-ordination of Allied shipping provided already during the First World War a notable example of the degree of importance and the pitch of integration to which international organization may attain.[1] There was achieved in this sphere in the course of the Second World War an equal if not greater measure of co-operation of which an interesting sidelight is the remarkable Anglo-American 'knock-for-knock' agreement in reference to collision claims.[2] It is not, therefore, surprising that a shipping organization intended to continue its operations into the post-war period has arisen. This, the United Maritime Authority, was established by an Agreement on Principles having Reference to the Continuance of Co-ordinated Control of Merchant Shipping signed by the Governments or Authorities of the eight principal maritime Powers in London on 5 August 1944.[3] It is therein recited that the contracting parties accept as a common responsibility the provision of shipping for all military and other tasks necessary for, or arising out of, the completion of the war in Europe and the Far East and for the supplying of all the liberated areas as well as of the United Nations generally and the territories under their authority.[4] In order to discharge their responsibility in this regard they undertake to keep under requisition all ships of their registers or otherwise under their control.[5] Other nations, including neutrals, are invited to subscribe to arrangements ensuring the use of their tonnage in conformity with these principles.[6] Enemy tonnage becoming available is likewise to be put into the common stock.[7] And, in order that the allocation

[1] Cf. Sir J. Arthur Salter, *The Allied Shipping Control* (1921).

[2] Treaty Series no. 1 (1943), Cmd. 6416. Cf. Hyde in *American Journal of International Law*, 37 (1943), p. 289.

[3] Misc. no. 3 (1944), Cmd. 6556. Eighteen Governments ultimately became parties to the Agreement (Cmd. 6754, p. 3, n.).

[4] Para. 1. [5] Para. 2. [6] Paras. 4–5. [7] Para. 6.

of the total available shipping 'may continue to be effectively determined to meet the requirements of the United Nations, a central authority shall be established, to come into operation upon the general suspension of hostilities with Germany'.[1] The plan of the authority in question is contained in an Annex to the Agreement and is printed below together with paragraph 7 of the principal Agreement, wherein the functions of the authority are defined. The authority consists of a Council of representatives of all the contracting parties and an Executive Board exercising its authority through two branches, under the chairmanship of appropriate officials of the British and American ministries of shipping respectively. The four contracting parties most prominent as maritime powers are assured of representation on the Executive Board, but its final composition is left unfixed (para. 7). Contracting governments not represented by members of the Board may nominate 'associate members' who are entitled to *ad hoc* membership when matters affecting such governments are discussed (para. 8). The Executive Board and its Branches proceed by agreement without voting (para. 9). Thus, decisions affecting ships under the control of a particular contracting party are reached in agreement with that party's representative on the Board or associate member as the case may be (para. 10). This interesting procedure is but in conformity with the general principles laid down in the Agreement, that so far as is consistent with the efficient overall use of shipping as determined by the central authority, each contracting party may allocate ships under its own authority wholly or partly to cover its own essential shipping requirements and that normally ships under the flag or charter of any government are to be under the control of that government.[2]

The United Maritime Authority was designed for so temporary a purpose that it has already ceased to exist. For the Agreement provided that the principles laid down in it, which were to take effect upon the coming into operation of the authority, should remain in effect for a period not extending beyond six months after the general suspension of hostilities in Europe or the Far East, whichever might be the later, unless it should be unanimously agreed among the governments represented on the Executive Board that any or all of them might be terminated or modified earlier.[3] In accordance with this provision the authority ceased to operate on 2 March 1946. When, during the previous month, the Executive Board met in London in its fourth and final session its members thought it desirable to bring to the notice of the contracting governments that certain difficulties might still arise in connexion with the allocation of shipping, especially of relief and rehabilitation cargoes. The Board was of opinion that the governments concerned might desire to make arrangements for mutual co-operation during a further limited period—until 1 November 1946—and presented certain Recommendations to this end. These advocated, *inter alia*, the setting up of a United Maritime Consultative Council without executive authority for the purpose of exchange of information upon the basis of which individual shipping policies might be the more effectively determined.[4]

AGREEMENT ON PRINCIPLES HAVING REFERENCE TO THE CONTINUANCE OF CO-ORDINATED CONTROL OF MERCHANT SHIPPING

The undersigned representatives, duly authorized by their respective Governments or Authorities, hereinafter referred to as contracting Governments, have agreed as follows:—

[1–6 omitted.]

7. (*a*) In order that the allocation of all ships under United Nations control may continue to be effectively determined to meet the requirements of the United Nations, a central authority shall be established, to come into operation upon the general suspension

[1] Para. 7 (*a*). [2] Para. 7 (*b*), (*c*). [3] Para. 9.

[4] *United Maritime Authority: Shipping Arrangements for a limited Transitional Period after March 2nd, 1946*, presented by the Minister of War Transport to Parliament, March 1946, Cmd. 6754.

of hostilities with Germany. The central authority shall be organized in accordance with the plan agreed in the Annex.

(*b*) The central authority shall determine the employment of ships for the purpose of giving effect to the responsibilities assumed by each contracting Government in paragraph 1[1] to provide the tonnage required from time to time to meet current requirements for ships for the military and other purposes of the United Nations, and ships shall be allocated for those purposes by those Governments in accordance with the decisions of the central authority. So far as is consistent with the efficient overall use of shipping as determined by the central authority for those purposes, and with the provisions of paragraph 7 (*c*), each contracting Government may allocate ships under its own authority, wholly or partly to cover the essential import requirements of territories for which it has special shipping responsibilities.

(*c*) In general, ships under the flag of one of the contracting Governments shall be under the control of the Government of that flag, or the Government to which they have been chartered.

In order to meet the special case of military requirements those ships which have been taken up, under agreements made by the United States Government and/or United Kingdom Government with the other Governments having authority for those ships, for use as troopships, hospital ships, and for other purposes in the service of the armed forces, shall remain on charter as at present to the War Shipping Administration and/or the Ministry of War Transport as the case may be, under arrangements to be agreed between the Governments severally concerned. (Any further ships required for such purposes shall be dealt with in a like manner.)

The fact that these ships are assigned to military requirements shall not prejudice the right of the Governments concerned to discuss with the central authority the measures to be taken to provide shipping for their essential requirements within the scope of paragraph 1.[1]

(*d*) The contracting Governments shall supply to one another, through the central authority, all information necessary to the effective working of the arrangements, e.g., regarding programmes, employment of tonnage, and projected programmes, subject to the requirement of military secrecy.

(*e*) The central authority shall also initiate the action to be taken to give effect to paragraph 5[1] and shall direct action under paragraph 6.

(*f*) The terms of remuneration to be paid by the users (Government or private) of ships shall be determined by the central authority on a fair and reasonable basis in such manner as to give effect to the following two basic principles:—

(i) Ships of all flags performing the same or similar services should charge the same freights.

(ii) Ships must be employed as required without regard to financial considerations.

[8–9 omitted.]

[Here follow the signatures of representatives of the Governments or Authorities referred to above.]

ANNEX

Organization of the Central Authority

1. The central authority shall consist of—

(*a*) A Council (United Maritime Council).

(*b*) An Executive Board (United Maritime Executive Board).

(*a*) *The United Maritime Council*

2. Each contracting Government shall be represented on the Council. Membership

of the Council shall also be open to all other Governments, whether of the United Nations or of neutral countries, which desire to accede and are prepared to accept the obligations of contracting Governments.

3. The Council shall meet when deemed necessary and at least twice a year at such places as may be convenient. Meetings shall be arranged by the Executive Board. The Council shall elect its own Chairman and determine its own procedure. The meetings of the Council are intended to provide the opportunity for informing the contracting Governments as to the overall shipping situation and to make possible the interchange of views between the contracting Governments on general questions of policy arising out of the working of the Executive Board.

(*b*) *The United Maritime Executive Board*

4. The Executive Board shall be established with Branches in Washington and London under War Shipping Administration and Ministry of War Transport chairmanship respectively.

5. The Executive Board shall exercise through its Branches the executive functions of the central authority. Appropriate machinery under the two Branches shall be established for the purpose of enabling them to discharge the functions described in paragraph 7 of the Agreement on Principles.[1] Machinery to carry out the arrangements under paragraph 8[2] of that Agreement as regards ships engaged in coasting and short sea trades and as regards small craft shall be set up under the Executive Board.

6. The division of day-to-day responsibility between the two Branches of the Executive Board shall be established as convenient from time to time. So that the two Branches of the Executive Board may work in unison, meetings of the Executive Board as a whole shall be arranged at the instance of the two chairmen, as often as may be necessary, and at such place as may be convenient from time to time.

7. The membership of the Executive Board shall be restricted in numbers. By reason of their large experience in shipping normally engaged in international trade, and their large contribution of ships for the common purpose, the following Governments shall be represented on the Executive Board:—

Government of the United Kingdom of Great Britain and Northern Ireland;
Government of the United States of America;
Government of the Netherlands;
Government of Norway.

It shall be open to the members of the Executive Board to recommend to contracting Governments additions to the membership of the Executive Board as circumstances may require in order to promote the effective working of the central authority.

8. Each contracting Government not represented on the Executive Board shall be represented by an associate member who shall be consulted by, and entitled to attend meetings of, the Executive Board or its Branches on matters affecting ships under the authority of that Government, or on matters affecting the supply of ships for the territories under the authority of that Government.

9. The Executive Board and its Branches shall proceed by agreement among the members. There shall be no voting.

10. The decisions of the Executive Board affecting the ships under the authority of any contracting Government shall be reached with the consent of that Government, acting through its representative on the Executive Board or through its associate member, as the case may be.

11. The Executive Board shall be the duly authorized body for the purpose of para-

[1] The machinery devised is explained in the *Report of the United Maritime Planning Committee*, London, H.M.S.O., September–October 1944.

[2] Para. 8 of the Agreement states that the principles agreed shall apply to all types of merchant ships irrespective of size, but that para. 7 (*b*) shall not apply to ships engaged in coastal and short trades, the arrangements for the control of which shall be appropriate to meet local requirements.

graph 9[1] of the Agreement on Principles, but it is understood that no decision reached under that paragraph by the Governments represented on the Executive Board shall impose any new or greater obligation on any other contracting Government without its express consent.

12. A Planning Committee shall be set up to begin work in London as soon as possible after the signature of the Agreement on Principles for the purpose of working out on a basis satisfactory to the contracting Governments the details of the machinery required to enable the Executive Board to discharge its functions, including the functions under paragraph 7 (*f*). Any contracting Government may be represented on the Planning Committee.

13. The Executive Board shall have the full use of the machinery and procedure of the War Shipping Administration and Ministry of War Transport in order to avoid duplication.

14. The contracting Governments shall nominate their representatives on the Planning Committee to the Governments of the United States and the United Kingdom as soon as practicable. They shall also so nominate their representatives as members or as associate members of the Executive Board as the case may be. The Governments of the United States and the United Kingdom shall be responsible, in consultation with the other contracting Governments concerned, for determining the date of coming into operation of the central authority in accordance with paragraph 7 (*a*) of the Agreement on Principles.

IV. *The United Nations Relief and Rehabilitation Administration*

The constitution of the United Nations Relief and Rehabilitation Administration (U.N.R.R.A.) took the form of an Agreement signed by forty-four 'Governments and Authorities', 'being United Nations or being associated with the United Nations' during the late war, at Washington on 9 November 1943.[2] Though bearing the designation 'United Nations' U.N.R.R.A. had no formal connexion with the general international organization of that name.[3] It was essentially a temporary body and is already in process of winding up. During its lifetime it was, however, entrusted with the discharge of certain international functions of a permanent kind, namely, those relating to the notification of epidemic diseases and to the securing of uniformity in quarantine regulations assigned to the International Office of Public Health at Rome by the International Sanitary Convention of 1926[4] and the International Sanitary Convention for Aerial Navigation of 1933.[5] This arrangement did not, however, prejudice the status of the International Office of Public Health and was expressed to be capable of enduring for not longer than eighteen months.[6]

But in spite of the short life of U.N.R.R.A. its constitution contained features of peculiar interest from the point of view of international constitutional law to which it is thought proper to draw attention here. For it marked a new departure by the transposition to the international sphere of the theory of division of powers embodied in the

[1] i.e. to decide upon the termination or modification of any or all of the principles agreed before the expiry of the period of six months during which the Authority is to operate.

[2] Treaty Series no. 3 (1943), Cmd. 6491.

[3] Cf. *supra*.

[4] Treaty Series no. 22 (1928), Cmd. 3207.

[5] Treaty Series no. 19 (1933), Cmd. 4938.

[6] *Resolutions and Reports* (of the First Session of the Council), Resolution no. 8 (2), Misc. no. 6 (1943), Cmd. 6497, p. 11. In accordance with this Resolution drafts of supplementary instruments appropriately modifying the principal conventions were drawn up. These were approved by a further Resolution (no. 52) adopted at the Council's Second Session (cf. Misc. no. 5 (1944), Cmd. 6566, p. 10) and then signed by representatives of various states, being thereafter printed as Misc. nos. 7 and 8 (1945), Cmd. 6637–8.

Constitution of the United States of America. There was conferred upon the Director-General, who was styled the 'executive authority' of the organization, 'full power and authority for carrying out relief operations contemplated by (the constituent Agreement) within the limits of available resources and the broad policies determined by the Council or its Central Committee'.[1] These last organs, which were composed respectively of the totality of Members of the organization and of the principal states therein represented, were confined to the roles of 'policy-making body of the Administration' and, 'between sessions of the Council', of making 'policy decisions of an emergency nature'.[2] This arrangement has been criticized as purporting to attribute to the Director-General a degree of authority lacking any solid basis in political reality in a world in which international decisions continue to be implemented primarily through national action.[3] The criticism seems to be just, and it may be questioned whether such an arrangement would be possible in the case of a permanent international body. Nevertheless, the experiment is of significance.

The power given by its constitution to U.N.R.R.A. to 'designate or create agencies and to review the activities of agencies so created'[4] is also worth noting. Its attribution is perhaps consonant with the unique character of this body, which was conceived of less as itself a delegacy with specific functions than as an organization comprehending both legislative and executive branches. In this connexion it is appropriate to note also the manner in which the Constitution of U.N.R.R.A. was capable of amendment. In the provisions regulating this matter the competing considerations of the formal equality of all states and the practical preponderance of the principal Powers was sought to be reconciled by the separation of amendments into three categories. Those involving new obligations for Member states required the approval by the Council or plenary body by a two-thirds majority but took effect as regards each state only upon acceptance by such state. Those involving a modification of the Constitution without the imposition of new obligations upon states were to take effect upon their adoption by the Council by a two-thirds majority including the votes of all the members of the Central Committee. All other amendments of the constituent Agreement could be effected by a simple two-thirds majority vote of the Council.[5]

Because of the circumstance that U.N.R.R.A. has ceased to exist its constitution is not printed in this Section. But attention may be drawn to the considerable literature concerning its functioning and to what may be termed the legislative acts of its Council.[6]

V. *The Inter-governmental Committee for Refugees*

[It is hoped to print the constitution of the Inter-governmental Committee for Refugees in the Documentary Section of the forthcoming volume of this *Year Book*.]

[1] Art. IV, 1–2.
[2] Art. III, 1, 3.
[3] Jenks, in this *Year Book*, 22 (1945), pp. 11, 43.
[4] Art. I, 1.
[5] Art. VIII.
[6] Briggs in *American Journal of International Law*, 38 (1944), p. 650; Jessup in ibid., p. 101, and in *Foreign Affairs*, 22 (1944), p. 362; Masters, *Handbook of International Organizations in the Americas* (1945), p. 413; Miller in *U.S. Department of State Bulletin*, vol. xi, p. 501.

REVIEWS OF BOOKS

Essential Human Rights. A Symposium. The Annals of the American Academy of Political and Social Science. January 1946. Edited by WILLIAM DRAPER LEWIS and JOHN R. ELLINGSTON. Philadelphia. 195 pp. ($2.00.)

The United Nations Commission on Human Rights will be engaged for some time to come in drafting an International Bill of Human Rights. There are welcome indications that the Commission will not regard this task as a matter of immediate urgency and that it will devote prolonged study to the preparation of what may become an historic document of the greatest significance. The American Academy of Political and Social Science has, therefore, performed a signal service by inviting Dr. Lewis, in his capacity as Chairman of the Committee on Essential Human Rights set up by the American Law Institute, and Mr. Ellingston, a member of that Committee, to edit a collection of short articles by scholars of authority on various aspects of the international recognition and protection of fundamental human rights and freedoms. The American Law Institute which has to its credit the great scientific achievement of the Restatement has added to its stature by thus associating itself in a practical way with the idea of an international bill of the rights of man. The draft prepared under the auspices of the Institute and published in the volume under review, is bound to be of substantial assistance to the Human Rights Commission.

It is not possible, within the scope of this review, to do more than to mention some of the papers in the Symposium. It opens with short but revealing statements by Mr. Stettinius and M. Henri Bonnet on the importance of human rights within the framework of the United Nations. Professor Merriam writes on the contents of an international bill of rights; Mr. Ellingston on the right to work; Mr. Jenks on economic and social rights; and Dr. Loewenstein on the right to government by consent—a theme which he has fully developed in a book, the significance of which is perhaps greater than its title indicates. Judge de Visscher contributes an article on human rights in Roman Law countries. Professor Borchard gives an account, perhaps more sympathetic than we would feel entitled to expect, of the historical background of international protection of human rights. The articles by Professor Rappard on human rights in mandated territories, by M. Azcarate on protection of minorities, and by Dr. Kaeckenbeeck on the Upper Silesian experiment come from persons of well-known practical experience in these fields. Professor Fenwick's contribution on the Pan-American action for protection of human rights comes, too, from the pen of a lawyer who can justly say in relation to the subject of the article, *pars magna fui.*

H. L.

The Thomistic Conception of an International Society. By GERALD FRANCIS BENKERT, O.S.B., M.A. Catholic University of America Press, Washington, D.C., 1942. 193 pp.

This little work on the Thomistic Conception of an International Society forms volume lxx in a Series of Philosophical Studies published by the Catholic University

of America. The author (as he takes care to warn us) approaches the subject from the point of view of moral and social and political philosophy rather than from the point of view of international law or jurisprudence. And, within his proper field, his primary concern is with the philosophical conception of international society rather than with the practical organization or the constitution of the governmental machinery of such a society. Since, however, the philosophical principles with which he is dealing are 'the principles of natural order, based on the Natural Law', as conceived by St. Thomas Aquinas, the work contains matter of vital interest to those who are seeking to renew the intellectual and moral bases of a civilization that seems to be in real danger of disintegration.

After a brief historical survey of international ideas and organization in the ancient world and the Middle Ages, and of the proposals for international organization in modern times, the author deals in a chapter on Man and Society and the State with the natural basis of international society or a society of states. Following the tradition of Augustine and Aquinas he sees man as an animal *naturaliter sociale*. The spiritual principle which distinguishes man from all other animals and makes him an intelligent and free agent endows him with personality: *Persona, id quod est perfectissimum in tota natura*. The immediate end of this rational creature is a life of virtue and happiness and of material sufficiency in the temporal order, which broadly speaking is the life of politics. And this life of the temporal order is so to say a preparation for the last end of man in an existence beyond the temporal order, which broadly speaking is the life of religion.

Within the political and social sphere we thus find a threefold order of interdependence: economic, intellectual, moral. In these separate spheres it is the function of the state to seek the common good of the organized community. In the conditions of the modern world these relations of economic and intellectual and moral interdependence pass beyond the boundaries of states and form the basis or one of the bases of an international community. Hence, Franciscus de Vittoria, taking his principles from Aquinas, leveloped the conception of the state and of international society as forming one integral olitical order. The logic of these principles postulates the existence not only of indi-idual states but also of a political framework which will adjust the mutual relations between states and thus constitute a positive society of states. As Père Delos has it: 'Il y a donc des principes puisés dans la nature même des sociétés politiques qui trouvent une application analogue dans l'État et dans la Société internationale. S'il y a un ordre politique interne ou national, et un ordre politique international, l'un et l'autre sont dominés et commandés par des principes fondamentaux uniques, qui se vérifient dans l'une et dans l'autre société, et qui assurent l'unité de l'ordre politique.'

The unity of mankind thus finds its basis in the unity of origin of the human race, and in the unity of our human nature, and in the unity of our habitation on the earth, and in the unity of our immediate end and mission in the world. 'In the light of this unity of all mankind which exists in law and in fact', says Pope Pius XII, in the *Summi Pontificatus*, 'individuals do not feel themselves isolated units, like grains of sand, but united by the very force of their nature and by their internal destiny, into an organic, harmonious relationship which varies with the changing of the times.' It thus appears that the Thomist conception ('Thomistic' is a horrid word) of an international society has an interest of its own, as the thought of one of the deepest thinkers whose philosophy exerts a new power in all the intellectual centres of the world; and an added interest since it is the accepted philosophy of the Popes, and guides the action of the universal church in the fashioning of the new international society.

The Forces that Shape our Future. By CLYDE EAGLETON. New York University Press–Oxford University Press, 1945. x + 200 pp.

In this book are collected the James Stokes Lectures on Politics delivered by Professor Eagleton in the University of New York in 1943. They constitute one of the most successful essays in popular treatment of the topic of international government which has yet been undertaken. No audience could fail to be moved by the learned author's interpretation of the events and trends of the times. It is but seldom that he is betrayed into mis-statement by the limitations upon detailed treatment which the vastness of the subject imposes. Perhaps the juxtaposition of the statement that 'during the First World War . . . Germany enrolled in the armed forces 82% of her male workers' and of the estimate that she had during the same conflict 'two men working at home to support each soldier at the front' (pp. 32–3) is a trifle odd. Perhaps also Professor Eagleton is a little premature in concluding that the thirtyfold increase in the destructiveness of war over ten centuries puts the very continuance of life in peril (pp. 54–5). For it would not seem that, whatever the future may have in store, the latest and greatest of wars has seriously diminished the numbers of the human family, whatever it may have done to their standards of life. The 'illusion' of figures in this matter was pointed out by Judge Moore many years ago. But these are mere blemishes —as is also the blunting of Marshall's fine phrase 'Russia and Geneva have equal rights' by the substitution of the Western for the Eastern giant (p. 149). They do not detract seriously from a work meriting a wide circulation.

Les Rapports entre l'Organisation internationale du Travail et la Cour permanente de Justice internationale. By G. FISCHER. Paris, 1946. Editions A. Pedone. 388 pp.

The relations between the International Labour Organization and the Permanent Court of International Justice are of interest from the point of view of both international law and organization. The analytical lawyer will be attracted by the challenge of potential conflicts between Articles in different parts of the Peace Treaties of 1919 (Article 14 of the League Covenant and Article 37 of the Constitution of the International Labour Organization), or between clauses of different multilateral treaties (Article 37 of the Constitution of the International Labour Organization and Article 34 of the Statute of the Permanent Court of International Justice). The student of international organization is more likely to concentrate on the task of exploring the intricacies of the operation of such specialized institutions within the framework of a comprehensive international institution. He may attempt to obtain a more thorough understanding of the intentions of the signatories by a functional interpretation of the relevant treaties, or he may seek enlightenment by borrowing conceptions from political science such as that of the separation of powers.

As might be expected from a scholar who received his training at the Universities of Paris and Geneva, Dr. Fischer puts the emphasis in his competent and searching monograph on the analytical approach to his topic and fortifies his arguments by analogies from the fields of constitutional law and political science. It is his special merit to have analysed comprehensively the whole range of the relations between these two autonomous and non-political agencies within the orbit of the League of Nations.

The Statute of the Permanent Court of International Justice has undergone some changes in its replacement by the International Court of Justice. The International Labour Organization is in the process of being incorporated as a specialized agency into the United Nations. This does not, however, mean that Dr. Fischer's work has all been in vain. Obviously, the book has lost much of the topical character and practical usefulness which it would have had in the inter-war period. It retains, however, its value as a thorough case study in the fields of treaty interpretation and of international organization. Dr. Fischer's book equally serves as an ideal starting-point for an inquiry into trends which have become more clearly visible since its publication. Assuming that the Draft Agreement between the United Nations and the International Labour Organization of 30 May 1946 will come into force, there can no longer be any question of the supremacy of the Constitution of the International Labour Organization over the Statute of the International Court of Justice, as had been convincingly argued by Dr. Fischer with regard to the Statute of the Permanent Court of International Justice (cf. Articles 92 and 103 of the Charter of the United Nations). The unsatisfactory situation, as it existed under the aegis of the League of Nations, in which the International Labour Organization had no right of direct access to the Permanent Court of International Justice, is likely to be remedied (cf. Article 96 (2) of the Charter of the United Nations and Article IX of the Draft Agreement of 30 May 1946). As is, however, foreshadowed by Report II (1) of the Delegation of the International Labour Conference on Constitutional Questions (submitted to the 29th Session, 1946), the International Labour Organization itself may prefer that, as is provided in the case of other specialized agencies, certain matters should be submitted to special tribunals and not to the International Court of Justice.

G. S.

Military Government and the Rule of Law. Occupational Government in the Rhineland, 1918–1923. By ERNST FRAENKEL. 1944. London, New York, Toronto: Oxford University Press and Geoffrey Cumberlege. Studies of the Institute of World Affairs, in collaboration with the Carnegie Endowment for International Peace. $8\frac{1}{2} \times 5\frac{1}{2}$ in. xi+267 pp. ($3.50; 16*s*.)

This study, containing the results of an investigation into the Rhineland occupation after the last war, was conceived as part of a wider study on Germany's position in post-war European reconstruction. In December 1943 a preliminary draft was submitted as a confidential memorandum to the governmental agencies concerned, and while neither of the sponsoring institutions identifies itself with the views expressed in this book, they have presented it to a wider public as a 'serious attempt to demonstrate in a scientific manner the many ramifications of a problem that is as complex as it is topical'.

The work is divided into two parts respectively dealing with the Armistice period (until January 1920) and the Peace period (1920–3). This limitation in time is doubly to be regretted. First, while the whole period 1918–23 contains lessons most valuable for the present, the lessons of the subsequent period of the occupation, when the confusion and high feelings aroused by the war were receding more and more into the background, will be of very great importance in the future to the present occupiers of Germany. Already to-day there are signs that the stupor which came over the Ger-

man people after their unconditional surrender is giving way to a more positive attitude towards defeat. In the second place, the failure to continue the study beyond 1923 has the result that no consideration is given to those decisions of the Permanent Court of International Justice or of the various arbitral tribunals established by the Versailles Treaty relating to divers aspects of modern occupation law. It is true that most of these decisions refer to events arising out of the German occupation of Allied territory in 1914–18, but they are none the less relevant to a study of occupation law in general.

This twofold division of the book logically emphasizes the distinction between the *occupatio bellica* of the Armistice, in which the general rules of land warfare and in particular The Hague Convention amplified the terms of the Armistice agreement, and the *occupatio pacifica* (or *Mischbesetzung*, as Karl Strupp would have it) of the peace period where the occupation was expressly governed by the Versailles Treaty and the Rhineland Agreement, supplemented by the declared intention of the Allies to restrict their power by the 'rule of law'. The important difference between the two is that in the Armistice period the occupation was part of a military operation under military control, whereas after the peace treaty was signed it was no longer a military operation under military control but a political operation in which the armies operated as agents of the occupying Powers, under civilian control exercised by and through the High Commission. The restrictions assumed by the declared intention to be bound by the rule of law meant that the 'bearers of public power respect definite rules of jurisdiction and procedure in their governmental and administrative activities—that they recognise those formal principles that are indispensable for the protection of the individual from arbitrary interference with his personal integrity'. In its practical application this principle met with difficulties arising from the differing conceptions of the rule of law prevalent among the four occupying Powers and Germany herself, and from the varying military and political strengths of the occupying Powers *inter se*, a matter which was possibly of greater importance, thanks to their mutual disagreements.

The Rhineland Agreement was a 'product of American political tradition', but was 'interpreted and executed in an environment devoid of American legal and customary controls'. The learned author therefore concludes that occupation under the rule of law must be based on a political philosophy which can be reconciled with the political tradition of the occupied country. 'The problem of supremacy of law under the peculiar conditions of an occupation régime cannot be solved merely by reference to general considerations of justice and democracy. . . . The concept of "rule of law" has different meanings in a government based on democratic consent and a government based on military force.'

The importance of this book seems to lie not so much in its detailed analysis—legal and political—of the past, although that must not be under-estimated, as in its implied and expressed suggestions for the future. There is evidence that its lessons have not been lost. Unconditional surrender, on which the Allies insisted in 1943–5, even, as is sometimes suggested, at the expense of prolonging the war, formally deprives a country which so surrenders of all *legal* rights whatsoever against its erstwhile enemies —yet this book contains many examples of ingenious and at times impudent arguments of German jurists, politicians, and courts regarding various facets of the occupation. Furthermore, in the case of Germany insistence on unconditional surrender inevitably led to the *debellatio* of that country, where no shadow of a legal government now remains. This state of affairs will obviate many of the difficulties which beset the occupying Powers after the last war and cancel out many undesirable precedents,

whatever other difficulties the resultant vacuum may cause. In this respect Dr. Fraenkel has shown remarkable foresight.

In the course of the study the author has touched upon many important matters. Speaking of the punishment of war criminals, the interesting suggestion is made that 'a belligerent that is unwilling to punish its own war criminals must be treated as if it is unable to enforce its criminal statutes' and that the 'punishment of war criminals on the basis of the "international-law" principle is not an act of vengeance but is rather the exercise of a judicial power which the hostile government failed to apply to its own subjects'. It is doubtful if any such justification can be found for the punishment of war criminals in the present state of international law, although this ideal may, if properly developed, become a useful adjunct to the preservation of peace in the future. On another small point, of which German propagandists and their sympathizers have made much, we can be grateful that Dr. Fraenkel has nailed the lie of the *Schwarze Schmach* (the alleged criminality of French colonial troops, especially in regard to sex crimes). This canard was important not so much in itself as in its success in influencing public opinion in the United States in favour of the German cause.

The book is completed by appendixes containing relevant texts and an exhaustive bibliography. It is interesting to note that the index to cases contains no reference to any case decided by a British court. The author writes in an attractive style, and the almost complete absence of footnotes is a welcome change from the usual appearance of a legal book. It should be compulsory reading for those responsible for administering occupied territory (not only Germany), and will be of great interest to all who are concerned with the wider issues of the mechanics of victory.

S. W. D. R.

Lehrbuch des Völkerrechts. Unter Berücksichtigung der internationalen und schweizerischen Praxis. By PAUL GUGGENHEIM. Lieferung I. 1947. Verlag für Recht und Gesellschaft A. G. Basle, 1947. 159 pp.

Those acquainted with Professor Guggenheim's past valuable contributions to international law have been eagerly awaiting the appearance of his text-book. We venture the opinion that, if the present first instalment is an indication of the quality and of the scope of the treatise, the literature of international law will be enriched by a work of distinct doctrinal interest and considerable practical usefulness. The present volume is of an introductory nature. It is concerned largely with a presentation of the sources of international law, in particular of the law of treaties. The first fifty pages are devoted to an examination of the general character of international law and of its relation to municipal law. With regard to the latter the author shows how fully the law of Switzerland has accepted the doctrine of incorporation of international law as part of the law of the land with regard both to customary and to conventional international law.

As the title indicates, the treatise is intended to pay particular attention to international law as interpreted by Switzerland. The author has succeeded admirably in accomplishing this task. A succession of treatises of this kind—such as that of Professor Hyde and Professor Rousseau—will be invaluable to the student and the practitioner as an authoritative exposition of the interpretation and the application of international law by the countries concerned. Where Professor Guggenheim has succeeded admirably is in placing this aspect of the treatise within the framework of a general exposition of international law. The doctrinal part of the work is characterized

by a progressive approach and by a full consideration of the literature. But Professor Guggenheim has carefully avoided mere eclecticism and, when necessary, he does not hesitate to give expression to an unorthodox view. It is only very seldom—as for instance with regard to subjects of international duties (pp. 3–6)—that his treatment shows signs of indecision.

The volume includes a Table of Contents of the future instalments of the treatise. It is to be hoped that the author will be able to include a special chapter on the United Nations even if Switzerland has not by that time become one of its members.

H. L.

Comparative Law: An Introduction to the Comparative Method of Legal Study and Research. By H. C. GUTTERIDGE. Cambridge, at the University Press, 1946. xvi+208 pp. (12*s.* 6*d.* net.)

Professor Gutteridge has supplemented his articles in various law reviews with new material so as to provide the English lawyer with a comprehensive introduction to comparative law. That his book is full of ripe wisdom and learning goes without saying, and workers in this most fascinating field of study will not be long in convincing themselves that it is to be kept, not merely on their shelves, but by their sides, whatever the investigation they are engaged in. The great danger in writing an introduction to what is, after all, little more than a method, is that one will be led into formulating and justifying a methodology, a body of coherent doctrine which one calls on one's readers to accept. Professor Gutteridge is far too old a hand to fall into that trap; and for all his width of acquaintance with continental law, he retains a robust English scepticism in face of exclusive systems. He knows that the function of comparative law is to compare, and that it is justified by its results, whether it helps to unify the law of various countries, to fill in the gaps in English law, particularly in its most defective branch, the Conflict of Laws, or merely to throw light on its dark places. But his experience also tells him that it is no use preaching to the converted, and that if the comparative lawyer is to break down the stubborn resistance of most practical lawyers, he must admit frankly the dangers and difficulties involved in the comparative method, not merely the immense difficulty of access to the necessary foreign materials, but also the differences of legal method between our own and other laws and the danger of neglecting the peculiar social and economic context of an unfamiliar foreign doctrine. To some the resulting picture may seem too grey, too disheartening to those attempting hurdles which are in any case of formidable height. But comparative law is too attractive a subject to lack devotees, and facility is not to be unduly encouraged.

Professor Gutteridge has also avoided the danger of striving for too coherent a treatment. Anything relating to comparative law that is important enough to merit a full discussion is grist to his mill; and although he says in his preface that 'this book is not intended to be a treatise on foreign law', he knows that a proper appreciation of foreign legal methods is a necessary preliminary to fruitful comparison. And assuredly what the reader expects of the greatest English comparative lawyer is that he should speak freely, and without fear of being too discursive, on the various topics he has found interesting and important in his life's work. For myself, I value the incidental remarks as highly as anything in his book, for example, his discussion of the Overriding or Supereminent Principles (*clausulae generales*) at work in continental law, and his scepticism as

to the alleged unimportance of the single decision as a foundation of new law or the much-lauded freedom with which continental judges interpret statutes. Moreover, his discussions of the problem of legal terminology, of comparative law in legal education, and of the movement for and the techniques employed in the unification of private law gain immeasurably in richness from his own experience and practical activity. One can always hear the great teacher, asides and all.

The technical value of the book is greatly enhanced by Dr. K. Lipstein's appendix, which gives as complete a list as possible of foreign law reports and law reviews.

A few points may be noted by way of criticism. On p. 11 justice is not done to Aristotle's collection of Greek Constitutions or to his Politics, surely one of the most masterly and most influential treatises on comparative law ever written. But in truth Professor Gutteridge rather neglects constitutional law, where, ever since the time of Bagehot, and even earlier, the comparative method has been applied with very fruitful results. Doubtless we tend to think of the comparative study of institutions as somewhat apart from comparative law, which is traditionally more concerned with the comparison of legal doctrines. But the distinction is false. Perhaps the most famous of all doctrinal comparisons, however outmoded they may now seem to be, are contained in Dicey's *Law of the Constitution*, and they are closely interwoven with the comparison of institutions. Moreover, Dicey proved beyond dispute that one of the distinguishing features of the English constitution is its inextricable connexion with private law. Those who urge the value of the comparative method in dealing with private law throw away one of their best arguments if they do not appeal to its success in the field of public law. Professor Gutteridge deals adequately with comparative work in labour law, but does not make the point that, although counsel and judges engaged in administering the criminal law work in almost complete isolation from what is going on outside this country, criminologists and prison officials are in close touch with their foreign confrères. Indeed, the isolation of English law, which he compares to its detriment with all other subjects, such as letters, natural science, economics, music, art, and even vocational subjects such as engineering and medicine, does not seriously extend beyond the narrow confines of 'lawyers' law'. Wherever judges and practitioners have to share control with laymen there is no obstacle to comparison.

Attention is rightly directed on p. 15 to the absence of any complete study of the divergences between English and Scots law, but comparisons are rather commoner than is stated in footnote 2. Bankton's large treatise, published in 1751–3, is entitled *An Institute of the Laws of Scotland in Civil Rights: with Observations upon the Agreement of Diversity between them and the Laws of England*; and the promise of comparison is fairly fully, though not very satisfactorily, kept. Then there is Brodie-Innes's rather disappointing *Comparative Principles of the Laws of England and Scotland* (1903), which never went beyond its first volume, on Courts and Procedure. More satisfactory, though sketchy, are Mr. Burn-Murdoch's notes in the latest edition of Green's *Encyclopaedia of Scots Law*; and finally, there is a little-known book published by James Paterson in 1865, under the title *A Compendium of English and Scotch Law*. There is little here but juxtaposition, though it is useful as a starting-point. On the use of foreign law to fill in the gaps in the English doctrine of Conflict of Laws reference must now of course be made to Dr. Martin Wolff's book on (English) *Private International Law*, published in 1945. Finally, a few of the supplements to the *Rechtsvergleichendes Handwörterbuch*, referred to on p. 83, have actually appeared in unbound form, though unfortunately they do not complete the work.

F. H. LAWSON

The Economic and Financial Organisation of the League of Nations: A Survey of Twenty-five Years' Experience. By MARTIN HILL. Washington, Carnegie Endowment for International Peace. Studies in the Administration of International Law and Organisation, No. 6, 1946. xv+168 pp. ($2.00.)

This study, by a member of the League Economic and Financial Organization, was first produced for the use of the San Francisco Conference in mimeographed form and is now reissued after some revision. It is not to be doubted that it constituted an addition of some value to the scanty literature of international organization. A possible demerit is that it does not give overmuch information concerning the structure of the Organization of which it treats. Some elucidation of, for instance, the relationship of the secretariat of that body to the general League Secretariat would have been welcome. In the absence of discussion of such technical aspects of administration little remains beyond a chronicle of facts. These are presumably stated accurately but whether with entire clarity must be a matter of opinion. It is said on p. 62 that League intervention, bringing her 'not only disinterested advice . . . but also access to the resources of foreign capital markets', enabled Austria in 1934 to convert the 'League Loan' of 1923 to a lower rate of interest, the innuendo being, one would think, that the Austrian economy so recovered as to cheapen money. But from pp. 78–9 it appears that claims for redemption of the 1923 loan are still unsettled. But certainly the account of the history of the recommendations of the Bruce Committee, and of the war-time activities of the Organization, is of high interest. Within the rather strict limits he has set himself the learned author has undoubtedly acquitted himself well.

International Law. Chiefly as Interpreted and Applied by the United States. By CHARLES CHENEY HYDE. 2nd revised edition. Boston: Little Brown Company, 1945. 3 volumes. lxxxvi+2489 pp. ($45.)

The present review appears nearly two years after the publication of Dr. Hyde's treatise. Perhaps no excessive apology is required for this delay. The fortunes of the most important treatise of international law now at the disposal of the student are not likely to be affected by delays, unavoidable in these days, in reviewing.

Nearly a quarter of a century has elapsed since the publication of the first edition of this work. Professor Hyde has used the intervening period not only to expand the treatise, which has grown to almost double its original size, as an exposition of international law applied by the United States. He has made great strides towards transforming it into a truly international work in which account is taken of foreign practice and foreign opinion, judicial and otherwise. For it is no longer a treatise dealing merely with the application of international law by the United States. It is a work concerned with all aspects of international law of interest to the United States. There is no dearth of material from which to draw for that purpose—as may be seen from the massive volumes of Moore and Hackworth. But what is specially valuable in Professor Hyde's treatment—and what we cannot reasonably look for in a work, however encyclopaedic, of a different character—is weighty, measured, and critical analysis of the practice which he describes. There is a judicious temper in his manner of writing which occasionally—though only very occasionally—results in what the hasty critic may consider an excess of elaboration. Even when the learned author feels it incumbent upon him to express dissent from certain practices he quotes scrupulously the opinion

differing from his. Thus, while he respects the tendency, apparent in recent treaties, to describe as piratical certain kinds of conduct in furtherance of public aims as distinguished from public gain (p. 773), he quotes in full the view justifying that tendency by reference to recent developments in submarine and aerial warfare. While disapproving of the appeal to the *clausula rebus sic stantibus* in the matter of the suspension by the United States in 1941 of the International Load Line Convention, Dr. Hyde gives a full account of the views which prompted the action of the American Government (p. 1527). On occasions the judicious method of discussion may create an impression of inconclusiveness. This applies, for instance, to the author's treatment of the question of the protective jurisdiction of a state over aliens for crimes committed abroad and directed against the security of the state (p. 806). Professor Hyde admits the right of such protective jurisdiction with regard to acts originating abroad but consummated within national territory—a potentially extensive source of jurisdiction in view of the modern developments in broadcasting and telegraphic communication. He also admits the right of jurisdiction in the matter of conspiracies perfected abroad. However, he doubts—with good reason, it is believed—whether there is any general acquiescence in an unlimited exercise of jurisdiction of this nature. He mentions, without approval or otherwise, the solution suggested by the Harvard Draft Convention. But there are probably tests more acceptable than those suggested in the Harvard Draft—such as the degree of seriousness, to be determined in case of doubt by an impartial agency, of the offence against the security of the state claiming jurisdiction.

It is only on very rare occasions that Professor Hyde lays himself open to the charge of overstating a case without taking into account the opposing views. This applies, for instance, to his treatment of the *Altmark* incident in February 1940. The learned author is clearly of the view that the British action was contrary to international law (pp. 2339–41). Yet it may be suggested that his lucid exposition of the subject would have gained in persuasiveness by a discussion of the view that the passage of the *Altmark* through the Norwegian territorial waters was not an 'innocent passage' in the contemplation of The Hague Convention—'innocent' meaning in this connexion such passage as is a normal incident of international navigation and not a circuitous manœuvre undertaken to avoid capture. However, in general there is no dogmatic rigidity in Professor Hyde's treatment of questions of neutrality. Thus he is inclined to regard as justified by international law—especially by reference to the doctrine of self-preservation—the transfer of destroyers to Great Britain in August 1940 and the Lend-Lease Act of March 1941. He does not hesitate, in appropriate cases, to challenge the legality of the conduct of his own country. Thus, in discussing the Anti-Smuggling Act of 1935, he expresses the view that that enactment 'proclaimed assertions which the individual legislating State might encounter difficulty in applying without violating the requirements of international law' (p. 794).

There is about this weighty treatise an unusual combination of scholarship and of cautious faith and idealism which are bound to prove a lasting inspiration. Some will possibly find that caution has had the upper hand in the treatment of such subjects as humanitarian intervention (p. 250) or the principle of non-recognition of title sought in violation of international law (p. 374). But these examples of caution are not typical of the treatise. Thus, in discussing international servitudes, which some consider as derogatory to the sovereignty and dignity of States, he says: 'The international society is vitally interested in efforts to impose such restrictions and in the continuity of them' (p. 514). His treatment of the question of the punishment of war crimes is, notwithstanding its studied restraint, a decisive and welcome contribution to the subject

(p. 2414). And even with regard to humanitarian intervention his caution is counterbalanced by the fervent expression of the expectation, the germs of which he discerns in the existing practice, that 'the international society will ultimately evince an interest in the welfare of the private individual sufficient to cause the law of nations to restrict the freedom of a state in its treatment of its nationals' (p. 211).

However, it would betray a lack of perspective, in a work of this character, to single out in a review of limited scope selected topics or passages for approval or criticism. It would be equally inappropriate to suggest that on occasions the style is elaborate to the point of becoming involved. Such elaboration of style as there is must as a rule be attributed to the intricacies of the subject-matter. It is easy—but it is not always satisfactory—to produce a simple statement of the law. As it is, the massive treatise of Dr. Hyde is a pre-eminently readable book—even on such technical matters as the extent of the maritime belt and the territorial character of bays. It is often illuminated by remarks of refreshing robustness, pithy sayings, and flashes of quiet humour. It is a long book for the average student to read, but provided that the footnotes embodying the weighty scientific apparatus are put aside for a time, it is not certain that the treatise cannot be recommended as a text-book. Professor Hyde has put the student and the practitioner under a heavy obligation by placing at their disposal this imposing product of ripe scholarship. It is to be hoped that the learned author will in due course prepare a third edition which will incorporate the Charter of the United Nations in its various ramifications, and the other developments in the sphere of international organization. We must hope that the scope and the quality of these changes will be such as to provide a substantial and worthy contribution to a new edition of a great treatise.

H. LAUTERPACHT

Report of the Conference Delegation on Constitutional Questions on the Work of its First Session, 21 January–15 February, 1946. Montreal: International Labour Office, 1946. 144 pp.

The constitution of the International Labour Organization was even more closely bound up with the Peace Treaties which brought to an end the First World War than was the Covenant of the League of Nations. Indeed, its official designation was 'Part XIII of the Treaty of Versailles and the corresponding parts of the other Treaties of Peace'. Save for an amendment of Article 393 of the principal treaty, adopted in draft in 1922, whereby the size of the Governing Body was increased from twenty-four to thirty-two persons, this constitution has remained unaltered since, except that for some ten years it has been the practice to refer to it as the 'Constitution of the I.L.O.', and to number its articles from 1 rather than from 387 (p. 20 of the Report under review). The dissolution of the League, of whose organization the I.L.O. was expressed in Article 392 of the Treaty of Versailles to be part, now necessitates some consequential changes. So also of course does the formation of the United Nations, whose General Assembly and Economic and Social Council are charged with the higher social tasks but whose Charter does not, somewhat regrettably, make specific mention of the I.L.O. among those 'specialized agencies' which, by Article 57 thereof, are to be brought into relationship with the world political organization. More material amendments were proposed at the twenty-sixth ordinary General Conference of the Organization, held at Philadelphia in 1944. That Conference adopted a Declaration in general terms 'concerning the aims and purposes of the I.L.O.', a document which the late President Roosevelt said 'may well acquire' an historical significance similar to that of

the Declaration of Independence but which in fact adds little to the functions of the Organization because of the very breadth and nobility of view with which these were conceived already in 1919. The Conference also requested the Governing Body to set up a Constitutional Committee to examine and map out the place the I.L.O. should hold in the new world organization. This Committee had not reached any definite conclusions regarding changes to be made in the Constitution when the General Conference met again in Paris in 1945. That Conference adopted three direct amendments to the Constitution—regarding membership, finance, and future procedure in respect of amendments—and accepted the suggestion of the Committee that a small Working Party, reflecting the tripartite character of the Organization, should be set up 'with a comprehensive mandate to review all outstanding questions relating to the Constitution and constitutional practice of the I.L.O.'. This Working Party, styled a trifle obscurely the Conference Delegation on Constitutional Questions, has now presented its first Report.

That the Delegation's proposals should be unspectacular could be regarded as a silent tribute to the skill and vision of the Fathers of the Constitution of 1919. It is perhaps also to some extent a commentary upon the comparatively cool reception the I.L.O. would appear to have had at San Francisco. At all events the Delegation in the main contents itself with recommending the annexing to the Constitution, in place of the Nine Guiding Points of Article 427 of the Treaty of Versailles, of the Declaration of Philadelphia, and with advocating minor, and for the most part purely formal, changes rendered necessary by the dissolution of the League and the creation of the United Nations. It did indeed discuss at length the perennial problem of 'maximising' the ratification and adoption of International Labour Conventions and Recommendations. But it rejected, no doubt wisely, the proposal that the I.L.O. should be given power to make decisions binding on its members, and its suggestions amount to no more than that the term 'draft convention' should be abandoned as misleading—as giving the impression that a convention adopted by the International Labour Conference does no more than lay down a principle which ought at some point to take concrete form in national legislation—and that members of the Organization should accept the duty of making comprehensive reports of their action upon draft conventions (now to be called 'conventions') and recommendations. The Report also goes into the questions of the possibility of implementing conventions by means of collective bargains and of the feasibility of an international labour inspectorate. It deals likewise with the problems of ratification of conventions by federal states, and by states whose legislation is already in advance of the international standard specified in conventions. It discusses, too, the problem of representation of specialized or state management in the Organization, and also that of the representation of what the Charter of the United Nations inelegantly calls 'non-self-governing territories'. But the conclusions of the Delegation are mainly negative. Thus, upon the two matters last mentioned, it is of opinion that the 2–1–1 scale of representation of governments, employers, and 'workpeople' should not, or not yet, be changed; and it goes no farther than to suggest the removal of the limitation upon the numbers of advisers delegates of colonial powers and the like may have in order to exploit the 'great but fleeting opportunity' of the I.L.O. which arises from the present rapid development of social consciousness in 'non-metropolitan' territories. No doubt the practical difficulties in the way of a bolder policy are enormous, but a reading of this sober document leaves the impression that the I.L.O. is at present pursuing, at least in so far as concerns its domestic affairs, a somewhat conservative and tentative policy. C. P.

Hugo Grotius und Johannes Selden. By HANS KLEE. Verlag Paul Haupt. Berne, 1946. 70 pp.

This able and interesting essay represents an inquiry into the origins of the contest of ideas centring on the conception of the freedom of the senses. The author's wide reading has enabled him to put the controversy between Grotius and Selden in the illuminating perspective of contemporaneous legal philosophy and the history of natural law. There is no attempt to extol one writer at the expense of another, and the result is a balanced account which will well repay reading.

An International Bill of the Rights of Man. By H. LAUTERPACHT. New York, Columbia University Press, 1945. x+230 pp. ($3.00; 20*s*.)

The rights of man is a subject the importance of which at the present time can hardly be exaggerated. The Second World War, demanding as a total war must, a precipitate increase in the scope and power of governmental authority, has produced a situation which must be disquieting to all who care for the liberal tradition of western civilization. Both the elemental liberties of the individual and the sense of his dignity and worth are alike wilting under the all-pervading shadow of the new Leviathan. There can be no international law except in an international community cemented by common values and loyalties; the liberal tradition founded on the fundamental worth, rights, and equality of men, irrespective of race and creed, is the one common basis on which such a community may be built. There can be no community of Leviathans. The protection of human rights is therefore not only desirable in itself but also goes to the very roots of the whole problem of law and order in international relations: it is not merely an exercise in idealism but the most urgent necessity of the times.

Lawyers at all times have been aware of the importance of the subject, but for the most part they have been content with general theories. Professor Lauterpacht has been more courageous, for he has drafted a detailed and practical programme for the definition and enforcement of human rights. Not that he neglects or underrates the importance of doctrine; indeed, the whole of the first part of the book is devoted to a survey of the legal and philosophical pedigree of the idea of the rights of man; a survey which combines meticulous scholarship with a firm grasp of general trends. But whereas most writers would have been content to stop there, Professor Lauterpacht follows up with concrete proposals in the form of a draft Bill of the Rights of Man, consisting of a preamble and twenty carefully drafted articles. The Bill is in three main parts: the first sets out the fundamental rights (such as personal freedom, freedom of religion, equality before the law) which the signatories would agree to make an integral part of their constitutional laws; the second part lists certain political, cultural, economic, and social rights, such as the right of government by consent, which by their nature require treatment separate from the elemental rights found in the first part of the Bill; the third part deals with the problem of enforcement. The remainder of the book is a detailed and comprehensive commentary both on the Bill as a whole and on its particular provisions.

The choice of the rights to be enumerated in the first two parts of the Bill is of course a highly controversial matter and, as the author himself acknowledges, to draft concrete proposals is to invite criticism. Many readers will doubtless wish for omissions or additions—the present reviewer, for example, has doubts about the decision to omit the right of property—but all will be grateful that here at last is a concrete proposal to

criticize; and every critic will find that his arguments have been anticipated and carefully examined before being rejected by the author.

The Bill is conceived not as a mere declaration of general principles for the guidance of states, but as a legal instrument creating legally enforceable rights and duties between states and their peoples and between states themselves. There necessarily arises, therefore, the problem of enforcement, which is perhaps the most difficult of all. To design an acceptable technique of enforcement that will be effective, while yet making all necessary allowances for differences between the constitutions of states and differences of political tradition, is a formidable task. All these difficulties are faced squarely. Enforcement by international judicial review is obviously impracticable, and it would clearly be necessary primarily to rely on municipal courts. The technical difficulty which at once presents itself is to find a satisfactory vehicle for the Bill in states like Great Britain which have no written constitution or 'higher law', and where statutes are not subject to judicial review. The author finds the solution in giving the municipal courts the power and duty, while enforcing a statute inconsistent with the Bill, to declare nevertheless that the statute is not in conformity with the Bill of Rights. Such a declaration by the municipal courts could be made the point of departure for international action organized through a High Commission established within the framework of the United Nations. The functions and constitution of the suggested commission are fully set out and discussed. This is a statesmanlike solution for a problem of unusual complexity and should be considered in the light of the provisions of the Charter of the United Nations. The manuscript of this book was finished in the autumn of 1943 and it was only possible to include a short note on the Dumbarton Oaks proposals. Since then the Charter has given both the General Assembly and the Economic and Social Council important tasks for the promotion of respect for the rights of man. Sir Alexander Cadogan has pleaded that more constructive tasks should be given to the United Nations, in the fulfilment of which the great Powers would stand a reasonable chance of remaining united.[1] By Article 13 of the Charter the Assembly is required to initiate studies for (*inter alia*) 'the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'. In drafting an international bill of the rights of man the Commission on Human Rights might do worse than to adopt Professor Lauterpacht's programme as a basis for further study and investigation.

R. Y. J.

Political Reconstruction. By KARL LOEWENSTEIN. The Macmillan Company, New York, 1946. 498 pp. ($4.)

It is perhaps necessary, because of its title, to draw the special attention of international lawyers to this important book of the Professor of Political Science and Jurisprudence at Amherst College. For this is not a mere *livre de circonstance* intended to supply a ready-made solution to a passing political difficulty. It is true that Professor Loewenstein is mainly concerned with the future development of Germany. But the general thesis which underlies the work and which the author, a recognized authority on comparative constitutional law, develops with learning and acumen is concerned with a weighty theme of international law and of the Charter of the United Nations, namely, with intervention. The book is an attack upon the orthodox doctrine of prohibition of intervention as the author conceives it. His

[1] *The Times* newspaper, 11 October 1946.

principal thesis—and there will be only very few who can deny it—is that, as a matter of rational development and of the inescapable requirements of international peace, the internal régime of a state cannot remain a matter which is exclusively within the domestic jurisdiction of the state. It is possible that the learned author has exaggerated the extent of the traditional prohibition of intervention in this matter. The prohibition of intervention is one of the manifestations of the rule of international law which prescribes respect for the sovereignty of states. But there is substance in the view that that prohibition is directed mainly against interference by a particular state as distinguished from collective intervention on behalf of international society. Only the former is a menace, which the law must discourage, to the sovereignty of states. This is so although the Charter of the United Nations is apparently wedded to a more comprehensive prohibition of intervention—a problem which the author discusses at length. It may be predicted that Professor Loewenstein's general thesis will remain of value and of interest long after the question of Germany has been settled in the Treaty of Peace. That thesis is that the right to government by consent must be elevated to the dignity of a fundamental human right fully guaranteed by international law. H. L.

Full Powers and Ratification, A Study in the Development of Treaty-making Procedure (Cambridge Studies in International and Comparative Law, No. II). By J. MERVYN JONES. Cambridge University Press, 1946. xv+182 pp. (12*s.* 6*d.*)

The peculiar opportunities for the historian of international law, notably in connexion with the influence of private law thereon, which the literature of the seventeenth and eighteenth centuries offers were pointed out by the learned author of *Private Law Analogies* twenty years ago. In that work Professor Lauterpacht made particular reference to the profusion in those centuries of monographs on prescription in international law and on treaties of guarantee and to their comparative scarcity since that time. The end of the eighteenth century brought the American and French revolutions and it is to those events that the change in international legal literature remarked on is to be attributed. For they put an end to the period when international law was no more than private law 'writ large' and when analogies from private law could in consequence be profitably employed upon a considerable scale for the development of the former system. But, if the great revolutions put an end to the Age of the Prince, they began that of the Parliament. And this was so no less in the international sphere than within the state. For the succession of democratic control to absolutism occurred in relation to foreign as much as to domestic policy in many states. The result was that, though the theory and the particular concepts of private law lost much of their former influence upon international law, the significance for international law of the actual content of municipal systems of law, and especially of municipal rules regarding the conduct of foreign policy, became very much greater.

These parallel processes induced by the growth of democratic government, the diminution of the influence upon international law of the theory of municipal law and the increase of the impact of its content, are strikingly illustrated in this scholarly study by Mr. Mervyn Jones. In the first part of it he examines the nature of Full Powers and shows how it underwent a complete transformation in consequence of the historical process alluded to: the municipal law doctrine of agency, its original basis, with its

corollary that there was a duty on the state to ratify anything done or signed *intra vires*, was utterly overthrown. The *promise* to ratify, originally frequently contained in Full Powers, was replaced by a clause reserving the *right* to ratify. Ratification and not signature came to constitute the acceptance of a treaty, and Full Powers to negotiate and sign ceased to be capable of a literal interpretation. In the second part of the book the author turns from what had thus become the shadow to the new substance: ratification. He demonstrates that in connexion with that institution the private law analogy was, during the seventeenth century and most of the eighteenth, valid at least to the extent that the duty to ratify was held not to apply where the envoy had exceeded his instructions, and that there was no other generally recognized ground for refusing ratification. Had there been a perfect acceptance of the doctrine of agency, no acknowledgement by the principal of the agent's act would of course have been demanded. But this point was never reached. Indeed, before it could have been, the constitutional state arose and ratification was erected into something infinitely more substantial than Lord Stowell's 'form, but an essential form'. By the law of many states the treaty-making power came to be vested partly in the legislature, and both theory and practice came to concede a greater or less degree of international legal effect to the resultant internal limitations upon the power of the nominal Head of State to proceed to ratification. Though the writers differ to some extent, the author of this study concludes—and doubtless rightly—from the actual conduct of states that 'international law will not stultify itself by insisting on the validity of treaties which are constitutionally invalid'. So, in a subtle sense, private law has come into its own again.

This, then, the waning of the influence of the municipal legal rule and the waxing of that of the municipal Rule of Law, is the notable development in the life of the modern law of nations which is to be found illustrated in this valuable book. Other considerable topics are, in addition to those mentioned, touched upon: they include the relation between the possession of Full Powers and diplomatic status, the difference between Full Powers and Commissions, the question of the retroactive effect of ratification, and that of the date of entry into force of treaties in general. The whole argument is documented with great care and considerable amplitude. The learned author, who is one of the most lawyer-like of international lawyers, has indisputably demonstrated with what effectiveness the rich resources of the history of the law of nations may be drawn upon. It is much to be hoped that he will go on to employ upon a somewhat larger canvas the same historical skills he has here displayed.

CLIVE PARRY

A Guide to the Practice of International Conferences. By VLADIMIR D. PASTUHOV. Washington, Carnegie Endowment for International Peace. London, George Allen & Unwin Ltd., 1945. ix+275 pp. (12*s.* 6*d.* net.)

This book, by a former member of the League Secretariat, is the fourth in the Carnegie Endowment's series of Studies in the Administration of International Law and Organization. It is not to be doubted that it constitutes a valuable contribution to the literature of international organization. It is a perfect mine of information on all matters connected with the convocation and conduct of international conferences. Thus we learn that the lost-property bureau is best placed in the entrance hall of the conference building and that the ventilation of rooms in which plenary sessions are held is a major sanitary problem because of the incessant smoking to which delegates are

prone. These are small points indeed, but they might very well be overlooked. However, Mr. Pastuhov does not entirely escape the extraordinarily truistic manner of writing which seems to characterize all works on diplomatic practice. One wonders if it be really necessary to commit to print the fact that the government of a state at war may 'even in wartime, take the initiative in convoking an international conference, whose objective is not to further the progress of the war but to make plans for dealing with problems arising after the war' (p. 16), or that 'Sometimes an effort is made to commemorate in a material form the meeting of an international conference. Special stamps are issued, and medals in remembrance of the gathering are coined' (p. 150). Surely there is an adequate experience of these things, dating even from the time of the Field of the Cloth of Gold, which needs no iteration. Yet the fact remains that the success or otherwise of a conference will depend in a large measure upon the care with which it is organized, and a guide of this sort is therefore to be welcomed. One feature of it merits special mention. That is its illustration by a good deal of primary matter contained in the Appendixes. These last make interesting reading and add much to the actual text.

C. P.

The Conflict of Laws. A Comparative Study. Volume i, Introduction: Family Law. By E. RABEL. Michigan Legal Studies. Ann Arbor, The University of Michigan Press; Chicago, Callaghan & Co., 1945. lvi+745 pp. ($12.50.)

The American Law Institute is to be congratulated on having enlisted the services of Dr. Rabel in writing a comparative survey of Conflict of Laws as a counterpart to the *Restatement on Conflicts of Laws*. It is generally recognized that the *Restatement* suffers somewhat from an excess of doctrinal considerations due, perhaps, to the preponderant influence of Professor Beale, who acted as draftsman. A critical study of the *Restatement* required a practical approach based, if possible, on a wide experience of legal systems other than the American system, and of international requirements. Dr. Rabel is admirably equipped for this task for he has taught law in Austria, Switzerland, and Germany, has occupied a high judicial position in all three countries, and served as a member of the Mixed Arbitral Tribunals. Finally, as the head of the Institute of Comparative Law in Berlin and as the editor of its periodical he has obtained an unrivalled knowledge of the various legal systems of the world.

The work is both comprehensive and practical. The private international law of all European and American states is considered, that of the United States, France, Italy, Germany, and Switzerland is examined in great detail. A special feature is the considerable mass of material drawn from South American legislation, literature, and practice. Yet the idea of presenting a comprehensive view has led, as the Preface admits, to a study which in its finished form can no longer claim to be primarily a critical analysis of American law and legislative proposals or of any one of the world's systems of conflict of laws. It is the final word of an eminent authority on law who has made comparative law, and comparative private international law in particular, one of the principal objects of his studies and who offers to the world his materials, his method, and his conclusions as to how a system of private international law should be constructed.

Unlike other works of a universalistic tendency, the book is not founded on *a priori*

principles. Dr. Rabel's approach is strictly empirical. General theories are disregarded, the deductive method is rejected, and each case is considered on its merits. Developing the views expressed by his pupil Neuner in *Canadian Bar Review*, 20 (1942), p. 479, Dr. Rabel holds that rules of private international law are exclusively determined by policy considerations (pp. 24, 89). Nevertheless, it is clear that, in a work of as ambitious a character as the present, doctrinal questions must figure conspicuously. The sections on the structure of rules of private international law (p. 43), on the approach from the substantive law (p. 45), on the so-called 'spatially limited' or 'particular' Conflict rules (pp. 4, n. 2, 95, 195, 652; see now Morris in *Law Quarterly Review*, 62 (1946), p. 170) are models of their kind. In the matter of *renvoi* the author follows Falconbridge in *Canadian Bar Review*, 19 (1941), p. 311, and approves the English solution, but *Re Ross*, [1930] 1 Ch. 377, 388 is quoted for a proposition which it does not support (p. 75). Classification is treated on the basis of the author's well-known article published in *Zeitschrift für ausländisches und internationales Privatrecht*, 5 (1931), but it is doubtful whether the views of Robertson (pp. 48, n. 10, 53, 54) are fully represented. The remark that 'it is not even true that the so-called connecting factors should always be defined by domestic law' (p. 60) is not further clarified in the subsequent discussion. Contrary to the prevailing opinion, Dr. Rabel would like to see 'Preliminary Questions' decided by the Conflict rules of the *forum* (p. 591). The section on inter-regional and inter-provincial rules of conflict contains an interesting discussion of *In re O'Keefe*, [1940] Ch. 124, which is considered from the English and the Italian points of view (pp. 130–3).

On balance, Dr. Rabel prefers the test of domicil to that of nationality for the determination of the personal law, but he would qualify the present test by adding a strictly determined requirement of residence for a period of one year (p. 160). This proposal may serve a useful purpose in the United States inasmuch as it tends to eliminate the element of fraud and is not meant to clarify the notion of domicil, which is reasonably easy to apply. In England, the same proposal would add a further condition to a vague test without giving the test itself any greater precision (see Cheshire in *Law Quarterly Review*, 61 (1945), p. 351, at p. 371). On the other hand, it may be useful to consider whether the present conception of domicil should not be superseded by a test which is solely related to a specified period of time. As regards questions of so-called 'special capacity' (such as capacity to commit a tort), Dr. Rabel would apply the law governing the principal question, while the personal law rather than the *lex rei sitae* is to govern presumption of death (p. 167). The author would therefore appear to agree with *Re Cohn*, [1945] Ch. 5, which rejected the argument (not mentioned by Dr. Rabel) that presumption of death is a matter of procedure. Similarly he would approve of *Re Schnapper*, [1928] Ch. 420, which is equally passed over (p. 174). As regards capacity to enter into commercial contracts, Dr. Rabel rejects the *lex loci contractus* which is applied in America and approves of Professor Cheshire's proposal to apply the proper law (p. 194). This test should also be applied in cases of breach of promise (p. 204). Formalities of marriage are to be governed by the *lex loci actus*, notwithstanding the tendency of some countries to treat the requirement of a religious ceremony as a matter of substance (p. 242). The essential validity of a marriage is to be determined by the personal law of the parties 'and should continue to govern for a certain period after the parties have changed their domicil' (p. 293). At first sight this proposal, which is influenced by the desire to prevent evasion of the law, may appear novel, but it is in keeping with the author's attitude towards a new concept of domicil. Moreover, the Nordic Convention of 6 February 1931

sanctioned the same course. Also, it is in accordance with suggestions made by Professor Gutteridge in this *Year Book*, 19 (1938), p. 38.

On the other hand, it is not certain whether the author employs the notion of domicil as understood in English law, seeing that he uses it frequently in a less technical sense equivalent to residence (see pp. 310, 400, 402). This doubt is borne out by the author's second proposal to the effect that after a change of domicil and the lapse of one year the *lex loci celebrationis* is to apply. The reader would expect that in this case the law of the new domicil applies until it has been abandoned and a further year has lapsed. Turning to the relevant English decisions, it may be doubted whether *Simonin* v. *Mallac* (1860), 2 Sw. & Tr. 67, bears out the proposition that English courts in the nineteenth century consciously applied the classification of a foreign statute which characterized *formes habilitantes* as relating to capacity and *actes respectueux* as relating to formalities (p. 267). *Brook* v. *Brook* (1861), 9 H.L.C. 193 (cited p. 267, n. 93), does not seem to refer to Gretna Green marriages; *De Wilton* v. *Montefiore*, [1900] 2 Ch. 481 is cited as an exception to the rule that in matters of capacity to marry English courts will recognize the jurisdiction of the foreign court of domicil over British subjects domiciled abroad, but it is difficult to see how this conclusion is reached. The chapter is continued with a masterly analysis of The Hague Convention on Marriage and concluded by a discussion of such varied questions as the capacity of a married woman to contract, transactions between husband and wife, and the duty of support between spouses.

The chapter on the legal effects of marriage on property raises the difficult problem whether the law governing these relations should be immutable. After a balanced survey the author tends to favour the doctrine of mutability, principally on the ground that this solution helps to avoid an undesirable positive or negative conflict between the effect of the law governing the matrimonial property régime and the law governing succession (p. 363). However, the author recognizes that an entirely satisfactory solution can only be reached if each system of municipal law provides for a sufficient co-ordination between its rules of succession in relation to the various systems of matrimonial property at home and abroad which may apply in individual cases (pp. 377, 382). *Re Martin*, [1900] P. 211 is subjected to heavy criticism, inasmuch as the effect of marriage upon previous wills is classified as relating to matrimonial property (p. 375).

The Private International Law of Divorce in England and the United States is ill-suited for a comparison with its continental counterpart, seeing that the latter distinguishes between jurisdiction in divorce and choice of law, while in the former these two problems are merged into one. Dr. Rabel favours the jurisdiction of the domicil (p. 445). He finds little to recommend in continental solutions as to which law is to govern divorce, and would apply the law of the domicil, provided a certain minimum period of one or two years has lapsed (pp. 459–61). Here again it may be doubted whether such a reform would be desirable in England, where the chances of a fraudulent change of domicil are very restricted even under the existing rule. In *Hussein* v. *Hussein*, [1938] 54 T.L.R. 632, which is quoted for the proposition that English courts will assume jurisdiction in an undefended petition for a divorce if the husband is not even resident within the jurisdiction (p. 397, n. 23), the petition was not for a divorce but for a decree of nullity (see also pp. 412, n. 94, 413). The statement that the police court is competent to decree divorces in Denmark, Norway, Czechoslovakia, and in England (p. 417, n. 109) is perhaps open to question, certainly as far as the last is concerned. The discussion of the *Arrêt Ferrari*, Sirey, 1922, 1, 137; Sirey, 1923, 1, 5; Sirey, 1929, 1, 92, leads to an interesting comparison between the Anglo-American and

the continental tendency to allow a married woman a separate domicil for the purpose of obtaining a divorce (p. 443). The principle that jurisdiction in matters of divorce should be exercised by the courts of the domicil, provided a minimum period of residence is established, is also put forward in connexion with the question in what circumstances foreign divorces should be recognized (p. 513). Dr. Rabel adds: 'The claims of the countries following the national principle must be relaxed . . . the irresponsible attitude with which the *lex fori* is applied in other countries ought to be renounced.'

Dr. Rabel raises the question (p. 464, n. 11) whether in virtue of Section 13 of the Matrimonial Causes Act, 1937, whereby a deserted wife may institute divorce proceedings at the last common domicil, a decree of divorce, pronounced by a foreign court, would be recognized in circumstances analogous to those in *Armitage* v. *A.G.*, [1906] P. 135. It would appear, however, that this question cannot arise since the Act operates only if the last matrimonial domicil was in England. *Williams* v. *North Carolina* (No. 1), 317 U.S. 287 is subjected to severe criticism (p. 461), which has proved justified by subsequent events.

The statement (p. 495, n. 149) that 'the defence based on fraud as authorized in *Bater* v. *Bater*, [1906] P. 209, is limited to fraud in affecting jurisdictional facts' is apt to give a false impression of the function of the plea of fraud in English Conflict of Laws, unless read in connexion with the observations on p. 505, n. 200. The section on partially effective divorces throws an interesting sidelight upon the practice of French and Swiss courts which grant divorces to Spaniards, Chileans, or Colombians, but will treat them as married for the purpose of a second marriage (p. 517). Putative marriages are treated in some detail, and the suggestion is made that the relations between the parties should be determined by the law that would have been applied had the marriage been valid (p. 549). Thus the status of children born of void marriages should be governed by the law governing legitimacy (p. 550). Accordingly, the decision in *Shaw* v. *Gould* (1868), L.R. 3 H.L. 55, is rejected, but the suggestion that it should be overruled (p. 569) is impracticable. Attention is drawn to the mutability of the law governing the relations between parents and children, but the subject is not pursued farther (p. 558). The chapters on the relations between parent and children, on illegitimate children, and on adoption raise a number of interesting questions which cannot be discussed here.

These observations and criticisms, which have singled out a number of problems of special interest to English readers, illustrate the wide range of Dr. Rabel's work. It provides the student, the practitioner, and the legislator with an invaluable source of materials, it exposes the defects of present rules of private international law, and offers suggestions on how to develop and improve them. The publication of the subsequent volumes of this monumental work must be awaited with eagerness.

K. LIPSTEIN

The International Secretariat. By EGON F. RANSHOFEN-WERTHEIMER. Washington, Carnegie Endowment for International Peace, 1945. xxvi+ 500 pp. (25*s.*)

The internal organization of international institutions involves peculiar problems which in the early days of the post-war era are of great practical significance. This book, written by a former official of the League of Nations, describes the machinery which

made the League work. It appears at a particularly opportune moment and deals in an attractive manner with a subject of which most students have only scanty knowledge.

The author is concerned with two interconnected matters. In the first place his account is descriptive or historical. He shows the elaborate and, it seems, highly efficient system of administration which over a period of twenty years was created at Geneva by continuous development, but almost without any precedent capable of affording guidance. The impression which the reader derives from the author's careful analysis is that, however much the League has failed as a political instrument, its achievements in the technical fields and, particularly, in matters of organization are considerable. A great part of the book is devoted to the International Official and his status (pp. 239–381); the discussion constitutes a valuable contribution to a subject which still stands in need of a great deal of research.

Secondly, the author is concerned with the future. He sets out to discover those elements of the League's experience in international organization which have a bearing upon coming experiments.

'If the League experience cannot provide ready-made solutions it can offer an account of past mistakes and lengthy detours which after much trial and error have led to satisfactory arrangements; it can offer the record and the particulars of these arrangements themselves. Thus it can make an important contribution to the international administration of the future. The experience of the recent past would seem particularly valuable in matters regarding the best type of leadership, the proper relationship between the head of the international agency and his principal collaborators, the question of the principles that underlie the establishment of a multinational staff, and the methods of recruiting it and of securing a maximum of efficient cooperation.' (p. 427.)

It is undoubtedly the second aspect of this book that provides so great an enrichment of the available material, and it can only be hoped that those responsible for the formation of the international bodies which are being brought into existence will learn the lessons so convincingly and succinctly taught in this book. It is too early to say whether the author will be allowed to enjoy this reward. The apparent lack of any method in the selection of staffs and the advertising of vacancies enjoins an attitude of caution rather than of enthusiasm.

F. A. MANN

Human Rights and Fundamental Freedoms in the Charter of the United Nations. A Commentary. By JACOB ROBINSON. Institute of Jewish Affairs, New York, 1946. 166 pp.

This is an important contribution to one of the central and most significant provisions of the Charter. Dr. Robinson, who is an acknowledged authority on questions relating to minorities, has provided the student and the statesman with a scholarly analysis of the clauses of the Charter relating to fundamental rights and freedoms. He has made full use—possibly too full a use—of the records of the proceedings of the San Francisco Conference. For his conclusions, largely influenced by a useful study of the *travaux préparatoires* of the Conference, seem to underrate in one vital respect the potentialities of the Charter. His opinion, as stated in the Conclusions, is that, except for the 'qualifying clause of Article 2, paragraph 7, which implicitly authorises the United Nations and individual members to call attention of the organs of the U.N.O. to such violations of human rights as may represent a threat to peace requiring enforcement action (Chapter VII) . . . in all other cases of violation the United

Nations has no jurisdiction' (p. 105). It is possible that the learned author somewhat confuses the notions of 'intervention' and 'jurisdiction'. Undoubtedly the general denial of the right of intervention in exclusively domestic matters extends also to the question of the observance of fundamental human rights and freedoms. But 'intervention' is a technical term. It means authoritative interference intended to regulate the conduct of a state as a matter of legal obligation. It does not include discussion, study, advice, and recommendation. All these are potent instruments of the jurisdiction of the United Nations with regard to human rights and freedoms. The Resolution of the First General Assembly in the matter of the treatment of the Indian population in South Africa is an indication of the limitations of the clause of domestic jurisdiction.

Dr. Robinson seems to agree with the view that the extent and the degree of the implementation of the provisions of the Charter in the matter of human rights will depend upon the political and moral strength of the United Nations as a whole. (We may add that these will, in turn, depend on the way in which the United Nations will give reality to that crucial aspect of its purpose.) This being so, it may be a mistake to crystallize too rigidly the meaning of the Charter in this and in other respects by reference to *travaux préparatoires* and otherwise. Many will regret, for instance, that the Commission on Human Rights found it necessary to lay down, early in 1947, that it has no power to take action with regard to the multitude of individual complaints received in its office. It would have been sufficient to lay down—assuming that there was an impelling necessity to fix rigid rules at that juncture—that at present the Commission had no power to take any action amounting to intervention. In Dr. Robinson's thoughtful monograph there will be found much support not only for the necessity of caution but also for faith, fortified by sound legal analysis, in the dynamic character of the Charter and its vast potentialities.

H. LAUTERPACHT

Le Préambule de la Charte base idéologique de l'O.N.U. By ANDRÉ SALOMON. Éditions des Trois Collines, Geneva–Paris, 1946. 229 pp.

The preamble to the Charter of the United Nations is in itself an historic document of some significance. Juridically it is an innovation inasmuch as the Conference at San Francisco apparently entertained no doubt that, in the words of the official American commentary, 'the statements expressed in the Preamble constitute valid evidence on the basis of which the Charter may thereafter be interpreted'. M. Salomon, in a shrewd and able analysis, treats it as a legal document throughout. He has made full use of the now available complete record of the proceedings of the Conference and of its Committees. Possibly the value of M. Salomon's monograph would be enhanced by a fuller use of the various official commentaries on the Charter, in particular that of the United States. The author subjects to a searching examination every sentence and practically every word of the preamble beginning with the phrase 'the peoples of the United Nations'—a form of words which gave rise to considerable discussion at the Conference. Thus the Dutch delegate raised objections on the ground that the phrasing might give rise to constitutional difficulties in Holland, where the Queen is the sole repository of the treaty-making power—an objection reminiscent of a reservation of a similar character made by Japan with respect to the phrasing of the Preamble to the General Treaty for the Renunciation of War.

The monograph is a competent piece of work by a jurist of promise. It will be found highly useful by the commentators of the Charter.

H. L.

Vergleichende Rechtslehre. By ADOLF F. SCHNITZER. Verlag für Recht und Gesellschaft A. G., Basle, 1945. xii+497 pp.

This is an important work by an eminent jurist who will be known to many readers of this *Year Book* as the author of the leading Swiss text-book on private international law. The first or theoretical part of the book deals with the nature of the comparative method of legal research and with the purposes for which it can be utilized. The second or historical part contains a general description of the various legal systems which have been developed in the course of the rise of mankind to a state of civilization. The third or institutional part is devoted to a series of comparative surveys of some of the main institutions to be found in all systems, such, for instance, as rights of property and inheritance.

The first is perhaps the most valuable part of the book and contains a very definite contribution to the methodology of the subject. In it the author discusses the relation of comparative law to other departments of learning and explains the technique which can be employed and the nature of the materials which are available. Here Dr. Schnitzer is at his best and this section of his work is one which marks a new stage in the processes of clearing up the meaning of the phrase 'comparative law' and the assessment of its value as an instrument of study and research. English readers who are not familiar with continental modes of thought and terminology may find this part of the book to be somewhat hard going, but they should not allow this to deter them from any appreciation of the merits of a very searching and exhaustive discussion of the fundamental problems which must be faced by anyone who engages in comparative research.

The second part of the book takes the form of an elaborate classification of all the world systems of law based on the course of their historical development. Dr. Schnitzer has handled his materials with great skill and these chapters reveal an astounding depth and range of learning. Classifications of this nature are, however, apt to break down in practice owing to the existence of cross-divisions and one may, perhaps, be permitted to express some doubt whether the effort expended on them by the learned author has yielded an equivalent return.

The third or institutional part of the book represents an attempt to illustrate the value of comparative research by applying the method to certain selected topics, namely, the sources of law, the law of persons and things, family law, and the law of obligations. Varying opinions are held as to the value of panoramic surveys such as this, but Dr. Schnitzer's outline is useful as a signpost to the kind of problems which a comparative lawyer is likely to encounter when he investigates the rules of legal systems with which he is unfamiliar. It is, of course, difficult to make an exhaustive test of the contents of an encyclopaedic survey of this nature, but it would seem that there is little to find fault with if the special purpose of the survey is kept in view. The summary of the English legal system is satisfactory in general, but there is some confusion as regards the nomenclature of the component elements of our judicial hierarchy. The question of the application of the doctrine of consideration to negotiable instruments is dealt with in insufficient detail. These are, however, matters of minor importance which can easily be corrected in subsequent editions of the book. The foregoing observations are not proffered in any hypercritical spirit. Comparative law is still in a transitory stage and there is abundant scope for experiment both as regards the employment of the comparative method and the purposes for which it can be utilized. Dr. Schnitzer has given us a treatise of outstanding merit which is destined to take a high place among the principal works dealing with the subject. H. C. G.

Air Law. By C. N. SHAWCROSS and K. M. BEAUMONT, assisted by P. R. E. BROWNE and A. R. PATERSON. London, Butterworth, 1945. liii+816 pp. (60*s*.)

This work is nothing if not comprehensive. The aim of the authors has been to present a study of all rules of international law, conflict of laws, English statute law, and common law relating to any aspect of civil aviation. Roughly half of the book (pp. 365–749) consists of appendixes which set out in full practically all the relevant conventions, statutes, orders, and regulations. Moreover, the main text is itself richly provided with references to a wide range of authorities. In thus presenting the raw material of air law in a complete yet convenient form, the book will be quite invaluable. Its scope is sufficiently indicated by a list of the main topics dealt with, which include the nature and sources of the law, the right to fly, classification and definition of aircraft, carriage by air, surface damage and collisions, insurance, commercial dealings with aircraft, customs, administration, master and servant, airports and aerodromes, jurisdiction, and many others.

In one respect the learned authors have perhaps been a little over-ambitious: they have attempted to write both for the specialist and for the layman. Consequently, a considerable portion of the text is occupied by attempts to provide a sort of 'child's guide' to the law. The reader in search of material on some difficult problem of air law may be exasperated to find that he is being instructed on the meaning of 'tort', 'crime', 'contract', 'statute', 'equity', and so on. It is submitted that this excessive pandering to the complete tyro is a mistake in a work of this kind. It is true that the authors have in mind the layman administrator or executive who may be seeking guidance on technical points of air law; but a reader who has not some rough idea of how contract differs from tort has no business to be dabbling in a specialized branch of the law and it were far better not to encourage him to do so.

A reduction of this 'everyman's lawyer' element would have permitted fuller treatment of some of the more difficult problems of international air law, many of which receive somewhat sparse discussion. For example, the problem of the status of non-national aircraft is mentioned in connexion with the League of Nations (p. 57), but little use is made of the learned studies on this subject made both by the League Committee on Communications and Transit and C.I.N.A. We are again given little guidance on the important problem of international ownership and operation of aircraft. The central question of how to secure and regulate the granting of commercial privileges is nowhere examined with the attention it deserves. These gaps are all to be found in that part of the study which concerns public international law. International lawyers may perhaps tend to be unduly sensitive, but even making due allowance for that, it is difficult to avoid the conclusion that these gaps are in some measure due to an impatience with international law and all its works which the authors take small pains to conceal. Such impatience is readily understandable in the practitioner of a mature and majestic system like the common law; yet it is unfortunate that it should have betrayed the learned authors into making pronouncements on public international law which occasionally border on the naïve. For example, it really need occasion no surprise that the Paris Convention does not contain a general clause to the effect that parties shall make consequential alterations in their municipal laws, nor is it necessary to make heavy weather of the 'submission' that there is an 'implied obligation' (p. 60) to do so. It seems also to be assumed almost as a matter of course that an international convention must be badly drafted and that 'English lawyers'

(p. 58) cannot be expected to make sense of them: an assumption which fortunately is ill-founded. A major problem in the administration of any convention is to secure efficient machinery for necessary amendment: it is therefore startling to find that the amendments to the Paris Convention, achieved with so much skill and diplomacy by C.I.N.A., are regarded as a defect (p. 64), that Convention being compared unfavourably with the Havana Convention which 'has *suffered* no alterations' (italics supplied).

However, it must be emphasized that these criticisms are in the main levelled only at those parts of the book which deal with public international law; this is by no means the most important part of it, and those parts which deal with conflict of laws, and with English law generally, provide a thorough and most useful summary. For here the authors are on their home ground and the treatment is much more satisfactory. An immense amount of labour must have gone into the compilation of the very scattered material, and all who have to deal in matters of air law will feel grateful to the authors for having undertaken it.

The volume was completed before the Chicago Conference; a pocket is provided in the binding for a promised supplement on the Chicago Convention.

R. Y. J.

Il Riconoscimento nel Diritto Internazionale. By GIANCARLO VENTURINI. Studi di Diritto Internazionale diretti da Roberto Ago e Giorgio Balladore Pallieri, vol. xi. Milano, Dott. A. Giuffrè, 1946. 140 pp. (Lire 160.)

Italian legal literature is rich in studies on recognition, but Dr. Venturini's book is able to hold its own, for it treats the subject clearly and systematically, employs sound legal argument, and draws extensively upon literature and diplomatic sources, including Anglo-American practice. The author rejects Anzilotti's contractual view and holds that recognition is governed by law. In the absence of a competent international organ a recognizing state decides quasi-judicially whether the recognized state fulfils the requirements of statehood. It follows that states are under a duty to recognize if the requisite conditions are fulfilled and that tacit recognition is restricted to cases where the intention to recognize appears clearly. For the same reason the author rejects the view that recognition can ever be revoked and prefers to explain the rule that *de facto* recognition can be withdrawn by reference to a change of circumstances. Similarly, he rejects conditional recognition and recognition relating to future events or to events the effects of which have spent themselves. What appears to be conditional recognition is usually a contractual stipulation in the nature of a treaty. The declaration of recognition is examined in the light of the general principles of law concerning mistake, fraud, duress, illegality, and impossibility. The subjects of recognition are treated in some detail, including the attributes which must be present if recognition is to be granted. Finally the Anglo-American practice concerning the effect of recognition of governments upon the international validity of acts done by government before recognition was granted is set out in outline and approved.

Dr. Venturini has written a lucid and scholarly book which should serve as an excellent introduction to one of the most difficult problems of international law.

K. LIPSTEIN

The Effect of War on Contracts. By GEORGE J. WEBBER, LL.D., Barrister-at-Law. Second edition, 1946, with a Foreword by the Rt. Hon. Sir DAVID MAXWELL FYFE, K.C., M.P. London, The Solicitors' Law Stationery Society Ltd. lxviii+802 pp. (£3. 17*s.* 6*d.*)

This book contains a great deal of material and deals with many and varied subjects, all of which relate to the legal effect of war on contracts, though it is not always necessarily war that produces the legal effects described.

In the first part the author begins with a discussion of war and its duration and termination. In the next chapter he treats the Emergency Powers (Defence) Acts, 1939–40, and the regulations made thereunder as well as some of the many problems to which they have given rise. There follow chapters on Enemy Character, Procedural Capacity of Alien Enemies, and Contracts with Enemies in general. The second part is devoted to an explanation of the fate of nine types of commercial contracts during war-time. Although to a large extent the emphasis continues to be on trading with the enemy, many other topics are included; thus the chapter on Sale of Goods deals with the Price Control provisions, the effect of requisitioning (which, he submits, cannot extend to trading ships belonging to a foreign state), and the requirement of an export or import licence; and the chapter on Insurance of Property contains a full discussion of the War Risks Insurance Act, 1939, and of the vexed problem of defining perils of the sea and war risks. The third and fourth parts (comprising 312 pages) really constitute a monograph on frustration; the discussion of the *Constantine* case and the *Fibrosa* case alone accounts for 14 and 23 pages respectively. Finally, there are sixteen Appendixes which set out some miscellaneous matters such as an abstract of the United Nations Charter, certain statutes, some decisions too recent to be mentioned in the main part, the International Law Association's suggestions for rules on the effect of war on contracts, and so forth.

It will be seen, therefore, that this is a very rich and useful book which will provide the practitioner with a great many of the tools he requires in his daily work. The unusually copious citations from judgments will probably be welcomed by many who have no ready access to the reports, and the careful references to a substantial portion of the emergency legislation (surprisingly enough, the Defence (Finance) Regulations do not seem to be mentioned) will be found very helpful by those who require some guidance before they embark upon a search in 'Butterworth'. One of the most attractive features of the book is that it gives an important place not only to legal writings, but also to material from the Dominions and the United States. There is every justification for the tribute which in the Foreword Sir David Maxwell Fyfe pays 'to the industry, learning and enthusiasm for the law' of the author.

Whether the author has put the ample space at his disposal to the best possible use is not so certain. He does not frequently explore the unknown. He is inclined to compile rather than to analyse, to enumerate rather than to systematize (see, e.g., Chapter 16 on the Doctrine of Frustration). It is the experienced practitioner who will derive the greatest benefit from this undoubtedly valuable book.

F. A. MANN

La Costituzione dell' Ordinamento Internazionale. By PIERO ZICCARDI. Studi di Diritto Internazionale diretti da Roberto Ago e Giorgio Balladore Pallieri, vol. ix. Milano, Dott. A. Giuffrè, 1943. 457 pp. (Lire 100.)

The problem of the basis and the sources of international law has exercised, at one time or another, the mind of every student of international law, and no international lawyer has been able to avoid a declaration of faith. Dr. Ziccardi is a follower of that modern school of Italian scholars who, under the guidance of Santi Romano and Balladore Pallieri, have left the path of strict positivism and have abandoned the leadership of Anzilotti. The basic tenets of this school may be summed up thus: The present international community is the community of Christian peoples which developed in the twelfth century. The sources of law governing this community are fundamental constitutional principles (e.g. equality), custom, and treaties. Within this community each state has certain fundamental powers, i.e. the *jus contrahendi*, the power to create legal relationships through unilateral transactions and the power of self-defence. Equipped with a wide knowledge of the literature of international and private law Dr. Ziccardi has attempted a critical review of these doctrines.

The author adopts the concept of a basic norm from the Viennese school, but he has sought to give it an objective content. The law-making power of treaties is denied, save as regards the parties, and even then only in virtue of the rule *pacta sunt servanda.* Customary law is accorded first place as a source of law. But the author rejects as inaccurate the current views on the nature of customary law and denies that long usage and *opinio iuris* are necessary requirements, while he concedes that they afford useful evidence as to the existence of customary law. General principles in the sense of Article 38 of the Statute of the International Court of Justice are not accepted as a valid source. They are merely applicable on the ground that they represent the method of interpretation by means of analogy which is practised in all courts (see Salvioli in *Revista di diritto internazionale* (1924), p. 278). Like all followers of this school the author is a dualist, and his observations on the application of international law by municipal courts as well as on subjects of international law, including the position of the individual in international law, are particularly persuasive. The discussion of recognition is less convincing.

The book shows that the author possesses a sound legal training and a very wide range of knowledge. In substance it provides a critical restatement of some well-known problems and some shrewd contributions on individual questions. It is to be hoped that with the dawn of a new era in Italy, Italian scholars will revert to that clarity and conciseness of style which gave a distinctive mark to the writings of the great lawyers of the pre-fascist period.

K. LIPSTEIN

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