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By ARNOLD D. McNAIR

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WAR is waged in order to bring about some change in the existing order of things, a change which one or both of the belligerents is unwilling to entrust to the machinery of international law, so far as such machinery exists. Indeed, as mankind in general regards war as the greatest of evils, and nations are constantly devising treaties and pacts and conventions by which they seek to minimize the risk of this evil, the outbreak of a war generally has to be preceded by the tearing up of numerous 'scraps of paper', and this process is accompanied by pleas that the treaties were 'unjust', or have become obsolete, though the truth may be merely that they have exhausted someone's patience.

The most fundamental condition of every attempt of men to live together is a reasonable amount of good faith. Treaties therefore must be kept, otherwise the whole system of international society breaks down. On the other hand, circumstances change, and there must be some provision for revising treaties without recourse to war.

In this Pamphlet the Vice-Chancellor of Liverpool University, one of the greatest living authorities on International Law and formerly Whewell Professor of International Law in the University of Cambridge, discusses the dilemma, contrasts the weakness of international law compared with national systems of law in its machinery for 'peaceful change', and points the way to future improvement.

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WAR AND TREATIES

What is a Treaty?

ANY attempt to consider improvements in the law and practice of treaties while Germany is under her present governors seems at first sight a waste of time. Treaties impose no check upon a country like Germany in her present mood, and it is only steadily increasing force that can restrain her. But we must be careful not to 'mistake a distressing phenomenon for an incurable disease'. If we thought that the leaders of Germany were going to dominate the world or infect it with their attitude towards treaties, we should at once scrap the whole system of the making and observance of treaties which international society has gradually developed through many centuries, and settle down to a world system resting solely on force and in no part on good faith. That would be a counsel of despair. We should ignore all the lessons of history if we did not realize that, when this great struggle is over, there will be an intense and widespread desire to take a big step forward in the organization of international society. This desire will not be confined to ourselves and our allies and such few neutrals as may remain. To capitalize that desire and to make the most of that opportunity when it comes, it is essential to understand the existing international institutions so that we can profit by their past and eliminate their defects.

It is therefore fitting that we should examine the treaty system which is one of the main factors in securing that measure of stable relations and peaceful intercourse that we have enjoyed in the past. This is particularly necessary if we hold, as I do, that defects in the existing machinery of the making and revision of

treaties must bear some responsibility for Germany's getting into her present condition and Samson-like involving a large part of the world in her own self-destruction.

What then is a Treaty, in which term we must include Conventions, Declarations, Protocols, Exchanges of Notes, Pacts, &c.? In its simplest form it is an agreement between two or more States. But, although every treaty involves the agreement of two or more States, to define it as an agreement between States is an over-simplification. The fact is that, whereas in the internal life of States and in the private affairs of their subjects a large variety of legal instruments is available and a choice is made of the most suitable to the purpose in hand, the treaty is the main instrument with which the society of States is equipped for the purpose of carrying out its multifarious transactions, and the only instrument when it is desired that those transactions should be embodied in an agreement. In England, for instance, we make use of many different legal instruments in the internal life of the State. We use the *contract* for carrying out most of our business affairs involving the action of more than one person; the *conveyance* or *assignment* of immovable or movable property, which may be made for a money consideration or may take the form of a gift or an exchange; the gratuitous *promise* clothed in a particular form; the *charter* or *private Act of Parliament* creating a corporation; the *public Act of Parliament* which may be declaratory of existing law, or create new law, or codify existing law with comparatively unimportant changes, or may enact a part of our constitution; and one of our greatest constitutional documents, Magna Carta, though ultimately it became an Act of Parliament, in form closely resembles a treaty.

The Various Functions of Treaties

The result of the poverty of international legal institutions is that the treaty has to do duty for a great variety of purposes, and it is necessary to enumerate them in order to assess the bearing which war has upon them, and the degree to which the attempt to endow treaties with perpetuity may contribute to the outbreak of war. Thus, if international society wishes to enact a fundamental, organic, constitutional law, such as the Covenant of the League of Nations was intended to be and in large measure is in fact, it employs the treaty. If two States wish to reaffirm their adherence to the principle of the three-mile limit of territorial waters, as in the first article of the Anglo-American Liquor Convention of 1924, they use a treaty. If Denmark wishes to sell to the United States of America her West Indian possessions, as she did in 1916, or if Great Britain wishes to cede Heligoland to Germany in return for a recognition of certain British rights in Africa, as happened in 1890, they do so by treaty. If the British Empire wishes to lease naval bases to the United States of America, that will be done by treaty. Again, if the great European Powers are engaged upon one of their periodic resettlements and determine upon certain permanent dispositions to which they wish to give the force of 'the public law of Europe', they must do it by treaty. If it is desired to create an international organization such as the International Union for the Protection of Works of Art and Literature, which resembles the corporation of private law, it is done by treaty. And if two or more States wish to form an alliance such as the Anglo-French alliance, or to put on record their mutual intentions of amity and non-aggression, as in the German-Polish Treaty of 26 January 1934, or to

join in guaranteeing the security and inviolability of another State such as the permanent neutralization and inviolability of Switzerland, they must employ a treaty. If a large group of States wish to lay down rules of law which will govern their future conduct in peace, such as the conventions regulating air navigation or the use of navigable waterways, or in war such as the Declaration of Paris on sea warfare or the Hague Conventions, they do so by a multipartite Treaty. Many such treaties receive almost universal assent and, being the nearest approach, for a society lacking a legislature, to legislation, are sometimes called 'law-making treaties'. This is, however, a dangerous metaphor because treaties, unlike statutes, only bind those who assent to them.

This enumeration of the various functions performed by the treaty is enough to show that it is impossible to state with accuracy rules of law and practice applicable to treaties of all kinds. But we are here concerned mainly with the more political kinds of treaty, using the word in the widest sense—treaties relating to territorial matters, alliance, mutual support, guarantees of inviolability, non-aggression, and so on. Within these limits, let us now consider (1) the recent shock to the Sanctity of Treaties; (2) the Durability and the Revision of Treaties; (3) International Supervision of Treaty-making.

THE RECENT SHOCK TO THE SANCTITY OF TREATIES

Uppermost in the minds of many millions at the moment is the feeling that the very basis of our society —mutual good faith—has received a shattering blow. The most fundamental condition of every attempt of men to live together, that is, to live as social beings, as members of a society, be it the human family or the village or town or State, or, the latest form of society attempted, the Family of Nations, is a reasonable

amount of good faith—as much as is consistent with the stage at which human nature at any given moment has arrived. That the standard of conduct expected by society of the ordinary man is higher than it formerly was cannot be denied. The Old Testament and the books of Homer bear witness. At those moments in the history of the world when our reliance upon the common standard of mutual good faith receives a rude shock, we feel as if the bottom had dropped out of society—as if we must begin all over again to build up laboriously that modicum of good faith and straight dealing without which a social life is impossible. And as we are compelled to lead a social life, whether we like it or not, and by our discoveries and inventions are continually extending its bounds and intensifying our dependence upon it, we feel at such moments of shock as if the very permanence of our existence was at stake.

We stand at one of these moments in the history of man to-day.

'Pacta sunt servanda'

From the earliest times society has insisted upon the necessity of one man being able to rely upon the word of another, and the covenant-breaker has always been singled out for peculiar opprobrium. The early history of almost every people abounds with attempts to fortify the binding obligation of private contracts and public treaties by resort to extraneous securities. God is called to witness the plighted word. Oaths are exchanged and the Divine wrath is invoked upon the perjurer. Montague Bernard tells us that in the earliest extant treaty of medieval Europe, in the sixth century, the parties swore 'by the name of God Almighty, by the Indivisible Trinity, by all Divine things, and by the dreadful day of the last judgment',

and that down to the Treaty of Paris of 1856 the ancient and pious formula in treaties 'In the name of Almighty God' remains 'a last relic of the natural sentiment that a great public act, such as a Treaty of Peace, is suitably clothed with the solemnities of religion'. To the Divine sanction have been added from early times material sanctions in the form of penalties or of hostages—men, lands, and cities—to secure the faithful performance of a treaty. In fact, there is no principle of law which has received such universal homage and is so widely spread as the rule *pacta sunt servanda*—agreements must be kept.

The classical affirmation of the binding force of treaties is to be found in the Protocol which preceded the Treaty of London of 13 March 1871. Russia had seized the opportunity of the preoccupation of France, Prussia, and Great Britain with the Franco-Prussian War to repudiate the Black Sea clauses of the Treaty of Paris which had been imposed upon her at the end of the Crimean War in 1856. She alleged certain breaches of those clauses by other parties to the Treaty as a ground of repudiation, but in substance her case was that she was weak in 1856 and was now relatively stronger. She presented the other parties with a *fait accompli* and 'got away with it'. The Treaty of 1856 was modified by the Treaty of London of 1871, but in a Protocol which preceded the modification Great Britain, France, Italy, Prussia, Russia, and Turkey put on record the following declaration which has constantly been cited since as an affirmation of the binding force of treaties:

> 'That the Powers recognize it as an essential principle of the law of nations that no Power can liberate itself from the engagements of a treaty nor modify the stipulations thereof, unless with the consent of the contracting parties by means of an amicable understanding.'

No State denies the binding force of treaties, and every time a breach takes place the violator pays homage to the rule by endeavouring to justify his action upon some legal ground, such as a prior breach by the other party.

Hitler's Way With Treaties

Hitler's idea of a treaty is illustrated by a passage from Rauschning's *Germany's Revolution of Destruction*, quoted and endorsed from painful experience by Sir Nevile Henderson in his *Failure of a Mission* (p. 79). Hitler 'was ready to sign anything. He was ready to guarantee any frontier and to conclude a non-aggression pact with anyone.' According to Hitler

> 'it was a simpleton's idea that expedients of this sort were not to be made use of, because the day might come when some formal agreement had to be broken. Every pact sworn to was broken or became out of date sooner or later. Anyone who was so fussy that he had to consult his own conscience about whether he could keep a pact, whatever the pact and whatever the situation, was a fool. He could conclude any pact and yet be ready to break it the next day in cold blood if that was in the interests of the future Germany.'

It would be tedious to enumerate all the instances of this 'sickening technique'. A few of the more flagrant will suffice:

(*a*) *The Naval Agreement.* On 18 June 1935 Great Britain and Germany entered into a Naval Agreement which was described as a 'permanent and definite agreement' fixing the ratio of the tonnage of certain classes of the vessels in their respective fleets. This agreement was denounced by Germany on 28 April 1939.

(*b*) *Austria.* On 11 July 1936 Austria and Germany entered into an Agreement which contained the following clause:

> 'Being convinced that they are making a valuable contribution

towards the whole European development in the direction of maintaining peace, and in the belief that they are thereby best serving the manifold mutual interests of both German States, the Governments of the Federal State of Austria and of Germany have resolved to return to relations of a normal and friendly character. In this connexion it is declared:

(1) The German Government recognizes the full sovereignty of the Federal State of Austria in the spirit of the pronouncements of the German Führer and Chancellor of May 21, 1935.

(2) Each of the two Governments regards the inner political order (including the question of Austrian national socialism) obtaining in the other country as an internal concern of that country, upon which it will exercise neither direct nor indirect influence.

(3) The Austrian Federal Government will constantly follow in its policy in general, and in particular towards Germany, a line in conformity with leading principles corresponding to the fact that Austria regards herself as a German State.'

This did not prevent Germany from invading and occupying Austria in March 1938.

(*c*) *Poland.* On 26 January 1934 Germany and Poland signed a Declaration containing the following clause:

'Should any disputes arise between them and agreement thereon not be reached by direct negotiation, they will, in each particular case, on the basis of mutual agreement, seek a solution by other peaceful means, without prejudice to the possibility of applying, if necessary, those methods of procedure in which provision is made for such cases in other agreements in force between them. In no circumstances, however, will they proceed to the application of force for the purpose of reaching a decision in such disputes.

'The guarantee of peace created by these principles will facilitate the great task of both Governments of finding a solution of problems of political, economic and social kinds,

based on a just and fair adjustment of the interests of both parties.'

On 28 April 1939 Germany, wishing to clear the decks for action against Poland, denounced this Pact, using as an excuse the British Guarantee of Poland given on 31 March 1939.

(*d*) *Denmark.* On 31 May 1939 Germany and Denmark signed a Pact of Non-Aggression. Before invading Denmark in April 1940 Germany did not even take the trouble to denounce the Pact.

(*e*) *The Hague Conventions.* It would take a long time to enumerate the breaches of the Hague Conventions regulating the conduct of war and the rights and duties of neutral States to which Germany is a party and which she has broken since the outbreak of war. Perhaps the most flagrant violations of this type of treaty by Germany are the constant sinking of merchant ships, allied and neutral, by submarines, contrary to the London Naval Treaty of 1930, to which she is a party. This treaty expressly obliged submarines to conform to the established rules of international law to which surface vessels are subject, in particular the rule that 'except in case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety'. The sinking of the *Athenia* in the first week of the war inaugurated a long calendar of such crimes which will continue until the last German submarine is destroyed.

The Interpretation of Treaties

Before leaving the Sanctity of Treaties a few words must be said upon their interpretation. Disputes as to

the interpretation of a treaty stand to international litigation in much the same relation as motoring accidents do to litigation in the English courts of common law. About four-fifths of the Judgments and Opinions given by the Permanent Court of International Justice since it opened its doors in 1922 have been concerned with the interpretation of treaties, and it is now becoming increasingly common—particularly in non-political treaties—to insert a clause which obliges the parties to refer any dispute as to interpretation to the Permanent Court. It is hardly possible to over-emphasize the importance of generalizing this practice. A treaty can be violated, not only by a clear breach or an unjustified denunciation, but also by the subtler means of a claim by a party to a treaty to be entitled to give it his own interpretation. So long as States are not compelled to submit to international tribunals disputes concerning interpretation, the binding force of treaties will always be exposed to strain and danger. The occasions on which the judgment or award of an international tribunal has been defied by one of the parties are extremely rare; the difficulty is to get Governments to agree to refer disputes to international tribunals; once they have got to that point, it is most rare for them not to carry out the decision.

THE DURABILITY AND THE REVISION OF TREATIES

The Sanctity of Treaties is a fundamental principle of international relations (whatever the ruler of Germany may say), but it would be disingenuous to pretend that it admits of no qualifications. *Pacta sunt servanda* is a maxim of Jurisprudence rather than a precise statement of a rule of law, whether public or private, and we must examine its limits. For ebb and flow are inevitable in human affairs, and nowhere more than in international human affairs. As a Russian diplomat,

Baron Brunnow, once said (albeit in connexion with a transaction that reflected no credit upon his country—the repudiation by Russia in 1870 of the Black Sea clauses of the Treaty of Paris of 1856): 'In the order of human affairs it is in the power of no one to proscribe or deny the action of time.'

John Stuart Mill, writing in the *Fortnightly Review* in 1870 with regard to the same incident, said:

> 'What means, then, are there of reconciling, in the greatest practicable degree, the inviolability of treaties and the sanctity of national faith, with the undoubted fact that treaties are not always fit to be kept, while yet those who have imposed them upon others weaker than themselves are not likely, if they retain confidence in their own strength, to grant a release from them?'

But we must bear in mind that what is called the revision of treaties is only a part of the general problem of 'peaceful change' in international affairs. During the past twenty years the expression 'treaty revision' has become a political catchword and has thus been a cloak for a good deal of confused thinking.

Treaties are classified as 'executed treaties' and 'executory treaties', or, more precisely, since a great many treaties consist of stipulations of both these types, a treaty may contain both executed and executory provisions. For instance, a treaty which merely cedes territory is said, once the territory has been handed over, to be 'executed'. It has taken effect and become a mere link in the title of the acquiring State just like a conveyance of land. But treaty provisions such as those of the Treaty of Versailles of 1919 whereby Germany accepted certain limitations upon her naval, military, and air forces, or those of the Anglo-German Naval Agreement of 1935, are said to be 'executory'; they create outstanding obligations which continue in force. The term 'treaty revision'

is appropriate to 'executory treaties' because there is something to revise; it is inappropriate to 'executed treaties', because the treaty has already taken effect, and nothing remains of it to revise. You may think that the new territorial dispositions created by that executed treaty ought to be changed again, but you ought not to call that a question of treaty revision. Whether the situation which someone wants to change has arisen from a treaty, as in the case of the Free City of Danzig, or without a treaty, as in the case of the occupation by Rumania of Bessarabia, the problem is really the same. Thus, without ignoring the fact that frequently both peace and justice require a transfer of territory or the adjustment of a frontier, we must not regard such situations simply as cases for 'treaty revision'. In fact, the revision of treaties, which means in effect the revision of executory treaties, forms a small part of the problem of creating the machinery required to give a peaceful form to the changes in international conditions that must inevitably occur.

From the dawn of history force, applied or threatened, has been the chief agent in promoting changes in international conditions. Sir John Fischer Williams's *International Change and International Peace* contains an admirably lucid exposition of this theme. He quotes a passage from the *Round Table* of 1931:

> 'War is chronic . . . not because anybody wants war or likes war, but because it is the only method by which important political changes can be effected in a world which has no political machinery of any sort for the conduct of its common affairs.'

If the constitution or laws of a State afford no means of effecting changes in the internal affairs of that State, either its citizens use force—for instance by means of a revolution when the constitutional methods are inadequate—or, if the Government is powerful enough to

repress force, injustice may result. As in the single State, so in the world society of States. So long as international society is unable to develop peaceful machinery for giving effect to legitimate aspirations and desires based on political and economic changes, it is inevitable that sooner or later those aspirations and desires will burst their dams and violence will result. 'Come weal, come woe, my *status* is *quo*' is a disastrous maxim. For example, any attempt to make the series of treaties which will end the present war *perpetual is foredoomed to failure.* It is vital either that they should contain within themselves the machinery for the revision of their provisions and of the new conditions created by them, or that such machinery should be created outside them and be applicable to them. The problem of reconciling stability with means of peaceful change, of finding a mean between rigidity and flexibility, has so far baffled international society and has been responsible for one crisis after another frequently ending in war. Let us therefore examine how international society stands in this respect, and begin by contrasting international law with national systems of law.

The Contrast between Treaties and Contracts

The two great systems of law—Roman Law and the English Common Law—upon one or both of which the law of nearly every European and American people and of some Asian peoples is based, have found it necessary in the process of time to qualify the principle of the indissolubility of obligations. These qualifications present one of the main differences between national legal systems and the less mature system of international law, although the latter has been inspired by the former and has recruited nearly all its principles and its procedure from them.

The Roman law of *metus* and the English law of duress or coercion, whereby contracts can be set aside when it can be shown that they were entered into under compulsion or threats of force, find no parallel in international law in the case of a treaty which is signed or ratified under the compulsion of military occupation or the threat of the beginning or the continuance of a war by a State possessing overwhelming force. (The case of compulsion applied to the person of a negotiator is different.) No international lawyer who valued his reputation could suggest that the Treaty of Versailles of 1919 was not *legally* binding upon Germany because as the result of her military situation and the peculiar terms of the armistice she had no practical alternative but to accept it. Again, while Roman law and English law contain rules governing the effect of *error* or mistake and *dolus* or fraud (I do not suggest that *dolus* and fraud are identical), only the most primitive and embryonic traces of any analogous rules can be found in international law.

The (national) law of contracts and the (international) law of treaties present another fundamentally important contrast—namely in their ability to meet changes of circumstance. There are several ways in which the law of contracts can meet such changes. A contract may, in course of time, become *impossible* to perform. Both Roman law and (though late in its history) English law recognize that in that case the contract may be dissolved. Again, there may be a fundamental change of circumstances which could not have been foreseen by the parties, or at any rate has not been provided for by them. English law (going farther in this respect than Roman) dissolves such contracts by means of what is known as the doctrine of *frustration*. Moreover, the British statute-book is

now full of instances in which the State by administrative or judicial action can set aside contracts where a change of circumstances has made it contrary to the public interest to maintain and enforce them. We shall search in vain for adequate parallels in international law, and since this deficiency is of supreme political importance and is one of the obstacles to peaceful change, it is worth examining with some care.

Let us consider, first, the legal means, such as they are, of the termination or revision of treaties, and, secondly, the political and diplomatic machinery and practice.

Legal Means for the Revision of Treaties

The law by itself cannot *revise* a treaty. Only the agreement of the parties can do that. But the law can indicate certain circumstances in which it is terminated, and terminated for all parties.[1] Where the subject-matter of a treaty is physically destroyed, as for instance a particular person or ship or other property, there is no doubt that the courts of almost any country, or an international tribunal, would hold the treaty to be terminated. A physical change such as the permanent drying up of a river regulated by a treaty of navigation, the permanent submersion of an island, the complete exhaustion of a coal-mine lying under two countries or of a sedentary fishery, would no doubt have the same result. Where again the change, though not purely physical, destroys the very object or *raison d'être* of the treaty, the result would probably be the same. Thus when Cyprus passed under British administration in 1878, the British

[1] We are not concerned with the circumstances in which one party can found upon the violation of a treaty by the other party the right to declare it terminated. Our problem is to determine what are the circumstances in which it is terminated automatically by the law for all parties.

Government was advised by its Lord Chancellor that the treaty system of Capitulations, the object of which was to bring the subjects of Christian States and their affairs in a Mussulman country under the jurisdiction of their own consuls, would come to an end because 'their *raison d'être* ceases where the legislation and administration is no longer in Mussulman hands'. *Cessante ratione legis cessat ipsa lex* (when the reason of any particular law ceases, so does the law itself).

Similarly, some national legal systems,[1] as we have seen above, contain rules or doctrines which enable their courts, when certain changes occur in the circumstances which formed the basis of a contract, to declare the contract terminated automatically and for both parties and without denunciation by either of them, and there is no reason why international tribunals—for international law is largely recruited from the rules of national law—should not develop a corresponding doctrine. It takes different forms in different legal systems. The doctrine in English law of 'Frustration of the Contract', already referred to, has been defined by a present Law Lord (Lord Russell) as follows:

> 'If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event, or those circumstances, and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances. The dissolution lies not in the choice of one or other of the parties, but results automatically from a term of the contract.'

In several pieces of litigation taking place before international tribunals, or between the inter-State tribunals of Federal States such as those of Switzerland and former Germany, a somewhat similar

[1] See Lauterpacht, *Function of Law in the International Community*, pp. 270–85.

doctrine has been advanced which is known as the *rebus sic stantibus* (things remaining as they are) doctrine, namely an implied condition that a treaty is dissolved by a vital change of the circumstances in which it was made. The text-books of international law contain statements in favour of the existence of this doctrine, and some support can be found for it in the judgments and awards of international tribunals. But while tribunals do not usually deny it a place in international law, in no case that I am aware of has there yet been a clear application of the principle in a piece of international litigation. The doctrine has, however, played an important part in the political and diplomatic settlement of international disputes and in the revision of treaties by agreement.

Political and Diplomatic Practice

One serious result of the immaturity of the *rebus sic stantibus* doctrine and the uncertainty as to its true place in international affairs is that in the hands of an unscrupulous statesman it becomes a standing threat to the principle of the sanctity of treaties. By asserting that treaties only remain in force during the continuance of the circumstances prevailing when they were made, he can, when he thinks that his country is strong enough to throw off an inconvenient treaty, trump up some change of circumstances and claim that the treaty has thereby been dissolved. Whatever may be the future development of the doctrine in judicial hands and as a principle of law, it cannot be tolerated as a wholly unjudicial means of challenging the duration of a treaty. But at the same time States ought to be ready—as are reasonable men in their private affairs—to regard important changes of circumstances as an argument for the re-examination of a treaty by all the parties to it, and they should be willing to enter

into conference with that object when there are any prospects of an agreed revision resulting.

A passage occurring in a dispatch by Lord Granville, the British Foreign Minister, on an occasion already referred to, is instructive:

> 'If, instead of such a declaration, the Russian Government had addressed Her Majesty's Government and the other Powers who are parties to the Treaty of 1856, and had proposed for consideration with them whether anything has occurred which could be held to amount to an infraction of the Treaty, or whether there is anything in the terms which, from altered circumstances, presses with undue severity upon Russia, or which, in the course of events, had become unnecessary for the due protection of Turkey, Her Majesty's Government would not have refused to examine the question in concert with the co-signatories to the Treaty. Whatever might have been the result of such communications, a risk of future complications and a very dangerous precedent as to the validity of international obligations would have been avoided.'

Time after time, Great Britain and other States have recognized that a change in political conditions is a proper ground upon which to make or accede to a request for the revision of a treaty. For instance, in 1921, in view of the progress made in the legal institutions of China, the British Government became a party to a Resolution which promised sympathy with the aspiration expressed by China for the removal of 'existing limitations upon China's political, jurisdictional and administrative freedom of action' and concurred in the appointment of a Commission on Exterritoriality[1] in China which visited that country

[1] 'Exterritoriality' is the name of the system, rapidly disappearing, whereby the subjects of certain States having a European civilization, while resident in certain countries not possessing that kind of civilization, are withdrawn by agreement from the local jurisdiction and remain under the jurisdiction of their own Governments exercised through consuls.

and reported upon the condition of her judicial system and her treaties with foreign countries stipulating for the exterritoriality of their subjects. Again, in 1936, when Turkey took the perfectly correct step of asking for a conference to consider the revision of the régime of the Straits contained in the Treaty of Lausanne of 1923, Great Britain and other Powers acceded to her request and agreed by the Montreux Convention of 20 July 1936 to a modification of that régime. In short, the true bearing of the *rebus sic stantibus* doctrine upon the conduct of international affairs is that certain changes of political conditions form a ground for the re-examination of a treaty by the parties to it. It is a matter of dispute whether in the present stage of the development of international institutions the doctrine can be regarded as a ground upon which it can be claimed that a treaty has ceased to be binding. Some centuries ago it was not uncommon to insert in treaties a clause making their continued validity expressly dependent upon conditions remaining as they are (*rebus sic stantibus*), and it is now becoming common, particularly in treaties between more than two parties, to insert clauses providing for revision by consultation. A recent illustration is to be found in Article 21 of the Washington Treaty of Naval Disarmament of 1922, which contains the following clause:

> 'If during the term of the present Treaty the requirements of the national security of any Contracting Power in respect of naval defence are, in the opinion of the Power, materially affected by any change of circumstances, the Contracting Powers will, at the request of such Power, meet in conference with a view to the reconsideration of the provisions of the Treaty and its amendment by mutual agreement. . . .'

This practice is not only free from objection but desirable. At the same time it must be remembered that such clauses only provide for voluntary revision.

A clause which provides machinery for obligatory revision, for instance Article 16 of the Anglo-Egyptian Treaty of Alliance of 1936 stipulating for revision by a binding decision of the Council of the League of Nations, is rare.

It is clear, then, that there exist at present neither legal means nor diplomatic machinery capable of meeting by peaceful processes the inevitable changes to which international society is, as a human institution, exposed.

The answer given by John Stuart Mill to the question raised by him in the *Fortnightly Review* quoted above was as follows:

> 'To effect this reconcilement, so far as it is capable of being effected, nations should be willing to abide by two rules. They should abstain from imposing conditions which, *on any just and reasonable view of human affairs, cannot be* expected to be kept. And they should conclude their treaties as commercial treaties are usually concluded, only for a term of years. . . .'

The first of these rules is a counsel of perfection. The second, while it might advantageously be adopted more widely than it is in the making of political treaties of non-aggression, alliance, demilitarization, &c., is clearly not applicable to those treaties which cede territory, determine new frontiers, and effect large territorial settlements such as the great treaties of 1815, 1878, and 1919–20. Fixing a term of years may often be appropriate in the case of treaties which resemble contracts and in legal language remain 'executory' throughout their duration, such as a treaty of non-aggression or a contract of service. But a term of years is not appropriate to the kind of treaty which resembles a conveyance and is 'executed' soon after it has been duly entered into, for instance, a treaty of cession or a treaty for the delimitation of a frontier.

Article 19 of the Covenant of the League of Nations

It may well be that in course of time international tribunals will develop some satisfactory rules governing the effect upon treaties of changes of circumstances, but it would be idle to wait for the operation of this process, for two reasons. The first is that the changes of circumstances which afford the chief threat to peace are changes of political and economic circumstances, and it is these which from the nature of things are the most difficult to bring before a legal tribunal, and with which it is least fitted to deal. The second is that, while legal tribunals might be able to develop rules governing the *termination* of treaties by reason of change of circumstances, it is difficult to see how the same method could be applied to the *modification* of treaties and still less to the consideration of other international conditions endangering peace.

A half-hearted attempt to remedy this defect was made in Article 19 of the Covenant, which is as follows:

> 'The Assembly may from time to time advise (*inviter*) the reconsideration by members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.'

This Article, which in an earlier form was part of the rigid guarantee of the *status quo ante* contained in Article 10 and was severed from it because it seemed to impair the efficacy of the guarantee, is at any rate a general recognition of the inevitability of change in international affairs and the desirability of substituting for force some machinery of peaceful change. But the machinery was patently inadequate. In the first place, it is not clear (*a*) whether the advice of the Assembly must be unanimous and include the votes of the members concerned, in which case revision is dependent

on consent, or (*b*) whether the Article merely refers to what is known as a *vœu* (recommendation, wish, pious hope, view or opinion), in which case unanimity would not be required but the advice would not be obligatory, or (*c*) whether the votes of the parties concerned can be excluded on the ground that no one can be a judge in his own cause. In the second place, the Article does not make the advice of the Assembly obligatory, though it would be a considerable factor in ranging public opinion against a member State which ignored the advice. In the third place, on the very rare occasions on which a member State invoked the Article in support of the revision of a treaty, for one reason or another the Assembly was able to escape giving effect to the request.

The Article has in practice proved abortive. Many members of the League feared that if it developed into an effective piece of machinery it would lead to the surrender by them of some of the advantages which had accrued to them from the Peace Treaties of 1919–1920, and also they could not feel confident that the modification of the *status quo ante* to their disadvantage would lead to a permanent settlement and would not merely form the starting-point of further demands.

Nevertheless, however modest, however embryonic, this Article may be, it contains the germ of a truth of which we must not lose sight—namely, that it is futile to attempt to superannuate war unless we can substitute some peaceful machinery for achieving one of the common objects of war—changes in the *status quo ante*. Moreover that peaceful machinery, if it is to amount to more than revision by consent, must involve a willingness to accept the judgment of some kind of international tribunal or authority upon the equity of your claim instead of insisting on being judge in your own cause. One of the greatest disappointments of the

past twenty years has been the way in which States have resisted proposals for a gradual extension of the compulsory jurisdiction of the Permanent Court of International Justice, and the grudging qualifications which have been attached to their acceptance of these proposals when finally extracted from them.

As matters now stand, international law is an ally, a bulwark, of the *status quo ante*. That is one reason why, as Professor E. H. Carr has recently pointed out in his *Twenty Years Crisis*, it is so popular with the Powers that are satisfied with their present position and have no wish to see it changed. The indissolubility of a treaty except by consent is one of its most cherished principles, and it is easy to understand why that should be so, so long as the only alternative is the termination or modification of the conditions resulting from the treaty by the uncontrolled action of one party and without any submission to the judgment of a superior or of third parties.

INTERNATIONAL SUPERVISION OF TREATY-MAKING

Another point in which international society differs from the State is that national systems of law place some check upon the kind of agreements which they will permit the persons subject to them to enter into. The law of England contains many rules rendering illegal contracts which involve criminal offences or breaches of morality or conduct which is contrary to public policy. Treaties whereby the parties agree to co-operate in doing, or to support one another in doing, something which is plainly illegal or immoral, such as aggression upon a third country, and sometimes its partition between them, are usually secret. But there are many published treaties which are oppressive or unjust to one of the parties, or offend against the interests of the international community as

a whole. It may be a long time before all treaties must be brought to the bar of public opinion and approved before they are valid, but before the Family of Nations can become a true society some control must be placed upon the present licence of treaty-making. In view of the far-reaching danger to society which is implicit in a bad treaty, society must sooner or later acquire some kind of initial control upon treaty-making. A treaty is, or at any rate many treaties are, more than the concern only of the contracting parties.

Registration and Publication of Treaties

While States are still free to make what treaties may please them, whether they are oppressive to one party or contain a threat to a third party or are otherwise objectionable from the point of view of the world community, a certain check has now been placed upon one of the most dangerous aspects of treaty-making, namely, secrecy. The disclosure during and after the World War of a number of secret treaties made by Governments behind the backs of their peoples produced a feeling of resentment which found expression in Article 18 of the Covenant of the League, which is as follows:

> 'Every treaty or international engagement entered into hereafter by any member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding unless so registered.'

From a technical point of view this Article has met with great success. Up to a few months ago 4,600 treaties had been registered with and published by the League of Nations, including many voluntarily registered by States not members of the League, for instance, Germany before she became a member in 1926 and the United States of America, so that the world now has in

the *League of Nations Treaty Series* something approaching a statute-book. Few would assert that no member of the League has since 1920 entered into a secret treaty, but Article 18 has forced into the light of day many treaties which would otherwise have remained secret. Three further comments upon this Article must be made:

(*a*) Under it the functions of the Secretariat of the League are purely automatic: if a treaty (which term includes conventions, declarations, exchanges of notes, and every kind of international engagement) is sent to Geneva by a member of the League for registration with the Secretariat, registered it is. Registration confers no approval and at present no machinery exists for challenging before some impartial authority, such as the Council of the League or the Permanent Court of International Justice, the legality or morality of the treaty, or for raising the question whether it is contrary to the public interest, or even the question whether the document is a 'treaty or international engagement' within the meaning of Article 18.[1]

(*b*) It is not clear whether the effect of the last sentence of Article 18 is to make the treaty entirely void, or only voidable at the instance of a party to it, or merely to prevent it from being cited before an international tribunal such as the Permanent Court. Perhaps it merely has the political effect of making it

[1] Nevertheless there are at least two occasions on which the publication of a treaty in the *League of Nations Treaty Series* is accompanied by a copy of a protest against the treaty or its registration: (i) the registration in 1926 of an exchange of notes between Great Britain and Italy regarding their respective spheres of influence in Ethiopia is accompanied by a protest by the Ethiopian Government against the conclusion of an agreement between these two Powers regarding interests in Abyssinia, and (ii) the United Kingdom Government protested in 1924 against the publication in the *League of Nations Treaty Series* of the 'Articles of Agreement' of 6 December 1921 between that Government and representatives of what became the Irish Free State.

easier for a democracy to repudiate a secret treaty entered into by its Government, as soon as its contents are disclosed.

(*c*) Article 18 is aimed at secret treaties, not the secret negotiation of treaties, and is intended to give effect to the desire for '*open*, just and honourable relations between nations' which is expressed in the Preamble of the Covenant. The public negotiation of treaties would be impossible for the Government of a democratic country having a free Press and a free Parliament, and it is unreasonable and undesirable that any kind of Government should be compelled to negotiate in public. Publicity is contrary to the very nature of negotiation or bargaining, and diplomacy must always remain primarily a confidential procedure, as is the handling of delicate affairs in private life. It will be mischievous if the public negotiation of treaties is allowed to become a democratic ideal or aspiration.

It may seem to the reader that too much space has been devoted to this procedural Article. So far its importance has been technical rather than political, but it contains within it the germ of the international supervision of treaties and must be borne in mind when the next opportunity of a step forward in world organization occurs. The lack of any machinery for the supervision of treaty-making and the paucity of rules upon the legality of treaties are a serious defect in our present system.

An Important Experiment

There are many other improvements in the law and practice of treaties which a progressive society will discover and foster. It would be out of place here to enumerate the many experiments that are being made and the obstacles that are being encountered. There is, however, one experiment which after a trial of

twenty years has, in my judgement and in my personal experience, justified itself and which I should like to see being extended to a wider sphere. That is the method of composing the national delegations sent to conferences organized by the International Labour Organization.

The delegation normally sent to an international conference is purely governmental, that is, consists of persons (whether exclusively officials or not) nominated by Governments and bound to vote according to the instructions of their Governments (with whom they are usually in daily communication). The national delegations sent to these Labour Conferences are, as to two of the members, Government nominees and, as to the other two, the nominees of representative organizations of employers and workmen respectively. This innovation, which was, I believe, one of the British contributions to the constitution of the International Labour Organization, has been a great success. The delegates of the employers and workmen are less likely to be influenced by purely national interests than the governmental delegates, for they have interests which cut across national frontiers and enable them to establish close contact with the similar delegates of other countries. The whole atmosphere is different, and the clogging influence of the complex of ideas connected with national sovereignty which is so inimical to international co-operation is weakened and often absent. It must, however, be pointed out that the delegates (both national and vocational) to International Labour Conferences have no power to bind their countries and that the only obligation upon a State member of the International Labour Organization is to submit all Draft Conventions adopted by the Conference to the national authority, be it Parliament or some other body, which has power to adopt and give effect to it.

It would be ridiculous to contrast the respective progress of the International Labour Organization and of the League of Nations (in the stricter sense) during the past twenty years and to attribute the success of the former to the introduction of a non-governmental element into its conferences, but there can be no question that this innovation is responsible for the more co-operative atmosphere which pervades the International Labour Organization and without which little progress towards an international society is possible. It may be impossible to make use of non-governmental delegates for the purpose of negotiations upon political matters, but there is a wide field of international non-political affairs into which the practice of the International Labour Organization discussed above could with advantage be introduced. There is all the difference in the world between being pushed reluctantly by inevitable factors along the road of international co-operation and actively desiring it and seeking for it.

Conclusion

Our present international system first permits a treaty to be dictated by force—whether it be the threat of imminent war or the threat of the continuance of war temporarily suspended by an armistice. Secondly, it pronounces such a treaty to be legally binding in spite of the duress or coercion which procured its signature and ratification. Thirdly, it affords no means of revising the treaty except with the consent of both parties. This lack of machinery for the revision of a treaty, whether dictated or not, without the consent of all the parties is one of the capital defects of international society. (I say international society, not international law, for law is the instrument of society and can only operate when society permits it to do so

and creates the machinery for its operation.) Such an attitude towards treaty-making has at least two unfortunate consequences, both pregnant with future trouble. In the first place, if the terms of the treaty are unfair and oppressive, as is almost bound to be the case of a dictated treaty—for no one can be judge in his own cause—the party upon whom it has been imposed will not rest until he has thrown it off. In the second place, if the aims of that party should go beyond the terms of a fair settlement and become vindictive or aggressive, it will be difficult for the Government of the party who dictated the treaty to mobilize the public opinion of its own or other countries in order to check the growing menace until actual aggression takes place.

There are some who, while recognizing the imperfections of international society and the risks of explosion which result, hold the view that these risks can be minimized by patient and honourable diplomacy and by a gradual rise in the standards of international morality. There are others who put their trust in something more organic, who believe that law and order cannot be left to grow spontaneously but require organs for their development and enforcement. It was the second school of thought that was responsible for the Covenant of the League of Nations in 1919. It is unlikely in the extreme that international law will, if left to itself and unaccompanied by any kind of organization, ever develop satisfactory rules to ensure the just making and revision of treaties and to secure their observance. My hope is that at the end of the present war we shall begin where we left off in 1919, that we shall free a reformed Covenant of the League from connexion with any particular group of treaties, that we shall endow the Permanent Court of International Justice with obligatory jurisdiction over all

legal disputes amongst the States who belong to it, and that we shall create some really effective machinery for controlling the making of treaties and for revising treaties and other international conditions whose maintenance is inconsistent with an ordered society. If at the end of this war the 'organic' school of thought prevails over the 'pragmatic', and another attempt is made to convert a number of sovereign or independent States preserving a precarious peace by means of a balance of power or some other device into a real society, one of the first things that will have to be tackled is the removal from international law of its imperfections and immaturities in regard to treaties, some of which it has been the aim of this pamphlet to explain.

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