Grotius, was concerned with peoples rather than with sovereigns. The totalitarian concept, on the contrary, is the entire negation of law as a logical system having a long, natural, and historical growth, and obeying innate and ineluctable principles, *ex necessitate juris.* We must return to those principles, particularly where they apply to the rights of human beings who constitute the *aerarium vivum* of states. If this fundamental truth is kept in mind, the general trend of the renovation of international law will be to exalt and fortify that neglected branch of law, contemptuously termed Conflicts of Law by the Anglo-American jurists, and honored by the European jurists as Private International Law.

It is painful to have to admit that the insidious notion of law, as the capricious product of legislation or of administrative fiat, has long held sway in the fields of common law and international law. Statute law has become more important, while established principles of law have received less consideration. Many of the publicists in international law seem to have succumbed to this demoralizing influence, especially since the advent of the League of Nations. They have too often held that whatever the League ordained would be the supreme law of nations. Interest in the *science* of international law has therefore become greatly lessened. The pragmatic or empirical school has been in the ascendancy. In recent years attention has been centered too little on the historical and philosophical origins of international law. Stress has been laid on what the law ought to be—*lege ferenda*—rather than on existing law—*lege lata.* A return to first principles is imperatively demanded if the law of nations is to be restored and renovated for its sacred function in the new world order.

The task set before us would seem to be threefold: first, to determine the exact nature of the interests to be protected in this new world order; second, to re-examine and re-assert the fundamental principles of international law, the *fontes juris gentium;* and third, to oppose to the totalitarian concept of the state the concept of the inherent, inalienable rights of human beings. Along these lines it may be possible to accomplish the restoration and renovation of international law to meet the needs of a changing world order.

PHILIP MARSHALL BROWN

THE LEGISLATION OF THE PEACE CONFERENCE

Out of the depths of that sadness and sense of discouragement which the war must bring to rational and humane persons, there radiate gleams which relieve the darkness. Among these gleams the current emphasis upon the necessity for studying now the problems of the post-war world are among the brightest; here is hope for the future. During the first months of the war there was much stir of post-war planning in England, and that activity crossed the Channel and embraced groups in France, in the then neutral countries, and, surreptitiously, even persons in Germany. Then there seemed to intervene a period when the exigent demands of the immediate

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problems of the war siphoned brain-power and time away from the study of questions just as important but more remote. Even before the North Atlantic conference of President Roosevelt and Mr. Churchill it was evident that the study of the problems of peace had been resumed in England. In the United States meanwhile both official and private attention had been paid to the future. Among the private groups, the Commission for the Study of the Organization of Peace was perhaps the most elaborate and its preliminary report has been published.[1] With special reference to the eventual solution of the problems of the Pacific area, the Institute of Pacific Relations continues its long-range researches embodied in the Inquiry series much of which has been reviewed in this JOURNAL.[2] Unpublicized but important mixed groups of official and unofficial personages have held informal discussions in continuation of the excellent tradition developed in the last two decades. Coöperation between groups in the United States and in England and Canada and other countries has not been lacking. In South America certain long-range studies of post-war problems are either under way or projected. The newspapers have recently reported two important meetings in London; one, official, of the delegates of all the Allied European nations, and the other, unofficial, of leading scientists from many countries, including the United States.

During the same years there has continued a process which fortunately is normal and continuous although it may have received special stimulus from the present crisis. This process is the imaginative study by scholars of the future of international law, and of its proper rôle in a science of international relations. Glance through the Book Review section of almost any issue of this JOURNAL and the variety of these studies becomes apparent. The last issue—for July, 1941—is full of examples with the editorials by Briggs and Fenwick and Brown heading the list with three different approaches. Professors Briggs and Fenwick deal in their editorials with Dr. Gerhart Niemeyer's new book, which deserves high rank in the group we are considering. In the same issue one may refer to the reviews of the books by Wriston, Fraenkel and Zipf, and to Mr. Coudert's references to the Attorney General's invocation of the Harvard Research Draft Convention on Rights and Duties of States in Case of Aggression—albeit the Attorney General transposed the Draft from the future subjunctive, in which it was written, to the present indicative.

If, like the writer, one accepts the eventual victory of the United States and the British Commonwealth together with their allies and associates among the acceptable postulates for thinking about the post-war world, one must begin by considering the probable nature of the peace conference. For present purposes, one need not go beyond assuming certain characteristics including the ability—from the physical, military and economic point

[1] International Conciliation No. 369, New York, April, 1941.

[2] Vol. 35, pp. 416, 591, 595.

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of view—of a group of states to decree the structure of the post-war world and the law which shall govern its international relationships. Because of this fact, this comment does not discuss the application of the established rule of law according to which a treaty binds only the states parties to it. It is fair to assume that the peoples will demand and that the governments will be prepared to adopt a structural plan for some type of international organization; I should hesitate to say "like the Covenant of the League of Nations", although in a rough and popular way that would convey the thought. I suppose no one would deny the utility, indeed the absolute necessity for expert study of blueprints of such a plan before the day of the peace conference is upon us. But the question which this comment seeks to raise is slightly different. It is the question whether the peace conference should not this time go further and examine the wisdom and feasibility of adopting some fundamental changes in the bases of international law. This is not the moment to argue the merits of Niemeyer's theories or of the functional approach in general, or the necessity of retaining the basic fictions of state sovereignty and equality, or other postulates and norms. This is the moment—and there is no time to be lost—to suggest that such problems could not possibly be dealt with in a satisfactory way at or during the peace conference itself. The real thinking (and arguing) must go on over a long period of time prior to the convocation of the peace conference; unhappily there may be a great deal of time but it is not too soon to start. Elihu Root paid tribute to the importance of the work of the *Institut de Droit International* as a preparation for the Hague Peace Conferences. There have not been wanting acknowledgments of the utility of the work of the Harvard Research in International Law in preparation for the First Conference for the Progressive Codification of International Law. Various technical commissions of international lawyers continue to pave the way for the periodic Conferences of American States. In all of those instances, however, the problem has been the comparatively simple one of reframing certain specific rules within the framework of an established system. The task here suggested is the reconsideration of the system itself.

Anyone who has taken part in the work of groups of lawyers may well shrink from admitting the practicability of ever reaching even a modicum of agreement in such a vast and controversial realm as this. Yet human beings in the face of necessity have reached agreements which long seemed impossible, *e.g.*, upon a unified command among the Allies in the last World War. Agreement among scholars, and especially among legal scholars, is perhaps more difficult than agreement among statesmen and politicians, but it is not unprecedented. The United States today is fortunately the dwelling place of many notable European international lawyers; our colleagues in the other American States are accessible; one might confidently expect collaboration from our Chinese colleagues and others in the British Commonwealth. Here is room for joint consideration by the traditionalist and the reformer;

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the positivist and the naturalist. Perhaps the work should go on through the normal channels of the printed page, the platform, the round table, the seminar, the class room. Perhaps it should be organized in national groups or in international groups of private persons or associations. Perhaps it is in this day and age the rôle of government to marshal the forces. Under whatever guise or auspices, the work needs to be done. It is a responsibility of the international lawyers of the world, a responsibility to be discharged before the great peace conference meets, as meet it will. Whether one likes it or not, that conference will as a matter of fact lay down rules by which the world will be governed for years to come. One hopes that the wisdom of the statesmen will see to it that at least upon subjects of universal concern and of permanent importance, the group of conferees will be composed of delegates invited to come from all quarters of the globe. The fiat of that conference will be law; the fundamental philosophy of that law must be determined during the time which intervenes.

PHILIP C. JESSUP

OF THE ILLUSION THAT WAR DOES NOT CHANGE

It is one of the more pleasant characteristics of man, and usually justified, that he does not anticipate outrageous conduct upon the part of his fellow men. He lives happily as part of a society in which he may usually feel sure that he will not be attacked or robbed, and he has therefore developed a habit of confident and unsuspicioning security. He may even forget that this confidence is the result of his own efforts in building round about himself a system of law and law enforcement. It is not a perfect system, and it needs constant study and repair; but on the whole, it justifies his confidence. In the society of nations, there is no such system of law enforcement, and, consequently, no such feeling of security. The individual, feeling secure against outrage within his state, is shocked by an outrage within the community of nations, where he has not provided similar defenses for his security. Since there are not such restrictions, worse and worse outrages are perpetrated in the community of nations. Each nation must be prepared continuously to resist attack; and the international lawmaker must always anticipate the commission of increasingly outrageous deeds against which his law must be built and maintained. The law can not stand still; it must always look forward to new eventualities; it must recognize that changes will occur, and it should foresee them.

These reflections arise from the reading of some incidental words in a paper recently delivered before the Grotius Society in London, in which the speaker made reference to the dangers, in a functional approach to international law, of the illusion of novelty, and of over-emphasis upon the dynamic aspects of current events.[1] He quotes from T. J. Lawrence, and the

[1] Georg Schwarzenberger, "The Aid Britain Bill and the Law of Neutrality", The Grotius Society (London, 1941), reprint, pp. 7–13.

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