PART IX

SETTLEMENT OF DISPUTES

CHAPTER I

THE IRISH DISPUTE: A PROPOSAL FOR THE COMPOSITION OF THE TRIBUNAL

Editor's note Lauterpacht rarely wrote for the press, whether in the way of articles or in the form of letters to an editor. Of the former, there are but three examples: the article that appeared in *The Times* on 6 January 1950 regarding the recognition of Governments (see above, vol. 3, pp. 115–8); the article in the same newspaper on 8 January 1952 following the judgment, adverse to Britain, of the International Court of Justice in the *Anglo-Norwegian Fisheries* case (see above, vol. 3, pp. 213–7); and the article, also in *The Times*, published on 30 and 31 July 1952 relating to the *Anglo-Iranian Oil Company* case (see above, vol. 3, pp. 242–4). Of letters to an editor, there appears to be only one example – a letter to the Editor of the *Manchester Guardian* that appeared on 25 July 1932 and which forms the present chapter. It contains a suggestion of a procedure that might be followed for the settlement of the land annuities dispute then dividing the British and Irish Governments.

Under the Land Purchase Acts of 1870–1889 enacted by the British Government, Irish tenant farmers were enabled to purchase their land through loans advanced by the British Government. The loans were repayable by annual instalments known as the Land Purchase Annuities. In 1923 the Irish Free State undertook to accept liability for these annuities. Under the agreement the Irish Government would collect the annuities from the farmers and pay a specified lump sum directly to the British Government. This amounted to about 3 percent of Irish national income and became a considerable burden on the Irish economy. In March 1932, upon a change of government in Ireland, the new government withheld payment of the annuities, claiming that the 1923 agreement was not binding. It rejected a British proposal for arbitration by an Empire tribunal. For its part, the British Government would not consider submitting the question to the Hague Court or any other foreign tribunal.[1] In retaliation the British Government, in July 1932, imposed a 20 percent duty on about two-thirds of Irish exports to Britain, the principal destination of Irish exports. This was the beginning of the so-called 'Economic War' between the Irish Free State and Britain. Later that month, the Irish Free State declared its willingness to submit the questions at issue to arbitration, provided the arbitrators were not selected exclusively from the British Empire.

Against this background, Lauterpacht wrote his letter of 27 July 1932 proposing the setting up of a tribunal to consist of Irish and British judges in equal

[1] Canning, P., *British Policy Towards Ireland 1921–1941* (1985), pp. 129–30.

numbers, thus seeking to reconcile the views of both sides. At the same time, he suggested that the tribunal could be empowered, once the legal decision had been given, to mitigate or recommend mitigation of the decision by some equitable adjustment of the possibly harsh consequences of the legal finding. The letter contains echoes of points which Lauterpacht made in his other writings at about that time relating to the justiciability of disputes and the scope of the judicial function. (See, for example, below, chapter 3 'The Doctrine of Non-Justiciable Disputes in International Law'.)

Whether the Governments gave the suggestion any consideration is not known, but the dispute was only finally resolved in April 1938 on the conclusion of the Anglo-Irish Agreement under which all financial claims by either Government were settled by a final payment of £10 million by the Irish Government.

To the Editor of the 'Manchester Guardian'

Sir, – The controversy between His Majesty's Government and the Government of the Irish Free State has now been reduced to what is in effect a point of procedure. This being so, I venture to submit a proposal the acceptance of which would not, I believe, be inconsistent with the attitude adopted by both parties to the dispute.

In 1903 the dispute between this country and the United States concerning the Alaska boundary reached a dead-lock in consequence of the refusal of the United States to accept the British offer of arbitration. Subsequently a solution of the difficulty was found by the parties setting up an *ad hoc* judicial tribunal consisting of three members appointed by Great Britain and an equal number of arbitrators appointed by the United States. The parties agreed to abide by the final judgment rendered by the majority of the tribunal. That majority was ultimately brought about as the result of Lord Alverstone, the President of the tribunal, voting in favour of the contention put forward by the United States. Lord Alverstone's 'defection' created some resentment in Canada, but the verdict of history has been that this arbitration constituted not only an important contribution to international judicial settlement, but also an inspiring example of judicial impartiality. I venture to suggest that the solution of the present difficulty could be found by setting up a judicial tribunal entrusted with the task of rendering a final judgment and composed of six persons – of three judges, citizens of the Irish Free State, nominated by the Government of the Irish Free State, and of three judges, subjects of the United Kingdom, nominated by His Majesty's Government in the United Kingdom.

A tribunal of this nature would be an empire tribunal in the meaning attached to this term by the British Government. It would, at the same

time, be a tribunal in which – to use a now current phrase – the dice would not be loaded against the Irish Free State. It could not reach a decision at variance with the contention of the Irish Free State Government without the concurrence of at least one of the members appointed by that Government. There is no compelling reason to assume that the deliberations of this tribunal would inevitably result in a dead-lock. The interests at stake in the Alaska boundary dispute were larger, but there was no such dead-lock. Undue scepticism ought not to impede the search for an equitable solution acceptable to all. The element of impartiality and judicial detachment – and, with these, the prospect of an effective decision – could be strengthened by the insertion in the arbitration agreement of a provision to the effect that the members of the tribunal shall be persons holding or who have held in the past high judicial office. By adopting this safeguard the parties would be going only one step beyond the provisions of the Alaska boundary arbitration agreement which laid down that the members chosen shall be 'important jurists of repute who shall consider judicially the questions submitted to them' and 'each of whom shall first subscribe an oath that he will impartially consider the arguments and evidence presented to the tribunal, and will decide thereupon according to his true judgment.'

The probability that a tribunal chosen in this manner would reach a decision by a majority, if not by unanimity, could be enhanced by some appropriate provisions. Thus the arbitration agreement could empower the tribunal, after the legal decision has been given, to mitigate or to recommend the mitigation by some equitable adjustment of the possibly harsh consequences of the legal finding. Alternatively, the possibly undesirable or inequitable effects of a strictly legal finding could be circumvented by some specific legal rule, assented to in advance by the parties. The history of judicial settlement among the nations abounds in instructive examples of arbitral agreements of this nature. Thirty-six years ago John Westlake contributed, in a letter published in *The Times* on 6 January, 1896, to the solution of the dangerous British Guiana dispute with Venezuela and the United States by suggesting that the arbitration agreement should, by adopting the principle of prescription, contain rules calculated to prevent any undue disturbance of the existing territorial *status quo*. In the recent dispute between France and Yugoslavia concerning the payment of various Serbian loans floated in France before the War, the arbitration agreement of April 1928 laid down that, after the Permanent Court of International Justice had given its legal verdict, a special arbitral tribunal shall adapt the judicial finding to the requirements of equity.

A proposal for an arbitration agreement intended to render innocuous some of the harshness of a strictly legal decision is admittedly of a highly controversial nature. It is here put forward because it might be instrumental in enhancing the chances of an effective decision by a majority or even by unanimity. However, its adoption or rejection does not decisively affect the main proposal which is here submitted, and which can be adopted by both parties without either of them abandoning any principle or interest to which they attach importance.

CHAPTER 2

PEACEFUL CHANGE – THE LEGAL ASPECT

Editor's note It has not been easy to decide where to include the present chapter. It consists of the text of a lecture delivered by Lauterpacht in 1937 as one of a series on 'Peaceful Change – an International Problem'. Lauterpacht's contribution – in examining the legal aspects of peaceful change – covers diverse topics: international legislation; judicial legislation; the concepts of *rebus sic stantibus* and abuse of rights; machinery for the revision of treaties and compulsory conciliation. Although each of these subjects has its proper place in the outline of the present volumes, an appropriate location for a contribution which brings all these subjects together is in this early chapter of the Part on the settlement of disputes. Despite the fact that the political context in which the lecture was written is now two-thirds of a century behind us, and some of the examples given are now quite out of date, the discussion of the limits, as well as the potential, of the judicial process remains of abiding interest.

The series of lectures was published in Manning (ed.) *Peaceful Change – An International Problem* (1937). The other lecturers appear all to have been members of the staff of the London School of Economics – C.K. Webster, Arnold Toynbee, L.C. Robbins, T.E. Gregory, Lucy Mair, Karl Mannheim and C.A.W. Manning himself.

1

A lecture on the legal aspect of the international problem of peaceful change cannot be a topical performance. So far as the present lecture is concerned, the German claim for the restoration of colonies and other territorial claims aiming at a modification of the Peace Treaties of 1919 might never have been raised. Their political importance is abundantly obvious to everyone, but they must be disregarded here for the reason that they do not raise legal issues of significance. It is not a question of law whether the former German colonies should be restored or not – unless one chooses to engage in arguments as to the legal validity of the Treaty of Versailles. Neither would it be profitable to discuss the niceties of the question as to whether and by what procedure mandated territories formerly belonging to Germany can be transferred as mandates or ceded in full sovereignty, seeing that they are not at present under the sovereignty of the mandatory. That question will shrink into

insignificance as soon as there is the political will to effect the transfer or cession. The same must be said of the question as to the procedure by which the Covenant of the League can be separated or declared to be separated from the Treaty of Versailles and the other Peace Treaties. The problem of peaceful change is much larger and more fundamental than the revision of the Peace Treaties concluded after the war of 1914–1918. That problem will remain after these Treaties have been revised to the satisfaction of all concerned. In the unlikely event of that happening, we should still be confronted with the same imperative need for a system of peaceful change which the world did not possess in 1914 and the absence of which made change by war a legitimate legal process. The two principal calamities in the history of international law after the World War – the separation of Manchuria from China and the annexation of Abyssinia – are instances of unilateral international change which had no connection at all with the Peace Treaties.

Neither would it be true to say that the problem of peaceful change is one of the territorial division of the world. If, through the interposition of a compassionate Higher Power, the world were today to be territorially apportioned in accordance with justice and reason, and if – to give only some examples – the existing international legal position with regard to migration, tariffs, and raw materials were left as it is, the problem of peaceful change would still remain paramount. For that issue is one of the fundamental questions of international law. It is probably the fundamental question of any system of law. Prior to 1928 (the date of the General Treaty for the Renunciation of War) the main reason for denying to international law the quality of law was not the absence of an international executive or judiciary, but the legal admissibility of war as an institution for changing the law. The law was bound to recognize war as an agency of change for the reason that there was no institution for peacefully adapting the law to changed conditions. An institution of that nature is indispensable in the relations of human beings or aggregates of human beings purporting to be governed by law. A legal system which fails to provide such institutions bears in itself the germs of its own destruction. It is in itself an incentive to violence. It is, in the long run, contrary to justice and unworkable in practice. These are obvious truths, and they have been eloquently voiced in recent years by the protagonists of peaceful change. We are not at liberty to say that they have been referring merely to some aspects of the Treaty of Versailles and not to a wider need.

There are two further reasons which have added to the urgency of the problem of peaceful change and which forbid us to identify it with any

particular claim or claims for revision. The first is that after the World War the question of peaceful change has, especially in Great Britain, constituted an obstacle in the way of the recognition of the rule of law through the acceptance of the duties of obligatory judicial settlement. International law has been identified with the Peace Treaties. These have been looked upon as unjust and transient, and any real progress in the sphere of obligatory judicial settlement has been viewed with suspicion on the ground that, in the absence of a machinery for peaceful change, it must result in the perpetuation of an obnoxious *status quo*. This was one of the reasons why in 1924 the British Government – and, indeed, the bulk of British public opinion – rejected the Geneva Protocol for the pacific settlement of international disputes. In the absence of an effective machinery for modifying the existing legal position, the rule of law has become synonymous with injustice. Sir Austen Chamberlain on that occasion eloquently voiced the necessity of keeping open avenues of change and not blocking them by rigid obligations of pacific settlement and its enforcement. Opponents of international progress found themselves in possession of a powerful argument. They became champions of justice as against the oppression of the law. But they were equally emphatic in declining the suggestion that the proper course is not to reject the rule of law but to provide for effective machinery for peaceful change. The only lesson which they were prepared to derive from the dilemma was that a just war is better than an unjust peace, that we must concede to others the right to wage war in defence of justice as against an oppressive *status quo*, and that we must be strong enough to meet the ensuing challenge. When the question of the acceptance by Great Britain of the obligations of the Optional Clause was discussed, international lawyers of repute uttered warnings against pushing too far ahead on one line of international progress so long as the other – institutions of peaceful change – remained stationary. They were apprehensive lest, under a regime of obligatory judicial settlement and in the absence of institutions of change, international tribunals should find themselves in the position of being compelled to give judgments rendered in accordance with law but contrary to justice and inimical to international peace and progress. That attitude must be regarded as partly responsible for the fact that when in 1929 the British Government signed the Optional Clause the various reservations appended thereto reduced the signature to a parody of its professed object. Confronted with the same problem, the draughtsmen of the General Act for the Pacific Settlement of International Disputes attempted in 1928 the impossible task of making it an instrument for both applying and changing the existing law. The result was a document

deplorable from the point of view of draughtsmanship and applicability. So much have minds become preoccupied with the necessity of changing the law that they have become insensible to the benefits of its normal observance and ascertainment. At the same time, while there has been no inclination to accept peaceful change as an institution with all its implications, the determination to slow down the growth of institutions applying the existing law has been much more pronounced. There has thus taken place a process not unfamiliar in an undeveloped society, namely, the reduction of the general standard of practice to the lowest level of obtainable minimum.

Secondly, one revolutionary event in the history of international law has added emphasis to the problem of peaceful change. That event was the conclusion in 1928 of the General Treaty for the Renunciation of War. Prior to that Treaty the system of international law, glaringly inconsistent in many matters, was symmetrical in one respect: while it made no provision for institutional peaceful change, it permitted war as an instrument for changing the existing legal position. Every State had the right, by formally going to war and thus risking its own existence, to alter the *status quo* either by annihilating the defeated opponent or by dictating to him the conditions of peace. The Treaty of 1928 prohibited war as an instrument either of enforcing the law or for changing it. But it is clear that unless something else is put in place of the proscribed institution of war as an instrument of change, the Treaty, far from becoming a starting point of progress, must become yet another source of illegality by necessarily increasing the opportunities for breaking the law.

II

These are the reasons why it is undesirable to reduce the question of peaceful change to the level of a highly important but essentially transient controversy concerning the revision of the Treaty of Versailles and other Peace Treaties. It may be said that that particular aspect of peaceful change is important enough in itself and that there will be time to occupy ourselves with the bigger question after we have solved the concrete problem with which statesmanship is at present confronted. This may be so. But then, as suggested, that aspect of the matter does not as such constitute a legal issue. Its solution is a function of political will and expediency. It is undesirable to use language identifying it with *the* question of peaceful change by giving to a claim for the revision of a particular treaty a designation which raises issues of a truly fundamental nature. There are obvious objections to the view that peaceful change means

any particular problem of revision confronting us at any given time, and that it is preferable to adopt the pragmatic method of leaving the fundamental issues alone and of trying to solve each difficulty as it arises. Such pragmatism would be deceptive. For we may find that in the absence of legally effective institutions of peaceful change we are not solving these particular problems but are compelled to accept solutions under the impact of force or – what is the same – of the desire to avert war.

What is peaceful change as an effective institution of international law or of international society? It is the acceptance by States of a legal duty to acquiesce in changes in the law decreed by a competent international organ. It is the existence of a legislature imposing, if necessary, its fiat upon the dissenting State. This, it is submitted, is the only proper meaning of peaceful change as an effective legal institution of the international society. Undoubtedly peaceful change may be brought about, in individual cases, in various other ways. It may take place as the result of the denunciation of a treaty agreed to or tolerated by the other contracting party. It may be the product of agreement following upon negotiations, or mediation of a third party, or a recommendation of a commission of conciliation, or the efforts of the Council of the League. The Peace Treaties of 1919 have already been substantially revised by some of these methods. But these are not instances of the working of peaceful change as a legal institution.

The problem – at least the legal problem – of peaceful change is not how to induce States by moral persuasion or by appeal to political expediency to give up existing rights with regard to a particular State. The question is, what are the regular constitutional means of effecting peaceful change without the consent of the State which sits tight on its rights? This can be done only by overriding legislation. It is imperative in these matters to use language which is unambiguous and to think out the implications of the terms which we are using. Questions involving the international aspects of State sovereignty and, generally, international relations, easily lend themselves to a solemn artificiality of language in which words are used to conceal rather than to disclose intention. Those conversant with the formulas and reservations of treaties of obligatory arbitration will appreciate this point. The same danger besets the discussion about peaceful change. There are statesmen and jurists who speak eloquently of the absurdity of a system of law which contains no organic provision for a change of the law. In fact, the position is so unsatisfactory that eloquence comes to one without undue effort. But when confronted with the inescapable implications of the establishment of a system of peaceful change, they recoil from them with horror or impatience. They