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THE INTERNATIONAL RULE OF LAW*

William W. Bishop†

In contrast with the previous lectures in this series on the Rule of Law, we are today not concerned with how the Rule of Law operates in a highly organized modern state like our own United States; but are turning instead to the world-wide community (or perhaps more properly international arena or international sphere of action, since the very word "community" may over-emphasize the degree of common sentiment!), in which the present role of the law is far less than within the state. Our first question is whether there *is* in fact any such thing as an international Rule of Law, or something approaching it. We may be like the legendary essayist on "Snakes in Ireland," who simply wrote, "There *are* no snakes in Ireland." Some would dismiss our topic by saying, "There *is* no international rule of law." If I agreed with them, I would sit down and we would all be spared anything further in this lecture. But I do *not* believe that such would be an accurate appraisal; such a quick denial of the international Rule of Law would not correspond to reality of today.

Thus it becomes necessary to inquire in some detail how far we do have anything which may properly be described as the international Rule of Law, to speculate a bit why we do not have more, and to ask what may be done to bring about a more effective Rule of Law internationally.

What do we mean by "international Rule of Law"? Without precise definition, I believe we could agree that the concept includes reliance on law as opposed to arbitrary power in international relations; the substitution of settlement by law for settlement by force; and the realization that law can and should be used as an instrumentality for the cooperative international furtherance of social aims, in such fashion as to preserve and promote the values of freedom and human dignity for individuals. Charles Rhyne, former American Bar Association President, said:

> "The rule of law within nations . . . connotes the existence of the hundreds of legal rules, the legal procedures, courts, and other institutions which in sum total add up to order and

* Lecture delivered on June 27, 1960, as part of a series of lectures on the general topic, "Post-War Thinking About the Rule of Law," given in connection with the Special Summer School for Lawyers held at The University of Michigan Law School, Ann Arbor, June 20-July 1, 1960.—Ed.

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> stability, equality, liberty, and individual freedom. . . . The rule of law among nations means the regulation of mutual intercourse of nations, and international contacts and relations of individuals, by legal concepts, standards, institutions and procedures."[1]

Before going further, let me clarify two points. In dealing with the international Rule of Law, we are *not* discussing the normal application of international law by *national* courts in appropriate cases coming before those courts.[2] Nor are we concerned primarily with the disputes of individuals with other individuals who are separated by national boundaries. Such disputes and relations are reasonably well handled by national courts and national laws, in accordance with conflict of laws principles — although greater unification of private law in some fields would be welcome, and greater uniformity of conflict of laws rules desirable. For such disputes between individuals there is also commercial arbitration, powerfully encouraged by the Arbitration Association, International Chamber of Commerce, and similar groups.[3]

Our real problem arises when one or more governments become parties to the controversies; when there is a dispute between an individual (or corporation) and a foreign government, or between the governments of two or more nations. It is to this situation that we look this afternoon. In our consideration of this topic, let us remember the strong support for the international Rule of Law expressed by Executive, congressional, and judicial officers of our own Government and of foreign democracies, and the interest of various groups of practicing lawyers, represented particularly by the American Bar Association's Special Committee on World Peace Through Law.[4] President Eisenhower said two years ago,

1 Opening statement before Boston Conference on World Peace Through Law, March 27, 1959. A.B.A. Special Committee on World Peace Through Law, THE RULE OF LAW AMONG NATIONS: DIGEST OF PROCEEDINGS OF REGIONAL CONFERENCES OF LAWYERS 47 (1959).

2 *Cf.* statement of Mr. Justice Gray, in The Paquete Habana, 175 U.S. 677, 700 (1900): "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." See also Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT'L L. 239 (1932); Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26 and 792 (1952-53).

3 See DOMKE, INTERNATIONAL TRADE ARBITRATION (1958).

4 See Rhyne, address as President of A.B.A., *World Peace Through Law*, 44 A.B.A.J. 937 (1958), also in 83 A.B.A. REP. 624 (1958); Rhyne, *World Law or World Holocaust*, 81 N.Y. ST. B.A. REP. 30 (1958); *Report of Special Committee on International Law Planning* (T. E. Dewey, Chairman), 83 A.B.A. REP. 566 (1958); and documentation of the A.B.A. Special Committee on World Peace Through Law. Note also the work of the World Rule of Law Center at Duke Law School (Arthur Larson, Director), and that Center's DESIGN FOR RESEARCH ON INTERNATIONAL RULE OF LAW (1960).

on "Law Day U.S.A.": "In a very real sense the world no longer has a choice between force and law. If civilization is to survive, it must choose the rule of law."[5] In 1919 Woodrow Wilson wrote: "What we seek is the reign of law based upon the consent of the governed and sustained by the organized opinion of mankind."[6] Senator Robert Taft declared, Sept. 25, 1947: "I do not see how we can hope to secure permanent peace in the world except by establishing law between nations and equal justice under law."[7] Referring to the ABA Special Committee on World Peace Through Law as " 'practical idealism' at work," former Governor Adlai Stevenson said, Oct. 21, 1959: "Building peace is the most important job in the world today. It cannot be built by arms. It can only be built by law."[8] Pointing to the need to establish the rule of law so as to "provide a way of settling disputes among nations as it does among individuals," Vice-President Nixon declared, April 13, 1959: "If we are to rule out, as we have and should, the use of force or threats of force as a means of settling differences where negotiations reach an impasse, the sole alternative is the establishment of the rule of law in international affairs."[9]

How far has the world gone in the adoption of an international Rule of Law? What sort of law and courts do we now have in the international sphere? How well do they work, and why don't they do a better job? Here we are concerned with international law, that system of customary rules and international agreements considered by nations as legally binding on themselves in their dealings with one another and with each other's citizens.

Our present system of international law grew up in the 16th and 17th centuries among Western European states that had become sovereign, that is to say, independent of any temporal superior, and yet were in need of some means of regulating and making more predictable their relations with each other. Widespread theories of a natural law which obligated individuals and nations alike, and a common background of Roman law and of Christian-classical ethical and intellectual traditions, made it easier for the idea of an international law, binding on independent sovereign states, to take root. Building upon what seems a curious hodge-

[5] Statement of April 30, 1958, 38 DEP'T STATE BULL. 831 (1958), quoted in A.B.A., Special Committee on World Peace Through Law, COMPILATION OF QUOTATIONS 4 (Jan. 1960).

[6] Quoted *id.* at 5.

[7] Quoted *id.* at 11.

[8] Quoted *id.* at 12.

[9] Quoted *id.* at 5.

podge of recorded international practice, legal doctrines of Roman law and canon law, ethical and philosophical speculations, and whatever else came to mind, the law writers of 300 and 400 years ago formulated principles and rules of international law. To a greater or lesser extent their statements were accepted and acted upon by nations in their practice, and then in turn succeeding writers drew both upon the earlier writers and the resulting practice of states. Through this repeated interaction of jurist and practical statesman, the ideas and natural-law philosophy of some of these "classical" writers on international law, like the 17th-century Grotius and 18th-century Vattel, had a tremendous influence upon the development of international law. For the last century and a half, however, it is to international customary law and international agreements, to the positive law actually followed by nations, that we turn, rather than to natural law speculations of the writers.

Today, in seeking the sources of international law[10] we begin with treaties, which lay down rules binding on the countries in question. Internationally, treaties take the place of both contract and statute in domestic law, since between the parties to a treaty the provisions thereof supersede customary international law.

Secondly, we look to "international custom, as evidence of a general practice accepted as law." Here we have the foundation of our international legal system, and meet the difficulties encountered when we look critically at any customary law. The practice must be "general," and must be accepted as legally binding. But it is hard to say how many nations must follow a practice before it is "general," what difference it makes which nations these are and whether there is conflicting practice or express opposition to the alleged custom, whether it is necessary that the particular nations in controversy are among those which can be shown to have accepted the practice.

As a third source, international courts are directed to follow also "general principles of law recognized by civilized nations," although in practice much less reliance seems to have been placed upon this source.

Finally, at least as "subsidiary means for the determination of rules of law," in international law we look to prior decisions of international tribunals or of national courts dealing with international law, and to the "teachings of the most highly qualified

[10] For the sources of international law, see Statute of International Court of Justice, art. 38, 59 Stat. 1060 (1945). The language quoted in the text is that of this article 38.

publicists of the various nations." In so doing, we must bear in mind that *stare decisis* is not a part of international law, and that our ideas of precedent are not found in the legal systems followed by the larger part of the world. Nevertheless, customary international law has largely developed from case to case, and an increasing number of these cases have been submitted to international tribunals or have been decided by national courts. Decisions of the courts help to form custom, and they show us what courts have accepted as international law.[11] As for the writers, we must remember Mr. Justice Gray's admonition, in *The Paquete Habana,* [175 U.S. 677, 700 (1900)] that, "Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

What organs for its law work does the international community possess? I would answer: a partially developed judicial system, a considerable body of administrative machinery, and *no* organized executive or legislative organs such as we find within the modern state. Even casual study of its Charter shows how the United Nations differs from what we think of as the executive or legislative branches of a government. Our international legislative process is solely that of agreement upon treaties by all the nations bound by them; we have no international legislature empowered to enact by majority votes laws obligatory on those not taking part in the legislative process.

Turning to institutions for the settlement of international disputes by application of law, what sort of courts do we find to deal with controversies between nations, or between a nation and those individuals or companies who are alien to that nation? Frequently during the past 160 years nations have resorted to international arbitral tribunals of their own creation. They have formed *ad hoc* tribunals to hear and decide either some single controversy or a group of cases. The state itself is usually regarded as plaintiff or defendant in such cases, although the real interest may be that of individuals aggrieved by the conduct of those for whom the defendant state is responsible. Often these tribunals consist of one person

[11] In Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815), Chief Justice Marshall wrote for the Court, concerning international law: "The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this."

named by each side and a neutral umpire; sometimes more arbitrators are used, and sometimes only a single judge. The exact questions to be decided, and the procedure to be followed, must be agreed upon by the states concerned. Decision, usually by majority vote, is through application of international law to the facts found by the tribunal, although the parties may agree on special rules to be followed. While within our country parties resort to arbitration because they want to keep out of the courts, international arbitration has been regarded as judicial settlement by an *"ad hoc* court," since nations have used this device in order to obtain a decision by law when there was no suitable court for the purpose or because they believed that the arbitral tribunal could do the particular judicial job better than any other available international court. International arbitration has, therefore, generally been treated as an international judicial procedure.

Since 1920 we have had the "World Court" at The Hague, first established as the Permanent Court of International Justice,[12] and then in the 1945 creation of the United Nations transformed into the International Court of Justice.[13] This court consists of fifteen judges (only one from any nation), elected for nine-year terms by majority votes of the United Nations General Assembly and of the Security Council. It is required that in the court "as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured." Although the United States did not join the court until 1945, there has always been an American citizen among its judges.[14]

Only states (not individuals or corporations on the one hand, nor international organizations on the other) can be parties in cases before the court, although UN agencies and other international organizations may ask for advisory opinions. The "World Court" has jurisdiction over disputes which both parties to the controversy agree to lay before the court. This may be done by special agreement after the dispute arises, or states may agree in advance to give the court jurisdiction over particular types of disputes arising between them — usually those involving interpreta-

[12] See HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942 (1943).

[13] For the treaty under which the court is established, see 59 Stat. 1055 ff. (1945). See also ROSENNE, THE INTERNATIONAL COURT OF JUSTICE (1957); LISSITZYN, THE INTERNATIONAL COURT OF JUSTICE (1951); LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT (1958).

[14] Americans who have served as judges of the "World Court" have been, successively, John Bassett Moore, Charles E. Hughes, Frank B. Kellogg, Manley O. Hudson, and Green H. Hackworth (the present incumbent). Philip C. Jessup takes office in 1961.

tion and application of some treaty.[15] Beyond this, those nations who wish to do so may, in relation to others accepting the same obligation, accept in advance the jurisdiction of the court as compulsory in all legal disputes concerning (a) the interpretation of a treaty, (b) any question of international law, (c) the existence of any fact which, if established, would constitute a breach of an international obligation, or (d) the nature or extent of the reparation to be made for the breach of an international obligation.[16] Thirty-nine nations are now subject, in varying degrees, under this "optional clause" to the compulsory jurisdiction of the Court in legal disputes as thus defined when the plaintiff state has also accepted this jurisdiction.[17] These include the United States, United Kingdom, France, Nationalist China, India and Japan; but the Soviet Union and all other Communist nations are conspicuously absent. Even this compulsory jurisdiction is in some instances cut down by the terms on which it is accepted. The United States, for example, limits our acceptance by the self-judging proviso of the Connally Amendment, that acceptance does not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America *as determined by the United States of America,*" thus rendering our acceptance of compulsory jurisdiction to a large extent illusory.[18]

Under the UN Charter, each member of the UN "undertakes to comply with the decision" of the court in any case to which

[15] For example, Art. 26 of the Treaty of Friendship, Commerce and Navigation between the United States and Italy, signed Feb. 2, 1948, provides: "Any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty, which the High Contracting Parties shall not satisfactorily adjust by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties shall agree to settlement by some other pacific means." 63 Stat. 2255, 2294.

[16] This so-called "optional clause" is art. 36, para. 2, of the Statute of the International Court of Justice, 59 Stat. 1060 (1945).

[17] A.B.A. Special Committee on World Peace Through Law, THE RULE OF LAW AMONG NATIONS: BACKGROUND INFORMATION 7 (1960).

[18] Emphasis added. United States acceptance of Aug. 26, 1946, 15 DEP'T STATE BULL. 452 (1946), 61 Stat. 1218 (1946). At present such "self-judging" limitations qualify the acceptance of compulsory jurisdiction by Liberia, Mexico, Pakistan, South Africa, and Sudan, as well as the United States. See generally Briggs, *Reservations to Acceptance of Compulsory Jurisdiction of the International Court of Justice,* Hague Academy of International Law, 93 RECUEIL DES COURS 223 (1958).

Because of the reciprocal features of compulsory jurisdiction of the Court, if the plaintiff state has qualified its acceptance of jurisdiction, the defendant state may take advantage of this qualification even though its own acceptance of jurisdiction was given unconditionally. Thus in the Case of Certain Norwegian Loans, brought by France against Norway when France's acceptance was limited by a provision similar to the Connally Amendment, the Court decided that it was without jurisdiction to adjudicate upon the dispute. [1957] I.C.J. Rep. 8. (France has since withdrawn this limitation upon her acceptance of jurisdiction.)

it is a party; if a party "fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to give effect to the judgment."[19]

Although the Permanent Court of International Justice had rather more business between the two World Wars, since 1946 the International Court of Justice has been markedly underworked. It has given judgment on the merits in about a dozen cases and rendered advisory opinions on about a dozen questions. Quite a number of other cases have been dismissed for lack of jurisdiction. Many international controversies which appear suitable for judicial settlement have not been submitted to the court (often because jurisdiction over the defendant state was obviously lacking),[20] while UN organs have been slow to seek advisory opinions.

In addition to the International Court of Justice, we must not lose sight of the effective Court of Justice of the European Communities, created for the European Coal and Steel Community and broadened to serve also as the court for the European Economic Community and Euratom.[21] Although it is geographically and functionally limited to the "Inner Six" European nations in the Communities, this court is a real step forward toward the international rule of law. Nor should we forget the recently-established

19 United Nations Charter, art. 94, 59 Stat. 1051 (1945). See also Schachter, *The Enforcement of International Judicial and Arbitral Decisions,* 54 AM. J. INT'L L. 1 (1960).

20 "Other legal disputes which might have been submitted to the Court during the period since 1946 include those relating to: the validity of Kashmir's accession to India; India-Pakistan sharing of river waters; the right of prisoners of war in Korea to refuse repatriation; the Peruvian seizure of the Onassis and other ships; the Egyptian claim of the right to bar Israel from the use of the Suez Canal and passage through the Gulf of Aqaba; the objections of Japan and others to U.S. nuclear bomb tests over the high seas; French seizure of Algerian emissaries on airplane from Morocco; Egyptian nationalization of the Suez Canal; Icelandic fishery laws; Indonesian seizures of Dutch property; the status of Formosa and the off-shore islands; the question of West New Guinea; the Allies' right of access to West Berlin; Tibet's right to independence from Communist China; and hundreds of individual claims, accumulating in foreign offices throughout the world, of denials of justice according to international law. The defendants in most of these disputes, if they had been filed, would have been entitled to deny the jurisdiction of the Court on the ground that they or the plaintiffs had not accepted the compulsory jurisdiction of the Court or that their acceptance or the plaintiffs' acceptances were subject to reciprocally applicable reservations." A.B.A. Special Committee on World Peace Through Law, THE RULE OF LAW AMONG NATIONS: BACKGROUND INFORMATION 15 (1960).

21 Concerning this court, see VALENTINE, THE COURT OF JUSTICE OF THE EUROPEAN COAL AND STEEL COMMUNITY (1955); Stein, *The European Coal and Steel Community: the Beginning of its Judicial Process,* 55 COLUM. L. REV. 985 (1955); Stein, *The Court of Justice of the European Coal and Steel Community, 1954-1957,* 51 AM. J. INT'L L. 821 (1957); STEIN & NICHOLSON, AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET—A LEGAL PROFILE, vol. I, ch. II, *The New Institutions* (by E. Stein) and ch. VII, *New Legal Remedies of Enterprise* (by E. Stein and P. Hay) (Michigan Legal Studies, 1960).

European Court of Human Rights,[22] concerned with the problems of individual human rights in the European countries accepting its jurisdiction.

While international arbitration and decision by the "World Court" are the two principal means for the use of law in the settlement of international disputes, we must not overlook the important part law may play in the settlement of disputes by direct negotiation, or in connection with mediation, conciliation, or adjustment of controversies through political bodies such as the Security Council, General Assembly, or Organization of American States.[23]

In focusing our attention as lawyers upon the institutions applying law to the settlement of international disputes, we must not forget that the most frequent use of law internationally lies in action taken according to its rules rather than in litigation or the settlement of controversies. The daily reliance upon international law as a standard of conduct in the normal relations between nations far exceeds in frequency, and may well equal in importance, its role as a basis for the settlement of disputes.

Why do states comply with international law, in so far as they do? The sanctions of international law appear to be a mixture, in proportions depending on the circumstances, of the forces of public opinion, habit, good faith, expediency, self-help, and reciprocal advantage when the law is followed and fear of retaliation if it is broken. Within the modern state the rule of law is backed by readily available force, indeed by more or less a monopoly of force in governmental hands, as well as by prevailing law-abiding sentiment. International law is usually quite well observed, in so far as its demands on states are not very exacting. However, we need means for compelling observance of the law internationally, which do not result in violence and evils far greater than the violation. But we must remember that the weaknesses of international law to meet the needs of the present day lie deeper than any mere question of sanction. As Brierly so well pointed out:

> "It is not the existence of a police force that makes a system of law strong and respected, but the strength of the law that makes it possible for a police force to be effectively organized.

22 See Robertson, *The European Court of Human Rights,* 9 AM. J. COMP. L. 1 (1960).

23 "These varied methods of facilitating agreement between parties to a dispute provide opportunities for statesmanship. Their success depends on the skill with which they are used by the statesmen concerned. . . .

"The capacity of either party to a dispute to demand arbitration or judicial settlement as a last resort probably facilitates negotiation." A.B.A. Special Committee on World Peace Through Law, THE RULE OF LAW AMONG NATIONS: BACKGROUND INFORMATION 19 (1960).

> The imperative character of law is felt so strongly within a highly civilized state that national law has developed a machinery of enforcement which generally works smoothly, though never so smoothly as to make breaches impossible. If the imperative character of international law were equally strongly felt, the institution of definite international sanctions would easily follow."[24]

With the world organized as it is, we must recognize that international law has not in the past been able to deal with the deliberate law-breaker; that nations have not been willing to act in such fashion as to put power behind the law. We may ask whether the imminent possibility of destruction of the greater part of the population and resources of the world by nuclear weapons and other instruments of warfare, may force even reluctant statesmen to recognize the advantages of following the law when departure from it may in serious matters bring such consequences.

Is there any obligation, either in law or in fact, to use law and these international agencies? Article 33 of the United Nations Charter does require that,

> "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."[25]

In Article 2, paragraph 3, members of the United Nations agree that "All Members shall settle their internationl disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[26] But despite these general provisions, the weakest point in our present international legal system lies in the fact that, except as parties may by treaty contract otherwise, the jurisdiction of international courts is purely voluntary; an unwilling defendant violates no law in merely declining to have the controversy dealt with by processes of the law. In the absence of specific agreement conferring jurisdiction, there is no means whereby a would-be plaintiff nation may bring another into court without the latter's consent, or obtain a judgment by default if it fails to appear. On this point President Eisenhower well said, "We

24 BRIERLY, THE LAW OF NATIONS 73 (4th ed. 1949).
25 59 Stat. 1042 (1945).
26 *Id.* at 1037.

have . . . at least the structure and machinery of an international rule of law which could displace the use of force. What we need now is the universal will to accept peaceful settlement of disputes in a framework of law."[27]

Herman Phleger, former Legal Adviser of the Department of State, recently declared: "We have plenty of law and plenty of mechanics for judicial determination of legal disputes, but there is no general will on the part of governments to resort to the existing law and the existing mechanics. The great problem is to change the climate of public opinion."[28] It is in this respect that the current movements for the world rule of law may hope to accomplish the most, through bringing about the desire to use the international law and international judicial machinery we already have.

But this is not the sole answer. We must ask what types of international disputes are susceptible to adjudication. There is much truth in the assertion that whether an international dispute is justiciable depends on the attitude of the parties; it *is* justiciable if both parties want to have it decided on the basis of law. However, as Sir John Fischer Williams cautioned years ago, "the more serious disputes, those which involve the more fundamental issues, are those where a change in the law is sought."[29] Brierly suggests that,

> "The analogy of the compulsory jurisdiction of municipal courts is in many ways deceptive. For one thing, they are part of an elaborate social organization which provides for the enforcement of legal rights as such, and there is no near prospect of that in the international field. . . . In the last resort there is no escape from the fact that judicial process, national or international, can settle a dispute in the sense of finally disposing of it only on one of two conditions; either the parties must be willing, or they must be compellable, to accept their rights according to law in full settlement of their demands."[30]

International law may give a solution to any controversy, but a solution which leaves the unsatisfied party with merely a declaration that it has no legal rights to a change in the situation may prove no satisfactory solution. Even within the state, there is con-

[27] Message for "Law Day U.S.A." April 30, 1958, 38 DEP'T STATE BULL. 831 (1958).

[28] A.B.A. Special Committee on World Peace Through Law, THE RULE OF LAW AMONG NATIONS: DIGEST OF PROCEEDINGS OF REGIONAL CONFERENCES OF LAWYERS 32 (1959).

[29] WILLIAMS, INTERNATIONAL CHANGE AND INTERNATIONAL PEACE 5 (1932).

[30] BRIERLY, THE OUTLOOK FOR INTERNATIONAL LAW 120, 122-23 (1944).

stant need for legislation, for keeping the law up to date with social changes; but in the international sphere we have no such legislative process except as all the parties concerned may be willing to join in a treaty to bring about the change.

We must further distinguish the types of controversy suitable for settlement by a court from those calling for political adjustment. The question of the right of passage through the Suez Canal, or of the right to divert and use part of the flow of an international river, is a legal question susceptible of judicial settlement if the parties are willing. But the appropriate way in which to divide the waters of the Indus between India and Pakistan so as to bring about the fairest and most beneficial use of these waters for the good of both countries calls for a basis of decision other than the existing law. The question whether, by cutting off access to Berlin, the Soviet Union (or East Germany) would violate international obligations, is a justiciable question; the question what should be done about the future of Germany is a political question falling outside the special competence of courts.

In sum, how far is our present system inadequate to give us a true international Rule of Law? I should be among the last to disregard the highly useful services now rendered by international law (and by international courts and international organizations); but I must mention some of its obvious weaknesses. One can readily point to the lack of obligation to use the law and means for settlement of disputes by application of the law, to the lack of the organized type of sanction we find in modern domestic law and which we need internationally if settlement by law is to replace settlement by use or threat of force, to the uncertainty of many international law rules (particularly on the customary side), the smallness of its range in so far as it allows nations complete discretionary control over many matters which actually affect the interests of other nations, the slowness of its development, and the great difficulties in bringing about by lawful means changes in the legal situation to meet an ever-faster-changing world.

Basically, our difficulty is that the peoples and governments of the world are not ready for the surrender of sovereignty to any type of world government, even on a most limited basis or on a federal model. Professor Jessup thoughtfully remarked a decade ago, "Until the world achieves some form of international government in which a collective will takes precedence over the individual will of the sovereign state, the ultimate function of law, which

is the elimination of force for the solution of human conflicts, will not be fulfilled."[31]

But even if we doubt that a complete realization of the international Rule of Law is probable without extensive alteration in the world's political structure,[32] let us look at some current developments relevant to our subject in the world as it is.

First, we must take note of the sudden expansion of the international community as new nations achieve independence and conduct their own foreign relations. Particularly in Asia and Africa, nations are becoming independent at such a rate that it is hard to keep up with them! International law began as a legal system among European nations with common ideas and ideals and fairly similar domestic laws. The American republics, commencing with the United States, were in the same tradition. Turkey was "admitted to the family of nations" in 1856; and Japan, China and others gradually followed. But since the end of World War II, think of the ever-lengthening list of new states taking their places in international affairs and international organizations: Philippines, Korea, India, Pakistan, Burma, Ceylon, Lebanon, Syria,[33] Jordan, Israel, Indonesia, Libya, Sudan, Morocco, Tunisia, Ghana, Guinea, Cambodia, Vietnam, Laos, Malaya, Cameroun, Togo, Mali Federation, and more to come like Congo, Somalia, Nigeria, Malagasy, Sierra Leone, Cyprus, and others. While the world is glad to see these countries achieve self-determination and independent control of their own affairs, these nations are by no means always happy to accept all the customary rules laid down by older members of the international community before they had acquired independent statehood. Some, at least, among these newer nations lack any widespread acceptance of those values and ideas which pervaded the international community when our system of international law grew up. Other nations, like the Soviet Union and Communist China, have broken with the Western past, and although still accepting international law on a pragmatic basis, no longer reinforce that law by the values and ideals which aided its development.

These events have placed a great strain upon international law and its instrumentalities. The "official doctrine" of the international community still follows what Daniel Webster wrote in 1842 as Secretary of State:

[31] JESSUP, A MODERN LAW OF NATIONS 2 (1948).

[32] *Cf.*, for example, CLARK & SOHN, WORLD PEACE THROUGH WORLD LAW (1958). Of course many other plans for altered international political institutions have been suggested.

[33] Now combined with Egypt in the United Arab Republic.

> "Every nation, on being received, at her own request, into the circle of civilized governments, must understand that she not only attains rights of sovereignty and the dignity of national character, but that she binds herself also to the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states. . . . No community can be allowed the benefit of national character in modern times without submitting to all the duties which that character imposes."[34]

But anti-colonial memories, and short-range interests during the "cold war," weaken the effectiveness in relations with these new nations of many parts of international law other than those embodied in treaties specifically accepted by them. Here is a real danger of a trend away from the international Rule of Law.

To balance this, we may note the growth of international organization in the past decades. Alongside the establishment of the League of Nations and then more recently the United Nations, we see also the development of old and new specialized functional agencies dealing with everyday international problems of health, labor, agriculture, education, money, mails, aviation, telecommunications, meteorology, shipping, atomic energy, and the like.[35] We have important regional or defense organizations like the Organization of American States and the North Atlantic Treaty Organization. We must not lose sight of the effective work of bilateral international organizations like the International Joint Commission which deals with boundary waters between the United States and Canada, or the International Boundary and Water Commission between the United States and Mexico, which has built and operates international dams. Of course we cannot forget the "supranational" European economic organizations, whose agencies and rules operate directly upon individuals and corporations as well as upon member states.

This growth of international organizations brings legal problems concerning their status internationally and before national authorities, their relations with each other, the legal position of

[34] Secretary Webster to the American Minister to Mexico, April 15, 1842, quoted in 1 MOORE, DIGEST OF INTERNATIONAL LAW 5 (1906).

[35] For the constitutional documents of international organizations, see PEASLEE, INTERNATIONAL GOVERNMENTAL ORGANIZATIONS: CONSTITUTIONAL DOCUMENTS (1956). For current developments, use the quarterly, INTERNATIONAL ORGANIZATION. Concerning the work of international organizations, see BECKEL, WORKSHOPS FOR THE WORLD (1954); LEONARD, INTERNATIONAL ORGANIZATION (1951); HILL, INTERNATIONAL ORGANIZATION (1952); CLAUDE, SWORDS INTO PLOWSHARES (1956).

international organization employees, and above all the interpretation and application of the treaties under which they are set up and function. The "constitutional law" of each such organization grows rapidly, while with what may be called "parliamentary diplomacy"[36] their rules of procedure become increasingly important. Their assemblies and councils afford yet further fora for the discussion and adjustment of international problems, with more or less use of international law in the process. Their deliberations frequently result in treaties to regulate and promote the activities with which they are concerned. Such organizations provide much of the administrative machinery we associate with governmental handling of problems, and law is important in their daily functioning. They make a valuable contribution toward the international Rule of Law, particularly when technical questions outweigh political considerations.

In international law today, the most noticeable phenomenon is the amazing number, variety and complexity of international agreements, or treaties, which represent purposeful development of the law and which so largely replace custom in most fields by more clearly defined rules chosen by the parties to meet their needs. Treaties deal with an almost infinite variety of subject-matter: the UN Charter, mutual defense, commerce, consular functions, taxation, standardization of vaccines and health measures, rights of airlines of one country to do business with another, etc., etc. Most of the cases heard by the "World Court," and most of the international legal problems which today arise in legal practice or between foreign offices, involve international agreements.

As the law contained in treaties has become the predominant part of our field, the principles and practices pertaining to the making, effect, application, interpretation, modification and termination of treaties become an ever more vital part of international customary law. More and more we depend on the notion of *pacta sunt servanda*; our gain in clarity of international rules and their suitability to human needs may come at the expense of that habitual conformity to law and tradition which characterizes all customary law. This growth of the *written* international law, comparable to the great growth of legislation in the internal law of most countries and at the same time reminiscent of the change "from status to contract" sometimes found by some observers in the history of private law, renders more and more acute the problem of the *bind-*

[36] See Jessup, *Parliamentary Diplomacy*, Hague Academy of International Law, 89 RECUEIL DES COURS 181 (1956).

ing force of treaties, and of the possibilities of their *lawful* modification or termination.

We have developed "mechanics" of making international agreements which serve our ends quite well [whether we think of agreements approved by the Senate which we call "treaties" for constitutional purposes, or those entered into by the Executive alone or by the Executive in conjunction with both Houses of Congress, which we call "executive" or "executive-congressional" agreements]. Whether negotiated and concluded between two nations by diplomats in traditional formal style, or handled informally as exchanges of notes, or drafted at international conferences as compromises resulting from a series of majority votes, we have adequate means for expressing those rules and principles upon which nations can agree. In these agreements, however arrived at, we need careful and imaginative draftsmanship to avoid difficulties of interpretation, and we need provisions ensuring that such disputes as may arise concerning the agreement will be submitted to courts or arbitration for settlement according to law.

The normal requirement of unanimous consent among the parties to each international agreement may be slowly disappearing; by consent in advance nations may agree to be bound by later-adopted rules to which they do not give specific formal assent. Thus the Halibut Conventions[37] between the United States and Canada provide that fishing regulations adopted each year by a commission under the treaty shall be effective on approval by the President and the Governor-General, without need to go through the treaty-making process each time. In the technical annexes to the 1944 Chicago Civil Aviation Convention,[38] amendments become effective for all parties when adopted by two-thirds vote of the Council, unless within three months a majority of the parties to the treaty register their disapproval. Under the UN Charter, amendments may be adopted by two-thirds of the membership and obligate even those who oppose them, provided all five permanent members of the Security Council concur in the amendment.[39]

Even with all that is being done to improve the international-agreement process, we must remember how far it falls short of true "legislation." We do not have rules laid down by any higher body which nations must follow, but a process which at some stage re-

[37] Convention signed May 9, 1930, 47 Stat. 1872; Convention signed Jan. 29, 1937, 50 Stat. 1351; Convention signed March 2, 1953, 5 U.S. TREATIES 5, or T.I.A.S. No. 2900.

[38] 61 Stat. 1180.

[39] U.N. Charter, art. 108, 59 Stat. 1053 (1945).

quires the agreement of each nation to be affected. We have made only the slightest moves away from the requirement of unanimous agreement. The fundamental basis remains, that no state is bound without its consent. As Marshall wrote so long ago in *The Antelope*, [23 U.S. (10 Wheat.) 66, 122 (1825)]: "No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another."

One reason for technical international legal progress in matters relating to the making of agreements is that no nation is obligated to enter into a treaty unless it wants to. But where the law does come into conflict with strong state policy, difficulties arise. When one nation wants to escape the obligations of a treaty it has accepted, or to stop performing, but another party to the treaty wants to keep it in force and demands performance, there is trouble. Here we may find disregard of treaties admittedly in force, unless the reasons for performance outweigh those for breach. This situation brings up questions whether there is a right to terminate a treaty unilaterally because of violation by the other party, and as to the effect of changed circumstances upon the continuing validity of a treaty when the parties did not provide for this contingency. The customary international law on these questions is not clear. The problem becomes how far those responsible for determining state policies will judge that the general interest in maintaining the sanctity of treaties is superior to the immediate gain they may see in repudiating a burdensome treaty obligation. In this area the best hope for progress toward an international rule of law would seem to lie in making effective provision for the determination of these cases, involving alleged rights to terminate for violation or change of circumstances, by impartial international judicial or political bodies.[40]

Another significant development is the breakdown of boundaries between international law and national laws as they are applied in practice. Whether in private practice or as government official, the lawyer usually meets international law questions intermixed with the domestic law of one or more countries. More and more frequently legal questions also arise in specialties such as international air law, international taxation, international telecommunications, international copyright, international narcotics control,

[40] *Cf.* Harvard Research in International Law, *Law of Treaties*, 29 AM. J. INT'L L. Supp. 653, 1077-1126 (1935).

health controls, conservation, and the like, where the specialized subject-matter becomes a unifying theme for international law and national law dealing with a common problem. Lawyers and government officials tend to think of aviation, taxation, radio, copyright, or narcotics, rather than to distinguish between the national and international sources of the rules involved. More and more of international law today affects the individual directly. In many areas we may see a difference between the growth and effectiveness of the law applied in joint regulation of *individuals* by governments, and the slower and more doubtful development of rules designed to restrain *state* action. What may be called "treaty-*laws*" come to play a more important part alongside the older "treaty-*contracts*." I would suggest that in this whole area in which nations cooperate to regulate or promote individual activities, international law is most likely to afford a successful means of dealing with the questions which arise, since political feelings are not so high and both states concerned feel an obvious common interest in promoting (or repressing) the activity involved. In this limited field the international Rule of Law is fast growing.

On the other hand, in the last decade or so we see considerable de-emphasis of international adjudication, at least as compared with the inter-war period or with earlier hopes. There is less resort to the "World Court" or to international arbitration, and fewer states are willing to undertake the obligations of compulsory jurisdiction. There appears to be a growing preference for non-judicial settlement of international disputes; settlement by direct negotiation[41] or international organizations are favored. One may see here a certain analogy to the domestic efforts of lawyers to keep their clients out of court. We must further remember that the exalted and trusted position of courts internally in Europe and the Americas is not shared by courts in all other parts of the world such as the Soviet Union or many Asiatic lands. Whether we like it or not (and as an American lawyer I don't like it!), the emphasis is shifting away from the settlement of international disputes by the judicial application of international law, and toward the specific agreement of the parties negotiated within the general framework of the law and expressed as a treaty. This trend from international adjudication toward negotiated settlement raises serious problems for the international rule of law. Political and military

41 Sometimes followed by apportionment by a domestic claims commission of the sum paid between various claimants.

power undoubtedly play a greater part in such negotiated settlements than in judicial decisions. On the other hand, many disputes are not so easily susceptible of judicial decision, and call for political adjustment. The international legal order must include processes of political adjustment as well as judicial settlement. Formulation of, and agreement upon, generally applicable rules of international law may be less practicable and less useful than the achievement of orderly solutions to particular problems in view of their peculiar facts.[42] When we contrast the relatively small number of independent states in the world and the enormous factual differences between these states, with the thousands and millions of individuals who live in even a small modern state, we readily see why solution *by general uniform rules* may be less suitable in controversies between states than within the state. But if the international Rule of Law is to have room for such means of dealing with problems, as it must, safeguards must be worked out to ensure that the solutions do conform to the Rule of Law and do not depend solely upon arbitrary use or threat of power. Third-party settlement may not be quite essential to the Rule of Law internationally, but attempts to dispense with it may negate the Rule of Law altogether.

Finally, overshadowing these developments which may be of interest chiefly to international law specialists is one overwhelming fact: the disappearance of any safe or practicable alternative to the use of law, in an age when nations have such ability to destroy each other. We need only call attention to the all too obvious implications of a world where several powers are armed with atomic and hydrogen bombs, missiles, instrumentalities for chemical and biological warfare, and so on, to see that the old alternative of the actual resort to force for the settlement of international disputes (instead of mere threat of force or fear that it might be used) has lost much of its appeal even for those nations which might not care much for the law!

With the world as it is, and in the light of these current developments, what may be done in a practical way to bring about a greater approach to the international Rule of Law? Under-Secretary of State Herter wisely said:

[42] See Brierly, *The Rule of Law in International Society*, 7 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET, ACTA SCANDINAVICA JURIS GENTIUM 3, 9 ff. (1936), reprinted in BRIERLY, THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS 250 (1958). See also DICKINSON, LAW AND PEACE, ch. 1 (1951).

> "[T]he further development of the rule of law among nations must come through a slow evolutionary process. It will depend in the first instance on the growth of mutual comprehension among all nations of the *need* for the peaceful machinery of law and of the horrors of the alternative machinery of war. Thereafter it will depend on the spread of confidence born of experience slowly accumulated in practical application of the machinery and technique of law."[43]

First, I would suggest that our own country, and other nations, make greater use than we have made of the legal machinery we now have. In cooperation with other nations, we could make far more use of the International Court of Justice for the decision of legal controversies (or for advisory opinions on legal questions before international organizations) than we have in the past. We should work for greater acceptance of the compulsory jurisdiction of the International Court, taking the lead instead of "dragging our heels" through the effect and influence of the self-judging limitation on our acceptance of compulsory jurisdiction found in the Connally Amendment.[44] Here the Executive and leading members of Congress have strongly urged that we give up the right to determine which questions are domestic as opposed to which are international, and follow the Statute of the International Court in letting the court decide according to international law whether it does or does not have jurisdiction. President Eisenhower well said at Delhi University last December, "It is better to lose a point now and then in an international tribunal and gain a world in which everyone lives at

[43] 37 DEP'T STATE BULL. 223, 228 (1957).

[44] Note 18 *supra*. Concerning efforts to repeal the Connally Amendment, see *Hearings on Compulsory Jurisdiction, International Court of Justice,* Jan. 27 and Feb. 17, 1960, before U.S. Senate, Committee on Foreign Relations, 86th Cong., 2d Sess., on S. Res. 94. Urging elimination of this limitation on U.S. acceptance, see President Eisenhower, *State of the Union Message,* Jan. 7, 1960, 42 DEP'T STATE BULL. 111, 117-18 (1960); and correspondence between President Eisenhower and Senator Humphrey, *id.* at 128.

Urging repeal of this "self-judging" Connally Amendment, see further Preuss, *The International Court of Justice, the Senate and Matters of Domestic Jurisdiction,* 40 AM. J. INT'L L. 720 (1946); Briggs, *The United States and the International Court of Justice: A Re-examination,"* 53 *id.* 301 (1959); A.B.A. Section of International and Comparative Law, REPORT ON THE SELF-JUDGING ASPECT OF THE UNITED STATES' DOMESTIC JURISDICTION RESERVATION TO ITS ADHERENCE TO THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE (1959), reprinted in *Hearings, supra* at 281.

In 1947 the American Bar Association took action urging withdrawal of this "self-judging" American limitation. 72 A.B.A. REP. 82, 378 (1947). In September 1960, it refused to change from this stand.

peace under the rule of law."[45] Where we can, we should insist on the inclusion in treaties of provisions to the effect that controversies over their interpretation or application should be submitted to the International Court of Justice.

Secondly, if there is a real disposition to use international legal processes, nations like our own might well consider the establishment of permanent local international tribunals to deal with the thousands of international claims for injuries to individuals at the hands of foreign governments, now gathering dust in the files of foreign offices until the day when arbitral tribunals are set up. Individuals might well be given direct access to such tribunals in their own name, with as inexpensive a procedure as practicable.[46] Possibly chambers of the International Court of Justice, meeting in various parts of the world, could be used for this purpose.

Third, there is much room for useful work in bringing about international cooperative compilation of international customary law, and making the law easier to find[47] as well as more clearly defined,[48] through codification work of the UN International Law Commission[49] and more widespread publication of sources.

45 Address at Delhi University, Dec. 11, 1959. Quoted in A.B.A. Special Committee on World Peace Through Law, COMPILATION OF QUOTATIONS 4 (Jan. 1960).

46 See A.B.A. Special Committee on World Peace Through Law, THE RULE OF LAW AMONG NATIONS: BACKGROUND INFORMATION 23-25 (1960). See also Borchard, *The Access of Individuals to International Courts*, 24 AM. J. INT'L L. 359 (1930); JESSUP, A MODERN LAW OF NATIONS 18, 32-34 (1948); BISHOP, INTERNATIONAL LAW CASES AND MATERIALS 207-09 (1953).

47 "The sources of international law are widely scattered. To get the law one must gather together and distill evidence accumulated from centuries of custom, international judicial and arbitral decisions, domestic decisions, writings of experts, publicists and diplomats, treaties, and many other sources. There is at the present time no adequate systematized compilation of the above. If we are ever to have a world rule of law it is obvious that there must be a current and complete set of source materials of international law which would include reports, digests, indices and commentaries. We all realize how difficult it would be to do an acceptable job of domestic research without such tools as the American Digest System, National Reporter System, and American Law Reports Annotated. Previous efforts to create such practical tools in the international law field have met with only partial success." A.B.A. Special Committee on World Peace Through Law, THE RULE OF LAW AMONG NATIONS: BACKGROUND INFORMATION 30 (1960).

Steps in this direction have been made in the national digests of international law prepared by Moore (1906) and Hackworth (1940-44) and published by the United States Government; and in the excellent series founded by Lauterpacht as the *Annual Digest of Public International Law Cases* and continued as *International Law Reports*, which cover international and national court decisions since 1919.

48 The late Sir Hersch Lauterpacht, who served as the British member of the International Law Commission and later as judge of the International Court of Justice, wrote: "[O]nce we approach at close quarters practically any branch of international law, we are driven, amidst some feeling of incredulity, to the conclusion that although there is as a

Fourth, we must strive for the better handling of non-justiciable disputes by political means but in conformity with the law. In our enthusiasm as lawyers for the use of the judicial process, we must not forget the need for orderly change in legal rights through negotiation assisted by political processes. As nations see the overwhelming need for peaceful settlement rather than reliance on the threat or use of force, we may hope to see progress in dealing with disputes where a change in the law is needed.

Finally, above all we must as lawyers try to bring about a better public understanding[50] of the need for international law, of what we now have in the way of international law, of our existing means for making that law and using that law, and a stronger conviction that with the present powers of military destruction resort to law instead of force becomes increasingly vital. If enough people in enough countries *want* the international Rule of Law, we can go a long way toward it even under present international political institutions.

rule a consensus of opinion on broad principle—even this may be an overestimate in some cases—there is no semblance of agreement in relation to specific rules and problems. . . . The fact, which is both disquieting and chastening, speaks for itself. There is, upon reflection, nothing astonishing about it. How could it be otherwise in a society in which judicial settlement is sporadic, in which there is no legislative activity in the accepted sense and in which custom is slow of growth and controversial in interpretation and application?" *Codification and Development of International Law,* 49 AM. J. INT'L L. 16, 17, 19 (1955).

[49] On the work of the International Law Commission, established by the United Nations to assist in the codification and progress development of international law, see the YEARBOOKS OF THE INTERNATIONAL LAW COMMISSION. See also LAUTERPACHT, *op. cit. supra* note 48; and Stone, *On the Vocation of the International Law Commission,* 57 COLUM. L. REV. 16 (1957).

[50] Perhaps the best introduction to a better understanding of international law is BRIERLY, LAW OF NATIONS (1st ed. 1928; 5th ed. 1955). See also BISHOP, INTERNATIONAL LAW CASES AND MATERIALS (1953); and the quarterly AMERICAN JOURNAL OF INTERNATIONAL LAW.