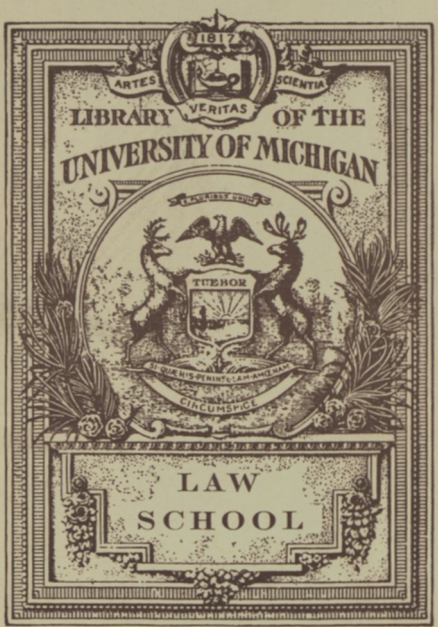
1957

International Law and the United Nations

University of Michigan Law School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EIGHTH SUMMER INSTITUTE

INTERNATIONAL LAW AND THE UNITED NATIONS

CONFERENCE HELD AT THE UNIVERSITY OF MICHIGAN

JUNE 23-28, 1955

Summer Institute on International and Comparative Law

University of Michigan, Law School

International Law and the United Nations

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Lectures on

International Law and the United Nations

Delivered at

University of Michigan Law School

June 23-28, 1955

Foreword

by

William W. Bishop, Jr.

Ann Arbor, Michigan
University of Michigan Law School

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FOREWORD

In June, 1955, the University of Michigan Law School held a six-day Summer Institute dealing with problems of international law and of the United Nations. This was the eighth in the series of annual Summer Institutes dealing with important problems in areas of public concern, often with particular emphasis upon the comparative or international law aspects involved. The 1955 Institute came at the time of the tenth anniversary of the signing of the United Nations Charter on June 26, 1945, and approximately a decade after the termination of hostilities in World War II. The growth of the United Nations during that decade has been paralleled by the increasing interest in international legal studies on the part of law students, law teachers, and practicing lawyers in the United States and elsewhere throughout the world.

International and foreign law questions will bulk increasingly large in the activities and interests of many practicing lawyers, government officials, and schools in the years ahead. Some familiarity with legal problems and their solution in a context wider than the single state or nation is believed desirable in broadening the horizons of the law student and lawyer, helping him to place familiar rules and practices in a larger perspective, and clarifying his understanding of the domestic legal system with which he is most familiar. If the lawyer, who in American society so often takes a leading part in community and government activities and in the formulation of public opinion and national policy, is to discharge adequately the broader responsibilities of his profession, he must have some acquaintance with international law. International law, as the legal aspect of international relations, calls for the lawyer's skills, the lawyer's attitudes, the lawyer's approach. With the increasing importance both of the United States in world affairs and of international relations to all of us in the United States, it becomes highly necessary to have many persons sufficiently conversant with international law to understand the legal side of the problems arising in our relations with other countries. Recognition of this growing interest in international studies, and of the importance of bringing work

in international law and foreign law more closely to the attention of the great mass of American law students who will form the bar of tomorrow, caused the Ford Foundation to make a noteworthy series of grants to certain American law schools late in 1954 and in 1955 for the promotion of international legal studies. The University of Michigan Law School was among the grateful recipients of such a grant.

Having these factors in mind, the law school brought together for six days a group of law school teachers of international law, lawyers active in the field, and certain government officials working on international legal topics. The sessions were open to, and participated in by, law students, political scientists working in international law and relations, and interested lawyers. The purpose was to have a mutual exchange of ideas and discussions of new trends and developments. This volume contains the papers delivered and, so far as possible, the substance of the formal discussions which took place.

The subject matter of the Institute may be divided into two principal fields. The first portion was devoted primarily to the examination, particularly from the law teacher's standpoint, of some of the newer developments in international law and the general scope and content of what has more recently been called "international legal studies." The latter portion of the program focused upon the first decade of the United Nations.

Thus the first day was given over to a consideration of some of the newer vistas in international law, including by way of example the "policy science approach," the law of international trade and investment, commercial treaties as a subject for study and research, and the problems relating to needed and projected research in international legal studies. Problems involved in the actual teaching of international law courses and seminars of various types in law schools in the United States were taken up on the second day. By way of specific example, the panel discussion dealt with contemporary developments concerning treaties and other international agreements. As an indication of one of the very new fields, a session was devoted to "the challenge of the atom to international legal studies." A day of discussion explored the problems of adapting the traditional international law principles and practices of the past two centuries to the rapidly moving, and at times chaotic, developments in the fields of high seas fisheries, the continental shelf, and territorial waters.

The two days devoted primarily to the discussion of United Nations problems centered first upon certain legal aspects of

the first decade of the United Nations; and then looked to the current scene and the future with the discussion of "limitations on what the United Nations can do successfully" as brought out in the efforts to deal with restrictive business practices, and the general problem of review and revision of the United Nations Charter.

Those participating in the Institute were most grateful for the opportunity to live, eat, and visit together informally in the facilities of the William W. Cook Law Quadrangle of the University of Michigan. Warmest appreciation should also be expressed for the financial support of the Institute by funds from the budget of the University of Michigan Summer Session, the Ford Foundation grant to the University of Michigan Law School for international legal studies, and a generous donation by Mr. Gilbert H. Montague of the New York Bar, who has so graciously contributed to the support of other summer Institutes at the University of Michigan Law School. Finally, the undersigned as the Chairman of this Institute wishes to express his gratitude to Dean E. Blythe Stason and to his colleagues of the faculty of the University of Michigan Law School, to Mrs. Kathleen Dannemiller and Dr. Rinaldo Bianchi as his chief assistants in the Institute, to the staff of the University of Michigan Lawyers Club, to various students who helped in so many ways, and to all of those from the University of Michigan community and elsewhere who contributed as participants, each in his own way, to the success and enjoyment of the Institute.

William W. Bishop, Jr.

INTRODUCTION

E. Blythe Stason
Dean, University of Michigan Law School

It seems peculiarly appropriate that we should at this time be embarking upon a program involving an intimate and intensive study of all aspects of international law and the United Nations. The very fact that the United Nations has now responded to its tenth birthday celebration, and the accomplishments of the last decade are being reviewed in San Francisco as of this very moment, is a thoroughly sound reason for the kind of consideration which we in this institute can give to that great organization and its achievements, not only the achievements of the past ten years, but the prospects for the next ten years and the indefinite future. These are subjects of mighty concern to all good citizens, not to mention persons particularly interested in international law. That is one good reason, then, for an institute of this sort.

Then I believe there is another reason. We can with substantial satisfaction look about the world today and entertain a feeling of gradual relaxation of the terrific tensions between nations that have been so much a part of our lives during the last ten years. There are evidences on all sides of a relaxation of these tendencies.

Looking forward, then, we may feel a greater assurance of friendly relationships between nations in the future, not only in a diplomatic sense but in a sense involving trade and international intercourse, cultural exchange, and all of the rest that goes along with free international give and take.

We may, therefore, we hope and we trust, look forward to a continuing relaxation of tensions, and a continual building up of relationships between nations. The phrase "One World" is condemned in high places, but it does look as though we can hopefully expect a greater unity in the world than that which we have had in the immediate past. If we are going to have greater international intercourse, we certainly will need to have the rules of law and order essential to the maintenance of the program. So this seems to me to be another reason for a conference of this sort on international law, the United Nations, and the legal problems relating thereto.

And then there is still a third reason for this program. We who are responsible for the teaching of the next generation of lawyers feel rather keenly the burden of that responsibility. We at Michigan, and I know you in other educational institutions, feel the responsibility which rests upon us to bring up the next generation in our profession to an appreciation of the problems of international intercourse, and particularly, of course, the legal problems, because after all they are our central concern.

We feel, in other words, that the teaching of international law and its first cousin, comparative law—foreign law—the teaching of these subjects to the next generation of lawyers, is one of our major responsibilities.

At Michigan, as in other law schools throughout the country, this burden is being lifted according to the lights as we see them, but we need to interchange ideas in order that we may all move forward successfully in this all-important area, the training of the men and women who are to participate in these programs of international intercourse in the future, stands as the number-one task of legal education in this country today.

This, then, is a third reason for the conference which we have called and in which we are all participating today.

NEW VISTAS AND NEW APPROACHES IN INTERNATIONAL LEGAL STUDIES

June 23, 1955, Morning session

NEW VISTAS IN INTERNATIONAL LAW

PROF. PHILIP C. JESSUP (Columbia University, formerly Ambassador-at-Large): I suppose in using the adjective "new" in the title of my talk, I need some point of comparison in time, and quite arbitrarily and subjectively I am taking as my point of comparison a period extending back thirty years. I would like to spend just a few moments in trying to reconstruct what seemed then to be the new vistas in international law and the general approaches to the study of that field, in order that we may have a point of comparison from which to approach the vistas of 1955.

It is interesting that thirty years ago what seemed new in the United States, and particularly in the law schools of the United States, was the positivistic approach to international law, as something of a reaction against the European tradition of emphasis on the theory and philosophy of law. Great teachers and scholars in international law like John Bassett Moore and Charles Cheney Hyde were placing their emphasis upon the need to determine what was the practice of states, what do states do, or more properly in their thinking, what have states done? When you found out what states had done, you then knew what the custom was. When you knew what the custom was, that was the law, and you knew that that was the law, that was the rule, and your task was fulfilled.

The majority of the law teachers at that time were not concerned with problems which perhaps bother us more today. One had the concept of the role of the courts as being one in which the court or the judge merely extracted the appropriate rule from a body of law which was there ready in his hand. He pulled out the rule and applied it to the case, and that was that. If one talked about judicial legislation, that was an opprobrium and a reproach, the concept of the function of the courts was entirely different from what it is today.

One was very little concerned, in studying international law, with the "why" of the rule. One was very little concerned in asking the question, "With what result is this rule applied or followed in the practice of states?"

As Professor Manley Hudson began publishing his volumes

under the label "International Legislation," a great controversy arose over that term. Since there was no international legislature, how, people asked, could you use the term "international legislation?" Men used to have to fight bitter battles to explain to their colleagues in international law what was meant by the term international legislation, which I think is now so commonly taken for granted, so fully understood, that one does not need to pause to analyze the applicability of the term. Perhaps the hard sledding which the term international legislation had may be ascribed to the fact that legislation was not yet generally accepted in the law schools as an appropriate part of the field of study. One was concerned much more with the decisions of courts, much less with a study of legislation.

But international law itself was constantly on the defensive, as perhaps it may still be, although I think much less so. It was constantly fighting for its life among lawyers, to be properly considered a branch of law. Perhaps it was more generally accepted in the field of political science.

As one looks back, one finds in this period, beginning in the twenties—the middle twenties and late twenties—an excellent example of the best kind of work which was done within the then current frame work, namely, the product of the Harvard Research in International Law, in which many here participated, and which, as you will recall, was initiated in aid of the work of the codification of international law under the auspices of the League of Nations. It was largely modeled on the work of the American Law Institute, designed as a restatement of the rules, and, in those numerous statements and discussions of the Harvard Research, there was constant argument as to whether it was appropriate, in dealing with international law, to make any suggestion about the development or improvement of the law, or whether the task was not merely to find and state the rule, because that was what somebody said obsessed the minds of many who dealt with the subject at that time.

But it is interesting that if you get into the last phases of the Harvard Research in International Law, the two ideas begin to clash. I can recall very distinctly the discussions when it was proposed that the subject of neutrality be taken up. Many of our colleagues by 1937 were outraged at the suggestion that one should deal with this "old-fashioned" concept of neutrality. We now had the League of Nations, there was no more war, neutrality could not be a legal status, so the Harvard Research compromised and drew up simultaneously a draft on neutrality and a draft on the law applicable in case of aggression.

Fortunately, however, in that period as now, international lawyers were not obsessed with a passion for uniformity, and new lines were constantly developed.

I would cite what I consider the pioneering work of the late Professor Joseph P. Chamberlain in international organization, which I think rather early in that field began to point to the need for analyzing the actual problems facing the international community and to the institutional means which were devised to aid in the solution of those problems. This was long before anyone thought of producing the kind of casebook which Professor Sohn has given us, and long before the general establishment in our universities, particularly in our law schools, of courses on international organization.

Then I think typical of another pioneering effort and new approach is the book by Frederick S. Dunn on the protection of nationals, which reflected his training under Walter Wheeler Cook and others, and their use of mathematical and scientific methods of approach in dealing with legal problems and producing new ideas, certainly highly new ideas at the time when Dunn's book was published.

I am not attempting any catalog of books throughout the period, but I would just mention perhaps the books by Gerhard Niemeyer and later by Percy Corbett, and now, as we will hear in more detail from the most authoritative source, the work of McDougal and Lasswell—approaches which gradually led us into some appreciation of the sociological and other aspects of study in the international legal field.

So we have come to a point where the vista opening before international lawyers is one which results from asking ourselves constantly the questions "why?" and "with what result?" and examining problems not in terms merely of the rule, and not specifically for that purpose, but in order to do what one may call some "social engineering" in the international field.

Another aspect of the new vista, which has opened up vast possibilities in the study of this subject, is that we have freed ourselves from the old pigeon-holes in which our subject matter used to be confined. Public international law thirty years ago was a rather esoteric subject, very distinct from the others in the legal curriculum. We now have escaped from a separate cataloging or pigeon-holing of public international law, private international law, and what Dean Stason has just called the cousins of international law, comparative law, foreign law, and the whole field of international organization and administration, and indeed the whole field of international relations. I

think the vista now is one which comprises all of these and other related fields, giving an opportunity for immense scope in the task of the scholar in examining international legal problems. In other words, the whole world is now our oyster. (And incidentally, as we will see later in our program, the oyster has a particular international interest at the present time, as one becomes very much concerned with studying the submarine world in which the oyster lives and does not move and has its being!)

Now this broader entrance, this almost limitless vista in terms of the fields which are comprised in the task of the international lawyer, has led to the rather common adoption of the term "international legal studies." This seems to me to be an advantage, since it does very clearly point to the broad scope of the field which we are examining.

At the same time, it seems to me that there is no reason to be ashamed of the old label of "international law," although one finds frequently that some do seek to escape from using that term because of its Utopian quality which they are not ready to adopt. For example, in Louis Halle's excellent little book, Civilization and Foreign Policy, he goes to great lengths, in giving a description of international law, to call it "legitimacy," and to explain that legitimacy plays a part in foreign policy, although he cannot quite bring himself to say that international law plays that part. This perhaps is merely a matter of terminology, but the terminology I think does reflect an attitude of mind, and the new term, international legal studies, certainly does open up this broad vista. Clearly I think that the task as envisaged by international lawyers today is not the task of merely trying to draft some model code of world law. Codification is, I think, no longer considered as a method which must be confined to a codification in the old sense of a pure restatement of existing rules. Rather it seems to me the approach of international lawyers today is to study international relations and the way in which they are or may be regulated, to the end that desired results may be obtained with a minimum of friction.

It is part of this picture that the international relations which we are concerned to examine are much broader in content and in scope than the old international relations with which one used to deal. They now not only include the relations of state to state, but the relations of state to the individual (and notably including such collections of individuals as corporations), they include the relations of states and international or-

ganizations, the relations of one international organization to another such organization, the relations of international organizations to individuals, and even in many instances the relations of individuals to other individuals, particularly again perhaps in the corporate form. Now this is a vast change and an enlargement of the field. If I may be pardoned a personal allusion, what rather seemed to my mind to be modern international law eight years ago in terms of the individual, is now very much "old hat," and that we have taken in our stride a great deal which thirty years ago certainly was by no means acceptable.

Of course, in this respect scholars are ahead of governments, and they should be, and they should remain ahead of governments in the exploration of matters of this kind.

Now there are many gaps in our knowledge and understanding of international law, for instance, the role of the international lega factor in decision-making, a subject calling for examination in some detail.

Topics to explore in this newly enlarged field now open before us are limitless. I would like to emphasize that—there are such varied matters that there is opportunity for every type of personal inclination and skill to be utilized in expanding our field of knowledge and understanding of the international process.

There is still the task of collecting information and data. There are still the old problems under the old familiar terms, such as claims and treaties, and under all the other subject matter of the traditional international law.

We have two kinds of activities in these fields, as in the enlarged activity of our national set-up of a domestic claims commission to handle vast numbers of claims involving large amounts of money, and we have again, just as a single point, the new avenues opened by the recent decision of the International Court of Justice in the Nottebohm case, which affects the whole question of diplomatic protection.

In all of the fields which we are to cover in our program of this Institute, we see an interrelation of factors and indications of various goals which are open to us at the present time.

In the field of investment, for instance, we are going to consider not only that field specifically, but also restrictive business practices. Here we have institutional forms, such as the new International Finance Corporation which has just been approved by the Senate of the United States so far as American participation is concerned. Another notable example still in-

sufficiently studied, perhaps, to enable us to appreciate fully its importance, is the settlement of the Anglo-Iranian oil dispute, and the methods used there.

Much is to be done in the study of possible corporate forms for handling international trade and investment problems, and particularly challenging, I think, is the need for finding new devices to assure security for foreign investment, which will take adequately into account the interests and equities of the country in which the investment is made as well as the requirements of the investor.

Again we shall be studying the continental shelf, a subject which certainly is opening up terrifically broad new problems in which science and law need to march hand in hand if an adequate solution is to be reached.

The same is true of our topic of atomic energy, as legal problems arise there. We have the excellent article by Mr. McDougal and one of his colleagues on the hydrogen bomb tests, which open up again broadened subjects of interest for study.

The whole subject of the use of waters of rivers is an intensely practical and important problem now in the relations of many states, on which much legal engineering as well as civil engineering needs to be done.

Surely there is also much to be done now as these new vistas open, in a re-examination of old labels and old concepts, such as the concepts of equality and sovereignty, and more broadly the whole concept of power in its relation to law.

And always with us, and I hope never forgotten, is the continual problem of the regulation of international conflict and the possible means of solutions of international conflict.

In short, then, the new vistas in international law present us with a situation in which the problem and not the rule is the focus of our attention, and, in addressing ourselves to these problems, we need, if I may use terms from the industrial manufacturing field, we need a retooling of existing plants, we need raw materials, we need new structures, but above all we need new ideas and new blueprints.

PROF. MILTON KATZ (Director of International Legal Studies, Harvard Law School, former Ambassador.) A number of law schools, and the largest of the foundations, have recently committed themselves to a program called "international legal studies." The term is novel, and the content in process of evolution. It is the direction of this evolution which we are met here today to explore. It seems to me to call for the development of a range of reflection, inquiry, and teaching which includes the areas of learning customarily designated international law, international organization, comparative law, and private international law or international conflict of laws, and which extends beyond these to the municipal-law matrix of problems of international business and economic development. This range of scholarship and teaching is something more than a mere addition of the several elements. In sum, it encompasses the legal aspects of the international relations of governments, corporations, other private associations, and individuals. It should be conceived and developed as a sphere of learning and practice with a comprehensive meaning and validity that supplements and enriches—and does not displace or depreciate—the significance of its varied elements. It must also be conceived and developed as a constituent current within the main stream of legal education, and not as a divergent branch.

For want of a better term, we call this sphere of scholarship and teaching "international legal studies." If we could take our language, as the Elizabethans were said to have taken it, fresh and with the dew still on it, it might have been better to use the term "international law" in this broad sense. For the time being at least, that term has been pre-empted for a narrower meaning. Time and usage may yet bring a merger of the terms, and the emergence of a more specific designation for what is currently called international law.

This conception of international legal studies derives from premises and objectives which should be brought to light and examined. I am mindful that we are concerned with a living process, an organic part of the endlessly evolving life of the law, and that its manifold sources and tendencies cannot be identified with any neatly articulated set of assumptions or purposes. Yet it is part of the job of law schools to have a hand in nourishing and shaping the process; they cannot escape the burden of choice of direction and emphasis, and such choices turn on conscious or subconscious purposes and assumptions. We must also consider how this concept of international legal

studies, and the premises and objectives which it reflects, may be translated into programs of teaching and research.

In this, as in all phases of legal education, we must begin with a concept of the mission of a law school. That mission has a fourfold aspect. Students come to a law school expecting to be equipped for the practice of their profession, and these expectations must be met. The bar looks to the law schools for a continuing flow of effectively trained recruits, and this need must be met. Throughout the history of the republic, the legal profession has been not least among those who have shared the burden and honor of leadership in national and local affairs, to seek to cultivate in its students the capacity for leadership is an inescapable responsibility of a law school. As part of a university, a law school participates in the tradition of creative scholarship, and it must seek to contribute to the growth of the law and to understanding of the law.

This fourfold job is surcharged with a burden of forecasting. It might be natural for law schools to determine their needs solely by reference to the problems currently faced by mature and active lawyers, whether in law practice, government, or teaching and scholarship. It might be natural, but it would be risky. It would ignore one of the salient characteristics of this century: the rate and scope of change. Deep and rapid changes have pervaded, and continue to pervade, the relationships and processes of society which are the stuff of the law. On the average, the law students of today will reach their maximum level of professional opportunity between the ages of forty and sixty—that is, some fifteen to thirty-five years from now. It is safe to assume that both the familiar substance of their daily work and their larger responsibilities for leadership will differ from those of mature lawyers today. It is far less safe to make assumptions about the nature of the difference. To some extent, however, major trends are discernible, which can and should be taken into account in the continuing evolution of teaching and research.

Perhaps this is less a matter of forecasting than it is of catching up with events, it may be even less a matter of catching up with events than of not lagging too far behind them. It is helpful to examine this problem in the perspective of the history of American legal education. Seventy-five or eighty years ago, the subjects regularly taught in leading American law schools consisted substantially of contracts, torots, property, criminal law and procedure at law and in equity. Neither constitutional law nor corporations had yet been accorded an established place, and it was only with the passing years that conflict of laws, bankruptcy

corporate reorganization, administrative law, taxation, labor law, antitrust law and trade regulation became standard offerings. It is not hard to relate this evolution in the curricula of law schools to developments in American life. The rise of large-scale corporate enterprise presaged the growing concern of law schools with corporation law, the adoption of the Sixteenth Amendment and the spectacular growth of the national budget in connection with the first World War and the depression of the thirties foreshadowed the increased attention of law schools to taxation, from the rise of the railroads and the interplay of railroad operations and those of the early oil companies through the establishment of the Interstate Commerce Commission, the adoption of the Sherman Act, the creation of the Federal Trade Commission, the enactment of the Clayton Act, and the expansion of regulation in the thirties, the line is plainly marked that leads to the place of administrative law and trade regulation as standard bread-and-butter courses today. So it is with the others.

Surely it requires no gift of clairvoyance to identify one mighty trend in contemporary American life. For half a century, the life of the United States has been increasingly commingled with that of the rest of the world. Two world wars have expanded and accelerated the trend, and the aftermath of the second world war has stepped up the rate of acceleration. The enormous growth in the scale and complexity of the work of the State Department reflects this process, but this is only a part of the story. The foreign affairs of the United States government extend far beyond the characteristic concerns of the Department of State. The Department of Defense operates in far-flung places in Europe, Asia, and Africa, the Treasury Department is involved in foreign funds control and the work of the International Monetary Fund and the International Bank, and in the administration of the tariff, the Department of Agriculture watches foreign grain markets with an anxious eye, and administers an office of foreign agricultural relations, the Labor Department has an Assistant Secretary for International Affairs, the Maritime Commission, the Civil Aeronautics Board, and the Federal Communications Commission are concerned with world-wide shipping, air transport operations, and the international allocation of radio frequencies, the Department of Commerce maintains its Bureau of Foreign and Domestic Commerce and administers export controls, the Atomic Energy Commission is involved in international conferences on the peaceful uses of atomic energy, the Marshall Plan and other programs of economic co-operation and foreign aid have been administered by separate agencies. The foreign

concerns of the United States government are far wider than the work of the Department of State, and the foreign concerns of the United States as a nation are far wider than those of the United States government. This is felt not only in the seaports and financial centers of New York, Philadelphia, Boston, New Orleans and San Francisco. Oil is world-wide in its ramifications, and for leadership is measured by the extent to which these problems can become an integral part of the bar's active professional concerns. This is not a question of practical involvement by all lawyers in all places at all times. It may be doubted whether any part of the law could meet so universal a test. It is a question of sufficient involvement for lawyers to become aware that this phase of the law is a significant and normal part of the responsibilities of their profession. I have ventured to suggest that the growth of the law and of legal education will continue to follow the growth and changes in American life and that legal problems with international aspects will tend increasingly to become part of the daily grist of the lawyer's mill. If events should verify this estimate, it is this which will require and make possible the mutual adjustment of the responsibilities of leadership and the every-day job of the profession. It will enable and require the law schools to vindicate their fourfold responsibility in relation to the legal aspects of international transactions which involve individual American citizens, American business, or the United States government.

The work of the State Department, the foreign concerns of other departments and agencies of our government, and the varied and multiplying international involvements of American business, agriculture, and labor, are organically interrelated. So also are their legal aspects. They reflect the same historic process. They are different aspects of the contemporary struggle to approximate a workable set of world relationships, in which the odds will not be too high against the efforts of free men to grow their bread and fulfill their deeper potentialities. For purposes of analysis, and within limits which are understood, it is necessary to separate particular segments or phases of this complex from the whole, and to examine them separately. The content and limits of these separate phases or segments will be defined partly with reference to the purposes for which the analysis is undertaken and partly in terms of the traditions and habits of scholarship. This process of classification and abstraction is of course indispensable. Yet there is danger that it may be carried beyond the limits warranted either by the objectives of analysis or by the established patterns of scholarship. There is a corollary danger

that the received patterns of scholarship may be applied without sufficient regard to their historic setting. If this should happen in the study of the legal aspects of international relations, the price, I believe, would be a loss in vitality, a loss in the sense of reality, and a loss of contact with the springs of growth. It is good that the shape of international legal studies should correspond to the shape of the events and relationships in which the law is rooted.

It would involve a singular distortion of perspective if this concept should be so applied as to inhibit teaching or research in international law or comparative law or any of the older sectors of international legal studies. I have indicated my belief that international legal studies is a whole which is greater than the mere sum of its defined parts, and that it encompasses elements which are new as well as elements well established. Yet the whole cannot be vital unless the parts are also vital, and it would be ironic if a sense of contemporary change and growth, and an anticipation of future change and growth, should be confounded with indifference to the significance of prior growth.

When we seek to translate this concept of international legal studies into programs of teaching and research, we encounter varied sources of difficulty: a preoccupied student body, a heavily burdened faculty, pressure upon the curriculum exerted by requirements for admission to the bar, and all the familiar limitations of time and money and facilities. There are also difficulties which are less familiar. Apart from the task of training American candidates for the LL.B. and for the advanced degrees, the program of international legal studies must take into account the growing importance of the training of lawyers and law students from other lands. While the role of the legal profession differs from country to country, in many foreign countries lawyers exercise responsibility of fundamental importance. An understanding on their part of the nature and methods of American law, and an opportunity for joint inquiry by American law students and law students from other countries into problems of common or overlapping interest, can contribute to the constructive development of international relationships, in business and in government. The recruitment and selection of students from other lands and the development of appropriate programs for them in our schools involve practical obstacles which must be mastered.

For lawyers, these difficulties constitute another reminder that general principles do not decide concrete cases. They are also a reminder of the gap which exists between concept and execution in all the arts and higher crafts. The greater the art, the

wider this gap tends to be, and education is one of the greatest and most intricate of all the arts. As lawyers and teachers, we brings the implications of production and marketing in Saudi Arabia and the Persian Gulf home to Texas and Oklahoma. The farm organizations of the west and south give anxious attention to possible export markets for wheat and cotton. The steel industry of Pennsylvania and Ohio seeks iron ore in Labrador or Venezuela or North Africa. A uranium boom in Colorado brings potential international complications to Colorado. The Materials Policy Commission has warned us that the metal processing industries of America must import some part of their requirements of every metal except molybdenum and magnesium, and that these deficits will grow larger. As the appetite of industrial America for metal ores continues to grow, the practical interest of American communities in the development of raw material sources throughout the world may be expected to grow with it.

As the day-to-day work of government, business, and agriculture in the United States is increasingly affected by the world-wide ramifications of America's position, there is a corresponding effect upon the problems which make up the daily grist of the lawyer's mill. In the perspective of the past half century, it is sensible to assume that these effects will multiply. When the law students of today reach their maximum level of professional opportunity, whether in law practice, government, or teaching and scholarship, these problems may be expected to constitute a significant part of their active daily concerns.

I have referred to the heavy responsibility for leadership which the legal profession in the United States continues to carry in community life and in local and national government. The tide of involvement of the United States in world affairs carries with it deep implications for this responsibility. In a sense, the job of America in the world today is historically unique. While the task of international leadership has many historical precedents, the United States is perhaps the first nation which has undertaken such a task with a broadly based public opinion that demands a sense of active and adequate participation in the process. Two world wars and their aftermath, the continuing burden of Selective Service and rearmament, the all-pervading awareness of the cold war and of the possible consequences of nuclear weapons have made the individual American acutely conscious of his personal involvement in the issues of international affairs. Under his tradition, he runs his government. In practice, this has generally meant that he demands adequate information, a sense of participation and a feeling of effective control—at least ultimate control

—over any aspect of government which deeply interests him. Under the conditions of today, he feels this way about foreign policy and national security policy. This raises complex problems of which we are not yet perhaps fully aware.

The problems of public opinion in relation to governmental policy are sufficiently difficult in relation to vital domestic questions. Yet, on questions of domestic policy, such as employment, taxation, social security, price policy, wage policy, farm policy, information and experience are widely distributed among our people. When confronted by the relationships and events from which the issues of foreign policy emerge, the difficulties of public opinion rise to a different order of magnitude and intensity. Information about distant places and events is not only meager and sparsely distributed, but second-hand. All too often, the basis in experience for a sound judgment or a sensible hunch on the part of the citizen simply doesn't exist. Yet he feels himself vitally concerned. The combination of acute concern with ignorance and uncertainty may create a sense of frustration which will lie below the surface of public consciousness and gravely complicate the task of free government.

To a degree, De Tocqueville foresaw this problem a century and a quarter ago and hazarded the prediction that it would be a serious source of weakness for the republic. We need not share his pessimism to recognize that no single or quick or easy solution can be found for a problem so complex and far-reaching. A prolonged and many-sided effort will be needed to establish an effective working relationship between the American people and their government in regard to foreign policy. It will involve a vast psychological process with numberless mutations throughout the life of a generation.

In view of the role of the legal profession in the life of the United States, we may justifiably assume that this effort could be facilitated by an informed and understanding bar. As international legal studies come to be incorporated in the normal context of legal education, they may serve for the bar as a professional window opening upon the problems of international relations and foreign policy. It is necessary to underscore the reference to the normal context of legal education and to the professional character of the window. However desirable it might be to attempt to give law students and lawyers a general education in problems of international relations, this cannot be achieved through adventitious discourse. To a substantial degree, the potential contribution of international legal studies to the capacity of the bar must nevertheless do what lawyers and teachers have always

done. We must make general principles effective in concrete applications. We must take the materials at hand and, within the limitations imposed upon us by circumstances, work them into approximations of what we have in mind. As time goes on, we may hope that the approximations will approach closer to the concept.

Each law school will undertake this job in its own terms and in the light of its own circumstances, as will each teacher within each law school. Where the faculty is large, there may be a diversity of course offerings. Where the faculty is small, there may be a diversity of new facets and cross references introduced into a smaller number of courses. It seems to me of the essence to seek to cultivate a general interest in international legal studies within the faculty as a whole, and a general interest within the student body as a whole. The degree of interest will naturally vary, as it does among faculty and students in regard to private law as compared with public law, property law as compared with corporation law, or contract law as compared with the law of torts. When I speak of a general interest, I am perhaps restating in other terms the conviction which I expressed at the outset, that international legal studies must be understood and carried forward as a constituent current within the main stram of legal education and not as a divergent branch.

It may be of some interest for me to mention briefly some of the elements of our current efforts at Harvard. In the academic year 1955-56, twenty-one different courses and seminars will be offered in International Legal Studies. The range of the subject matter may be indicated by a sampling of the titles: International Law, Legal Problems of Doing Business Abroad, The Civil Law System, International Investment and Economic Development, Problems in the Development of World Order, Legal Problems of International Trade, Land Use Problems in Developing Areas, Comparative Public Law—Problems of Federalism, International Conflict of Laws, Taxation of International Trade and Investment. Eleven members of the law faculty will participate. Of these, only three will limit their teaching to International Legal Studies. The other eight will also teach courses of the longer-established type. In three of the seminars, the law teachers will be joined by colleagues from other disciplines: economics, political science, and city planning. These courses and seminars are grouped by subject matter under three rubrics: International Law and International Organization, Legal Problems of International Business and Economic Development, and The Comparison of Legal Systems.

In the year which has just come to a close, approximately 19% of our third-year students and 14% of our second-year stu-

dents have taken one or more of the courses and seminars offered in this sector. In addition, some 60% of the candidates for the advanced degrees and special graduate students took some work in the area. We hope that the general student body will participate increasingly in these studies in the years ahead.

Graduate and special students from other countries enrolled at the school numbered 72 in the academic year just ended. They came from thirty different nations. In addition, some 20 students from other countries were candidates for the LL.B. In our concept of the program, the work of all graduate and special students from abroad, whatever their particular center of interest, comes within the ambit of International Legal Studies.

Two programs of training currently under way involve lawyers of more advanced position and maturity. In one, we are participants joinly with the law schools of Michigan and Stanford, together with six Japanese law schools and the Judicial Research and Training Institute of Japan. In this project, six Japanese professors of law, two Japanese judges and a Japanese prosecuting attorney have pursued a variety of legal studies during the academic year just ended at Harvard. Most of the group will spend a second year of study at the law schools of Stanford and Michigan. In a later phase, the project will be broadened by visits of American law teachers to Japan and the exchange of Japanese and American law students. The project grows out of problems of legal adjustment created in Japan by the occupation, during which there were grafted upon the Japanese legal system a judicial structure, a pattern of organization of the bar, constitutional concepts and a considerable body of law derived from the common law and American legal experience. In the other program, fiscal officials from a number of countries, notably in the Middle East and Latin America, who have come to this country under the auspices of the United Nations, are engaged in special training at the Harvard Law School in problems of taxation and fiscal administration. These programs, together with certain others still in an exploratory planning stage, may point the way to important possibilities for advanced training.

In the evolution of our research, we have sought to cultivate projects which, while independently conceived and valid each in itself, may nevertheless tend to group themselves under broad and significant themes.

A variety of projects now under way bear upon the relationship of tax policy and administration to international investment, economic growth in underdeveloped areas and international trade. Taxation, just published, which we hope may plow new ground.

Within the calendar year, we anticipate publication of the initial monographs in the World Tax Series, which is designed to serve as a working tool for scholarship and a general guide to investors and their counsel. The outlines of a group of projects concerning the effects of regulation upon international trade and economic development are beginnning to emerge. One relates to the effect of the anti-trust laws upon American business abroad, another to the regulation of the electric power industry in underdeveloped areas, others, in a phase of preliminary inquiry, to state trading and to the legal and economic aspects of urbanization in predominantly agricultural societies.

Two of our faculty, together with a German judge on leave from his court for a year at Harvard, are exploring problems of comparative procedure. Their work to date has centered upon the problems of methodology which lie at the threshold of such an inquiry. Another project which is well under way affords an opportunity to examine the interaction of varied legal systems in an intensely practical context. This is the Harvard Law School—Israel Cooperative Research project, which has sought to take into account not only the main sources of present Israeli law—English Hebrew, Moslem and Ottoman—but also relevant civil-law experience and new departures in American, British, and Commonwealth practice.

At the invitation of the Codification Division of the United Nations Secretariat, we are undertaking the preparation of a draft code on the international law of the Responsibility of States It is a happy occasion which thus enables us to labor again in the vineyard planted by Manley O. Hudson and his colleagues in the Harvard Research. The work will be carried on as an autonomous responsibility of the participating scholars, with the advice of an Advisory Committee drawn from other universities and the practicing profession, and with appropriate assistance from the Codification Division The product will be submitted to the International law Commission.

A study of the legal status of international waterways, with special reference to international canals, has been carried forward during the current academic year, and is expected to be brought to completion by next autumn or nearly winter.

In these varied inquiries, the interplay of law and other aspects of a living society has underscored the need and opportunity for collaboration among lawyers and their colleagues in other disciplines. These projects have also pointed to the importance of widening and deepening the channels of interchange and collaboration among lawyers in this and other lands.

In company with our colleagues in the law teaching and practicing profession, we will persevere in the endeavor to help nourish this phase of the growth of the law, and to shape it into concrete applications with the materials vouchsafed to us. Just over 120 years ago, one of our predecessors in law teaching, then the Dane Professor of Law at Harvard, Mr. Justice Joseph Story, undertook to "submit to the indulgent consideration of the profession and the public," his labor on a subject which he deemed to be "of great importance and interest." He called it conflict of laws or private international law, and expressed the conviction that "from the increasing intercourse between foreign States as well as between the different States of the American Union, it is daily brought home more and more to the ordinary business and pursuits of human life." He went on to say: "The difficulty of treating such a subject in a manner suited to its importance and interest can scarcely be exaggerated. The materials are loose and scattered, and are to be gathered from many sources, not only uninviting but absolutely repulsive to the mere student of the common law." He persisted in his efforts, and his ultimate success may be measured by the astonishment which the average lawyer of today would feel at the suggestion that the conflice of laws was anything other than a standard bread-and-butter part of a normal law curriculum. As he stuck to his job, so may we to ours.

COMMERCIAL TREATIES: THEIR USE IN INTERNATIONAL LAW TEACHING, IN LEGAL PRACTICE, AND IN LEGAL RESEARCH

PROF. ROBERT R. WILSON (Duke University; former Consultant on Commercial Treaties, Dept. of State). The editor of a collection of treaties has suggested in his preface that treaties comprise a kind of skeleton of history, and provide a base for diplomacy as well as international law. He goes on to say that their study is, despite its apparent dryness, of incontestable usefulness.[1] In the case of commercial treaties, perhaps more people would agree upon the dryness than upon the usefulness. This may be due in part to a misunderstanding of what these treaties essentially are, and of the purposes they are designed to serve. With complete awareness of the suspicion about excessive aridity, it is proposed to consider commercial treaties from the point of view of (1) their use by teachers of international law, (2) their relevance to the work of the legal practitioner, and (3) their provision of a field for research in international law.

At the outset, it is necessary to emphasize what treaties of this type include, and to point out some things which they do not include. Labeled, in current United States practice, treaties of friendship, commerce, and navigation, they touch upon a very wide range of subjects, so wide in fact that they might with some accuracy be described as treaties of "general relations." Looking at the establishment provisions alone (as distinct from those on commerce or navigation), one encounters a startling array of topics, any one of which might merit extended consideration, as, for example, the entry and residence of aliens, aliens' rights to engage in professional and other work, the rights of accused persons, access to courts, the acquisition and protection of property, exploitation of natural resources, recognition of the juridical personality of corporations, engagement in business under the corporate form, commercial arbitration, religious freedom, social insurance, government contracts and concessions, jurisdictional immunity of public agencies, taxation of persons and of property, exchange control, industrial property, and (in some treaties of the past) military service.

1. Gebriel Noradounghian, Recueil d'Actes Internationaux de l'Empire Ottoman (1897), p. v.

Unfortunately, it is a common error of the layman to confuse this type of treaty with reciprocal trade agreements such as the United States has made over the past two decades. Both instruments, the commercial treaty and the trade agreement, look to multilateral trade. The basic difference, of course, aside from procedure (the trade agreements being executive instruments which are authorized by Congress in advance of their making, while each commercial treaty must go to the Senate for approval after its negotiation), is that the treaties set forth principles and standards of treatment, whereas the trade agreement, though it may embody some statement of principles (as on state trading and most-favored-nation treatment), chiefly comprises schedules of tariff reductions and bindings of rates on specific articles.

There is the further point that the treaties are designed as long-time arrangements. It will probably come as no surprise to teachers of international law to be told that the convention of commerce and navigation between the United States and Great Britain, signed July 3, 1815, is still in force. Users of Malloy's treaty collection will find printed with the text of this convention a declaration dated a few months after the convention was signed, to the effect that "in consequence of events which have happened in Europe, subsequent to the signature of the convention ... it has been deemed expedient, and determined ... that St. Helena shall be the place ... for the future residence of General Napoleon Bonaparte" and that "vessels of the United States cannot be allowed to touch at or hold any communication whatever with the said island, as long as the ... island shall continue to be the place of residence of the said Napoleon Bonaparte."[2] Not all of the more than 130 commercial treaties which the United States has made have lasted as long as this one with the British (only about one fourth of the total number concluded being in force today), but there is a presumption that this type of instrument will continue in effect over a substantial length of time.

Since the treaties are bilateral in form, a question may properly be raised of their place and importance in what some have called our "multilateral era."[3] A mere classification of international agreements of all types now in force would not justify any final conclusion about whether bilateralism has de-

2. Vol. I, pp. 627-28.

3. See, for example, Philip C. Jessup, "The Conquering March of an Idea," U. S. Dept. of State Bulletin, Vol. 21, pp. 432, 434 (September 19, 1949).

clined in importance. It is perhaps worth noting, however, that of the first 563 intergovernmental acts to which the United States became a party in the post-World-War *II* period, more than 80 per cent were bilateral in form.[4] This hardly suggests the demise of bilateralism. There has of course been a considerable accommodation of bilateral agreement-making to the commitments of states under new multilateral arrangements.

It remains to inquire what it is about commercial treaties which would justify focusing attention upon them as distinct from other types of bilateral treaties. With a view to providing a possible basis for an answer to this question, it is proposed to consider, principally, commercial treaties made by the United States over the past decade, i.e., since the cessation of hostilities in the Second World War. Within this period the country has signed about as many treaties of this type as were made during the inter-War years. Seven of the new treaties are now in effect. All except one of them (that with Ethiopia, which is in a short form designed for states not very far advanced in their administrative and economic development) are full-length instruments. The treaties in force are those with Nationalist China, Italy, Ireland, Israel, Greece, Ethiopia, and Japan. Those which have been signed but not ratified also afford guidance to current policy, particularly the one with the Federal Republic of Germany, because of its potential importance in the developing relations between two great industrial states.

I. Use in International Law Teaching

It is commonplace to say that, in the international legal system, bilateral treaties serve merely as contractual arrangements between states.[5] There is, however, a sense in which any binding agreement, even a bilateral one, "makes" law for the parties (the so-called particular international law. as it has been called by some European writers), in accordance with the theory of the autonomy of the subjects' will in the making of contracts.[6] There is, of course, the possibility that

4. Agreements referred to begin with the first (numbered 1501) in the Treaties and Other International Acts Series (which series began in January, 1946) and extend through No. 2063.
5. Cf. Sir Arnold McNair, "The Functions and Differing Legal Character of Treaties," British Year Book of International Law, Vol. XI (1930), pp. 100-119.
6. Lzare Kopelmanas, "Custom as a Means of the Creation of International Law," British Year Book of International Law, Vol. XVIII (1937), pp. 127-51.

one of the things a treaty may do is to emphasize the pre-existing law against the background of which the bilateral treaty is made. To a limited extent the latter purpose has, in fact, been served by commercial treaties.

Lack of complete agreement upon the theory of international law need not obscure the fact that in the field of peacetime economic relations the law's development has been very slow. States have traditionally claimed the right, without infringing the rights of their neighbors, to exclude the nationals and goods of other states or, if admitting them, to treat them on a basis of discrimination as compared with nationals. There has been effort for multilateral arrangements which would alleviate this situation, but in general these efforts have failed. In this situation bilateral treaties have traditionally been resorted to, and, as is well known, there came into existence, particularly in the nineteenth century, a wide network of commercial treaties, which acquired "a special significance for international law through the customary use of stock clauses which, in a measure, were a substitute for norms of universal international law."[7] Nussbaum has pointed out, however, that from the beginning of the twentieth century to the time of the Second World War, scientific inquiry into commercial treaties was virtually left to the economists, and that the systematic treatises on the law during this period gave little attention to these matters.[8]

The present-day teacher of international law may still, to be sure, content himself with the statement that universal international law imposes no obligation upon states to admit to its territory either nationals of other states or products thereof. He must, of course, point out that, once admitted, aliens are entitled to certain rights, and that for protection of the person and property of admitted aliens the state of residence has a measure of responsibility. It is submitted, however, that he will be unrealistic if he does not point out that the minimal rights which aliens enjoy under international law are commonly supplemented by provisions in treaties of the type under discussion.

These provisions are sometimes broadly phrased in terms of principles or standards, but sometimes they are more specific. The current pattern of United States commercial treaty makes much use of the national-treatment standard (as in connection with internal taxation, workmen's compensation and

7. Arthur Nussbaum, A Concise History of the Law of Nations (1947), p. 201.
8. Ibid., p. 199.

social security, access to courts, engagement in some types of work, selection of enterprises for nationalization, and with some exceptions, the organization of companies).[9] The treaties regularly commit the parties only to most-favored-nation treatment on certain other subjects, such as commercial travelers and coast-wise traffic, but there are many matters with respect to which both this standard and national treatment are specified.

It has now become customary to define national treatment and also most-favored-nation treatment in United States treaties. On certain subject matters, it has been thought necessary to define in such a way as to accommodate provisions to the federal organization of this country. National treatment of corporations of the other party in the United States, for example, is to be, in any State, Territory or Possession of the United States, the treatment accorded to companies created or organized in other States, Territories, or Possessions of the United States. It is perhaps too much to expect that teachers of international law will be completely informed as to the position of "foreign" corporations in American constitutional law, but the reason for the limitative definition of national treatment here is, of course, apparent. For instructors who lean to the problems approach, this and other provisions in the new treaties concerning corporations would seem to offer attractive possibilities.

The standards already mentioned lend themselves to definition, and therefore to use in instruction, more than does that of "equitable" treatment, which is specified at certain places in some of the new treaties. Some of them contain, for exam-

9. For an illustration of exceptions, see Article VII, paragraph 2, of the German treaty: "Each Party reserves the right to limit the extent to which aliens may establish, acquire interests in, or carry on enterprises engaged within its territories in communications, air or water transport, taking and administering trusts, banking involving depository functions, or the exploitation of land or other natural resources. However, new limitations imposed by either Party upon the extent to which aliens are accorded national treatment, with respect to carrying on such activities within its territories, shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted and which are owned or controlled by nationals or companies of the other Party. Moreover, neither Party shall deny to transportation, communications and banking companies of the other Party the right to maintain branches and agencies, in conformity with the applicable laws and regulations, to perform functions necessary for essentially international operations in which they engage.".

ple, the simple statement that, "Each Party shall at all times accord equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests."[10]

On some subjects there are rules more specific than a simple commitment to apply one or more of the above-mentioned standards would be. One of these is freedom of reporting, clauses on which have appeared during the past decade for the first time (in terms of permission to gather information material for dissemination to the public and to transmit such material for publication abroad) in American commercial treaties.

Another subject with respect to which there has come to be rather precise language, instead of simple specification of standard, is the taking for public use of property owned by resident treaty aliens. The prevailing lack of universal agreement on what the international law standard is today on this matter would seem to justify the fairly specific formula which, with some variance in wording, is now in use in American treaties.[11] For a teacher of the law of international responsibility today to present that subject without taking into account this treaty development (as well as effort at international conferences such as that of the American states at Bogota in 1948) would be to overlook a significant part of the evidence.

Apart from the provisions of a substantive character which appear in the new treaties, there is another feature of them, in the nature of adjective law, which may have special significance for the teaching of international legal relations. This is the

10. See the first article of the treaty with Israel (T. I. A. S. 2948), of that with Germany (Sec. Exec. E, 84th Cong., 1st Sess.) and of that with Haiti (U. S. Department of State Press Release No. 117, March 3, 1955). Fair and equitable treatment is also specified with respect to governmental purchase of supplies, awarding of government concessions and contracts, and government sale of services. See, for example, Art. XVII, para. 2 of the German treaty.

11. The wording in the most recently signed treaty, that with Haiti, is as follows: "Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof." (Art. VI, para. 4.) By a following paragraph, "in no case" is less than national and most-favored-nation treatment to be accorded. (Sen. Exec. F, 82nd Cong., 2nd Sess.)

compromissory clause. According to each of the treaties except that with Germany, "Any dispute between the Parties as to the interpretation or application of the present treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means." The German treaty is not really an exception to the principle, but the wording is different. It refers to any dispute which the parties do not satisfactorily adjust by diplomacy or some other agreed means, such a dispute is to be referred to arbitration or, upon agreement of the parties, to the International Court of Justice. In the attached protocol is a statement that after the Federal Republic of Germany becomes a member of the United Nations or a party to the Statute of the International Court, disputes not settled by diplomacy or some other agreed means shall be submitted to that tribunal.

It will be noted that this type of compromissory clause (a question as to the adequacy of which has been raised by one well-known American publicist[12]) does not contain any variant of the "domestic jurisdiction" reservation which states have commonly inserted in their acceptances of the Optional Clause of the World Court's Statute. The omission of the reservation was apparently deliberate. At the time a subcommittee of the Senate held hearings on the first of the post-World-War-II treaties, the Department of State pointed out the difference between an acceptance of obligatory jurisdiction for the "four extensive categories of questions" mentioned in Article 36 of the Court's Statute (and also in the Senate resolution of August 2, 1946) and acceptance of the jurisdiction in a special compromissory clause of a commercial treaty. The latter would apply, the Department's communication submitted, to "subjects which are common to a large number of treaties, concluded over a long period of time by nearly all nations." The subject matter of such treaties having been adjudicated in the courts of the United States, authorities for interpretation were regarded as, to a considerable extent, "established and well known."[13]

12. The suggestion was that the clause, as used in the Uruguayan treaty, "might have been made more precise as to the method of submission." Manley O. Hudson, "The Twenty-Fourth Year of the World Court," Amer. Jour. Int. Law, Vol. 44 (1950), p. 1, 34.

13. Hearings before a Subcommittee of the Senate Committee on Foreign Relations, Eightieth Congress, Second Section, On a Treaty of Friendship, Commerce and Navigation Between the United States of America and ... China ... signed ... November 4, 1946 (April 26, 1948), p. 30.

If the progress of international law depends in large part, as it appears to, upon the development of obligatory jurisdiction for international disputes, this feature of the new commercial treaties would seem to be especially meaningful for teachers of the subject on which this Institute has focused its attention.

II. Relevance to the Work of Legal Practitioners

The need for some knowledge of international law on the part of one engaged in the general practice of law has recently been emphasized by Willard B. Cowles, now Deputy Legal Adviser of the Department of State.[14] It is apparent that this knowledge should extend at least to the basic things concerning treaties and, more particularly, to sources of information concerning them. As Mr. Cowles has put it,

> Treaties, like statutes, have ambiguous words and their interpretation is often complex. The sources of materials interpretative of a treaty provision may be diverse. While well-trained lawyers are familiar with looking up the history of a legislative act, there are very few American lawyers who know how to start to look up the legislative history of a particular article of a treaty even though the use of extrinsic evidence is permitted to a much greater extent in reference to treaties than statutes in the United States.[15]

The quoted language would seem to apply especially as to commercial treaties, which, as has been seen, cover a wide scope of matters. One of these is real property. The right of aliens to acquire, use, and dispose of such property has presented special problems for American treaty makers because of the territorial distribution of power, and because of public policy, in this country.

It is well known that an estate tax of one of the States of the Union may be in conflict with a treaty which courts would be bound to apply.[16] Bilateral commercial treaties of the United

14. "To What Extent Will American Lawyers Need an Understanding of International Law to Serve Clients Adequately During the Last Half of the Twentieth Century?" Jour. L. Ed., Vol. 7, No. 2, pp. 179-198 (1954).
15. Ibid., p. 192.
16. Illustrated in Nielsen, Administrator, v. Johnson, 279 U.S. 47 (1929).

States have from a very early date in the nation's history provided for disposal of real property inherited by an alien who was disqualified by reason of his alienage to continue in possession. Some treaties have contained provisions for the acquisition, ownership an disposal of real property, although the right to lease has been more frequently specified than the right to own. The traditional policy in the United States has been to leave to the States of the Union the regulation of land acquisition (outside of Federal territory and the public domain). There has been some movement in recent years toward giving broader rights in this field to treaty aliens, and a formula for substantial reciprocity has evolved. By it, the foreign country is not obligated to accord to nationals or companies of a particular State, Territory or Possession of the United States treatment more favorable than that which the foreign country's nationals and companies receive from such State, Territory or Possession.[17] The formula, incidentally, does not appear in the three most recently signed treaties.

Members of the legal profession and those of other professions are presumably in interest with respect to what the newer-type treaties contain on the right of treaty aliens to engage in professional work. In negotiations with Israel and with each of several other countries it was agreed that, "Nationals of either Party shall not be barred from practicing the professions within the territories of the other Party merely by reason of their alienage, but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence and competence that are applicable to nationals of such other Party."[18] However, a Senate reservation made it clear that this rule was not to apply to professions which, because they involve performance of functions in a public capacity or in the interest of public health and safety, were state-licensed or reserved by statute or constitution exclusively to the citizens of the country. It was further stated in the reservation that no most-favored-nation clause should apply to the quoted provision. In the later-submitted treaties, provisions granting to aliens the right to practice state-licensed professions do not appear.[19]

17. Cf. Robert R. Wilson, "Natural-Resources Provisions in Commercial Treaties of the United States," Amer. Jour. Int. Law, Vol. 48 (1954), pp. 255, 378.
18. See Art. VIII, para. 2 of the treaty with Israel (T. I. A. S. 2948).
19. See letter of May 4, 1955, from the Secretary of State to the President, printed in Sen. Exec. E, 84th Cong., 1st Session.

The new treaties go further than did the pre-World-War-II agreements of the United States in specifying rights for companies. It has been noted above that national treatment as applied to a foreign corporation in the United States is to be that given out-of-state American corporations. Another potentially limiting provision is that which allows a party to withhold advantages of the treaty (except with respect to recognition of juridical status and with respect to access to courts) to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly a controlling interest. Establishment of facts concerning control may, in a given case, present complications for the practitioner.

Advisers to American firms doing business and maintaining staffs abroad may have occasion to interpret and utilize another type of provision. The most detailed version of it to date appears to be that in the German treaty, which reads as follows:

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of these professions within the territories of such other Party, for the particular purpose of making for internal purposes examinations, audits and technical investigations for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.[20]

For some subjects touched upon in the treaties it is, as has already been suggested, difficult or inappropriate to apply any of the well-known "standards" or very precise rules. For this very reason they may furnish special opportunity for the practitioner's persuasive skill. For example, with respect to business practices which, in the languages of the treaties, "re-

On the general subject, see Alan Reeve Hunt, "Reservations to Commercial Treaties Dealing with Aliens' Rights to Engage in the Professions," Mich. Law Rev., Vol. 52 (1954), pp. 1184-1198. This comment is critical of the Senate reservation.

20. Art. VIII, para. 1 (italics inserted).

strain competition, limit access to markets or foster monopolistic control, and are made effective by public or private combinations or agreements," the parties agree that such practices "may" have harmful effects upon commerce, each party agrees to consult on this at the request of the other party, and each party is then to take such measures as it finds legal within its legislation and deems appropriate.

Other subjects on which considerable flexibility is left possible are government purchases, government contracts and concessions, and government sales, for these there is simply provision for fair and equitable treatment of the foreign state's nationals and companies as compared with that accorded nationals.

The few illustrations noted in this section will perhaps serve to emphasize that the new pattern of commercial treaty presents at various points questions of interpretation and application. It seems likely that many of them will be raised in the course of litigation in national courts. In their resolution the history of particular clauses may need to be explored by counsel and account carefully taken of the rule of treaty interpretation which looks to the unity of the various parts. This rule, indeed, would seem to have particular applicability in the case of commercial traties, which normally contain a general exceptions article and have an interpretive protocol.

III. Provision of a Field for Research in International Law

At the outset of any consideration of the research possibilities which commercial treaties present, it will be apparent that research effort might be directed either broadly or in a narrow focus. The first suggested type of investigation might look to the consistency of the treaties with, and their actual integration with, some larger undertakings in the international community. The other approach would involve intensified effort on the history of particular provisions with a view of determining their origin, present-day applicability, and general utility.

There is adequate evidence in the treaty texts of the parties' desire to stay within the framework of the United Nations. The United States and Ethiopia, for example, explicitly "reiterate their intent to further the purposes of the United Nations."[21] More specifically, there is in this and each of the other post-World-War-II treaties, in the general exceptions ar-

21. Art. I, para. 2.

ticle, a clear statement that provisions of the treaty do not preclude the application of measures necessary to fulfill either party's "obligations for the maintenance or restoration of international peace and security...." While this language, especially in relation to that of Article 103 of the United Nations Charter, would seem to set at rest some of the questions that have been raised in the past about whether sanctions against an aggressor would be violative of pre-existing commercial treaties, research in this area, taking in the aspects which touch regional organizations, would merit careful consideration and perhaps justify cooperative effort. It might, in any case, be more realistic than re-working of the familar subject of the effect of war upon such treaties.

Another broad objective of research might be to determine the role of commercial treaties in the changing legal structure of the free world's international economic and financial relations. By express provisions the new treaties are not to preclude action required of or permitted to parties by the General Agreement on Tariffs and Trade. The most-favored-nation commitments in the bilateral instruments are not, according to a formula in recently signed treaties, such as that with Germany, to apply to special advantages accorded by virtue of the GATT. In this connection, a useful research project might be a comprehensive study of the history and utility of most-favored-nation provisions.

One problem encountered in connection with the commercial provisions in the new treaties is that of free trading. So far as the United States is concerned, its commercial treaties are directed to the promotion of private enterprise. This was brought out by President Eisenhower in an address on May 30, 1955, when he said, in part:

> Further to encourage the flow of private investments abroad, we shall give full diplomatic support ... to the acceptance and understanding by other nations of the prerequisites for the attraction of private foreign investment. We shall continue to use the treaty approach to establish common rules for the fair treatment of foreign investment."[22]

Again on May 2, 1955, the President, in a message to Congress, said that "Government funds cannot and should not be regarded as the basic source of capital for international invest-

22. Press Release of May 30, 1954 (italics inserted).

ment. The best means is investment by private individuals and enterprises."[23] The fact remains that there is state trading in the world, and the development of a formula applicable to it has encountered difficulties in the commercial treaties, as it has in reciprocal trade agreements and in the abortive ITO Charter. This suggests the possible usefulness of comparative law studies which would look to differences in the municipal law of parties which might limit the possibilities for effectively working commercial treaties as well as other types of agreements in the economic field. An investigation of comparative law relating to subjects normally dealt with in commercial treaties might reveal surprising trends in the individual states. It has recently been pointed out, for example, that with respect to the ownership of realty by aliens, there are indications that a "liberalizing trend is gaining momentum in this country [the United States] , while abroad, under the impact of nationalistic and collectivistic ideas, the opposite appears to be true."[24]

Until there has been more application of the new commercial treaties, it would perhaps be premature to project a study of what the texts contain concerning waivers of sovereign immunity. Each of the treaties signed since 1945 by the United States seeks to set limits to this immunity in the case of state-controlled commercial enterprises. The treaty with Germany, for example, contains the following,

> No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.[25]

At a somewhat different level, there might well be studies of particular clauses in the commercial treaties and in the case of many of them an historical examination of the way in which they have evolved—the clause, for example, on religious freedom, or on domiciliary searches and seizures. Perhaps more

23. Cong. Rec., Representatives, May 2, 1955, House Doc. No. 1520, on the International Finance Corporation.
24. S. A. Bayitch, "Conflict Law in United States Treaties," Miami Law Quarterly, Vol. IX, No. 2 (1955), 125, 142-43 (Note 219).
25. Art. XVIII, para. 2.

important, as international investment becomes a branch of corporate finance, would be an investigation of the significance of the provisions in the newer-type treaties on compensation for property taken for public benefit.[26] A rule appearing in the protocol accompanying each of the treaties specifies that these provisions shall apply to "property taken in the territories of either Party in which nationals or companies of the other Party have a direct or indirect interest."[27] The operation of this part of the treaty plan will apparently supply a new (i.e., a treaty) basis for international protection of beneficial interests of aliens in companies affected by expropriating measures of the state which has created the companies. Here would appear to be a topic meriting the best attention which legal scholars can bring to it—a topic which the incautious might even call exciting.

IV. Conclusion

The foregoing has been, not a complete summary of what the new commercial treaties contain, but a singling out of some features believed to be especially meaningful for teachers, practitioners and researchers. It would be easy to exaggerate the importance of the body of commercial treaty law. It would also be possible to underestimate the significance. Their provisions as a whole are more than mere repetitions of antique solemnities that are now out of date. Some of their clauses are very new indeed. The treaties in general are designed to promote cultural and commercial exchange between individual members of a world community which is apparently not now ready to adopt inclusive and universally-applicable rules on the subjects involved.

26. See Note 11, supra.
27. Paragraph 5 of the protocol accompanying the German treaty (italics inserted).

COMMENT

PROF. S. A. BAYITCH (University of Miami Law School): Among the few ideas concerning research in the field of commercial, friendship and related treaties that I shall be able, in view of the time limitations, to suggest here, is one intended to modify the still prevailing legalistic approach in this field. This approach concerned mainly with treaty law according to its text without taking into consideration the measure of efficacy given locally to its provisions, is centered, for the most part, upon the situation in this country where, for reasons well known, the identity of treaty law and municipal law is the most effective. This method, quite valuable for purposes of drafting of treaties and an analysis of their legal contents, should be supplemented, on the one hand, with an investigation into the actual effects of treaty law. This means not only a more thorough investigation into the locally practiced integration of treaty law into municipal law, but also into the factual administration, by competent authorities, of the treaty law so applicable. The aim of this research is to find out, in a realistic way, to what extent local law is or is not affected by treaties, and what law or what "version" of treaty law is applied on the local level by courts, administrative authorities, etc. On the other hand, this type of research cannot be limited to only one of the two or more contracting countries: the effects of the same treaty provision should be traced, in a parallel way, in both contracting countries. Therefore, comparative studies should be added in order that the municipal law affected (or presumed to be affected) by treaty law be properly identified. What I advocate is a bilateral approach designed to give a clear picture of the effects of a treaty on both ends of the agreement.

My second suggestion follows basically the same line of reasoning. It is the area approach recommended to research in the field of non-diplomatic treaties. Let me explain. This approach is based mainly on two considerations. One, that a larger geographic area with similar political, economic and legal background—and, from the point of treaty policies, with similar problems—be chosen as the object of research. And second, that the complete system of treaties in force in such, not only not only those entered into by this country, be taken into consideration and explored. By so doing, organic areas will emerge in research as a whole and, as a consequence, general problems affecting treaty law there will be worked out. Research so

directed will develop the over-all treaty structure, identify matters covered by treaty law and the respective standards established in treaties. Advantages of this approach are self-evident: not only will treaty problems of an area be shown in a coherent picture projected against the area-wide underlying problems, at the same time, the relative position of our treaties will appear in a proper perspective as compared with the general level of treaty law in force.

Such research is particularly indicated for Latin American countries, for South East Asia, for Africa or parts of it. Promising appear studies concerning Central America, the Caribbean (or limited to the British West Indies) and area-grouped members of the British Commonwealth of Nations (e.g., Australia, Africa, etc.).

This brings us to the most important regional organization, the Organization of America States. This Organization, for one reason or another, is still not given the amount of scientific attention it invites or commands. Treaties sponsored by the Organization are hardly mentioned, even less made the object of comprehensive research, with very few though valuable exceptions, of course. As you well know, there is an impressive number of these treaties in force in this country as well as in so many of the Latin American republics, dealing with problems usually contained in treaties of friendship, commerce, etc. I would even go farther and say that all conventions sponsored by the Organization deserve a more conspicuous place in our research projects, particularly in view of potentialities they present. May I call, in this connection, your attention to some of the recent draft-conventions prepared by the Organization, for example, on international sales, on judicial assistance, on commercial arbitration, and point out the need for research and discussion in these fields on an inter-American level.

Finally, the substantive treaty law arranged by topics still offers, regardless of an increasing number of important contributions, inviting opportunities for additional research. For example, treaty law concerning the treatment of aliens (particularly in regard of exercise of professions), position of corporations, taxation (general treaty standards and double taxation), labor law, judicial proceedings and assistance, private arbitration, extradition, financial transactions, air transportation (including rights in aircraft) and many more, may be chosen for research on a broad basis, i.e., taking into consideration all treaties entered into by this country (which is the usual approach), or, limited to areas, as indicated before, or, to groups

of treaties, as, for example, those sponsored by the Organization of America States, the United Nations or some of its specialized agencies. Furthermore, I may add that there is still work to be done in regard to standards (equal treatment, most-favored-nation treatment, equitable treatment, reciprocity) as applicable under internal treaty law.

There remains but little time for remarks on educational problems involved in this section of international law. Here, we must face the accepted tradition that in our courses on international law, substantive treaty law may safely be disregarded, because there is not time available, or, because other courses, as that in conflicts or in property or in decedents' estates, will do this job and discuss treaty law involved. Needless to say, this latter assumption is utterly fallacious. However, as long as international law will be relegated to an elective course and compressed in an illusive three year curriculum (both standards long overdue for a complete re-examination), it makes no sense to try and marshall the meager assets of the precious two weekly hours in favor of one chapter of international law over the others.

This state of affairs, I think, cannot continue indefinitely. However, complex problems involved cannot be discussed within the framework of my remarks. Nevertheless, one bright spot appears in the otherwise disturbing picture: at least on the post-graduate level valuable work is being done and promising plans are in the offing.

These remarks, as short and sketchy as they had to be, have, I hope, indicated that there is a challenge to research and teaching in the field of treaty law. I am sure this challenge will be readily accepted and properly met.

GENERAL DISCUSSION

PROF. KENNETH S. CARLSTON (University of Illinois Law School): It is as important to know how international law comes into being as to know what it is eventually going to be. The commercial treaties were derived from a process which takes place beyond the state itself, namely, negotiation. It is important to know how the treaties have come into being. It is important to know how to respect the interest of the other side in negotiating the agreement, what are the circumstances of the negotiation, did the other side have interests in certain provisions or were they exclusively American interests? If we had that information, we could then be in a position where we might predict eventually how a new multilateral arrangement might be arrived at in this field.

We are also the captive of the term "commercial treaties." It is more than a topic, it is a reflection of a process at work in the international community. If we were to take these treaties and classify their provisions into the topics or functions which they were designed to serve, and then investigate these topics or functions from the standpoint of treaties with other countires (such developments as are taking place, for example, in the continent of Europe with regard to the movement of workers and the protection of workers)—then we would be doing the kind of research that ought to be done in international law, not alone what has resulted but how it came into being.

PROFESSOR JAMES O. MURDOCK (George Washington University Law School): The topic this morning, new vistas in international law, is stimulating to one who thinks in terms of the radically changed world community of today. Certainly international law must take on new stature—new vistas—to take care of the exigencies of our times. How can we re-think and revitalize the law of nations so as to make it a decisive factor in the modern world community?

There is one way which will have great social significance. It will have a practical bearing on legal education and on the work of the legal profession. It consists of changing the basic nature of international law from a limited type of municipal corporation law, which affects directly some seventy nations, into a law which will also apply directly to individuals.

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made the subjects of international law in matters of proximate international concern, however, they will enjoy the benefits of international justice directly. Knowing of its utility, they will give it the widespread support of public opinion essential to a living legal system. This is because international law will then be democratized and humanized. It will become a law of peoples —a modern jus gentium—as well as a law of nations.

From the standpoint of its substantive content, international law, particularly as developed in treaties, has many provisions which concern the rights of individuals living abroad, their private property and international trade. The problem is to find ways and means of applying substantive international law norms directly to individuals. This question has been discussed for a number of years.[1] The practical problem is how to engineer the idea down to earth. It is suggested that the most useful field in which experimentation can take place is in international commercial transactions and in the international protection of the life and property of citizens abroad.

Historically this field of international law has developed two extreme procedures, neither of which have been satisfactory. At one extreme, extraterritoriality has been tried in the Near and Far East. It failed because it was not reciprocal or impartial. The other alternative, providing an extraordinary diplomatic remedy for the protection of citizens abroad has also failed to meet the needs of the international community. The prerequisites of requiring the citizen abroad to exhaust remedies in the local courts up to the highest tribunal before he is entitled to an international remedy, reveals the unfairness and futility of this alternative. Even after exhaustion of local remedies, there is no right to diplomatic assistance and no assurance that it will be effective, even if ultimately forthcoming.

Fortunately there is another alternative for the citizen abroad. At the present time it requires him to resort to self help through voluntary international arbitration with little if any help from international law. It is suggested that the development of this process should be used as a foundation for the evolution of international commercial courts. Such courts could provide impartial adjudication in courts of first instance. Unless a fair court is available to a citizen abroad in the first instance, it is unlikely that international justice will ever be available or ef-

1. Wright, "International Law and Commercial Relations," 1941 Proceedings A.S.I.L. 30; Cowles, "The Impact of International Law or Individuals," 1952 Proceedings A.S.I.L. 71; Jessup, A Modern Law of Nations, pp. 2, 15-42.

fective for most individuals concerned with international transactions.

The problem of democratizing and humanizing international law is clearly one for the free Western World to undertake by encouraging international commercial arbitration to develop as part of an enforceable system of international law. There are numerous ways in which governments can co-operate by encouraging the resort to voluntary commercial arbitration and by enforcing awards.

Justly formulated international arbitral decisions should be adequately reported under the auspices of the United Nations. Thus there will gradually develop a truly international private law. This term is not meant to be synonymous with private international law or conflict of laws. If the individual is to have direct, effective remedies in international forums of first instance, there must be developed an international private law to complement international public law, which will then be limited to matters of genuine public concern.

A project for the development of international law for individuals has been the subject of consideration in a seminar at The George Washington University Law School during the past year. It will be a pleasure to discuss the progress that has been made with those who are interested.[2] It is planned to have our studies at George Washington continue over a number of years with a view to achieving constructive results. The central idea is to endeavor to develop international law so that it will apply directly to individuals in impartial, accessible international courts of first instance. The individual must emerge as the end and purpose of the new international law, notwithstanding the fact that our archaic international law was created largely to protect the prince and his cousin, the diplomat.

JOHN R. WILLIAMS (Lakewood, Ohio; Lecturer in World Law, Western Reserve University School of Law): Professor Katz mentioned the influence of the individual and his sense of participation in international relations. A recent development with great potentialities for increasing the role of the individual in international legislation is contained in the proposed Draft Treaty embodying the Statute of European Community, prepared at the instance of members of the European Coal and Steel Community Assembly pursuant to invitation on September 10, 1952 of

2. An informal group of interested persons met on Sunday morning, June 26th, in the Lawyers Club and held an extended discussion on ways and means to develop international law for the individual.

the Foreign Ministers of Belgium, France, Germany, Italy, Luxembourg and the Netherlands. This proposed Statute, embodying a constitution for Western Europe, not only recognizes that the individual is a busject of international law, but also, by providing for direct popular election of Delegates to the proposed Peoples' Chamber of the bi-cameral Parliament of Europe, would give the individual actual participation in shaping international policy and developing international law. Popular sovereignty, which has been one of the bases of our constitutional government, is officially recognized by the framers of this Statute as one of the cornerstones in building a modern international organization.

Why should we in the United States of America ignore the possibility of affording the individual an opportunity to express his convictions through his own duly elected representatives in at least one policy-making body of the United Nations? "Popular sovereignty" principles, thus applied, would bring the United Nations more directly into the experience of the people in the United States and throughout the United Nations. World public opinion would be more clearly expressed, if the U.N. General Assembly became a bi-cameral body in one house of which the Delegates were chosen as they are presently, and in the other house the delegates were chosen directly by the people of the Member Nations in free and fair elections. Giving voice to popular sovereignty in this manner would undergird decisions made in the U.N. organs in which the delegates are directly responsible to member governments. In the long run U. S. policy decisions in the United Nations would be enhanced by the constructive criticism and support of our directly elected delegates in the U.N. Such a development would be desirable even if no actual legislative authority were presently delegated to this proposed re-constituted U.N. General Assembly.

June 23, 1955 Afternoon session

THE POLICY-SCIENCE APPROACH TO INTERNATIONAL LEGAL STUDIES

By Myres S. McDougal,
William K. Townsend Professor of Law, Yale University

The task assigned to me by our hosts is that of talking quite casually and informally upon the "policy science" approach to international legal studies. In recent years various specialists have produced a very considerable literature which might be related to a "policy science" approach. I do not profess, however, to be competent, or willing, to speak for all these writers.[1] What I proposed to offer for your consideration is simply a few of the more general ideas in a structure of analysis which Professor Harold Lasswell and I have sought to work out and apply in collaboration with our students in the Yale Law School.[2]

The differences between the policy-science approach which we recommend and traditional theory about international law may, I think, be most economically summarized under five main points, as follows:

> The first relates to the conception of the subject matter of study. International law is regarded not as a mere body of inherited rules but as a continuous process of decision, by authoritative decision-makers guided by community perspectives, within a context of

1. An introduction to this literature, with references, is offered in Lerner and Lasswell (eds.), The Policy Sciences (1951). See also Lasswell and Kaplan, Power and Society (1950); Snyder and Furniss, American Foreign Policy (1954); David Easton, The Political System (1953); Simon, Administrative Behavior (1947); Barnard, The Functions of the Executive (1946); Bross, Design for Decision (1953).
2. An initial formulation was offered in Lasswell and McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest," 52 Yale L. J. 203 (1943). More detailed elaboration with respect to international and comparative law is offered in McDougal, "International Law, Power and Policy: A Contemporary Conception," Hague Academy of International Law, 82 Recueil des Cours 137 (1953) and "The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order," 1 Am. J. Comp. Law 24 (1952) and 61 Yale L. J. 915 (1952).

many different social processes which transcend the boundaries of nation-states.

The second involves the range of intellectual tasks regarded as relevant for rational inquiry into this subject matter. The emphasis of a policy-science approach is not merely upon scientific modes of inquiry but upon the integrated and configurative use of many different skills of thought, such as the clarification of goal values, the description of trends in past decisions, the projection of future probabilities, the appraisal of decisions in terms of clarified policies, and the invention of alternatives in rule and institutional practice.

The third relates to the framework of inquiry necessary to the effective performance of these intellectual tasks. A policy-science approach distinguishes carefully between that theory (rules, prescriptions, myth) which is invoked and applied by decision-makers in justification of decision and the very different type of theory which is required by the detached observer for performance of the various policy-oriented tasks in the study of decisions, seeking in the creation of the latter type of theory to formulate concepts which will facilitate the relation of specific decisions, in terms of the variables which affect them and the effects they achieve, to the various social and power processes in which they occur.

The fourth relates to the explicit postulation of the goal values of human dignity in clarifying the policies and practices of international law. A policy-science approach assumes, not that merely one "international law" is possible, but that many different international laws are possible, and recommends to decision-makers confronted with alternatives in policy that they clarify and make the choices most compatible with human dignity in a free and abundant society.

The fifth, and final, point involves the recommendation to scholars of the deliberate use of the postulated goal values of human dignity in deciding what problems are most important and worthy of investigation. The principal emphasis of policy-science, as indicated above and as the hyphenated name is intended to epitomize, is upon policy—that is, upon affecting the choices of patterns of values which decision-makers project into the future—and its recommendation is that all the findings and techniques of contemporary science, as well as the

other relevant skills in thought, be brought to bear in promoting the policies of human dignity in all the world's communities. The urgent role of the scholar is that of clarification and recommendation. The effective performance of this role is indispensable to more rational decision.

Let us now develop, in the order stated, each of these points. We begin with the difference in conception of the subject of inquiry.

It is common knowledge in this group that for many decades, if not centuries, international law has been almost universally conceived as a body of rules governing the relations between nation-states. Illustration is superfluous.

Integral to this traditional conception of international law as a body of rules are of course also certain equally well-known ancillary misconceptions: that there are no objective decision-makers to apply the rules, that such decision-makers as may exist are moved by "political" rather than "legal" considerations, that important disputes between nation-states are not by nature amenable to "legal" settlement, that few, if any, "policies" or "interests" of nation-states transcend their own boundaries and so on.

In recent times, however, there has been a growing dissatisfaction with this conception of international law as a body of rules—a dissatisfaction which extends beyond noting that contemporary transnational processes of effective and authoritative power exhibit many participants other than the nation-state. The traditional conception does not direct attention to many difficult questions.

The type of question left unanswered, and often unraised, by the traditional conception of international law as a body of inherited rules may be indicated as follows: How does one identify the authoritative and controlling rules? Who, by what authority, prescribes what rules, for whom, by what procedures? Who makes recommendations to such authoritative prescribers and upon what intelligence? Who, authorized how, may invoke the application of prescriptions, with respect to whom, in what arenas? Who, for the promotion of what policies, applies prescriptions to whom, by what procedures? Who appraises prescriptions and terminates them when they cease to serve community purposes? By what factors in the environments and predispositions of decision-makers are all the activities and decisions above affected? What is the impact of community process, culture, class, personality, crisis, and so on, upon the expectations of decision-makers?

It is, therefore, becoming increasingly recognized that what students of international law are concerned with is not a mere body of rules but a process of decision, and a process of decision taking place within the context of a larger community process.

Perhaps the easiest way to clarify this emerging conception of international law as a process of decision is to begin with the context of community process, the context which presents the events to which decision is a response, which conditions decision and receives the impact of decision. The community process to which we refer is that of individual human beings interacting across the boundaries of nation-states. From the perspective of anthropologist, or of the much over-worked little man from Mars, one may observe that individual human beings interact across national boundaries in both organized and unorganized forms. Sometimes the individual acts through the form of, or plays organizational roles in, the nation-state, but at other times he may play roles in and exercise influence through international governmental organizations or political parties or pressure groups or private associations of the greatest variety, such as churches or business associations. Sometimes, further, a particularly gifted or endowed individual may be observed to act as a total personality, playing for his own purposes many different roles in many different organizations. The values sought by the individual and his groups in these interactions may cover the whole gamut of human demand—power, wealth, enlightenment, respect, well-being, skill, rectitude, affection, and so on. The values which the individual and his groups may employ to influence outcomes in particular interactions may cover an equally broad range. The particular practices adopted by the individual and his groups to affect outcomes include all those commonly characterized as diplomatic, ideological, economic and military and such practices may be combined in many different modalities, ranging through a spectrum from maximum persuasion to maximum coercion. The effects of any particular interaction upon the values of the participants or others may be confined to a locality or a region or may extend to a continent or a hemisphere or even to the globe. The perspectives of the participants in any given interaction may, further, include expectations that any decisions made will be made with varying degrees of deference to authoritative community policy, from minimum to maximum or somewhere between.

In describing interactions across national boundaries as "community process" it is not our intention to pass judgment

upon the degree of intensity of these interactions. The only reference we make is to the facts of interaction (in Professor Wright's apt words, "fields of interaction") and to the consequent interdetermination of values. In conventional literature it is greatly debated whether the globe today presents a "world community" or a "world society," with the positions of adversaries being determined largely by the definitions of "community" and "society" offered and with very little actual inquiry into the degree to which the peoples of the world in fact cherish common demands, expectations, and identifications. When, however, the rising common demands of people about the globe for many different values are noted, and when account is taken both of peoples' increasing interdependence with respect to these values and their increasing consciousness of such interdependence, it seems suggestive of at least mild disorientation to assert that there are few "common interests" which today transcend national boundaries. Both the process of power balancing which has characterized the world arena for several centuries and that great host of new-born international governmental organizations bear explicit testimony not only to interaction, but to common interest.

Let us now look more closely at the interactions in which the perspectives of the participants include expectations that decision will be taken with some deference to authoritative community policy. The recent book by Mr. Halle, mentioned by our Chairman this morning, offers excellent popular exposition of the important role that such perspectives of authority, transcending in varying degrees the boundaries of particular nation-states, play in the world power process. A more systematic presentation might be somewhat as follows.

The process of transnational interactions, the world community or social process, continually exhibits certain participants as depriving, or threatening the deprivation of the values of other participants, and both sets of participants, threatening as well as threatened, appealing to processes of authority, transcending themselves, to facilitate or restrain the deprivation. Comprehended in these processes of authority one may observe a wide variety of policy functions being performed.

Nation-state officials, officials of international governmental organizations, representatives of political parties, pressure groups, and private associations, educators, operators of mass media of communication, and so on, are continuously gathering, processing, and disseminating information for the enlightenment of the prescribers and appliers of policy.

All the above-mentioned and others are continuously recommending specific policies to the authoritative prescribers and appliers. The increasing role of officials of international governmental organizations is notable.

Both nation-state officials and officials of international governmental organizations are continuously formulating broad, general policies with respect to events transcending national boundaries in their effects and projecting such formulations into the future as authoritative community prescription. The specific practices by which such formulations are authoritatively projected include both explicit agreement and what is ambiguously called "custom," a complex process of reciprocal claim and mutual tolerance. In this latter form, much prescription is of course formulated by the decision-makers of particular controversies, who make and project policy as they apply it. Excellent example is offered by the Norwegian Fisheries Case,[3] where the International Court of Justice, having neither explicit agreement nor prior uniformity in claim and tolerance as sources of policy, drew, as authorized by its Charter, considerations of equity, principles of civilized law, and a variety of other variables. The prescriptions so projected by this process of agreement and custom both establish certain authoritative decision-makers and delineate the authoritative policies which are expected to guide decision. The policies so delineated include authoritative rules with respect to every claim and activity in transnational interaction. Such rules purport to prescribe what participants shall be admitted to what arenas for performance of what policy functions, how participants may establish and stabilize their claims to bases of power (resources, people, institutions), what practices in the range from persuasive to coercive among the diplomatic, ideological, economic, and military instruments are permissible or impermissible for the shaping and sharing of values, and what effects in terms of control over particular value changes and over the activities of other participants are permissible or impermissible for each particular participant.

Each participant in the world social process may be observed to have, in turn, access to certain arenas for the purpose of invoking the application of authoritative prescription. Though some arenas, such as international courts, may be restricted to nation-state officials or the officials of international governmental organization, still other arenas, such as national courts, are open to all participants, including the non-governmental groups and the individual human being.

3. The Anglo-Norwegian Fisheries Case 1951 I. C. J. Reports 116.

Both nation-state officials and officials of international governmental organizations are, similarly, continuously engaged, in response to invocation by all participants, in the process of applying authoritative prescriptions to specific situations or to the settlement of specific controversies. The notion that there is no objective decision-maker in international law, or that there is no international law because each nation-state makes and applies its own policy, simply belies the facts. External to any particular nation-state, and sitting in judgment upon it, are all the other nation-states and all of the officials of international governmental organizations, as well as the other effective participants in the world power process. The further notion that there are no "sanctions" for international law is equally erroneous. The appliers of authoritative prescription have at their disposal for securing conformity to application all those bases of power, including control over resources and people, and all those instruments of influence (diplomatic, ideological, economic, and military), which are otherwise at their disposal in effective interactions.

Both nation-state officials and officials of international governmental organizations may be observed, finally, in a constant process of appraising and terminating authoritative prescriptions when such prescriptions cease to serve policy purposes. The procedures for such termination are much the same as for initial prescription, with both agreement and unilateral application of "custom" playing major roles, but guiding prescriptions are different and international governmental organizations are beginning to serve an ever-increasing part in easing the shock of transition from old to new policies.

The contrast we make with these situations in which the perspectives of the participants include expectations that decision will be taken in accord with authoritative community policy is, of course, in terms of those situations in which the expectations of the participants are that decision will be taken with minimum deference to authority. In our imperfectly organized world arena, situations not infrequently recur in which the participants expect that a decision will be taken, in the sense that severe deprivations or the threat of such deprivations will be marshalled in support of demands, but that such decision will be affected by coercion or violence in disregard rather than support of world authority and order. Such decisions may be controlling but they are no commonly regarded as authoritative. In such contexts any asserted authority becomes but pretended authority.

This distinction between decisions taken in accordance with

authority and those taken by exercise of effective power in disregard of authority may now enable us to clarify and sharpen our conception of international law. When effective power is not at the disposal of authority, authority is not law but illusion. When authority is not the guiding policy of effective power, the decisions made effective are not law but tyranny or "naked power." The conception of international law that we recommend is, accordingly, that of the process of decision in the world arena, a part of the total world power process, in which authority is conjoined with effective control—in other words, that part of the world power process in which decisions are both authoritative and controlling. It is only when we thus explicitly focus attention upon patterns in decision of both authority and control that we achieve a conception of international law adequate to guide and facilitate the type and scope of investigation that our times require.

With this brief clarification of a recommended conception of international law, we come now to our second principal point in distinguishing a policy-science from traditional approaches to international legal studies: the consideration of the intellectual tasks regarded as relevant, or even indispensable, to the effective study of the authoritative and controlling decisions so brought within our field of interest.

The various possible intellectual tasks which a scholar might wish to perform with respect to such decisions may perhaps be most economically categorized as follows:

First, one may seek simply to describe trends in past decisions. Description in terms of trends, description which will permit comparisons through time and in terms of different decision-makers differently located in community structures of authority, must, of course, extend beyond mere reporting of the anecdotal features of decisions to careful categorizations of the events (value changes between participants) to which decisions are a response and of the effects of decisions upon the values of participants.

Secondly, one may seek by scientific study to account for the variables which affect or determine decisions. Such study, if it is to be consequential, must obviously bring many skills and disciplines to bear in inquiry with respect to a great range of environmental and predispositional factors such as the factual claims put forward by the parties, the technical legal doctrines invoked, the policy formulations argued, the attitudes, class, skills, personality, and affiliations of decision-makers, the number and disposition of different participants in the world and lesser arenas, the intensities in expectations of violence, and so on.

Thirdly, one may seek to project patterns into the future and to forecast what decisions will be. When appropriately disciplined by scientific knowledge of conditioning variables and by appreciation of the rate of change of such variables in the world and lesser arenas, such anticipations of the future are not likely to have much in common with simple-minded extrapolation of past decisions.

Fourthly, one may seek to clarify policies with respect to decisions and to state preferences about what future decisions should be. Particular past decisions, or trends in past decisions, may be appraised in terms of conformity to postulated goal values and detailed preferences and, when discrepancies are observed, recommendations may be made of future patterns of decision more in conformity with projected demands.

Fifth, and finally, one may undertake the task of inventing and evaluating new alternatives in rule and institution, in prescription and practice, for the more effective promotion of recommended policies.

It is not, of course, our intent to suggest either that there is anything novel in this itemization of intellectual tasks or that contemporary scholars do not attempt, with varying degrees of success, to perform each and all of these tasks. Our contention is merely that traditional approaches to international legal studies, by certain simple confusions in thought and theory, cause all of these tasks to be performed badly, with corresponding disadvantage to community policy.

The all-pervasive confusion in traditional theory begins with its failure to distinguish the very different perspectives of the detached observer and of the decision-maker and, hence, the further failure to distinguish the theory necessary for inquiry about decisions, from the authoritative myth which decision-makers apply in the course of decision. The assumption common to all traditional approaches is that the same technical formulations can perform at one and the same time all of the intellectual tasks indicated above: the rules, principles, standards, or prescriptions distilled by scholarship are put forward as competent uno ictu to describe what decision-makers have done in the past, to predict what they will do in the future, and to prescribe what they ought to do. The result is a body of theory which both focusses in excessive degree upon the policy function of applying prescriptions, in relative disregard of all the other important functions indicated above, and exhibits itself as composed of highly ambiguous and contradictory statements, making simultaneous reference with indiscriminate abandon to the facts to which decision-makers are

responding, to the policies invoked before decision-makers, and to the particular responses of decision-makers which are sought to be predicted or justified.

The epitome of this confusion is found in the common insistence that the principal and distinctive task of legal scholarship is simply to ascertain and state "what the law is." Freed from any reference to decision-makers located in a context of community and time, "what the law is" shifts uncertainly and bewilderingly back and forth among "what the law was," "what the law will be," "what the law ought to be," and "how the law ought to be changed." For example of this commingling and confusion of intellectual tasks in the observation of decisions, we offer a selection from Sir John Fischer-Williams:

> Our standpoint is thus to treat the study of law in the great international society as a factual study. On this view the question to be asked is: "What at the given time are the rules which the determining authority of a society ... considers proper for enforcement?" This is a question of fact. What is the existing law, sometimes called in Latin lex lata? We do not ask what rules might properly be derived from general principles and would if accepted be productive of peace, order and good government—the general aims of law—(what, to use a Latin expression again, is the lex ferenda?) but what in fact at any given time are the rules which are actually recognized as law.[4]

The briefest recall of traditional theory, with all its normative-ambiguity in concept and complementarity or bipolarity in rule, should quickly dispel any notion that the tasks of legal scholarship can be so simplified. In the most comprehensive constructs of public international law, it may be remembered, appropriate "subjects of international law" (nation-states, international governmental organizations) are paired against "non-subjects" (individuals, private associations, political parties, pressure groups), "sovereignty," "independence," "equality," and "domestic jurisdiction" against "international concern," "world order," and "collective security", "aggression" and "intervention" against "self-defense" and "police action", and "military necessity" against "humanitarianism", "violations of the law of war" against "reprisals", "reprisals" against "proportionality", pacta sunt servanda (agreements must be honored)

4. Williams, Aspects of Modern International Law (1939) 8, 9.

against rebus sic stantibus (but not if conditions change), "freedom of the seas" against "contiguous zones" and "territorial sea", "change of government" against "change of state", and so on. Similarly, in so-called private international law, with respect to the claims of nation-states to "jurisdiction," to the power to prescribe and apply policy in particular interactions, justifications in terms of "territoriality" may be opposed to justifications by "nationality," or "passive personality," or "protection of interests," or "universality," and vice versa, and any or all of these justifications may be countered by claims to reciprocal tolerance or deference under the labels of "immunity" or "act of state." It should require little demonstration that theory so formulated makes but darkening reference to the events that precipitate decision, the variables that affect decision, and the values affected by decision and, hence, can make but modest contribution to, much less perform simultaneously, the intellectual tasks of describing past decisions, of predicting future decisions, and of relating decisions to fundamental community policies.

It is the aspiration of a policy-science approach to escape this traditional confusion, so disastrous for the study of decisions and community policy, by formulating theory and devising of techniques of investigation which will promote the deliberate, integrated, and configurative use of all the necessary skills of thought in bringing all the intellectual resources of the modern world to bear upon the urgent problems of our time.

This brings us to our third principal point, the indication of a framework of inquiry recommended for promoting the more effective performance of the various intellectual tasks.

The broader outlines of such a theory are implicit in what has been said above about transnational interactions and processes of authority and in criticism of traditional approaches. In most general statement the necessary theory must, after appropriately distinguishing the perspectives of the detached observer from those of the decision-maker, offer ways of talking about transnational social and power processes sufficiently comprehensive both to subsume authoritative language and decisions among the phenomena to be investigated and to locate such decisions and language in particular social and power processes with sufficient precision to facilitate performance of all the indispensable intellectual tasks.

For describing the transnational interactions which both precipitate and are affected by authoritative decisions, a policy-science approach suggests the deliberate use of both "value" and "institutional" terms. In highest abstraction, a social process

may be described in terms of people seeking to maximize values by applying institutions to resources. Values refer to demand relations between human beings and, for purposes of the widest geographical coverage, we have suggested categorizations under the eight headings of power, respect, enlightenment, wealth, well-being, skill, affection, and rectitude. Any other categorizations would, however, serve equally well if operational indices of sufficient precision are offered to permit translation of equivalences in reference. Institutions are the detailed patterns of practices in persuasion and coercion by which values are pursued. Any particular value process may, accordingly, be described, with whatever degree of refinement necessary, in terms of participants in the process (individuals and groups specialized to the particular value), situations of interaction in which the value is deemed at stake, bases of power brought to bear to effect outcomes in such situations, the particular practices in persuasion and coercion employed, and the effects of outcomes upon the values of the participants and others. The totality of world, or any lesser community, social process might thus be described in terms of a series of interrelated value processes: a power process, a respect process, an enlightenment process, a wealth process, and so on with the power process being affected by and in turn affecting all the other social processes. The greater the degree of both comprehensiveness and detail achieved in such description, the more effective would be performance of the various intellectual tasks in the study of decisions, but policy purposes might be measurably served by achievement somewhat less than perfection, even by a clarification of the facts of interaction and legal technicality which merely consistently keeps at the focus of attention the distinctions between precipitating events, authoritative response, and the effects of response.

For the detailed description of power processes, the processes of direct professional concern to international lawyers, the mode of analysis we recommend parallels that suggested for any other social process. When power is conceived not simply as naked force but as a coercive relation between human beings in which some are able, by threats of severe deprivations or promises of high indulgence, to make and enforce for others choices affecting the distribution of values, inquiry must extend comprehensively to the interacting participants, who make power demands upon each other, to the situations or arenas of interaction, in which they expect decisions to be taken, to the particular base values upon which the participants premise their threats of severe deprivation of promises of high indulgence, to the particu-

lar practices, tactics and strategies, in the management of base values, by which the participants seek to exercise their influence and, finally, to the effects, particular and general, that are achieved by decision upon the values of the participants and others.

In application of this general analysis to the world power process, considered as a whole,[5] we have recommended that participants may be conveniently and realistically characterized as "nation-states" and their dependent units (territorially organized bodies politic), international governmental organizations, transnational political parties, transnational pressure groups, transnational private associations, and individual human beings. It is obvious that all the participants so categorized both interact in the various world social processes to which authoritative and controlling decisions are response and play important roles, though differing in modality and degree, in the various functions by which policy is prescribed and applied in the making of such decisions.

For describing the arenas in which such participants demand and shape and share power, it is convenient, as has been indicated above, to distinguish different types of arenas in terms of varying degrees of expectation of decision in accordance with community authority. In some arenas, the arenas of naked power, the expectations of participants are that decisions will be taken with minimum, if any, deference to authoritative community prescription. In other arenas, those afforded by the structures of national and international government, expectations are that decisions will be taken with varying degrees of deference to community authority.

The bases of power at the disposal of different participants in the world power process may be usefully described in either value or institutional terms. It may easily be observed both that any value may on occasion be at the disposal of any participant and that appropriate study of decisions may require categorization of detailed institutional practices in controls over people and resources for power purposes.

The general practices by which the participants in the world arena engage each other in effective interactions may be economi-

5. A fuller exposition of the mode of analysis recommended for describing the world power process is offered in the Hague Academy lectures referred to in Note 2 above.

For comparable modes of analysis, see Schwarzenberger, Power Politics (2d ed., 1951) and Strausz-Hupe and Possony, International Relations (1950).

cally categorized, as in much contemporary writing, as diplomatic (deals and agreements), ideological (appeals to mass audiences), economic (manipulation of goods and services), and military (management of instruments of violence). To such categorizations of practice in effective interaction, must of course be added modes of describing the practices in formulating and applying community policy (commonly referred to as legislative, executive, administrative, and judicial), which we have called policy functions. The categorization we recommend, in an effort to escape the ambiguity of the traditional terms of institutional description, is, as was illustrated above, in terms of the functions of intelligence, recommending, prescribing, invoking, applying, appraising, and terminating.

The effects achieved by participants in their interactions may be described in terms of impact upon all their values. Short-term effects include changes in particular value distributions and long-term effects may include structural changes in participants and arenas.

It is this broad framework of analysis which we propose for the more detailed investigation of each and all participants and their interactions. With respect to each participant, such investigation must entail a whole series of related enquiries: What specific factual claims does this participant make to effective interaction in the various world social processes? How in the past has community authority been prescribed and applied to such claims? What have been the significant conditioning factors? What are likely to be future trends in decision? How compatible are past and probable future trends in decision with clarified policies? What alternatives in prescription and practice may be suggested and established? And so on.

The kind of detail called for by "factual claims to effective interaction" may perhaps be indicated by brief reference to the "nation-state" as participant. For initial inquiry into the role and regulation of "nation-state" some of the appropriate questions might be: What territorially organized bodies politic does the world arena exhibit? How are these bodies politic related to each other in terms of degrees of independence and dependence in fact? What bodies politic claim admission to what arenas of effective control and formal authority? Over what bases of power, resources and people, do what bodies politic make what continuing claims to what control? By what practices, diplomatic, ideological, economic, and military do these bodies politic claim to shape and share values? By what particular practices do these bodies politic claim to participate in the various functions involved in the

formulation and application of community policy to all interactions? What claims do these bodies politic make to prescribe and apply policy in reference to particular value changes occurring both within and beyond their boundaries? And so on.

From the perspective of this orientation in the facts of interaction, with contending claimants identified and their claims described in any necessary degree of precision, inquiry might rationally proceed to how community authority has in the past been prescribed and applied to such claims. Decision-makers might be identified and comparisons might be made through time of how different decision-makers, variously located in national and international structures of authority and affected by various environmental and predispositional factors, have prescribed and applied different policies and have accepted or rejected different technical doctrines. By such study an observer might obtain insight into how the different decision-makers, so variously located and affected, have employed the traditional technicalities of "nation-state," "subjects of international law," "domestic jurisdiction," "sovereignty," "self-defense," "nationality," "territoriality," and so on, for the promotion of various policies in context, which would greatly facilitate performance of the preferential and alternative-inventing intellectual tasks of policy oriented inquiry.

A relatively brief illustration of how this general framework of inquiry may be applied to a particular problem is offered in the article on The Hydrogen Bomb Tests in Perspective,[6] which has been referred to by other speakers. For purposes of appraising the "legality" of the hydrogen bomb tests, an associate and I sought both to categorize the factual claims made by effective participants to the use of the oceans of the world and to explore the responses of authorized decision-makers to such claims in the prescription and application of community authority. The factual claims we found to range from the comprehensive continuous claims to practically all competence within the "territorial sea," through less continuous and more limited claims to navigation, fishing, and cable-laying upon the "high seas," to relatively temporary and limited claims to exercise authority and control for such purposes as security and self-defense, enforcement of health, neutrality and customs regulations, conservation or monopolization of fisheries, the conducting of military exercises, and so on. Examining how the authoritative decision-makers of the world community had in the past resolved conflicts between

6. McDougal and Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security," 64 Yale L. J. 648 (1955).

such claims, we observed that they had elaborated a comprehensive body of technical doctrine, known as "the regime of the high seas" and composed of two complementary sets of prescriptions: the one set, generally referred to under the label of "freedom of the seas," being formulated and invoked to honor unilateral claims to navigation, fishing, and cable-laying and the other set, referred to by a wide variety of technical terms such as "territorial sea," "contiguous zones," "jurisdiction," and "continental shelf," being formulated and applied to protect all that great variety of claims, both comprehensive and particular, which may interfere, in more or less degree, with navigation and fishing. The over-riding policy infusing all these decisions we found to be that of promoting the fullest, peaceful, and conserving use of a great common resource, and authoritative decision-makers were observed, in implementing this policy, to regard technical prescriptions and concepts not as inelastic dogmas but rather as flexible policy preferences, opening up all specific controversies for the explicit consideration of all factors affecting reasonableness. From this perspective, we did not find it difficult to affirm the protection of free world security as more reasonable than the precluding of certain relatively minor interferences with navigation and fishing.

Our fourth principal point, in distinguishing a policy-science from traditional approaches to international law, relates to the explicit postulation of a set of goal values for the purpose of appraising decisions. The making explicit in full detail of the values affected by decision may both enable the authoritative decision-maker to increase the rationality of his choices and afford the holders of effective power a more rational basis for their determinations of whether to maintain or remove particular decision-makers or to continue or discontinue particular structures of authority. Historic formulations in terms of the "realization of justice" or "maintenance of public order" are at simply too high a level of abstraction and are too primitive to afford adequate guidance to decision, such formulations can be employed, and have in fact too often been employed with the greatest variety in meaning, to refer to the consistent application of any value system, even one of human indignity. For decision-makers, authoritative or effective, to seek to relate inherited prescriptions and procedures in detailed effects to fundamental contemporary community policies is not an expression of arbitrariness or caprice but rather of appropriately disciplined responsibility.

The values we recommend for postulation are, of course, those which are today commonly described as the values of hu-

man dignity in a free and abundant society. For some two centuries, despite well-known counter-currents, the world arena has exhibited a growing unity and ever increasing intensity in the demands of people everywhere for a wider sharing of all the values which we have categorized in terms of power, respect, enlightenment, wealth, well-being, skill, affection, and rectitude. The evidence of this growing unity and intensity of demand is broadcast in both national and international formulations of authority, including the United Nations Charter, the Universal Declaration of Human Rights, the proposed covenants on human rights, the regional agreements, other existing and proposed international agreements, and in national constitutions, political party platforms, and private group programs of widest distribution in space and time. Though the demands being expressed through all these many different sources are still formulated at many different levels of abstraction and with little systematic ordering, their trend and direction in demand for fundamental relationships between human beings are unmistakable, and the intellectual tools are at our disposal for ordering and elaborating such demands in all necessary degrees of generality and specificity for clarifying an international law of human dignity.

It is sometimes objected by critics of this postulation of the goal values of human dignity that we overestimate the degree to which the peoples of the world today do in fact subscribe to such values.[7] It is urged by such critics both that even in the free world different peoples pursue basic values by very different institutional practices and that in much of the world dominant elites do not demand or even permit sharing of basic values. To the first point it may be answered that an international law designed to promote human dignity and freedom can tolerate, even encourage, the greatest variety and nuance in detailed institutional practices in different communities and cultures when the over-riding goal of the wide sharing of basic values is secured and protected by the authoritative and controlling decisions of a more inclusive community. To the second point it may be answered that the strong counter-currents in the world today against human dignity merely increase the urgency and magnitude of the task confronting those who prefer the values of human dignity. With full awareness of the pall on the horizon of man's future on this planet caused by the continuing cleavage in the world community and the concomitant tragic expectations of violence, it is our responsibility as scholars—as the advisors and critics of those who are more fully

7. See Northrop, "Contemporary Jurisprudence and International Law," 61 Yale L.J. 623 (1952).

engaged in making or registering the decisions of our time—to concern ourselves with the world arena as a whole and to seek not only to clarify and recommend practices of human dignity but also to originate the detailed institutional arrangements and proposals capable of enlisting the effective support necessary to their adoption and application at particular times and in particular contexts. It is clear that because of developments in the instruments of destruction and all technology and because of the increasing interdependences of peoples, whatever their present values and identifications, the world arena will be increasingly ordered by authoritative prescriptions and procedures. Such prescriptions and procedures may incorporate and implement the values of human indignity or of human dignity, in every decision such choice must in varying degree be made. The only rational action for scholars committed to the values of human dignity is, therefore, to bring to bear all the intellectual resources of the modern world for securing the incorporation and implementation of such values. If cooperation in such enterprise cannot be obtained on a global scale, it may be sought in the half-world, in the hemisphere, in the region, in the nation, or even in lesser areas. If "universality" be a dream, at least the beaches remain: it may be recalled that some of the most influential innovations in world institutions have taken place first on a limited or regional scale, from which they have won their way into the life of other areas, and eventually into more universal acceptance. The United States is today an official participant in a large interlocking and mutually influencing network of transnational organizations and activities, which owes much to the vision, ingenuity, and even tenacity of our predecessors and contemporaries. In the future as in the past we can nurture every flame of sentiment or interpretation of interest which in our best judgment affords opportunity of advance toward reducing the precariousness of perpetual crisis and bringing into existence a greater security for freedom.

The clarification of an international law of human dignity, in the sense that we suggest, would of course require continuous application by appropriate specialists of all the relevant skills of thought and techniques of investigation within some such detailed framework of inquiry as we have proposed. It might, however, be anticipated that such clarification would suggest a great many changes in inherited prescriptions and procedures. Recommendations might, for example, include such items as the more realistic categorization of authoritative participants, with less emphasis upon the "nation-state"—"no-nation-state" dichotomy

and with the admission of many functional groups and individuals to many new arenas, the creation of many new arenas of authority for the performance of many policy functions, other than application; the stabililizing of the claims of territorially organized communities to resources on clearer regional lines, the internationalization of the remaining unappropriated resources of the universe, and the increase of individual freedom of choice with respect to membership in communities, and movement from community to community; improvement in procedures for administering community prohibitions of coercion and violence and for performing all the various policy functions in the prescription and application of authority, extension of the traditional prescriptions about "jurisdiction," embodying merely mutual tolerance between nation-state officials, to multilateral and broad functional programs for the positive promotion of all particular values; and so on.

The fifth, and final, principal point we would make in characterizing a policy-science approach, that scholars should keep in mind their postulated goal values when deciding what problems to investigate, may appear anti-climactic but it is important. Skilled personnel and resources for inquiry into international law are scarce and require wise allocation. It may be recalled that our law schools in the 1930's poured very considerable resources into "factual" investigations which proved relatively fruitless because investigators had neither criteria of importance to guide them in their search for "facts" nor standards to appraise what little they learned. Our common anecdotal inquiry under traditional doctrinal headings has yielded no greater enlightenment. Even in this conference we will probably have opportunity if we have not already had it, to see alleged problems kicked about somewhat futilely and inconclusively because discussants had no framework for relating problems to each other or clearly articulated values for appraising the consequences of decisions. It is only, we would recapitulate in conclusion, by the explicit postulation of the goal values of human dignity and by the systematic and continuous employment of all the relevant skills of thought and inquiry that legal scholars can hope to rise to their contemporary responsibilities, release their creative potentialities, and make their appropriate contribution to clarifying and recommending an international law of human dignity, for a free and abundant society in the accessible world.

COMMENT

PROF. OLIVER J. LISSITZYN (Columbia University). It is quite clear that the approach to international law just outlined for us by Professor McDougal is an outgrowth of the great tradition of American legal realism. As a matter of fact, the policy science approach may be regarded as an attempt to organize and develop the insights of the legal realists into a coherent and explicit system within the conceptual framework of a particular model of the political process—that developed by Professor Lasswell—dispensing with the impressionism, the indirection, and even the whimsicality that have characterized many of the presentations of the realist ideas in the past. This raises two questions: (1) Is it desirable to systematize at all? (2) Is it desirable to systematize within the particular framework chosen by Professor McDougal?

American lawyers regard with suspicion all attempts to construct comprehensive systems. What they usually have in mind in this connection is the kind of system familiar in analytical jurisprudence—an attempt to construct an elaborately organized, internally consistent scheme of legal doctrines and deductions purporting to explain all legal phenomena in terms of legal logic.

Professor McDougal's system is of a different type. It purports to clarify the role of law as an institution in the political processes of mankind. If law is to be integrated with the social sciences, as I strongly believe it must and will be, systematization in the framework of the concepts of the social sciences seems essential. Unfortunately, within the social sciences themselves, there is as yet no generally accepted concepted framework. The Lasswellian model chosen by Professor McDougal is one of several systems struggling for recognition. There is no time today to go into any extended critique of this model. I think we must recognize, however, that the seeming novelty and difficulty of Professor McDougal's ideas tend to be magnified by the strangeness to most of us of the Lasswellian terminology he often employs, and the semantic shifts it involves. Perhaps he should be more generous in translating this language into more familiar terms for the benefit of the uninitiated.

In this connection, it is interesting that in Professor McDougal's discussion of the lawfulness of the H-Bomb tests in the Pacific, in his recent, truly excellent article, the criterion that emerges is one of reasonableness. Now this is a very familiar concept to all of us. In fact, if one reads the reputedly

conservative and positivist treatise of Hyde, one comes time and again across this criterion being employed to appraise various doctrines and claims.

It also seems to me that the Lasswellian framework has some gaps. For example, I do not think that it ever comes to grips with the problem of the differences in the hierarchies or orderings of values, and with its significance for the decision-makers and the subjects of the law. Whether the systematization attempted by Professor McDougal is, on balance, desirable or not, it does offer the advantages of an explicit model, a logical structure. It presents opportunities for further rational analysis and, as a result, for the enhancement of our understanding of the law and its relation to the world political process.

A problem that merits further consideration is the place of formal prescriptions or doctrines in the law. As I see it, the policy science approach, as it stands today, does not logically exclude either an emphasis on the application of prescriptions or doctrines in the interest of stability and uniformity, or an emphasis on getting the desired results in particular situations with prescriptions or doctrines relegated to a very modest role. The choice would depend on the perspectives and values of the decision-maker. Furthermore, there is always the danger, which I am sure Mr. McDougal recognizes, of the policy science approach being misused to serve arbitrary, subjective value preferences.

All of this, it seems to me, points to the need of further clarification through rational and, if possible, empirical investigation of such problems as the following: How important is apparent adherence to prescription or doctrine in the maintenance of the authority and dignity of the law? Is explicit subordination of prescriptions and doctrines to policy considerations likely to undermine this authority? Is such subordination likely to weaken, even among lawyers what has been called the law habit, and if so, is this good or bad? How far can prescriptions be manipulated without losing their quality as symbols of legitimacy? Furthermore, is the explicit identification of law with policy, or its use as an instrument of policy, likely to weaken its role in inhibiting arbitrary conduct on the part of the decision-makers? To be very blunt, is it possibly another step on the road to "1984"? Are prescriptions and rules an important psychological block in the way of arbitrariness, a block on the road to "1984"? If so, and if the prescriptions and doctrines are explicitly subordinated to other considerations, what specific values, perspectives, and habits must be cultivated to take their

place in the minds of the decision-makers, the elites, and the masses? In short, what symbols of legitimacy need to be developed?

Is the standard of human dignity as offered by Professor McDougal adequate? Or, on the contrary, as Professor McDougal no doubt would maintain, is the frank disclosure and discussion of factors other than the formal prescriptions that enter into the decision-making likely to enhance rational understanding of the realities involved, and thereby prevent or minimize the misuse of formal prescriptions for improper purposes? I ask these questions bluntly, because I do not think they should be passed over or dismissed lightly. They are the very heart of the problem of the role of law in our society.

In this connection, we must note that the policy science approach has so far been expounded primarily from the viewpoint of the decision-maker. In this, it has shared the tendency of the legal realists to over-emphasize the individual decision and also the law as an institution for the settlement of conflicts and disputes, with the concomitant tendency to minimize the importance of uniformity and predictability. Yet, as Professor Bishop has so well put it: "The application of any system of law, and above all of a customary law, finds its greatest place in action taken according to its rules and principles rather than in litigation or the settlement of controversies which have arisen between parties... Daily reliance upon international law in the normal relations between states far exceeds in frequency, and probably in importance, its role as a basis for settlement of differences."

It would follow that more attention should be paid to the implications of the policy science approach for the subject of the law, including here most emphatically the private individual and his legal adviser, and also for the legislator including here the treaty maker and such a body as the International Law Commission, attempting to lay down rules of conduct to be followed in the future.

Again, Professor McDougal has tended to stress in his studies of specific problems, such as the veto in the United Nations, or the H-Bomb tests, situations of conflict, particularly those of the cold war. More attention, it seems to me, should be paid to the functions of law in preventing conflict and facilitating co-operation. Here mutual trust and good faith are very important, particularly so since international law has no centralized organs for enforcement.

Again, there is much room here for empirical study of the operation of law in society, of such problems as the actual im-

portance of predictability and uniformity in various types of situations, conflict and non-conflict, and the reliance actually placed on the effectiveness of prescriptions or doctrines by the subjects of the law and their legal advisers, and by the legislators.

Perhaps I am misinterpreting Professor McDougal in thinking that his stress on the effectiveness of law leaves little room for consideration of still another role of international law, its role as a symbol of rectitude to which appeal is made in situations of conflict even where effective decisions cannot be made. We may deplore the use of legal symbols and prescriptions for propaganda purposes, but we must nevertheless recognize and study it as a reality.

It all boils down to this: before we let any system purporting to explain the role of law in society, including the world community, jell, we must know much more than we do about the impact of law and legitimacy on the human mind and human behavior under various conditions. This can be accomplished only by an extensive program of empirical studies.

Recognizing, as we must, the valuable contribution of the policy science approach to our perspectives, and to our understanding of the nature of law and its social significance, we must ask ourselves whether or not it is a culture-bound phenomenon, as suggested with reference to American legal realism, by Professor Northrop.[1] That such typical American conditions as the character of our legal system, the relative harmony between the rulers and the ruled in an open society, the generally optimistic and pragmatic outlook of Americans, and perhaps the prominent role played in our official and business life by the legal adviser or the general counsel, have all facilitated the rise of the policy science school, cannot be doubted. But trends of thought somewhat similar to our legal realism have appeared in other countries as well. I should particularly like to mention in this connection, some Scandinavian legal thinking, which is too little known in this country, and the recent book by de Visscher. Even existentialism has been drawn upon by the Danish writer George Cohn to challenge the traditional conceptualism of Continental law in a manner reminiscent of some legal realists. Finally, we must note the plain fact that there are similarities as well as differences between American legal realism and the Soviet conceptions of law.

Time does not permit me to elaborate on the evident significance of the policy science approach for legal education, which

1. Northrop, "Cultural Values," in Kroeber et al., Anthropology Today (1953), 668.

has already been much commented on. Clearly in international law as in other fields, this approach requires that law schools pay explicit attention not only to the prescriptions and doctrines, but to all other factors, political, social, economic, psychological, that enter into decision-making. There may be considerable practical difficulties, however, in fitting an adequate amount of instruction in these fields into the law curriculum. I doubt that this problem, in all its magnitude, has been fully solved anywhere as yet.

All in all, Professor McDougal has presented us with a challenging and fruitful system of concepts, which we can ignore only at our peril.

NEEDED AND PROJECTED RESEARCH IN INTERNATIONAL LAW:

A Panel Presentation

PROF. HERBERT W. BRIGGS: (Cornell University): It was suggested politely that those of us who spoke this afternoon might be imaginative and unorthodox and spread ideas for the recipients of Ford.funds, but the speakers this morning and those this afternoon have been so very imaginative and unorthodox (and Mr. Louis Wehle is still to follow), that it occurred to me it might be useful if I paused this afternoon for a few minutes on traditional international law. I do this because the whole of traditional international law is ripe for re-examination and reassessment in the light of contemporary needs.

One of the most stimulating features of the British Yearbook of International Law is the cheerful way it goes about questioning accepted values. In a recent issue, Mr. Blix takes a hard look at the traditionally accepted rule that, except where otherwise indicated, treaties require ratification, and he suggests that contemporary practice justifies a contrary rule: that in cases of doubt, signature alone is sufficient. In another article, Wilfred Jenks suggests the need for re-examining the traditional view that there is no state succession with regard to law-making treaties, and he asks what conclusions can be drawn from the practice of new states like Pakistan, Israel, Ceylon, Burma, and Indonesia.

My first point then is that the field of traditional international law is wide open, as far as needed research is concerned. If we glance briefly at collective research now in process or projected, we think of the officially sponsored collective research under the name of codification and the progressive development of international law by the United Nations International Law Commission, and we think of unofficial projects such as those of the Institut de Droit International and the International Law Association.

At its first session, in 1949, the International Law Commission reviewed twenty-five possible topics for codification and decided not to include in its provisional list the following topics, and I am going to be traditional and conservative, if not reactionary, and list them because, despite the Commission's unwillingness to undertake the codification of these topics at present, each one of them is a topic on which further research is needed.

First, subjects of international law. I suggest the large increase of new states, particularly since 1945, the demand for

self-determination by what we now call non-selfgoverning peoples, the attribution of juridical personality to international organizations, and the status of the individual in relation to international law, provide a fertile field for investigation. Documentary materials bearing on these problems are easily available.

The second topic, sources of international law. Here the most fruitful study might be an exhaustive examination of Article 38 of the Statute of the International Court of Justice, particularly paragraph 1-c thereof, the general principles of law recognized by civilized nations, as distinguished from treaties and custom. We have had a pioneer study by Bin Cheng in this field, and there is a considerable amount of material which could be added to his study.

Third, obligations of international law in relation to the law of states, more traditionally phrased, international law and municipal law. This study could embrace such topics as the Bricker Amendment and the actual application of treaties by the judicial system of a particular country.

A fourth topic postponed by the International Law Commission, the fundamental rights and duties of states, was thrust upon them anyway by the General Assembly, and they got rid of it, I think, as quickly as they could.

Fifth, domestic jurisdiction, something which really requires no comment as regards the need for study.

Sixth, recognition of acts of foreign states, that is, to what extent should the full faith and credit clause be internationalized?

Seventh, obligations of territorial jurisdiction, and in this connection you can think of the Trail Smelter case, the Corfu Channel case, and others.

Eighth, the territorial domain of states, the whole subject of jurisdiction, and the acquisition and loss of territory.

Ninth, the pacific settlement of international disputes, a comprehensive long-term project would be justified in this field alone.

Tenth, extradition.

Eleventh, the laws of war. The first report of the International Law Commission devoted a whole paragraph to its decision not to undertake a study of the laws of war. War had been outlawed, it said. Public opinion might not understand why the International Law Commission studied the laws of war. It might suggest a lack of confidence in the United Nations.

I submit that there are several reasons why this topic does require further research. In the first place, in his A Modern Law

of Nations, our Chairman, Mr. Jessup, has two thought-provoking chapters entitled "Legal regulation of the use of force," and "Rights and duties of states in case of illegal use of force." Whether the rules regulating the use of force are referred to as the laws of war or not, it is unthinkable to regard the use of force as beyond legal rules. In the second place, our Army and Navy officers need the help of international lawyers, the help that they can give from a study of the laws of war. A third reason bears on one aspect of the laws of war, a study of war crimes. There is a large jurisprudence in this field which has scarcely been touched by students of international law.

The decision of the Nuremberg tribunal in the trial of the major war criminals is the one most widely known. The fifteen volumes published by the United Nations War Crimes Commission in London include a report or digest of the 89 cases selected from the 1,911 transcripts which were submitted by various governments to the United Nations War Crimes Commission. The U.S. Department of the Army has a compilation which they say is 99% complete of war crimes trials conducted by the United States: the International Tribunal at Nuremberg, and 12 other Nuremberg trials, the 489 Dachau cases, the International Tribunal at Tokyo, 321 others at Tokyo and Yokohama, 11 in China, 87 in Manila, 9 in Italy , 25 in the Pacific Islands. In other words, the United States alone conducted 956 war crime trials. The number of defendants tried was 3,306. The number of defendants acquitted was 471. The number of defendants convicted was 2,835. The number of death sentences adjudged was 726, and the number of death sentences executed, 431.

These figures are war crimes trials of enemy personnel, or former enemy personnel, and do not include decisions of the military courts martial of the United States. If an American soldier, for example, was technically tried for violation of the articles of war, and the charge was murder or rape, it does not appear as a war crime in our books. There is a body of jurisprudence here. I am not sure of the extent to which it might be made available, but if available, a study of these cases as well as the others might be desirable.

These, then, are the 11 topics on which research is needed, although the International Law Commission rejected them for immediate codification.

What were the topics provisionally selected by the Commission for study? They included recognition, and we are all interested in this question of trying to find some legal function, as distinguished from a political function, of recognition.

Succession of states. Much new material is available. The Commission has not yet undertaken either one of these topics, although they have them on their approved list.

Then there is jurisdictional immunities of states and their property.

Other topics are jurisdiction with regard to crimes committed outside national territory, the regime of the high seas and of territorial seas, nationality, treatment of aliens, the right of asylum, diplomatic intercourse and immunities, consular intercourse and immunities, state responsibility, and, finally, the law of treaties.

Now here is a topic that arouses my enthusiasm. The Harvard Research did a magnificent research job on the law of treaties in 1935. It is 20 years out of date, and some of it was not very good anyway. Article 5-a, for example, said that although a treaty must be a formal instrument, no particular form is required. Professor Jesse Reeves of this institution was presiding, as I recall it, at that session, and the clause was put to a vote. Most people voted "yes," but there was one loud "no," and Professor Reeves turned to the man who said "no," transfixed him with that pontifical look he had, and said, "The vote is unanimous."

The International Law Commission has five treaty drafts, three Brierly drafts and two Lauterpacht drafts, as well as the Harvard Research draft, but it has not yet had time to devote to the subject. There is need for a comprehensive, all-inclusive examination and analysis of all the treaties which have been entered into. The materials are available in old collections, in the League of Nations Treaty Series and the United Nations Treaties Series. Such a study would throw illumination on a score of debatable questions in the law relating to international agreements and, if undertaken soon enough, would provide timely assistance to the International Law Commission.

It is no secret that the International Law Commission has been starved for time and for funds by the false economy of the General Assembly and its member States. Professor Jessup was a member of the Commission which drafted the International Law Commission's Statute, and they recommended a full-time Commission. It was not given that status. The Commission later recommended it themselves, and it was denied again. It may be that the Commission, in addition to lack of time and funds, has lacked sufficient drive. The point is that there is full opportunity for collective research by private organizations, which will help rather than compete with or hinder the International Law Commission.

In the third place, there is continuing need for individual research.

Now of these three—official research, collective private research, and individual research—it is the second, perhaps, with which this Michigan Institute is most concerned. The Institut de Droit International has in its time done some excellent work. The method of drafting a memorandum, having it discussed by correspondence, redrafted as a set of proposals, which are then discussed, dissected, and analyzed by the full Institut, has produced some very valuable drafts. One sometimes has the feeling, however, that no exhaustive research by anyone into all the available materials has been done. This feeling becomes even stronger when one examines the papers and discussions of the International Law Association.

The model for work in this field, collective research in international law, is the Harvard Research in International Law, led with superb skill and drive by Manley Hudson and an outstandingly able group of collaborators. It has made the most important contributions to the systematization of international law published in the English language in the past forty years. I do not know of any better work.

What was the method of Harvard Research? I hate to talk in the past tense, but its funds were not great, it had only twenty-five thousand dollars, I believe, for the first three drafts. But this was sufficient to permit exhaustive research by trained personnel under the direction of skilled leaders, and the evisceration of these drafts, not once, but a dozen times over a three-year period by a small group of advisers, and three times by the entire advisory committee. The result was a black-letter text and also a magnificent comment which sometimes seems more useful than the black-letter text.

Perhaps this result can be justified in private collective research, but with the International Law Commission we look at the black letter, the end result, for materials upon which to build for the future.

Case law comes into the picture, along with the analysis of documentary texts and legal commentary, to the extent that case law is available, and some of the Harvard Research projects relied more on case law, because there was more case law. Moreover, the method of black-letter text and comments is not the only method available. It might seem desirable, with reference to certain topics which do not lend themselves to this method of codification, to undertake collaborative research which would lead to the publication of a series of short monographs.

The main thought I would like to leave with you is that whatever new topics, beyond traditional international law, and whatever new methods are devised, the re-working of traditional topics remains a fallow field.

PROF. STEFAN A. RIESENFELD (University of California Law School). Although I do not wish to appear ungrateful to the past, I believe that modern research in international law, calls for a change of emphasis, if not a shift, in topics, techniques, and approach.

First, with respect to techniques and approaches I would like to call for a greater "internationalization of international law." This expression signifies three things:

(A) Closer attention to foreign ideas, practices, and problems. Even the magnificent Harvard Research in International Law was typically American, and paid comparatively little attention to foreign ideas, practices, and doctrines.

(B) Closer and more permanent co-operation with foreign scholars, i.e., not just brief visits but true and sustained co-operation in actual research.

(C) Closer attention to the international aspects and demands of the new economic realities.

So much briefly, for the techniques and approaches, although I would like to elaborate more on that a little later.

Second, with respect to new topics, I would like to call particularly for a more extensive and more penetrating standing treatment of the new groupings or power structures which are emerging, such as the North Atlantic Community, the Western European Union, and the European Coal and Steel Community, and in that framework, more study of the impact of technological progress and technological potentialities.

Let me elaborate now very briefly on those points. This morning we heard the need for what was called the bilateral approach to commercial fields. I agree wholeheartedly with everything that was said by the commentator on this point, in fact I fee that this bilateral treatment should be the product of bilateral co-operation. We in Berkeley, for instance, plan, and have made definite steps, to write a joint commentary with scholars of the Köln Law Faculty on the new Treaty of Friendship, Navigation, and Commerce with Germany, in the form of a section by section commentary on various points by experts in our own and the Köln faculty.

Similar treatment is needed for multipartite conventions, such as the conventions relating to copyright and other intellec-

tual property, or on matters concerning maritime commerce and navigation. There is no set of annotations available whereby an American lawyer could find out how the same rules which govern our own courts have actually been applied in foreign courts, a fact that can be found to be true with respect to practically all multilateral conventions.

Of course, projects like those require a more than superficial understanding of the foreign legal system as a whole. It is precisely this point where a new orientation is desirable. In fact, international law in general requires a much more efficient and intelligent handling of international law cases decided by foreign administrative agencies and courts than is available. Certainly much in the Annual Digest and Reports is magnificent, but there is still much room for improvement. There is a great danger in wholesale treatment. The various countries, even the civil law countries, often have their own particular answer to similar problems, and a careful treatment would always require collaboration with the scholars of the country, who actually live in that country and understand what it is all about. For instance, the most recent switch of German courts with respect to immunity questions,[1] which were commented upon by Professor Aubin, a Geneva professor, are of great interest but can be easily misunderstood by American scholars. So far, apparently, they have not even been noticed.

The new power structures such as the Coal and Steel Community particularly suggest and require new and more intensive approaches. If you read the Third General Report of the activities of the High Authority, you cannot help feeling that it is simply bristling with interesting legal problems, not only so far as the internal law of the Community is concerned, but also with respect to international law and comparative law. On page 32 of the Third General Report, for instance, we find a most thoughtful and provocative discussion of the implications of the waiver of the most-favored-nation clause by the Contracting Parties to GATT with reference to the states of the Community. The need for subjects such as a general treatment of the most-favored-nation clause was indicated beautifully and convincingly by Robert Wilson this morning. I agree with everything which he has said. I would only add that the effect of waivers and other matters involving the relationship of multipartite to bilateral treaties with respect

1. See, e.g., the interesting decision of the District Court Kiel, 19 March 1953, reprinted (1953) Neue Juristische Wochenschrift 1718; digested by Martin Domke, 48 American Journal of International Law 302 (1954).

to the most-favored-nation clause is an additional point which absolutely cries for treatment.

Another example: The five cases which so far have been decided by the "Schumann" Court of the Coal and Steel Community are of general interest from a variety of points of view, first, because of the subject dealt with, i.e., the creation of the common market, which is truly a great experiment and one of tremendous interest to the American lawyer, but also because of the judicial techniques which are employed. Here we have a treaty which contains terms borrowed from French administrative law and furnishes them for the judicial treatment of the problems of this new Community. But it so happens that the Judge who wrote the first very important decisions employing them was a German, Professor Riese. Now it is fascinating to watch how this German judge, while faithfully using the French terminology, still manages to infuse some of the German legal tradition in the way he builds up the structure and conclusions of the decision. It is this conscious effort to mold a new European administrative law and the blending of judicial styles which attaches a general interest to these decisions.[2] The coalescence of legal ideas, the blending of the cultures in this court, is much more pronounced and therefore perhaps more interesting than in the International Court of Justice.

Moreover, the general legal problems of the Community are fascinating. The impact of Community law on the general law of transportation, as well as the relation of Community law to the private law and the public law of the different continental member states in general,[3] are important not merely to the lawyers of the Community states, but certainly to any international lawyer, because of the new vistas, new techniques, and new problems that are present.

Again, we in Berkeley, thanks to the support we recently got, have worked out a five-year plan by which three of our faculty members at least, if not five, will investigate the legal problems of the Community from many aspects, such as the blending of legal systems of the community states, the legal relations of the community with the rest of the European powers, especially the members of the West European Union, and the Council of Europe. All these problems require urgent attention, not only from law-

2. See especially Daig, "Comment on the First Judgments of the Court of the European Coal and Steel Community" (1955) Juristenzeitung, 361.

3. See, for example, Steindorff, "Montanfremde Unternehmen in der Europaischen Gemeinschaft für Kohle und Stahl" (1953) Juristenzeitung 718.

yers most intimately connected with those countries, but also from the American international-law lawyer.

I will not deal in detail with the fisheries problem, because we will hear more about that on some other occasion. Mr. McDougal in this connection very recently coined the phrase of "Factual Continuity and Multiple Legal Problems." It is just as true in other questions as it is with reference to the problems to which he applied it. Excessive compartmentalization has been a major obstacle to proper perspective. There is no doubt, to be brief, that we need a modern, intelligent approach to many of our everyday problems.

Nobody can read the proceedings of the International Law Commission without feeling regret and a little bit of shame that such important questions as the Commission has discussed are treated in such a haphazard way. It seems to me much too casual. Not infrequently the Commission has to retrace its steps because someone says, "I wasn't there the last time, so I cannot vote at all," etc. There seems to be a lack of adequate preparation and sufficient documentation. Again a truly international staff would be a remedy, and I join wholeheartedly in the feeling about how much assistance is needed by the International Law Commission.

We should not be handcuffed by outmoded concepts. Every generation has its own problems, and I think we should be primarily the children of our own days and only the grandsons of yesterday.

PROF. QUINCY WRIGHT (University of Chicago). In the last number of International Organization there is an article that may have sounded alarming from the point of view of international law.[1] In this article it was pointed out that in its first seven years the Permanent Court of International Justice did a great deal more business than the International Court of Justice has done in its first seven years, and that there was less inclination to observe the decisions of the latter court than of the former. It also pointed out that in proportion to the number of parties to the statutes, there were fewer acceptances of the "optional clause" at the present time than there were in the days of the old "World Court." Furthermore it was indicated that the United Nations is paying less attention to international law than did the League, at least it has less frequently asked for advisory opinions concerning the legality of its actions. It was also noted that

1. Shabtai Rosenne, "The International Court and the United Nations: Reflections on the Period 1946-1954," 9 International Organization 244 (May, 1955).

the International Law Commission of the United Nations seems not to have made very rapid progress in getting acceptance of proposals on various subjects of international law. Finally it was noted that there seems to be much more dissent, far less uniformity of opinion, and perhaps less cogency of argument in the second "World Court" than there was in the first.

These statistical facts may be evidence that law is playing a lesser role in the community of nations now than it did thirty years ago. It may be evidence also that we are in a period of transition, that the rules which were considered fairly stabilized thirty years ago are in the process of change. In either case, it seems to me that there is good argument for research in the field.

What is happening to international law? I am going to suggest very briefly four fields in which it seems to me research might be conducted, some of which have been already referred to.

The first is that which Mr. Briggs referred to, the effort to state in more precise form the rules of law. I suppose that in the minds of some the ideal of law is a code with very precise definitions, that the terms of the code are capable of enforcement, and that, if enforced, they will bring about desirable results.

That I suppose is the traditional acceptance of a code, though for research purposes it might better be called a restatement. There have been efforts to restate international law in this manner, and I have no doubt that they have and can throw a great deal of light on international law and can be very important at the present time even though it is unlikely that a comprehensive and effective code will emerge. The topics which have been considered susceptible of treatment by this method have been referred to by Professor Briggs.

I would like to add one point. Should we assume that, in our present world, rules of international law must be universal? We have regional organizations. We have heard of American international law, of Soviet international law, of Moslem international law. It may be that there should be such regional differentials in the rules of international law. There are many bilateral treaties which set up different rules of law between the parties, compared to those they may apply to other states. I think this topic—what might be called the local application of international law—may be one of considerable importance. If there are such regional, local, and bilateral differentials, just what is the relationship of each of these systems to the general system of international law? Must universal law prevail over any such regional

differentials, or is it permissible for regional, local, or bilateral groups to establish special rules for themselves?

A second general field of research was referred to by Professor Katz—the integration of international law with the other disciplines of law. I suppose there has always been some such integration in legal instruction. In courses on contracts such subjects as the effect of war on contracts are usually dealt with. I think, however, that at the present time nearly every legal subject has international aspects. It may be that one of the most important roads toward the better application of international law would be the integration in each of these legal disciplines of its international law aspect. Such a practice in law schools might make the average lawyer more aware of international law than he often is.

There is a third general field of research which I want to mention. That is the role of international law in decision-making. Perhaps this formulation of the subject does not quite fit in with Professor McDougal's discussion. I am not sure that I would be correct in interpreting him as saying that legitimate and effective decision-making was always a product and a creator of law.

Dean Roscoe Pound had a series of articles in the Columbia Law Review a generation ago which discussed the administration of justice with and without law.[2] In those articles Dean Pound suggested that we might have a legitimate authority who could effectively administer justice, and yet the justice would be without law. He pointed out there might be some merit in such a system. He did not consider it a certainty that the administration of justice with law was always better. Some years ago Continental jurists were talking about what they called "free law." This was similar to what Dean Pound called the administration of justice without law. This phraseology assumes that law is a formal body of rules, principles and standards, which government may utilize or may not. Perhaps in some circumstances it can best utilize it, and in others not. It is usually said that courts—judicial authorities—ought to pay more attention to the formal body of law than the executive. The latter often has wide discretion. The legislature usually has even more. That conception raises the issue, what role should law have in decision-making?

The American Society of International Law is hoping to be able to carry on a research on this question, with especial reference to the American State Department. The State Department, in the past, has often asked for the advice of international law

2. Roscoe Pound, "Justice According to Law," Columbia Law Review XIII (1913), 696 ff; XIV (1914), 1 ff, 103 ff.

specialists in making foreign policy decisions, and it has been influenced by that advice in its action. On the other hand, many of us can look back in memory and call to mind some foreign policy decisions of the State Department which did not pay very much attention to international law. I remember the famous episode when Theodore Roosevelt thought it expedient to support a revolution in Panama. There was some difficulty in giving this support, because at the time we had a treaty with the Republic of Colombia by which we guaranteed the sovereignty and property of Colombia in the Isthmus of Panama. Nevertheless, Roosevelt promptly recognized the revolution. Instead of assisting Colombia to maintain its sovereignty, we did the opposite. We put American armed forces between Colombia and the Panamanian rebels. Secretary of State Elihu Root wrote a memorandum which greatly impressed President Roosevelt. The latter said that he did not have any idea how legal this action had been until he read Root's memorandum! That particular decision certainly was not motivated by considerations of international law.

I think this would be a very useful research. Just what role has international law played in American foreign policy? It could be discussed historically, it could also be discussed with reference to the present time. I am sure some of us have had experience in the State Department, and probably have some idea just how much influence the advice of people who profess to speak from the point of view of international law has on various kinds of decisions.

One cannot expect international law to be always the controlling factor in foreign-policy making. Foreign policy cannot be conducted by making logical deductions from any formal system, however precisely that system is expressed. Foreign-policy making in a changing world is one of adapting means to ends, and comparing alternatives to decide which is least undesirable. It often happens that nothing which can be done seems very desirable. It is a problem of values and power, and the degree in which that process can or should be guided by formal rules which have been found applicable in past situations is always a little questionable. So the issue is not only how much has international law been applied in foreign-policy making, but how much is it desirable that it should be applied. That is a subject which seems to me one of very great importance for research.

We also could have researches, and they have been made, on the extent to which international law is important in making decisions by national courts. This is an old question. There has been a great deal written about the extent to which international law is

and should be applied by national courts. Doubtless national courts do sometimes apply international law, but sometimes they do not. Under what circumstances is it impossible or undesirable for them to apply international law?

I remember that Professor Jessup some years ago commented that the Supreme Court of the United States had shown an increasing inclination to call issues of international law which arose in court "political questions," and to say that they would follow the judgment of the Congress or the President.[3] One of my students wrote a thesis on this question. He went through the opinions of the Supreme Court in the last thirty years, comparing them with opinions of the Supreme Court in the days of Marshall and Story. He found that in recent years there had not been nearly as many allusions to international law in the Supreme Court as in the first thirty years of American history.[4] Is that because the court has less respect for international law? Or is it because the court has made its own precedents, many of which incorporate international law? Or is it because the judges are less familiar with international law?

What respect then do national legislative bodies pay to international law? I did some work on this myself many years ago.[5] To how great an extent has Congress been motivated, in passing legislation, by a desire to enforce international law? To how great an extent has it referred directly to international law in its legislation? What is the trend in that regard? How many Congressmen know what international law is? What procedures do they follow which bring to their attention the bearing of international law upon legislation which may be before them? Our good friend and colleague, Francis Wilcox, heads the Staff of the Senate Foreign Relations Committee. He and his staff frequently issue important memoranda on international law and its bearing upon matters under consideration in the Senate.

We could also have researches on the role of international law in the activities of the General Assembly, the Security Council, and the World Court. I presume the World Court is the agency in the world which pays most attention to international law.

As a fourth and final field, I would like to suggest research on the relation of international law to public opinion. In his first

3. Philip Jessup, "Has the Supreme Court Abandoned One of Its Functions," American Journal of International Law, XL (1946), p. 168.
4. Paul Castleberry, The Supreme Court and International Questions, 1917-1948, Ph.D. Dissertation, U. of Chicago, 1949.
5. Wright, The Enforcement of International Law through Municipal Law in the United States, University of Illinois Studies V, Urbana, Ill., 1916.

address to the American Society of International Law, Elihu Root said that he thought with the advance of democracy public opinion was likely to have an increasing influence on foreign-policy making, and consequently the people ought to know more about international law.[6] I do not know whether they know more about international law now than they did when he said this fifty years ago. I do not know whether it is possible that they can know much about it. I am sure it would be desirable if international law could reach down further into our educational system, but I would like to speak of this subject from the opposite point of view—what is or ought to be the influence of public opinion on international law.

We can ask how much international law reflects what Professor Northrup called the "living law" of the world. His theory is that a system of law will never be effective in a society unless it really reflects the standards of value in that society. That of course raises the very fundamental question whether there is a world society in which common standards of value obtain. The minute you raise that question, you are asking whether there are any common standards of value which people and nations really believe in throughout the world. Unless there are, we can hardly expect to formulate rules of international law which will be effective throughout the world. It might facilitate advance in international law if studies were made of comparative ethics, comparative religion, comparative philosophies, and comparative law to discover whether there are any universal standards of value that all people in all societies accept, and if there are, to describe them.

Of course we have certain formal expositions of such standards—for instance, the Charter of the United Nations, which asserts that all people who subscribe to that document want to be saved from war, and believe in peace. Well, do they? What do they mean by peace? Is it really universally accepted that peace is better than war in all circumstances? There follows the statement that all believe in the dignity of man and universal respect for human rights. Is that merely a formality, or does that represent a genuine value which Communists and Moslems and Buddhists and everybody else in the world really believe in?

In theory the Preamble and the first article of the United Nations Charter are a statement of universal standards of value which, as Professor Northrop would say, is "the living law" of

6. Elihu Root, "Need of Popular Understanding of International Law," AJIL, I (1907), p. 6. See also "Public Opinion and Foreign Policy," Foreign Affairs, Spec. Supp. IX (1931) No. 2.

the world. If they are, the task of international law should be to formulate them into precise principles and rules that can be applied in the varying circumstances and contingencies of international life.

One of the first things that impresses one in these statements is that there may be some inconsistencies among them. Perhaps the outstanding inconsistency lies between the principle that nations have equal rights and the principle that individuals have equal rights, both stated in the Preamble. I think that one of the great problems which faces international lawyers is the reconciliation of national sovereignties and human rights. Can those two principles be reconciled? Are either or both real values in the world?

Walter Lippmann has recently dealt with the subject I have been discussing, using the term "a public philosophy." He is not thinking of the world, but only of the Western world. He asks, is there any "public philosophy" which all of the people of the Western world really believe in? It seems to me we have got to ask whether there is any public philosophy that all of the people of the world really believe in, not merely the Western world, if we are going to have an effective basis for international law.

This is a problem which faced the early writers on international law. What Northrop calls the "living law," what Lippmann calls "a public philosophy," Victoria and Grotius called "natural law." The classical international jurists thought that there was a universal value system, which all must of necessity accept. They actually drew natural law from classical philosophy and Christian religion, which underlay European culture, and they based international law upon these principles. The idea of "natural law" began to decline among the international law writers in the eighteenth and nineteenth centuries. Jurists became positivistic. I am not sure that they quite understood what they were doing; I am not at all sure that it is possible to develop a positive law in a society lacking unified government, except on the bases of a living law which represents the genuine beliefs, goals, and aspirations of the people who are going to be bound by this law.

So my suggestion is that research might be undertaken to discover the values, if any, which all peoples really believe in, to ascertain whether, if there are such values, the rules of international law conform to them, and if they do not, to study how they can be changed so that they will.

I suggest therefore as four directions of research in international law: restatement of the law, integration with other branches

of law, its role in decision-making, and its relation to prevailing public opinion and universal values.

UNITED STATES FOREIGN POLICY AND OUR LAW SCHOOLS: AN OBJECTIVE VIEW

by Louis B. Wehle, Esq., of the New York Bar

On a bench in the park a few weeks ago, I was sitting alone reading an early Latin edition of Grotius, and then I had the following experience which I shall recount from my precis made immediately afterwards.

A pleasant, eager-faced gentleman of middle age, unconventionally dressed, strolled over from where he had left a mechanical device. He sat down, after engagingly asking me whether he might, and said, "I have just this moment landed here from another planet, and I hope I am so fortunate as to find a man who can answer this question: I see that some of your islands and continents are thickly inhabited, which means that there must be a tendency to disorder and destruction, both among individuals and among peoples. Have you methods for preventing this?"

"I assume, sir, that you come from the planet we call Mars," said I. "I shall with pleasure try to answer your inquiry. In the first place, down here on the Earth, we have two chief instincts and two abiding and recurrent passions. First, there is the instinct of self-preservation." He nodded. "Then, you perhaps know, there is the sex instinct," "Yes, yes, quite," said he. "Then we have the passion for beauty and the passion for justice. In addition, we have, and sometimes apply, religion as the spiritual influence for guiding, reconciling, and controlling these four pervasive emotional forces amid our inner and external conflicts.

"So much for the background, Mr. Mars, if I may so address you. Now to answer your question, whether we have methods for preventing disorder and destruction: Some nations have achieved internal order through systematized rules called laws. An individual violating them either will be punished by the State, or he may, on private complaint, be enjoined from, or have to atone for, such violation. Those nations we call civilized. In the majority of these, that is, in what we call the Roman-Civil law nations, the rules have, in the main, been arbitrarily imposed by men who have won control over the people by force. In other

nations, especially the Anglo-American law ones, such as this, the rules have been chiefly developed by the people themselves or through their judges. In civilized nations generally, the laws have been so improved that a public penalty or a private remedy is provided for most types of injury done either to the State or to an individual."

"But, Mr. Earth, how do you prevent disorders between nations?" "We don't, Mr. Mars. For centuries they have been reduced by international contracts, called treaties. But many of the nations are still suffering from a war ended about ten years ago, and they are now drifting toward another which may wipe out some entirely. In fact, if you were to stay here for some time, you might have to make a sudden departure in your little spaceship." "But this is absurd!" protested my bench-mate. "Surely, if the nations have evolved laws to preserve order among individuals, they can control and reconcile their own collective instincts and passions by international laws."

"Now, Mr. Mars, I am ashamed to say that we haven't got very far on this. There are many reasons. I shall begin with a curious one which is rather indirect, but it is deep-seated and can give you some idea of the immobility of the obstructions to ordered world peace. Although most nations have up-to-date domestic laws, the majority treasure in foreign relations a quaint set of rules imposed by a great imperialist nation on its subjects about 2,000 years ago. These rules dealt with such things as could happen in a world without our sciences of physics, chemistry, biology, bacteriology, and so forth—without even gunpowder, steel, or applied steam and electricity. This legal relic of the pre-scientific era is called Roman Law. The nations adopted a so-called 'collective security' agreement, or Charter of the United Nations, after their latest war. Through their majority, they chose judges, most of whom are disinclined to apply any law other than Roman Law to today's international controversies."

"But, Mr, Earth, how about your instinct for self-preservation and your passion for justice? Can your judges, or what I would call high priests, ignore them?" "Perhaps not, Mr. Mars, but the majority of the judges are from Roman civil law countries. Having been trained in international law which is so inflexibly Roman Law, they seem either unable or unwilling to free their minds from its limitations."

"Do you mean to say," he exclaimed, "that these priests are allowed to ignore a modern principle of justice which could settle an international dispute and perhaps avert another world war! Why didn't the nations require the priests, when necessary

for justice, to use the modern law principles developed in the nations?" "Again you embarrass me, Mr. Mars. The nations did require that very thing in their charter that I've just mentioned, but the judges have rather disregarded the requirements."

"Now, really," he replied, with an uneasy smile that had a twist of suspicion, "I see you are jesting, so I will reciprocate by asking you why the priests are allowed by the nations to adjudicate any international dispute at all which might lead to war?" "They simply aren't allowed, Mr. Mars, and this is no jest, either. This is how it happened: The United Nations Council is the body charged with maintaining and enforcing peace. It has eleven members. Of these, the five most powerful nations (called 'the Big Five') are 'permanent' members, the other six memberships being temporary and held in rotation. The Charter says that one permanent member alone can veto any proposal in the Council which is non-procedural, that is, any which has to do with maintenance or enforcement of peace, but that action by the Council, merely procedural, like submitting a dispute to the Court, can be by any seven votes out of the eleven. This means, for instance, that, under the terms of the Charter, four smaller nations, with the help of three big ones, could submit a dispute to the Court against dissents of two big and two small nations.

"Before the Conference adopted the Charter, the Big Five made an outside agreement that any one of them, by its sole dissent, could prevent the Council's referring a dispute to the Court. Although the agreement was never approved by the Conference, it has been fully effective. The present chief of our foreign office was one of its foremost representatives at the Conference and presumably helped formulate the Big Five's agreement."

"Then, Mr. Earth, this means that the nations of your planet really want war." "No, Mr. Mars, I see your point, but it isn't so. A very powerful nation in the Big Five induced the other four to agree that one dissent could prevent submission to the Court, by promising that it would never so employ its dissent as willfully to obstruct the operation of the Council."

"Then I ask you: Has that powerful nation kept its promise?" "No, Mr. Mars, that nation, although one of the organizers of the United Nations, has been working for over thirty years avowedly and openly toward undermining from within, conquering from without, and permanently subjecting most of the other nations, including this one. With the aid of some other nations, allied with it through conquest or fear, it continuously strives in and outside of the United Nations Organization to foment international con-

troversies and to prevent the peaceful settlement of any. It has consistently violated its promise by using its own dissent, or threat of one, in the Council to prevent submission of any controversy whatever by the Council to the Court. I hasten to confess before you ask me, that, first, none of the other nations, not even ours, has repudiated the agreement through which we were defrauded of the major service which the Court was to perform for the Council, and secondly, the fraudulent, hostile, powerful nation is still a member."

"Then the title, 'United Nations' is hardly—" "Mr. Mars, actualities do sometimes have a way of stultifying our words." His hand went abruptly to his forehead. "My mind reels," he said, "before such colossal confusion and suicidal make-believe in an international arrangement for peace." After a silence, he ventured weakly, "You doubtless have a class of distinguished scholars in your nation who teach the law of nations or who are foreign office officials. Do those scholars explain this gigantic frustration of Peace to the people and suggest means to end it? If not, are they not apt to be abolished when the people realize the slaughter that is impending?" "Mr. Mars, there seems to be no sign of such resentment. This may be partly due to the speech barrier. The vocabulary of that learned, disinterested class of persons is so incomprehensible to the average man as to isolate him from that class, and he probably could not understand the reasons for present conditions even if some specially frank member of it should try to explain them."

"Mistakes, neglected in a coincidence of silence, could become nationally destructive," he said, "but your apparently short memories here must be comforting to some of your public men. Then, ambitious scholars may be influenced by the power of the Court priests and other dignitaries in the United Nations Organization, while more patriotic, but static, scholars may be paralyzed by the incredible political complex." "Be that as it may as to perhaps a small proportion of scholars, there is hope in our professional law school," I declared. "Some of them are now becoming definitely dual schools, teaching, on the one hand, domestic law for the legal profession, and on the other, international law and relations to those headed for public service in foreign affairs, and to those relatively few who will practice the legal profession in the field of international law."

"Our law schools," I went on, "will, we hope, become an important agency for transforming international law into an adequate, vital system of justice, and also for constructively promoting international co-operation, on the levels both of politics

and of the people's life. They should insist on the application of modern domestic-law principles throughout our law of nations. They should, by analysis of that fraudulent agreement of ten years ago, indirectly bring about its nullification and a restoration of the International Court's true function. They should, by expansion and projection of existing legal norms into the future, lead the way toward collaboration among friendly nations in large-scale international enterprises, organized regionally either as joint administrative authorities or as corporations, in engineering, construction, operation, and research, for the interests of the participating nations might thus become so merged that international disputes would seldom arise. A few schools are already alive to some of these ideas."

"If this change has begun," said my guest, "it seems that your law schools are becoming a force in the dynamics of international politics and business. Does not this new rôle of theirs expose national policy to new forms of manipulation by designing domestic or foreign influences? If so, can the schools preserve the disinterestedness you mentioned? Would they not have to exercise vigilance to identify and prevent unfriendly action from outside aimed at reaching the minds and motives of students and of teachers?"

"You have perhaps touched on a vital spot, Mr. Mars. Designing interests could try secretly to predispose or embarrass national policy through financial support of professorships and of special research or teaching projects, or by retainers of teachers as counsel. This danger, familiar to university departments of political science, could indeed appear in a new and even sharper form. It would be, first, the responsibility of the law school teachers and administrators to handle, otherwise it might come publicly to concern our national law-makers. A school training for public service in the foreign affairs of a nation must be conditioned by its foreign policy. So long as the nations resort to war, and to commercial and other rivalries that can lead to war, no nation, Mr. Mars, could tolerate the presence of law schools which embarrass, or impair the effectiveness of, its policies in international relations. This—"

"But," he interrupted, "even if the law schools throughout your nation should now come to perform the new rôle you have described, you must admit that, at best, they could serve only as an indirect cure for the conditions you have recounted. Could the cure operate in time?" "Mr. Mars, I don't know. Terrible mistakes have to be remedied. Conflicts contrived in many parts of the world by the fraudulent and destructive nation I spoke of are

rapidly becoming more acute. I have not mentioned how some established safeguards against aggression, deeply implanted in the law of nations by a century or two of international observance, have been impaired in recent years. Take the principle of domestic jurisdiction in connection with—"

"No, pardon me, I would rather not hear about it," said the Martian rising suddenly, yet courteously, "I long looked forward to visiting your planet, but I have already heard as much as I can bear about its instincts, passions, religion, and, above all, its international law. I prefer my own. If you can ever get away from here, come up and see me some time." And with that he quickly disappeared in his machine.

CONTRIBUTION OF COMPARATIVE LAW TO DEVELOPMENT INTERNATIONAL LAW

Jaro Mayda, University of Wisconsin

I should like to offer a few remarks on some ways in which research in comparative law is an obvious tool for progressive development of international law.

As I've listened to the various speakers this morning and afternoon, beginning with Professor Jessup, I've heard one point after another of my outline being made, explicitly or by implication. It was, of course, at least as comforting as it was discomforting. In fact, when Professor Wright referred a while ago to Professor Northrop's ideas on the fundamentals of international law of the future, and Professor Riesenfeld discussed the new developments in Western European federalism, and someone else spoke about what I would call "insight through law," I almost decided not to stand up and be counted.

Yet, I feel that after some of the very specific technical talk and much discussion of international law "chiefly as interpreted and applied by the United States," we may allow ourselves to raise our sights for a moment, from the leaves to the trees, and perhaps a little above them, and to look at international law as more than only a tool of national policy or export trade.

We all know of the constant stream of legal inspiration and cues between municipal laws and international law, from Roman and canon law on, and of the current reflection of national legal developments on the probable course of international law. I think especially of the relationships between such national statues as the United States Tort Claims Act and the changing attitude towards state immunity in various international areas, for in-

stance the status of public-owned commercial vessels, or the great importance on the development of international and world law of such changes in constitutional doctrine and instruments of various states, which give international law a formal priority and thus remove the constitutional obstacles to adherence to various international normative conventions, or the precedential value of national regulation in such fields as atomic energy or exploitation of continental shelf on international legislation.

These are not really the things I want to talk about. The research symbiosis between comparative law and international law goes much farther than the description and analysis of such items. As international law research is abandoning its traditional outlook and orthodox self-limitations, which had made it so much more respectful, but also less effective, and ceases to be an academic discipline, it becomes a technique, a method of regulating life and controlling violence in the international community. As such, international legal research must use all tools that are available: contribution of empirical research in political science, comparative research in other legal disciplines (it is easy to see, and has been alluded to by one of the preceding speakers, how much, for instance, administrative law can contribute), and progress in economics and other social and behavioral sciences. Each problem in the area of International law—unless one wants to rely in theory—must draw on all the surrounding fields that can give any help in empirical data, or analytical concepts.

What can comparative law contribute specifically? Since there is only a small group of specialists in comparative legal research present, it may not be superfluous to say that the study of and research in comparative law in general has at least three major values (I hope my colleagues will agree with me): jurisprudential value—contribution to the understanding of the nature and function of law, 2) technical value—help in developing, drafting or reforming specific segments of law, and 3) political-cultural value—insight into the fundamentals of a national makeup through the legal system. In each of these areas, comparative law has an obvious contribution to make also to international legal studies. On the first point, Article 38 of the Statute of the International Court of Justice is an obvious reference. I mean the "general principles of law recognized by civilized nations" included in this article as one of the primary sources the Court is supposed to draw upon. Although it may seem that the importance of this source, the international natural law, is bound to diminish with the increase in conventional law and the codifi-

cation of customary law, there is in fact another problem looming ahead of us. As, for instance, Professor Northrop of Yale has reminded us repeatedly—and Professor Wright referred to earlier—we cannot expect that an emerging world community, in which the Asian and African nations are playing an increasing role, can be well regulated by a system of international law that has its cultural and ideological roots in the small West European promontory only. The preparatory stage to a development of a system more widely footed is the analysis of those legal principles and ideological doctrines of other civilizations that can and should be incorporated into the developing system of world law. Much of this is a job for the legal comparatist. A look at the travaux préparatoires of some recent U.N. social and humanitarian conventions shows this quite clearly—but shows also in what kind of a preliminary and undeveloped stage that type of research is, in fact.

The major technical contribution of comparative legal studies to research in and development of international law is obviously in the area of Article 13 of the Charter, where it refers to the initiation of studies and the making of recommendations for the purpose of encouraging the progressive development of international law and its codification. As much as codification is just a restatement, it moves naturally only in the confines of positive international law. But real development of international law in the face of new problems and new areas requiring regulation must draw on all available help, among it that of comparative legal analysis. This is equally true in the field of properly developed draftsmanship of international conventions. To arrive at a formula in the draft of a multilateral treaty is not only a matter of understanding on the substance, but also such an expression of it that it would carry the correct meaning for every party, in terms of its legal concepts and semantics. In some types of conventions the ratio of reservations seems to be the reverse of the drafting skill and the subtle balancing of concepts which can be acquired only through a development of techniques thoroughly comparatively grounded. Even the simple problem of collaboration of American drafters with others raised in the civil law tradition is a comparative exercise—and a quite exasperating one at times, I am sure.

This last point overlaps with the third contribution of comparative legal research which I labeled "political-cultural." The problem is especially obvious on the level which is perhaps the only safe inter-stage to an effective world organization—the regional arrangements. Comparative legal research, which does

away with clíches and prejudices, and clarifies the real differences between the partners, does much for the rapprochement indispensable for reaching an international agreement. The Harvard comparative study of federalism for the West-European political community is another specific example, not less illustrative because it has not been translated into political reality so far. The ambitious comparative research planned by the University of the Saar, especially in the legal and economic questions of the Coal and Steel Community, is still another example.

And the "insight through law," which successful comparative research affords, is invaluable in promoting the somewhat elusive but terribly vital ingredient of any progress on the international plane: the understanding, awareness of reasons for differences, and objective evaluation of motives, in short, a contribution to the atmosphere of trust without which only the minimum of international law is possible. Here knowledge about others, in terms which are closest to lawyers, is a sort of a catalyst, or perhaps a climate, in which can develop readiness to accept international commitments and the ultimate supremacy of international law, and in which nations are ready to understand why there are conflicts between the international and their national laws, and how these conflicts should be solved. To all this and much else a fruitful research collaboration between internationalists and comparatists can contribute very much.

June 23, 1955 Evening Session

BROADENING THE SCOPE OF INTERNATIONAL LEGAL STUDIES

PROF. JOHN P. DAWSON (University of Michigan Law School): In general today our theme has been what Professor Jessup described as new vistas, or what we might call "beyond traditional international law," and the first question that arises is why, under a general heading of International Law and the United Nations, there should be scope provided for a group of people, some of whom are well known for not being international lawyers at all, to talk about matters of international trade and investment, which certainly are not within the usual framework of a course in public international law, and to talk about them really from what could be described as the point of view of simple, old-fashioned comparative law.

I think the title and the location in the program suggest that in advance of the speeches this morning by Professors Jessup and Katz there was already an acceptance of the thesis for which they so eloquently argued—the general thesis that could be described as the enlargement of the field of international legal studies. The object tonight, as I understand it, is to discuss the problem of ways and means, accepting the idea that international law, however we define it, should not be concerned solely with the rules which regulate the relations between states, and that there are many reasons why the law schools should deal with such matters as the impact of government and of the rules of international society on private individuals, private transactions, private legal relationships. That is the point of view that was so strongly and so well urged this morning. Accepting this thesis for purposes of argument, the problem would then be—how do we arrange our work so that methods, materials, and point of view can become accepted as a standard part of the American law school curriculum, brought within the mainstream of American legal education, as Professor Katz put it.

The arguments for doing this I do not intend to repeat, but they can be summarized as, first of all, arguments for the enrichment of international law itself—enlargement of horizons, the addition of new subject matter and new problems. For the overtures that were offered to private lawyers this morning by Professor Jessup we are grateful. We private lawyers, who engage part-time in comparing systems of private law, express the

hope that tonight there will be a similar acceptance of the principle that we need to work together—partly because the barriers between public international lawyers, as the area was previously defined, and the private comparative or private international lawyers, were artificial barriers anyway that ought to be levelled, partly because on both sides we can learn from each other. In this intermediate area the rules emanating from government bear down very heavily on international arrangements and serve to direct their course. Studies of private law will gain added meaning and content by dealing with matters that our fellow-citizens engaged in international transactions are daily grappling with, that governments are constantly concerned with, and that can be so administered as to open up opportunities, develop investment, trade, and various forms of international co-operative action. All of these matters, in other words, have a reality and a liveliness from which comparative lawyers and other persons concerned with private law systems can very greatly gain.

I would like to take just a moment to discuss the problems that we have so much considered on the private law side as comparative lawyers. I do this principally for the reason that I think the areas that we will become increasingly concerned with, if this approach begins to prevail, are in a way the problems that we have been struggling with for quite a long time in comparative law. Nobody knows quite what comparative law is. We have had a great flood of law-review literature attempting to define comparative law and describing the ways and means of comparing laws, teaching the subject, and so on. It is not a single subject, the field is unlimited. You can compare anything. You can compare legal rules in any field between any countries, and sometimes it is very profitable, sometimes it is not so profitable. But the difficulty in defining it is that you simply have no outer limit to the possibilities, which is in a way true of the new areas which we hope are opening up for all of us in the near future. I think what everybody describes in these discussions of comparative law is the experience of suddenly stepping outside your own system, your own experience, the ideas that have become really engrained, almost automatic, subject to immediate recall. One can accomplish a similar result by looking at history, but it can be done far better by looking at a modern system which starts from quite different premises. And then you suddenly find that the things you take for granted are not necessarily true at all. With law I think it is particularly valuable to do this, because I know of no area of organized human experience in which systems have been so built up and barriers are so high. Experience is rationalized by the

lawyers and ordered and surrounded with all kinds of theory which is exceedingly hard for an outsider to penetrate. The very difficulties of the penetration, however, give a greater reward when it has been done. In whatever way you go at it, it is a most educational experience.

We can go at it by ourselves individually, in groups (as, for example, with the Harvard tax project which I understand to be several years along, a quite comprehensive and ambitious program), we can bring in foreign lawyers already qualified to do research and gain from them (though I would say that this is difficult and perhaps the most difficult of all ways to go at this problem, i.e., to try to set foreign-trained people into a frame that we have already designed for ourselves), or we can try to get our own people, our faculties and our student bodies to have the experience and to become interested and curious. I will not try to develop further this general thesis about the values of comparison. But if the values are great, so are the difficulties. I think the expanded view of international legal studies which has been urged, and which I believe we here at Michigan also very fully accept, will involve us in some of the most difficult, time-consuming, and perhaps relatively the most expensive projects that we shall undertake.

But added to the ordinary and existing values of this study, we now have the project for bringing a number of foreign scholars to our universities. This has occured on a considerable scale already over recent years, and we hope it will occur on a much larger scale in the near future. This offers us an additional reason for trying somehow to figure out ways and means for incorporating the methods, approach, and some of the materials of foreign systems into the ordinary curriculum, the ordinary teaching procedures, of the American law schools. So that stating it briefly, we have a contribution to make as lawyers, surely, to the solution of the great international problems that press upon us. We have a duty to give to the student bodies an enlarged picture of the legal order, including some glimpses of foreign legal orders and legal methods. And above all, I think we have a great interest in educating ourselves. So tonight our object is to take some illustrations of particular courses and programs that have been developed, to see how far there are contributions in the subject matter, in the methods used, in the general point of view that is urged by the proponents of these schemes, to the very much larger and very ambitious program that was proposed this morning. I do not hesitate to say that this is part of international legal studies as now redefined.

THE LAW OF INTERNATIONAL TRADE AND INVESTMENT

PROF. HENRY deVRIES (Columbia University Law School): My talk will be devoted to outlining some of the problems of teaching and research in the field of international trade and investment.

At the outset, I may state that my approach is essentially that of the comparative method coupled with recognition of the importance of public and private international law as necessary sources of guidance in analysis and solution of legal problems with foreign law elements. For, in truth, there is no law of international trade and investment. There are American law, foreign law, and international law aspects of transactions cutting across national frontiers. One of the worthwhile results achieved in the seminars and courses in international trade and investment or counseling in international transactions is to compel integration of the sister disciplines of international and comparative law and conflict of laws.

The economic and political realities of contemporary international trade and investment call for a higher degree of integration of these disciplines than did international commercial law of the past. One of the principal reasons has been the world-wide transition from laissez-faire economic organization to various degrees of governmental control of private international transactions. By legislation and governmental regulation in most countries of the world, a complex of public and private law has been developed which, projected into international relations, has created the need for meaningful organization and systematization. Professor Katz has pointed out how courses in administrative law emerged in our law schools in the past twenty years or so, resulting in the need for segregating and systematizing a body of rules and principles applicable to activities of administrative agencies. Similarly, since World War II, numerous factors have resulted in the identification of recurring legal problems centered in the economic functions of international trade and investment. The tax studies of the League of Nations were aimed at avoidance of double taxation in the international field and, as such, were a starting point in defining a part of the law of international trade and investment. The expansion of exchange controls in the 1930's

affecting the validity of international private contracts, as well as modes of payment, injected another point of reference. The General Agreements on Tariffs and Trade (GATT), the International Monetary Fund, the International Bank for Reconstruction and Development, among the international instrumentalities affecting trade and investment, have provided the basis for an institutional approach in this area. Indeed, not only has the integration of public and private international law and comparative law been inevitable in this new area of international legal study, but law as such has had to join forces with international economics and political science.

From the point of view of the place of the Law of International Trade and Investment in the law school curriculum, I believe it essential to bear in mind that we are not preparing specialists, but training men chiefly in the law of the country where most of them will live their professional lives. It is the position of this country in world affairs today which compels our law schools to open their thinking to international problems, and it is the obligation of the law schools to contribute to the formation of intelligent understanding in national and world affairs which makes inevitable offerings in the international field. The legal problems of international trade and investment cannot be examined on the assumption that the student is equipped with the language and other educational qualifications necessary for a specialist's formation; the assumption must be, on the contrary, that the law of international trade and investment is a useful and highly desirable means of projecting the typical student into the unknown spaces of international life. It is one of the doors through which he may leave his home in the law and venture into alien attitudes. The congerie of problems of international trade and investment is not only a means of inducing the student of law to look beyond his national horizon, but a manageable medium for converging understanding of a foreign country's values and standards in a vital area of national life.

At this point, I would like to outline briefly our experience at Columbia University in developing courses and seminars in international trade and investment.

Shortly after World War II, I organized a two-session seminar which we called Counseling in International Transactions. As conceived orginally, and as it remains, it is a pilot plant for work in the are of international legal studies concerned with trade and investment problems. In its broadest scope, its program provided for inquiry into the international

law background of rights of aliens as related to a specific foreign country's law, international commercial arbitration, the legal problems inherent in the presence of American business enterprise in foreign territory, and of American nationals with property abroad.

As we progressed, it became clear that the Pandora's box of "international transactions" needed limitations of geography and subject matter. Though, as Professor Katz has remarked, the world may be our oyster, there is a serious problem of digestibility. For my purpose, speaking in terms of human limitations and materials available rather than of all countries with which the United States has trade and investment possibilities, the areas of interest are Western Europe and Latin America. Politically and economically, these are areas of obvious importance to the American student of international relations. Furthermore, the legal systems of these areas, though sufficiently different to aid in overcoming a provincial habit of thought, are not so far removed from an American students' normal legal training as to require complete re-orientation.

A point of importance is the distinction between the definition of trade and investment. Trade is a flow of goods. Investment is a movement of capital often accompanied by movement of persons. International trade may not involve an international transaction in the integrated sense in which we are using it. Goods are exported from or imported into the United States. But most export or import transactions raise few problems related to the need for projection into foreign or international law. The typical sale of good for export involves sale in the United States, payment in the United States. Similarly, imports follow a pattern of legal factors centralized in a single jurisdiction. We are here in an area of foreign or domestic commercial law rather than in an area of comparative and international law. In international trade, the new area study is indicated by recent institutional developments developed as a means of furthering United States participation in and encouragement of international trade. The Reciprocal Trade Agreements Act, reform of customs classification and administration, international aspects of agricultural price-support legislation, lead to analysis and understanding of the General Agreement on Tariff and Trade, the International Monetary Fund, and the operations of the Export-Import Bank.

The importance and long range possibilities of the varied elements justify the organization of a separate seminar broadening the base of international trade to include Legal Aspects

of United States Foreign Economic Policy. This approach permits systematization of international economics and work with international conventions. Similarly, a separate seminar in International Fiscal Counselling has developed as a medium for organized development of tax problems of international investment. The numerous Tax Conventions can thus be dealt with in their relation to American tax law.

We are entering an era in which competition from other highly industrialized countries will compel our sellers in international markets to extend credit terms to foreign buyers on far more liberal terms than at present. At that point, many elements of foreign commercial law will become of relevance to the American trader and his counsel accustomed to the sales transaction completed within his own jurisdiction.

International investment also comprises an area which, in terms of our objectives, does not require specialized treatment in the law school curriculum. Unless the investment is accompanied by what might be described as the "presence" of the investor or his group represented in foreign territory, what is sometimes called "direct investment," there is no essential need for comparative or international law integration. The living problems in the contemporary world, which demand solution through a unified approach, arise in a context of movement of persons, physical or aritficial, and property, tangible or intangible, for localization in one territory connected to this country by necessities of supervision or control. The problems may involve continuous dealings with a foreign government through accredited business representatives, branch or subsidiary operations aimed at foreign consumers, patent and trade mark licensing of foreign manufacturers, concessions in extractive industries and in the field of public utilities. They may be grouped around the three categories of the manufacturer of goods seeking expansion of markets, the investor in extractive industries, and possibly, as Professor Brewster suggests, international public utility investment. Simply from the point of view of an often mentioned concern in this area, that of confiscation, expropriation, or "forced sale," the latter two present special problems of exploitation of national resources or public services which by their nature are more susceptible to local political demands than is the producer of manufactured products. Turthermore, the legal problems of the manufacturing enterprise differ from those arising in operations of extractive industires or public utilities. From the pedagogical point of view, maintaining the factual pattern of a manufacturing

enterprise localized abroad permits consideration of a broader range of legal problems. The seminar can be organized to deal with key problems of rights of aliens under international and municipal law, comparative administrative, civil, and commercial law, exchange controls, labor and social legislation. A program of this cope obviously must be molded within the confines of language qualifications and availability of materials.

In our experience, up to now, the problem approach—the approach of the factually integrated international transaction—presented in broad terms to the students at the beginning of their work, is the most effective. It is the most effective, not only for attracting student interest, but in permitting a unity of structure of group organization.

As the role of international legal studies becomes more defined, we may well change from the problem approach to that of area studies. In organizing international legal studies in area terms, though international trade and investment will remain as a factor of high significance, the main emphasis will be on organization of legal aspects of the relations between the United States and a defined geographical area of the world. We are working now on organization of a program of Inter-American Legal Studies. Obviously, such a program cannot be limited to narrow legal problems arising in international trade and investment. The central problem in Latin America, affecting all phases of Inter-American relations, is whether the beginning of democracy, as it exists in a few countries, can find root and development in an area which has inherited an authoritarian tradition. To consider trade with and investment in that area without an understanding of the factors leading to political instability is to ignore essential realities.

As we move away from study of international commercial law through consolidation of newly organized legal studies in the international field, we approach consideration of the need for selection of groupings of foreign countries. These groupings, such as Latin America, Western Europe, Near and Middle East, emerge through extra-legal factors, manageable in legal terms as the result of development in international and comparative law studies of the past few decades. Legal problems of international trade and investment will be placed against a background of public law, of comparative constitutional and administrative law, as a means of determining the "legal climate" of our foreign neighbors before approaching private law problems of international business.

Before finishing this talk, I should mention the greatly

increased availability of materials for comparative work in the international field. One of our Associates in the Parker School of Foreign and Comparative Law at Columbia, Dr. Szladits, has just published a bibliography of books and articles in English on foreign and comparative law. Its four-hundred-odd pages are mine of relevant material. The United Nations studies, the U.S. Department of Commerce publications, the Library of Congress, staff papers of the International Bank and of the Monetary Fund, all are valuable sources of economic and legal literature related to trade and investment.

COMMENTS

PROF. KINGMAN BREWSTER, JR., (Harvard Law School): It has been said facetiously that the only difference between a seminar and a course in the Harvard Law School is that you can smoke in seminars. We still hide behind the Socratic method, especially in fields where our ignorance is altogether frightening such as on the frontiers of international trade and investment. And I think, quite seriously, on the question of technique, Mr. deVries, whose experience really is much greater than ours in this field, is quite correct in saying that both in terms of provocation and in terms of making the most of the opportunity for what is essentially a process of communication between different ways of thinking (if you are fortunate enough to have foreign students), the job must be done by discussion and by a voluntary atmosphere, not by a formal or canned presentation of prepared materials. Partly this is true for the very good reason that Mr. deVries mentioned: materials do not exist.

My approach is narrower perhaps than Mr. deVries' and it seems customary on this podium to regale the audience with problems of definition. We have the problem, of course, of the arbitrary division between trade and investment. We happen to handle them separately, not for conceptual reasons, but because there is another person particularly interested in trade, and I am particularly interested in investment. What do we mean by investment? I suppose we could call it "an arrangment or mechanism for the distribution of values across frontiers," but I have left my Lasswellian glossary at home, so we define the course as the Legal Problems of Doing Business Abroad.

Now, I think that in this gathering it is important to stake our claim. We are "muscling in" on an institute which deals, by label at least, with international law and international organization. I have nothing to disagree with Mr. deVries about, therefore you will have to bear with me while I say in my own words what he has said.

How are you going to get the average American law student interested in the things that bring us here? And interested in a way which makes him apply his professional skills and talents and interests to the problem? I would submit that bringing the international exposure to the average American law student—not the law student, as Professor deVries said, who plans to be a specialist in the field of international legal studies—the average

American law student is likely to see the true meaning of the problems and challenges of international law and international organization properly defined if he gets at them via the exhaustion of the more familiar legal tools, the exhaustion of private law-making, and the exhaustion of unilateral public law-making. This, in a way, is why we set up our sequence at Harvard in this international business field so that this Legal Problems of Doing Business Abroad course comes in the first term and out of it sprouts a bunch of seminars. Almost all these seminars could, I think, fall within any respectable definition of international law, that is, we have one which is explicitly The International Legal Protection of Private Investment. I am sure that this seminar is much more meaningful to the average American law student if he has seen what the problems are and what the private and unilateral public remedies were, that were tried and failed, before he gets to the question of what international mechanism can be useful. Likewise in the international taxation field, treaties or other remedies for the problems of double taxation I am sure are much more intelligible, much more meaningful, come by much more naturally, if the problems of a tax credit device and the problems of unilateral adjustments to the problem of double taxation have been exhausted. In my own field, where I teach a pretentious seminar called International Investment and Economic Development, I am sure that the problems of the International Finance Corporation, the problems of the International Bank, the problems of a SUNFED, the problems of various devices for handling the expropriation problem or guaranteeing against its risk in the case of extractive industries, again all these are much more intelligible and much more interesting and seem much less abstract if these legal problems and possibilities come naturally after the exhaustion of the remedies and the skills which the average law student already has acquired. So counseling and negotiation in terms of conflicting private interests, and in terms of accommodation to national regulatory law, seem to me a proper professional stepping stone to the full appreciation of the role of public international arrangements.

Our own course, then, tries to carry out the approach I indicate. It is built around a succession of problems whose legal solution would be required in order for an American to produce something abroad. We start with a hypothetical client whose needs, hopes, and fears have been drawn from the experience of various companies who have let us roam through their files. From then on it is a question of assessing the pros and cons of alternative ways of getting into foreign production. Branch or

subsidiary? total, majority, or minority ownership? And we pay quite a lot of attention to licensing as a form of "investment." For, as Professor Jessup has pointed out, the world cries out for legal ingenuity to devise new forms of capital transfer, and "investment by contract" should be considered not as a separate unrelated category of law but as a practical alternative to the equity participation which the word "investment" usually connotes. Obviously, no net decisions among these alternatives can be made without a cumulative assessment of the impact of private law, company law, regulatory law, exchange law, and tax law.

Of course we do not have the competence or the time to achieve a broad comparative coverage, but like most traditional law courses, ours is designed not for the imparting of information but to expose the dilemmas inherent in the private transaction and its public regulation. We started by focusing on a particular foreign country as well as on a single client. Our choice was Brazil, in part because of the helpful presence of a couple of young Brazilian practitioners. Next year we will draw to a considerable extent on French and Italian materials. But as I indicated, we are more interested in drawing on crucial illustrations of the problems of straddling conflicting sovereign commercial jurisdictions than we are in broad comparison of any particular legal systems.

The difficulties are apparent. A course which tries to hit the high spots at least of the broad range of problems relevant to international business counseling is an invitation to superficiality. It quickly outreaches the competence of any single instructor in its coverage of substantive fields of law even if comparison is confined to one or two systems. Further, since the focus is on counseling and negotiation rather than litigation, reported materials are scarce, unrealistic, or non-existent. We need to get at "lawyer-made law" as Dean Cavers has characterized it. Finally, there are the pedagogical problems you are always up against when you leave the ready-made discussible materials of appellate opinions.

But the effort seems well worthwhile, and the interest both among students and practitioners seems to bear out our hopes. And not the least of our hopes is that by taking the route of the private transaction beyond the water's edge more of our students will see international legal studies and international sophistication generally as a part of professional equipment, not as an esoteric, extracurricular indulgence.

So that it does not seem to me that we are laboring in separate vineyards; it does not seem to me that we are laboring in

competing vineyards. I would suggest that one of the greatest possibilities—and I have no particular brief for our way of having exploited it—but one of the greatest possibilities in making international law the problem of the legal generalist, not just the problem of the legal specialist, will be further experimentation with the relationship between private, public and international conflicts and remedies by a problem approach.

PROF. ROLAND J. STANGER (Ohio State University Law School): I would like to exercise to the full the commentator's privilege to be selective and confine my remarks to one phase of the law of foreign trade and investment—exchange controls.

Exchange controls are, of course, regulations imposed by foreign law. Of international law in the traditional sense there is very little in this area. But after what has been said here today, there is certainly no need for me to justify discussing this kind of foreign law before this institute.

Exchange controls are regulations imposed by foreign law—but they are the example par excellence of regulations whose impact is on international transactions. Moreover, they are the most comprehensive of such regulations—it is virtually impossible to conceive of an international transaction which need not pass through the screen of the exchange control regulations of one or more countries. Again, exchange controls, although they have a vital bearing on the affairs of residents of the country imposing the controls, bear most heavily on the foreigner, and can be and often are, used as a tool of discrimination against the foreigner. It is, I believe, no exaggeration to say that exchange control considerations now determine the shape of international transactions to a greater degree than does commercial law, even as tax law is the prime consideration in shaping many domestic transactions, rather than the law of contract or trusts.

An American lawyer has to be sanguine indeed to venture into this area. An adequate background would include an understanding of the social and economic situation of the country imposing the exchange controls which has prompted the policy judgments reflected in the exchange control regulations. Also one should have some understanding of what I am sure must be the most difficult branch of economics, international trade. And finally one should know something of the mysteries of international banking or of dealing in foreign exchange.

Having said this, one should be prepared to answer the question why this area should not be left to the economists, as it so largely has been. Perhaps a better question would be why law-

yers have so long neglected an area of law which has such an immediate and drastic effect on a wide range of transactions in which their clients engage. Economists are interested in the over-all effects of exchange controls on balance of payments and the pattern of world trade. But the individual exporter or investor is interested in the impact of the regulations on the transactions in which he wishes to engage. The American movie producer cares little about the United Kingdom's balance of payments, his sole interest is in how much of his film rentals he can bring out, and for what purposes he can use his blocked sterling. Some investors, concerned about whether they will be able to bring out their profits or repatriate their capital, may have to consider whether they should rely on an intergovernmental agreement, a foreign statute guaranteeing foreign investors, a contract they themselves make with the foreign government, as the oil companies have with India, or possibly whether they should enter into a forward exchange contract with the central bank, as some mining companies have in South Africa. The question has come up, under the American program for subsidizing the building of ships in American yards, how the dollar equivalent of the cost of building a ship in a foreign yard should be computed, where, because of exchange controls there were several effective rates between the dollar and the foreign currency. All these are certainly lawyer's problems. Again, any exchange control system raises such questions as the scope of judicial review accorded the decisions of the exchange control administrators, whether a country may properly resort to such measures as censorship of the mails to prevent evasion, and whether the traditional confidential relationship between banker and customer must be respected by the control. Also, I suggest that lawyers could make a real contribution in draftsmanship in this area, so that exchange control regulations, agreements and the like not only stated clearly the transactions they were intended to cover, but also were couched in language comprehensible to the regulated as well as the regulators.

I said earlier that there is little of traditional international law in this area. That, of course, was something of an exaggeration. There is of course the Bretton Woods Agreement setting up the International Monetary Fund. I believe it is enough here to say that there seems to be no possibility that the member countries will soon honor the commitment made in that agreement to abolish exchange controls except for certain limited purposes. There is no reason, however, to feel that all progress toward putting limitations on the power of countries to impose exchange

controls is impossible. Even if one concludes, as I believe one must, that some exchange controls are essential to many countries in the situation in which they find themselves, it is still true that there are many practices which have found their way into exchange control systems—applying regulations retroactively, discrimination between different classes of investors, and the like—for which there is no justification. There is room here for the piecemeal approach, presumably by the bilateral rather than the multilateral route, perhaps using such techniques as the most-favored-nation clause, or what might be called the most-favored-transaction clause.

Is this sort of subject matter teachable—and is it worth teaching? If the question is whether the student can acquire the same comprehensive grasp of the subject as he can say of contracts, the answer is certainly "No." The student lacks the background I have described, and it is difficult to supply it even in part, either from one's own limited resources or by making available certain materials to him, and everything that has been said here about the difficulty of providing adequate materials is doubly true in this area. I have found, however, that some articles in journals like The Economist, some of the country studies of the International Bank, and the like, make at least a beginning. The exchange control regulations of various countries are not too easy to come by, but they can be obtained from banks, from the International Monetary Fund, or from the Bank for International Settlements. And it is possible to isolate certain problems which a student can handle. In one seminar I had students write papers on the treatment accorded American movie companies and American oil companies under the British Exchange Control system, and on the effect of those controls on the operations of the Liverpool Cotton Market. The first two students found their problems manageable, the third floundered rather badly, as I feared he would. For all that, I believe they came out of the experience with some idea of the kinds of problems exchange controls present, and why they arise.

I would not rest the case for international legal studies generally on the idea that students will have immediate practical use for the knowledge acquired in their practice. I suggest that exchange controls are a conspicuous exception. Any lawyer who represents a movie company, a steamship line, an air line, an oil company, a mining company, or an automobile company, to mention only a few, is certain to run into exchange control problems not once but many times. To give a student the head start of having had at least one experience in finding his way through

the maze of exchange control regulation is, I believe, justification enough for the effort. And if the legal literature in the area is inadequate, as it certainly is, my only comment would be that we get on with our research.

PROF. MILTON KATZ (Harvard Law School). I will confine myself to an attempt to relate the remarks of this evening to the subject which Mr. Jessup and I discussed this morning—new vistas in international legal studies.

You may recall that I took a position which could perhaps be summarized in these terms. My first thesis was that the shape of international legal studies should correspond to the events and relationships in which the law has its roots; that, given the circumstances of our time and the developments of the past half century or more, it is philosophically valid, historically valid, and practically useful to take as our unit of inquiry the whole area which we described this morning as international legal studies rather than anyone or two of the segments within it. My second thesis was that this area of study should be pursued as an integral part of the general study of law, and that it should be taught as a part of the mainstream of legal education. My third thesis was that this outlook, this approach, has equal validity in relation to the training of the lawyer for his practice, the training of the lawyer for his larger responsibilities of leadership at the local or national level, and the responsibilities of law schools to make their contribution to creative thought and creative scholarship.

Now, I should like to try to relate what was discussed this evening to the foregoing concepts. Perhaps the most illuminating way to do this would be to take the subject matter discussed by the three speakers of this evening and consider it first from the point of view of the corporation which is engaged in international trade or investment, second, from the point of view of the United States Government or any other participating government, and third, from the point of view of the United Nations, or a part of the United Nations such as the Economic Commission for Latin America, the Economic Commission for Asia, or some of the regional organizations which have been the subject of attention today.

Consider the problems faced by a corporation which contemplates entering into international trade or investment, or establishing a business abroad. In embarking on such a venture, it must consider a complex of legal problems. From the point of view of the business enterprise this is a single complex of legal problems which it must explore as a unit. It must consider what

is the most appropriate form of legal enterprise for the particular venture. This may involve exploration of the corporation law of Delaware or New Jersey or whatever the state may be under which the business enterprise is organized. It must explore the tax consequences of attempting to do business in the form, shape, and place in which it may be undertaking to do business, and the various ways of organization or operation which will have this or that practical tax consequence under the income tax law of the United States. It must consider the effect of various aspects of American regulatory law upon the operation. The antitrust laws are perhaps the most obvious case in point. It must consider the application of existing treaties to the security of the investment when it is made. It must consider the application of international law to the security of the investment when it is made, to the possibility of prosecuting effective claims for relief in the event that the business enterprise, once it is installed in the foreign land, should be subjected to some kind of expropriation by the state in which it operates. It must also consider a corresponding range of problems arising out of the legal system of the country or countries within which the enterprise seeks to carry on business. Mr. deVries began by saying that the law of the other country, the law of the United States, and the international law problems are three different babies. From the point of view of counsel to the company undertaking to advise the company how to proceed, they are not three different babies. They are one complex of legal problems with respect to which he must seek light in a variety of legal systems.

Now, if you will examine the same range of problems as they may present themselves to our policy-makers in Washington, you find again that the governmental policy-maker confronts a single complex of problems which he must treat as a unit. In undertaking to determine the most fruitful trade policy for the United States, or the soundest investment policy or policy of foreign economic aid, the policy-maker must consider the entire legal environment within which the policies must be made effective. He must consider the effects of American tax law, the effects of American antitrust law, the effects of American tariffs. He must consider the possible range of treaties, both those which exist and those which might be entered into in order to produce desired results.

If we pass to a consideration of problems of trade and investment as they present themselves at the level of international organization, we again find that they must be examined as a single complex. Suppose the Economic Commission for Latin America

should be concerned about economic development in Latin America, and about the extent to which this could be promoted by encouraging the formation of capital in Latin America or encouraging the importation of capital from abroad. Suppose that it were concerned about the way in which a fiscal system must be established or modified in order to encourage the growth of an agricultural economy. It would find that it had to come to grips with a range of interlocking problems, of law and of legal training, the training of personnel, and the bringing into being of new knowledge. These would represent different facets of the complex of problems which would confront our policy-makers in Washington and the business enterprise contemplating international trade or investment, in their respective spheres of activity.

It seems to me that there is no need to strain to show the relationship of what was discussed this evening to the larger context. The relationship appears clear the moment one considers these problems as they in fact present themselves to anybody who has to deal with them, whether he is in business life or national governmental life or international governmental life.

There has been a note of regret, concern, apology—I do not know quite how to describe it—that has run through our discussions today. It had had to do with our worry about the rudimentary character of the materials with which we deal, the uncertainty in the elements of law with which we have been seeking to deal, and the rudimentary character of international law when one considers international law in relationship to the vast and tumultuous sweep of international relations with which it is supposed to deal. I do not really think there is any need for us to be apologetic. If our problems are fluid and shadowy, it is perhaps in part because we are in a world of transition and because it is our lot to be in a position where, if we suffer the pains, we may also have a chance to participate in the job of the beginnings of the creative process

DISCUSSION

PROF. QUINCY WRIGHT (University of Chicago): I might mention a phase of the subject we are discussing this evening which has come to my attention in connection with the operations of the Foreign Bondholders' Protective Council. The business of this organization when set up in 1933 was to try to collect more than a billion dollars worth of dollar bonds of foreign governments that were in default. Interesting international legal problems have arisen in this connection. For instance, recently the Council had the good fortune to find that it was not liable for having recommended the acceptance of a certain settlement. The Court of Appeals in New York held that this action against the Council was in fact an action against the sovereign state which was in default on its bonds, and which enjoyed sovereign immunity.

Another interesting problem arose in connection with a recent settlement with Japan. This settlement included a most-favored-nation clause, that if any subsequent settlement of a defaulted Japanese issue should be better, the dollar bondholders would profit by it. Subsequently the Japanese proposed a settlement with France. The French bonds had a provision that they should be paid in francs or in gold yen. There was a question whether or not this was a gold clause, and it made a lot of difference because there had been great depreciation of both the yen and the franc. The issue was finally arbitrated by a Swedish jurist who held that it was not a gold clause, and that the proper amount to pay was the value in yen or francs at the time the default occurred. The Japanese asked whether we would regard that as a settlement more advantageous to the franc bondholders than the settlement they had made for the dollar bondholders. This is a difficult question of international law and one which has not yet been decided. There is the additional feature, that the amount of franc bonds in default is small in comparison with the amount of dollar bonds, so that if the Council regards the franc settlement as more advantageous it will simply mean that the tentative French settlement will lapse. The Japanese will not jeopardize the larger settlement they have made with the United States.

PROF. STEFAN A. RIESENFELD (University of California Law School): I have listened to the speeches this evening with a great deal of interest and, really, with a great deal of amazement.

I am a little bit worried about the attempts of Professor Stanger to teach exchange controls profitably to American students. In foreign bars practice relative to exchange controls is perhaps the most difficult of all specialities. The law changes almost day by day. In Germany exchange control rulings and decisions fill volumes which are mysteries to the average German lawyer. It is handled by groups of specialists. The same is probably true, although I do not know for sure, in other countries. How can anyone give the student, or make the students feel, any assurance that what he does is right? Will it not lead to some kind of superficiality? Will it not lead him to being not really thorough and conscientious, but giving him the impression that he knows something when in reality he knows very little. Will it not be conducive to a kind of glibness and false pride in, "Now I know everything about exchange controls in foreign countries." Personally—and I would like to know what the feeling of others is—I see an enormous danger from a pedagogical point of view in going too deep into such an abstruse matter. It is of course another matter to see that exchange controls have certain effects and that international agreements to life controls are important. I think most attorneys, at least the European attorneys, if they have any actual question relating to a foreign country, will consult an attorney in that particular country and usually not only one but two, because he can very rarely trust the opinion of only one, and likes to check one against the other.

I really have to make a painful point tonight. I feel quite strongly that comparative law is one of the most difficult matters to teach. I have a colleague on my own faculty whom I respect boundlessly, Professor Albert Ehrenzweig. He is an Austrian by background and I am a German. Deep down in my heart, I have never overcome the feeling that Ehrenzweig might know everything about Austrian law but is not quite as perfect in German law. Even in two countries with the same language, the traditions vary so much that a Prussian lawyer was not ever completely sure about Bavarian law. Continental systems vary enormously, the training is different and the education is different. So if somebody purports to give an American student a feeling he knows something about European exchange controls, he must be a miracle man and I would like to know more about it. At any rate, I hope that the students are not inveigled into a false sense of security on this issue, because this would rather defeat the purposes of comparative law. To give them an over-all good understanding of the policy questions or how different persons think about basic problems, that is one thing, but the details

of mechanical operations or day-by-day change of policy considerations and their manifestation in administrative rules, in my mind, are a matter which I would hesitate to speak with any assurance to my students about and I would like to hear a little bit more what the student reaction is.

And that comes to the next point, viz., relative to "the mature student from abroad who may shed light on the matter." On many things the mature student from abroad can shed light, but there are zones and areas where only a real expert, one who is much more than a mature student, can shed light, and I am afraid that some of the more sophisticated seminars very dangerously reach the point where in my mind even the lawyer from abroad who happens to be present can shed only a very fuzzy light on the subject.

PROF. MICHAEL H. CARDOZO (Cornell Law School): I would just like to say that there is a great advantage in having the students and American lawyers generally know something about the reasons for exchange control even if they do not know entirely how they work. Some of what is done in these seminars can bring that out. What made me think of it was Professor Stanger's saying he was not sure that there was any international law concerned with this. I wanted to call attention to the fact that the first case in the International Court of Justice in which the United States was a party arose out of what I consider to be mostly a misunderstanding of various aspects of exchange controls in Morocco and in France. I think that shows the close connection of exchange controls with international law, and how much better it would be if there had been more understanding of it among the group of Americans who got us into that case.

PROF. KENNETH S. CARLSTON (University of Illinois Law School): Should there not be a co-operation in the future in international legal studies in this area with two other disciplines in the school? If there are area studies taking place in a particular university, would it not be desirable for this line of inquiry to be pursued in co-operation with such area studies so that the impact of the particular legal solution upon that particular country, whatever it may be, will be explored because there will be variances in the desirability of the various alternative solutions, according to the mores, the culture, and the outlook of the particular country in question? And secondly, linking up with this very same point, might it not be desirable to work to a certain extent in co-operation with the college of business administration, particularly in the field of

management, because here also it is important to administer the particular legal solution in such a way as to intrude into the economy of that country in an inconspicuous, gentle, and understanding a fashion as possible? This is a management problem as well as a legal problem, and there is a need for integration in the exploration of this area.

PROF. JOHN HAZARD (Columbia University): I wanted to ask the gentlemen teaching these courses in international trade whether it would be crowding the course too much to put in material on state trading. During the war Bob Wilson and I tried to work out some sections for the standard commercial treaty that might have to do with nations that were state traders. I suspect that someday we will trade with China. I do not suppose it will be very soon, and probably in Michigan you do not think it will be as soon as we think in New York. But it seems inevitable that there will be a demand from business interests that we follow the British line and make some money off the Chinese, and when we do, Detroit is going to ship a lot of automobiles there, as they did in the past. But if we do trade with China and again with Russia, as many have suggested that we will be doing, there is going to be a very large area of the world engaged in state trading and with which the United States lawyer is going to have to deal. If that is so, I should hope that the present courses, which are terribly valuable in dealing with the Western world and a large part of Latin America, might be expanded to discuss the questions of state trading which are very real. They would tie in with what we discussed this morning, namely, the whole problem of commercial treaties. Once state trading begins, it becomes of concern in the drafting of commercial treaties and also in Ken Carlston's subject of commercial arbitration. Our courts in New York have had problems that have to do with Americans who do not want to go to Moscow and negotiate in Russia at the Foreign Trade Arbitration Tribunal when they have already promised to do so in a contract. You all know our famous Amtorg Trading Corp. v. Camden Fibre Mills, Inc. (304 N.Y. 519, 109 N.E.(2d) 606 1952) case where the Court of Appeals said, why should we protect a sane adult in New York who ought to know what he is doing when he signs a contract with a Russian in which an arbitration clause appears?

Now, it seems to me that this kind of material ought to be presented. I wonder if we have to have a separate course. We have had a separate course on commercial relations at Columbia in the past, but I think there is some advantage in including this material in the general course on international law. Yet I have not heard a great deal about the subject of state trading today, and I thought that it might be something for a very brief discussion.

THE TEACHING OF INTERNATIONAL LAW

June 24, 1955 Morning Session

THE TEACHING OF INTERNATIONAL LAW

THE INTRODUCTORY LAW SCHOOL COURSE IN IN INTERNATIONAL LAW

PROF. PHILIP C. JESSUP (Columbia University): I want to say at the outset that, in talking about the introductory courses in international law this morning, I assume we are talking more definitely in terms of international law in its limited sense, not in the broad sense of international legal studies, which we discussed yesterday. It is in the more limited sense that I am dealing with the question of an introductory course in international law.

The second thing I would like to say is that I am not confining myself to a discussion of the particular ways in which we teach an introductory course in international law at Columbia. In one sense, I think it would be irrelevant to dwell too much on the Columbia experience, because our problems are different from those which exist in many other schools. We have a combination of activity of members of the law faculty and the faculty of political science, which does not exist elsewhere. We have one introductory course which is open both to law students and graduate students of political science. We also have one general introductory course in international law in one semester which is offered merely to law students. We have a third introductory course in international law offered exclusively to the students in our professional School of International Affairs. So I think our problem is not comparable with that which is met in most of the schools of the country. Furthermore, I am not at all sure that we have reached perfection in teaching of our introductory courses at Columbia, and I would not hold them up as necessarily the correct procedure.

On the other hand, I do not purport to sketch the content of such a course in the law school of Utopia. I would like rather to raise various questions that come up in my mind as connected with this problem instead of making any attempt to be dogmatic or to suggest that any uniformity is possible in law schools across the country. Essentially, the teaching of this course, as the teaching of any other course, must depend upon the general teaching philosophy and approach of the particular school.

Also, I would like to state I am not dealing here with advanced courses or the special training of graduate students. Much

of the work now given in international legal studies in many of the law schools is designed for the training of graduate students or of advanced students and must be considered in a particular way. Furthermore, I am not particularly concerned here with the problem of the training of foreign students. This is a problem of teaching international legal studies, but it is a very different problem. One here is confronted with the problem of teaching American law as if it were foreign law, because one is dealing with a foreign clientele who must be introduced to the American system. Let me turn, then, to the teaching of international law in a limited sense.

Now, it seems to me the purposes of a general introductory course in international law in a law school are two: first, to expose as many students as possible to an understanding of international legal problems, and, secondly, to make them aware of the points of view, methods, and other considerations which bear upon the introduction and solution of these legal problems, especially where these differ from those with which they become familiar in other courses.[1]

Against that background, I now make two assumptions: first, that this general introductory course will not be a required course, and, secondly, that it will not be taken in the first year. As to when such a course should be given, it seems to me much better that it should be offered in the second year, so that those students who are interested will have an opportunity to continue with advanced courses or seminar work in their third year. I believe it is better that the course should be confined to a one-semester course, unless or until students in a particular school are habituated to including a full-year course in international law in their programs.

At Columbia, as I say, we offer both a full-year course and a one-semester course, and the law students may choose between them. In this connection, a practical point of some importance is

1. I do not exclude as a general philosophy of education in the law schools the point of view illustrated by Donald H. Fleming's William H. Welch and the Rise of American Medicine (Boston, Little, Brown, 1954), because I think his comments on medical education are equally applicable to law. In discussing Dr. Welch's theory of the proper development of medical education, Fleming points out that the University must carry on perpetual warfare against the idea that there ought to be two kinds of medical instruction, one designed for mediocre students to make practitioners, and the other for superior students to make investigators and researchers. He quotes Abraham Flexner to the effect that there has been too much accumulation of ready-made material and not enough emphasis on a method of thinking by which an attitude of mind and a pattern of mental habits are to be formed.

that the schedule-makers must be allergic to conflicts between an international law introductory course and the so-called "must" courses in the ordinary "bread-and-butter" program. Students interested in international law constantly find they cannot take the course because it has been so scheduled as to conflict with another course that they feel they must take. This gets us back to the Dean's office, and I will comment on that again later. It is much better, however, if before taking the international law course your students could have previously taken, especially, the course in Conflicts, and Constitutional Law, and if possible, Comparative Law. This represents an ideal which would rarely be achieved. By and large, it seems to me that the place in which this course fits best is the second semester of the second year in the law school.

Next, one cannot assume that the students will have much background. I have made some futile efforts to induce my colleagues at Columbia to introduce into the ordinary courses in the curriculum at least passing references to public international law materials. It could be rather simply done. The possibilities would be evident to all of you. In connection with contracts, one can frequently make allusion to the different rules which pertain to the making of agreements among states, in an entirely different framework of legal operation. Quincy Wright mentioned yesterday the possibility of including references as to the effect of war on contracts. In criminal law, one can touch on extradition, on war crimes, and various other matters, which raise entirely different considerations, but within the general field of criminal law. The possibilities in conflicts of law are obvious. So in constitutional law, when one is dealing with, for instance, the Bricker Amendments, and the place of treaties in our domestic law, it is possible to open the minds and eyes of the students to the international problems which are involved. One could go on similarly through the curriculum. I suggest jurisprudence, admiralty, trusts and estates, equity procedure, and taxation, as questions on which the international point of view could be brought to the attention of the students. This, however, depends on an awareness of international law in the minds of all members of the faculty.

It seems to me when one comes to the approach to teaching international law in an introductory course, one might very well keep in mind the recent experience in teaching languages. As I understand it, in the modern way of teaching languages one escapes from the deadly old method by which one was immersed for a year or more in horrible struggles with grammar before one

ever got any appreciation of the language as a tool and as something which was of interest as a means of communication. Under the present methods, largely developed by the Armed Forces during the war, one first acquires an appreciation of the language as a spoken medium, and then goes on into some of the humdrum detail which is eventually necessary. Query: Whether in the teaching of international law one should avoid the traditional method of beginning with the nature and sources of the law, and plunge into some complex problems which will awaken his interest.

Now this leads me to the point which was touched on yesterday, discussed by Mr. Katz and also by Mr. Brewster: Is it necessary to devote much of one's time to developing student interest? Clearly, international law courses are very different from courses, say, on torts and evidence. It makes no difference whether the student is interested in those courses or not, he has to take them, he does not have to take international law.

Now, of the preconceptions with which the law student views a course in international law, I think there are three. First, that it is not law, secondly, that it is not useful, and thirdly, that it is not important. Mr. Katz has answered some of these questions already, but in connection with the point of view that it is not law, I believe there are some advantages in arranging the materials in the international law course as we did at one time through some mimeographed materials at Columbia, under rubrics which are familiar to the students through their studies of private law; that is, you have a section on contractual law, you have a section on torts, where you put your injuries to aliens, for example, you have a section on property, where you deal with territorial problems, you have a section on crimes. On the other hand, you can take the bull by the horns, and like Judge Hutchinson in Ryan, Trustee v. United States, which Mr. Briggs uses as Case #1 of his casebook, say we are entering a new wonderland of law, and try to tell them this is really exciting stuff that they will get into. In any case, you have to show here a body of material that a lawyer can put his teeth into, and something which is of both interest and importance.

Now, we may also say international law is useful to the practitioner. One can, perhaps, partly meet that as Mr. Bishop does in his "Foreword to students," by stating what big fees lawyers collect from international cases. This is an appeal to a baser motive and sometimes successful. The articles by Willard Cowles and Louis Sohn in the 1954 Journal of Legal Education are important in showing that one can make a convincing case in that regard, but I doubt whether one should fight it out on a pure bread-and-butter basis.

Thirdly, when students say it is not important, I think you must turn, as Mr. Katz did yesterday, to the general task of the lawyer and point out the important issues which are constantly brought up before public opinion, and with which they must deal as citizens, such as the Bricker Amendment, the controversy over prisoners of war in Korea, the question of recognition of Red China, and so on, and this task can constantly be illustrated by the erroneous manner in which the daily press deals with these subjects.

If one desires to plunge into the midst of things in the hope of arousing students' interest, one can, of course, change the order of the materials entirely, and I shall come back to some suggestion on that.

Secondly, as to the approach and method, it seems to me that for a course of this type, there is need for a selection of topics to be studied in depth, as against the possibility of creating a mental attitude on the part of these students, so that there will be at least a flicker in the eye when they hear such words as servitude or state succession or continuity. I would suggest that these points can be covered by outside reading plus occasional talk in class, but the point is that they should go deeply into some of the more fundamental branches of the subjects. I would not omit a consideration of the law of treaties, the law of claims, and the general jurisdictional field including immunities, except as the latter may be covered in the course in Conflicts.

Now, granted the purpose of the course, to which I have referred, I think it is important that one should touch on international organization, even though, as at Columbia and Harvard, other courses on international organization and administration may be available at the same time. This I think can be done, for instance, if one is dealing with the subjects of treaties, claims, and jurisdiction. One can pretty well, through the case material studied here, gain an understanding of the processes of the organizations, for example, in the requesting of advisory opinions, which must introduce them to the relative hierarchy of organs and powers in the General Assembly and Security Council, and in problems of United Nations' membership, problems of pacific settlement, problems of domestic jurisdiction, as in the Tunis-Morocco case, and, perhaps, the general question of immunity of international organizations and their officials, which would come under my general jurisdictional head. I think one can omit in such a course the whole subject of territory, except as it comes under jurisdiction, where one would deal somewhat with the geographical limits of jurisdiction. One can leave out

extration, deportation, and state succession. One might touch briefly prize law, neutrality, and the law of war. I would have some question whether one should not touch upon subjects of international law, recognition, continuity, act of state doctrine.

An alternate approach, it seems to me, to the one I have suggested of taking some of these normal topics and concentrating on them in depth is to plan, let us say, a course on the rights or status of aliens. This might have the advantage pointed to yesterday, of bringing the subject home to the individual in the international scene. It would begin by emphasizing the fact that an American, as soon as he leaves this country, is an alien. One would consider nationality in practically all of its phases. One would take up admission and expulsion, jurisdiction, civil and criminal, and here introduce them to the notion of sovereignty.

Also, it would be necessary to consider maritime and aerial jurisdiction, jurisdiction in occupied territory, international criminal jurisdiction, and so on. Extradition would also come in here. In the whole field one would treat the right to do business, to own property, to practice a profession, etc., which Wilson and others commented on yesterday. This gives an opportunity for a full introduction to the body of treaty law. Then one can go on into the full treatment of the subject of claims.

Similarly, in this general approach of choosing a particular body of subject matter, one could focus it around treaties or international agreements, and in the study of the cases there insist upon the student acquiring some familiarity with the subject matter of a case which may involve an issue of treaty interpretation, for example, before the International Court. It all could be brought in an incidental points in the study of treaty law.

Another alternative, which may be possible in some schools, and which I think is highly desirable—I am sorry we have not completely worked it out at Columbia—is that in which the same man teaches both public international law and conflict of laws, or where he is on friendly terms with his colleague teaching conflict of laws, to provide for some re-examination of the distribution of the materials. The distribution in the traditional courses is purely arbitrary. One could accomplish a great deal by transferring much of the public international law material into the conflict courses which students normally take. But these alternatives, it seems to me, would be something like half-way houses, resort to which would only be inspired by the need to stimulate either student interest or faculty and dean interest. Often in our law schools throughout the country, the great problem is to stimulate not the interest of the students, but the interest of the Dean.

are very practical ones, which must be faced. Some day, I think, we will find that bar examiners will include some problems of international legal studies in bar examinations. And when that day comes, the demand will be supplied for courses in this field, and at that point deans will demand that the course be supplied. Meanwhile, it seems to me that experimental courses of as great a variety as possible are highly desirable, and I hope that in our discussion this morning we may all have the benefit of hearing of other experiments which may be carried on in various schools, to the end that all of these ideas may be fruitfully exchanged and that new developments in the teaching of this introductory course of international law will lead to its securing an established place in the curriculum.

COMMENT

DEAN MIRIAM THERESA ROONEY (Seton Hall University Law School): My approach to this problem is three-fold. First, I had long experience with the problems of international law in the Department of State. I learned a great deal there about practical situations as well as theory, and I should like to take this opportunity to express my deep gratitude to the Legal Advisers and their assistants, with whom I worked closely for twenty years, for the wonderful teaching they gave me by example as well as by verbal direction.

Secondly, my approach is that of a teacher of international law who is concerned with the selection of what to teach and how to get that much across to students who have no previous practical knowledge or experience in confronting international law cases.

My third approach to this problem arises from being Dean of a law school and concerns the problem of providing the international law courses that Mr. Jessup has just spoken about. The Dean has a very real problem of how to get any more into the law school curriculum. What can one do in either a two-hour or a four-hour course in providing an intelligible introduction to international law? How can one arouse enough interest in the students for the problems that are not just "bread-and-butter" cases, but that constitute the real substance of the international law field?

What goes on generally in our law schools seems to me to be of the greatest significance to the world. Lawyers are necessarily the principal advisers to all the world's leaders, in economic, social, business, and all kinds of affairs. If the education of lawyers is confined merely to techniques and to the processes of handling only "bread-and-butter' subjects, the aspirations of the human spirit for justice will erupt beyond the controls devised by the law. Law students must in some way be aroused while they are still in school to an awareness of some of the world problems discussed here yesterday. Otherwise they will be unable to give the sort of advice the people expect. And if the law schools fail in the training for leadership in the maintenance and development of order under law, not only their students, not only their country, but the world will suffer from that failure.

How is a law school dean to meet this situation? International law is not a "bread-and-butter" subject. It is not yet required for bar examinations. Its clients are not frequently met with in most

law offices. In an already overcrowded curriculum, international law seems to most students to be a subject which could well be left out of account. Nor will graduate courses in the subject take care of the need, since comparatively few take graduate work after admission to the bar. If the practical problems of international law are to become known in any degree to the legal profession generally, a way must be found to provide at least an introduction to them in the regular law school curriculum. For the law school dean, the decision involves not only the content of the course which should be included, but the value of the other senior courses which it must necessarily displace or shorten.

The course in international law cannot be taught in a vacuum. Its problems and rules must be related to the law of torts and contracts, of insurance and corporations, of agency and conflicts of jurisdiction, with which the student has already become familiar. If it can be taught so as to tie in to the seamless web of the law, to many of the situations which the student has seen arise in other law school courses, its place in the curriculum is justified even if no clients with international problems may be anticipated by the students immediately after admission to practice. It is in the broader viewpoint and the deeper learning involved that international law earns its right to be included in the usual law-school curriculum.

The question of how to arouse a student's interest and how to encourage him to pursue on the graduate level the kind of research and study that the subject requires, remains. Unless the introductory course is taught skillfully, it may result in a mere hodge-podge or smattering of unrelated cases which the student is happily rid of as soon as possible instead of serving as an inviting introduction to a life-long field of study. Mr. Murdock has spoken about the undesirability of chopping up the subject matter into bits. How the introductory course can provide a broad view of the field in the brief time allowed is a pressing question.

My own conviction is that philosophy provides the key. There is, of course, a necessity of teaching facts and for learning what the cases are about, but something else has to be incorporated into the international law course before it will meet the needs of the community. In my own teaching I have used Professor Bishop's casebook, and I have had the privilege of seeing its development through several of its stages. It is very teachable and a most satisfactory casebook for the introductory course, but I cannot help wishing there were a bit more about philosophical foundations in it. I think Professor Bishop set out to include some philosophy in the book, but by the time he whittled and

culled and got the manuscript within the space expected by the publishers, there was not much philosophy left in it, and I think neither he nor the rest of us who have been discussing philosophy over a long period of time are quite satisfied with the result in this respect.

There was a time when philosophy provided the customary approach to international law treaties. Then a strong reaction set in which succeeded in eliminating philosophy almost completely from the field. It is not necessary or desirable to return to the old a priori treatises to satisfy the need. But something much more than the positivists' rule of the case is required. Mere codification of the rules has proven to be illusory as a practical rationalization. Perhaps the most enheartening statement made at this meeting was Mr. Jessup's allusion yesterday to the prevailing revolt against positivism. I was part of that revolt when it first began to take shape. It is wonderful to find here at this conference so many others in the field who feel and share the same conviction.

Students in our law schools should know a great deal more than they do about the difference between positivism and existentialism, between contemporary theories of natural law and idealism, and between subjectivism and realism. If they did, they might be able to anticipate and avoid the dangers of using the public force to coerce and punish free human beings into conformity with some subjective and slanted view of power and control. They should instead be able to observe and analyze facts and situations, and to ascertain jurisdiction and reach judgments in conformity with the best expressions of the common good, in such a way that persuasion and the appeal to reason, rather than coercion and the use of force, be thought of generally as synonymous with law. This knowledge should come to them less by theoretical treatises than by inductive analyses and evaluations of the philosophical notions latent in judicial and comparable legal opinions, to the end that fallacious premises may be detected before the wrong conclusions are given effect.

Above all, students of international law should know that international law, like all law, is founded on reality, on nature, and in this sense it may be said to be based on natural law. They should learn that natural law is not anybody's subjective notion, that it is not an ideal, but that it is derived from facts. It should be made clear to them that law is already existent in the universe and that it needs to be discovered and formulated, but that in discovering and formulating, it is the human mind that functions, not in vacuo, but as needed. It is in the interna-

tional law sphere particularly, that we all have begun to learn again that to the extent that we misunderstand the natural law, we miss the goals we desire and struggle for, and we have to go back and make a new start. In addition, we lawyers are beginning once more to recognize that the human mind achieves its highest point in reaching a judgment, and that judgment is the basis of law. It is not the case situations alone that are important, but rather, it is the judgment the mind makes with respect to the resolution of the fact situations with which it is confronted that is important. Students are not going to understand much about international law until they know this.

Now, what are we going to do about getting this into the introductory course? It seems to me that there is only one practical suggestion that I can offer here and now, and that is to enlarge a little bit more on the over-all philosophical background, where this fits in as a branch of the universal picture, and give these students some glimpse of the vistas you are opening up here. If they could only be helped to see, for example, that philosophical fallacies in the legal system of Nazi Germany led to its conquest, perhaps the theories implicit in contemporary law would not seem to esoteric. Then, if they were given some practice in analyzing the philosophical theories to be found in the cases about claims, treaties, and the like, through a skillful use of the Socratic-dialogue technique, they could be brought down to earth where human beings live, and not left in the realm of fantasy where no flesh and blood people can be found.

One of the most discouraging aspects of the teaching of the philosophy of law has been the fact that jurisprudence courses have not hitherto devoted the time and effort necessary to show the relationship of ideas to the actual judgments that have been enunciated in common law or in international law cases. A careful study of the history of juridical ideas and their effects would be especially valuable in the international sphere.

I hope some support can be given to research in how best to get the philosophy from the cases, analyze it, try to find out where it is wrong or fallacious, what needs to be added to round it out a bit more, and then bring that knowledge back to the graduate schools and eventually to the introductory course, so that students will come to realize that it does matter what you think, and that it does matter why you say what you do.

If the students are going to get a better understanding of international law when it is most needed, they cannot be allowed to graduate completely illiterate in the history of juridical ideas. It seems to me there are three tasks immediately ahead: first,

the interest of the law students in international law problems must be aroused, second, better teaching of the significance of the problems involved must be encouraged, third, a deeper philosophical knowledge should be expected of the teachers so that they can stimulate keener analysis on the part of the students. A good casebook is a help for the first of these, but is not enough alone to develop the other two. Good teachers are indispensable.

The task is formidable. Perhaps hardly a beginning can be made by way of improving the situation. But that is no reason not to try.

INTERNATIONAL ORGANIZATION COURSES AND INTERNATIONAL ORGANIZATION IN INTERNATIONAL LAW COURSES

PROF. LOUIS B. SOHN (Harvard Law School): The basic problem in teaching international organization courses is the fluidity of the subject matter and the profusion of available materials. Every morning's mail brings to my desk many new documents, and quite often at least one of them has to be brought immediately to the attention of the class meeting on that day. The New York Times carries every day items which require further investigation, and voluminous correspondence is necessary to obtain the basic documents. There is no international West Publishing Company nor an international Prentice-Hall to bring us our cases neatly packaged and properly indexed.

Teaching any course is an individual experience and all those to whom I have talked about teaching my subject have different methods of approach. I cannot speak for others, but you might be interested, perhaps, in my own experiences in teaching the main course on world organization and the seminars which are closely related thereto over a period of almost ten years.

When I gave my first course on the subject at Harvard in 1946, my materials were quite different from those used today. At that time, we had available only the records of debate at San Francisco, the reports of the Preparatory Commission and of its Executive Committee, and the records of the first organizational meeting of the General Assembly in London. I felt, therefore, that the new organization and its possibilities must be studied in their historical setting, and consequently I divided that first course into three parts: first on the concert of Europe, second on the League of Nations, and third on the United Nations. From the beginning I tried to emphasize two problems of special interest to lawyers: interpretation of legal instruments and settlement of disputes.

We dealt, for instance, with such cases as the Greek revolution against the Turks in the 1820's and the Belgian revolution against the Netherlands in the 1830's, dealing both with the various methods by which these difficult situations were settled, and the incidental problems raised with respect to the interpretation of the basic documents on which the action of the Great Powers rested, the treaties of 1815 and 1818. Similarly we dealt with cases which arose in the League of Nations, such as the Corfu case, the Bulgarian-Greek frontier incident of 1925, the Japanese invasion of Manchuria, and the Italian invasion of Ethiopia. In suc-

ceeding years, this method was extended to a growing number of cases before various United Nations organs, trying to get the facts straight, analyzing the arguments of the parties and the constitutionality of the final decisions reached by the United Nations.

After a while it proved impossible to deal with all these cases in chronological order. The last time we used this method, we had before us 31 cases dealt with by the Concert of Europe, 40 cases discussed in the League of Nations, and 10 cases considered by the United Nations. Many of those cases could be presented only in the form of written student reports which could not be discussed in class, and it became obvious that the whole structure of the course needed complete revision. The historical method had to be abandoned in favor of a more analytical approach. After a few years of experimentation I arrived at an outline which formed the basis for my casebook, the first edition of which was published in 1950.

The original manuscript of that casebook had close to 5,000 pages, and the publishers immediately said that it had to be cut down to less than 1,000 pages. After several months of reevaluation of the current importance of various documents and cases and of their practical value as teaching instruments, it proved possible to cut the core of the casebook to 1,100 pages, though 200 additional pages of basic documents were smuggled in later as an appendix. Of course, the final book bore little resemblance to the original manuscript except in general structure. All materials dealing with nineteenth-century cases were rigidly excluded, and only a few bibliographical notes show that international government is not an invention of our generation but that it had a respectable history prior to 1918. Only sixteen documents from the period 1918-1939 survived the pruning scissors, though to this total must be added ten decisions of the Permanent Court International Justice. Some interesting cases fell thus by the wayside, such as the case of the boundary between Turkey and Iraq, the European Commission of the Danube case, the case of the Finnish ships, and the Leticia incident. Even some important United Nations cases had to be omitted, e.g., the Iranian question, the Corfu Channel case, and the Egyptian request for the withdrawal of British troops from Egypt. Several whole chapters had to be cut out during the final revision on privileges and immunities of international organizations, on the status of the secretariat, and on budgetary and financial problems.

After this painful process of diminution was completed, still a hefty book remained, and most teachers found it impossible to

cover all the materials in the book in one course. As years passed, the situation became even more difficult, particularly as each of us found it necessary to add some newer cases to those already contained in the casebook. Part of my collection of such cases was published in the form of a supplement in 1953, but there are many other cases by now which should not be neglected. I am struggling, therefore, at this point with a new edition of the casebook and with the problem of finding a new and more satisfactory approach.

But before discussing the proposed contents of the new casebook and thus of my course as it has evolved during the last five years, it might be useful to report on other developments in the field of teaching international organization courses. When I started first in 1946, I did not hesitate to discuss within the framework of the general course also the question of the growth of international administrative agencies such as the Universal Postal Union, the fascinating legal problems of the International Labor Organization, and the intricacies of the Organization of American States. But slowly the new United Nations problems crowded the other organizations out of the course, and even the four classical ILO cases with which my casebook opens no longer interest the students and had to be omitted from the course in the last few years.

But this storehouse of rich experience in solving international problems by co-operative effort cannot be entirely neglected by teachers and scholars. We have, therefore, added to our curriculum at Harvard two special seminars dealing, respectively, with the international administrative agencies (especially with the specialized agencies of the United Nations) and with regional organizations.

In these two seminars similar methods of teaching are being used. In the one on specialized agencies students are asked to draft the constitution of a new international agency—e.g., one dealing with peaceful use of atomic energy—on the basis of the texts and actual practice of existing agencies. Special materials have been prepared giving students a common background for discussion of various problems, in addition, each student is made responsible for a particular agency and is asked to study not only the constitution of that agency but its actual practice and to bring to the attention of other members of the seminar any important deviations from the general norm. Thus when we discuss in the seminar the question of membership, one of the students will ordinarily raise the question of the usefulness of provisions requiring prior United Nations' consent to the admission of new

members to UNESCO, another will discuss the question of associate membership in the World Health Organization, while a third one will call our attention to the problems caused by the United Nations request that ICAO expel Spain. On the other hand, the students are discouraged from writing papers on one agency only, and are asked to select topics of a comparative character. While working on their papers, each student usually consults with his colleagues who are experts on various agencies and, reciprocally, helps others to find precedents in the documents of the agency with which he is most familiar. A co-operative effort is thus encouraged and additional knowledge is acquired in the process by both parties.

The seminar on regional organizations is conducted at Harvard in a similar manner. The current project is to study the problems which will need to be solved if and when the North Atlantic Treaty Organization should broaden its activities beyond the military sphere. Here again the approach is based on the study of the experience of other regional organizations in Europe and the Western Hemisphere, and students are given the responsibility for bringing the relevant materials about each organization to the seminar.

Coming back to the problems of general international organization, I have to admit that here also we have solved our difficulty in part by separating some questions from the main course and putting them in a seminar on problems of world order. The agenda of that seminar differs from year to year, but we usually select for it problems of topical interest or questions which a lawyer is especially qualified to answer. Last year, for instance, we discussed in this seminar the jurisdiction of international courts, disarmament, and the punishment of international crimes. In other years, we have discussed human rights, self-determination of nations, co-ordination of specialized agencies, and collective self-defense arrangements.

In the main course, I am trying to rely more and more on the case method, and in my new edition I propose to include a much larger proportion of cases as distinguished from other types of documents (such as international agreements, documents of the San Francisco Conference, and various drafts and proposals). The case method as applied in my casebook differs, however, to some extent from that used in other fields of law. There is in it, of course, a fair sprinkling of decisions of international courts, though most of them are advisory opinions rather than judgments rendered in contentious proceedings. But the main body of cases consists of excerpts from United Nations debates

presenting the points of view of the main contestants and the final decision given by the body discussing the matter. To some extent this is equivalent to presenting to a student not the decisions of the Supreme Court of the United States but the briefs of the parties together with the final decree of the court, omitting the reasons given by the court as leading it to the particular solution adopted in the case. Perhaps this development is not entirely undesirable. Most lawyers spend their time not deciding cases, but pleading them, and the mystery of the art of marshalling their arguments is as important for fledgling lawyers as the knowledge of the rules contained in already decided cases. Thus we can perhaps make a virtue of necessity and capitalize on the opportunity here offered. Next year I intend to stimulate discussions further by dividing the class in two and asking one group to present the arguments in favor of the final decision, while the other group is asked to oppose such a decision. After reading the arguments actually made in the case, both sides would be required not only to present them in a proper way but also to supplement them with such other arguments as seem relevant to the case but have not been made.

The question of proper interpretation of the Charter and of prior decisions on similar questions discussed by the United Nations would form naturally an important part of each debate. In some cases, when the debate reveals inadequacy of the rules applicable to the case, the question of the possibility of changing them may properly be discussed, together with concrete proposals for change brought in by members of the class.

With respect to problems to be discussed in the main course on international organizations, I found it necessary to shift emphasis every year. At the end of each course I have tried to gather comments from students as to the problems which they found most interesting and which they considered most appropriate for the law school discussions. Some of the students came up with useful suggestions which then were tried on the next class, not always with success. Two things seem to be clear—that students come to a course in world organization mostly because they are interested in problems of peace and security, and that, therefore, those problems should be put to the fore in any course in this field.

The original order of proceedings as outlined in my casebook was more or less as follows: after four hours devoted to a general introduction, we started with the basic problem of interpreting international constitutions, and followed this up with the discussion of the crucial issue of domestic jurisdictions, rights

and duties of states, composition and functions of the General Assembly, peaceful change, the Economic and Social Council, human rights, trusteeship and colonial questions. In the final part of the course, we considered the problems of peace and security and peaceful settlement of international disputes, with special emphasis on the activities of the Security Council and the exercise of obligatory jurisdiction by the International Court of Justice.

It proved, however, too difficult to deal separately with the General Assembly and the Security Council. Many cases were considered by both of them, in other instances the General Assembly took over some functions of the Security Council, the growth of the role of the General Assembly was closely connected with the decline of the role of the Security Council. My new materials try to consider the functioning of the General Assembly and the Security Council as an organic whole. After an introductory part devoted to the problems of organization and procedure, such as membership, composition, voting, subsidiary organs, we take up first some cases which were settled by the Security Council itself e.g., the Iranian Case, follow them up with those which were transferred from the Security Council to the General Assembly, e.g., the Spanish and Greek Cases, and finally deal with cases in which the General Assembly took over some of the functions of the Security Council, e.g., the Uniting for Pease Resolution and the final stages of the Korean Case. Emphasis is placed here on the interpretation of Charter provisions relating to the powers of the two organs, the constitutionality of various acts and the differences between the letter of the Charter and the living law of the Organization. The materials help to point out that the law on the books is not the same as the law applied in practice, and that the law governing a new international institution often develops quite differently from what was anticipated by its founders.

In the second part of the course we deal with social and economic problems, discussing the activities of both the General Assembly and the Economic and Social Council in such fields as human rights and economic development of under-developed countries. Problems considered here include the case of Indians in South Africa, forced labor, trade union rights, the declaration and covenants on human rights, self-determination of nations, and also control of a nation over her natural resources and land reform.

The third part of the course is devoted to trusteeships and colonial cases considered by the General Assembly, its special

committees and the Trusteeship Council. We deal here with the Southwest Africa Case, the Ewe problem, customs unions between trust territories and other colonies, the powers of the General Assembly to determine whether a territory is no longer self-governing, the duty to supply information to the United Nations on the political development of the non self-governing territories, etc.

The problem at this point is to keep all these materials within 1,000 pages and at the same time present sufficient excerpts from the cases to show the flow of arguments. It seems more desirable to discuss a smaller number of cases more fully rather than a larger group of cases superficially. In making the final selection I have tried to lay emphasis upon cases which present several interesting problems rather than cases which illustrate a single point only. The whole arrangement is still in a state of flux, but I hope to get it in final shape by March 1956, and my materials should become generally available by the end of next summer.

Turning now to the other half of the subject assigned to me, it seems important to note that all new casebooks on international law contain a sizable amount of materials on international organization. A teacher of international law can no longer ignore such materials, and I believe that in most courses on international law there is a fair consideration of some problems of international organization. In addition, various United Nations organs deal with problems of international law in the strict sense of that term, and their contribution cannot be ignored by a conscientious teacher.

For instance, Professor Bishop in his casebook on international law deals with both compulsory and advisory jurisdiction of the World Court in his chapter on nature, sources, and application of international law. In dealing with treaties, he considers the various documents of the League of Nations and the United Nations on reservations to international agreements, the opinion of the Permanent Court of International Justice interpreting the ILO convention concerning the employment of women during the night, and the revision of treaties through "peaceful change" procedures established by international organizations. The question of membership in the international community can not be considered without taking into account the membership provisions of international constitutions, and besides the usual materials on the subject Professor Bishop includes here the debate in the Security Council on the status of the Republic of Indonesia, and documents on mandates and trusteeships. There

is also here a set of questions on international organization which could easily be expanded into a whole course on the subject. A generous excerpt from the advisory opinion on reparation for injuries suffered in the service of the United Nations is also included in this section. Professor Bishop uses also the International Declaration of Human Rights and excerpts from the two covenants. Similar use is made of other international organization materials in other parts of this casebook, as well as in the latest editions of casebooks by Professor Briggs and Judge Hudson.

It seems to me that this is as it should be. The two subjects—— international law and international organization — are closely interconnected and it would be presumptuous to try to build an artificial curtain between them. Neither of these two subjects can be taught without encroaching upon the other, either one of them constantly derives benefit from the other, and there is a continuous flow of ideas from one field to the other. The link here is already more organic than, for instance, between public and private international law, and I believe that in due course these two subjects will merge into one system of world law, assuring freedom, order and justice to all nations of the world.

COMMENT

PROF. BRUNSON MacCHESNEY (Northwestern University Law School): The important thing to me about law school teaching of international law and organization is the hope that we will arouse the student's interest and energies and help him become a more useful citizen, and better informed in his potential role as a leader of the bar and public opinion. This has been our main objective at Northwestern since World War II. To achieve this objective, the faculty has made the course in international law in effect required of all students. The method of achieving this requirement has been to combine the materials in public international law with conflicts of law, which in Illinois is a bar subject and taken by nearly all students. Since the jurisdictional part of conflicts is taken up in prior courses in civil procedure, this means the combining of choice of law and constitutional questions with public international law materials. In practice, the time thus devoted to public international law has varied from twenty-five to thirty classroom hours.

What do we try to do in this introductory international law course, which is given in the third year? We have tried to establish in this course an understanding of the nature of international law as a primitive, undeveloped legal system for dealing with the crucial problem of the control of force by law. Consequently, the emphasis is on the fundamental elements of international law that bear on this problem rather than on those aspects which may be of more importance in the practice of law. For this reason, as part of such a course we examine those aspects of international organization that relate to this central problem. Similarly, in the conflicts part of the course an effort is made to emphasize the philosophical problems and the relation between a system of world law, if you will, and the power of the local law system. The jurisdictional and the jurisdictional immunity parts of public international law can thus be examined carefully from the same standpoint. There are many other aspects of the two subjects which permit useful cross-references. The effort throughout is to treat the materials, while not integrated as much as might be desirable, as presenting a common problem through which the students are being exposed to legal systems and concepts other than the ones familiar to them in the more traditional subjects.

Just a word in closing on the question of a separate course in international organization. Some of its aspects, as has been noted, are treated in the general course in international law. For a more detailed study of international organization we have found the seminar most useful. Students who are interested in taking more work in the field can, through the use of term papers, a smaller discussion group, and examination of original sources, obtain a deeper understanding of some of the issues which are explored in general in the basic course in international law.

INTERNATIONAL LAW SEMINARS

Brief Comments

PROF. MICHAEL H. CARDOZO (Cornell Law School): I would like to comment, first, on Professor Jessup's suggestion that we ought to get along with our colleagues who teach the conflicts course, and try to get some international law into the conflicts field; at Cornell we have an opportunity of doing it that perhaps some of the others do not have, because the international law professor and the conflicts professor are merged into the same person. I am responsible for both, and I get a little international law into the conflicts course, at least once a week. I am not going to compare the two techniques of conducting international law courses, that is, the lecture course as distinguished from the seminar course, but merely try to describe the things we have actually been doing at Cornell with seminars over the past three years.

We have an international program at the Cornell Law School for LL.B. candidates that leads to an LL.B. degree "with specialization in international affairs." We have three problem courses in the program. One is called the problems of domestic and international business, which is conducted by Professor Schlesinger. It deals with specific cases, usually arising in U.S. courts, and having some foreign element that brings out the comparative law as well as domestic procedural problems. This is a combination that Rudy Schlesinger is peculiarly able to handle and appeals greatly to the students' desire for bread and butter in every course.

The other two seminars are mine. One is called International Law II, and the other International Policies. The International Law II course is really a continuation of the basic International Law I course, aimed at getting the student somewhat more deeply into the standard subjects covered in the basic course.

We have been starting off, during the last two years, with a study of the international law cases in New York courts, leading to the survey published in the Cornell Law Quarterly. The students look for the cases in the advance sheets, digest them, and then participate in the seminar in a general discussion. Worthwhile cases are written up for the published survey.

Of course, the first question we run into in connection with this survey is, "What is an international law case?" We have narrowed our research somewhat by limiting ourselves to cases

where foreign governments are directly concerned, even though they are not a party. In other words, we really are defining international law in what Professor Jessup called the limited sense. Our purpose is to eliminate the traditionally comparative law or conflicts cases. The distinction is, of course, seldom entirely clear. By "direct concern to a government," however, we mean a case in which a foreign office or the State Department is likely to take an interest. We have included, for example, the cases involving exchange control, because in that particular subject a foreign office or a government has a great interest.

Through consideration of these cases the student gets a chance to see international law at work in specific instances, and at the end of our course of seminars we try to get the students to write up their own definition of international law.

An example of the kind of problem that we have in the International Law II course is one that I gave this year. We tried drafting a "pelagic animals act," whereby Congress would authorize the President and the Secretary of State to enter into executive agreements to take the place of the more cumbersome treaty system that is now used in connection with fisheries and whaling and other kinds of seagoing animals. The idea was to give the students a chance to see how these subjects are handled through international agreements or treaties, how far control can extend on the high seas, and for a little bread and butter, how to draft agreements and legislation.

The International Policies course takes a somewhat different approach. We start with subjects of current importance in international relations. The students are given an idea of the lawyer's part in international affairs, whether he is in private practice or government service. I may say that the International Law II course comes in the spring of the second year for those students in the international program, and the International Policies course comes in the fall of the third year. I have a number of mimeographed copies here showing the kinds of problems and the way we have written them up in past years. You will see that each one is aimed at getting the students to understand the basic problem and to solve the kind of question that a lawyer involved in one of those problems might meet. We assume that more is learned from handling specific problems than from general reading.

Last fall in the International Policies course we covered among other things the difference between the EDC and the Paris agreements relating to Germany, special ways in which trade and other relations with Latin America are treated in our U.S. legis-

lation, and the problem of review of the UN Charter. I tried one year to use the Moroccan case which the United States and France litigated in the International Court of Justice, but found it was really too complex and too difficult to get at the basic material, for the students to do very much with it.

At one time we gave as a problem the question as to what the U.S. Government should do if East Germany should march on West Germany as North Korea did against South Korea. We are fortunate in being able to gain some perspective by having a few foreign students and a few non-law students participate. In this connection, with each problem we try to have an expert from the outside come for a talk and discussion in the course of the seminar. We include faculty experts from other parts of the University, from the Government Department, Economics, etc. The courses are conducted as seminars, as we have explained, and the limited number of students makes it possible for us to give each one individual assignments that can be discussed with the whole group. Sometimes we give one assignment to two or three students, with the idea that they may be able to work together on it. We do not go as deeply into some of the problems as, I gather, some of the Harvard seminars do. I think we probably do less solving of problems than trying to find out where to get the solutions.

The history and theories of international law are brought out through the medium of practical problems. The program is aimed at students who are especially interested in international affairs or international aspects of law practice, and we generally hope that they will end up with a somewhat more intelligent understanding of world affairs. We try to make it clear that the techniques and intellectual exercise used in resolving international controversies and problems are essentially the same as are used in any legal question. Both require as a first step the recognition of the issues involved. In connection with the program we emphasize that there is to be no sacrifice in the basic law courses leading to admission to the bar. We constantly bear in mind that our primary function is training students to handle lawyers' work.

We also emphasize that specialization is not intended as a means of getting a better job. I know from my own experience in the Legal Adviser's Office at the State Department that even there an applicant with outstanding intellectual ability will be chosen over the one who has gone deeply into the study of international law, but has displayed less talent. At Cornell we also recognize that it is probably better for the students to do their

specializing in an extra year, presumably leading to a Master's degree, if they have the time and the funds. We also know that the basic law program has to be such that the students can do their specialization without missing important work in other fields of law.

There are naturally, on a campus like Cornell's, many courses in the international field that we like to be of benefit to the students. We require one course outside the law school for all the students in the international program. They can take some course like Professor Briggs' on the United Nations or Mario Einandi's Seminar on Comparative Government, etc. We have not yet made our final plans as to how this program will be handled, but we are still trying to make it fit properly into the whole law school curriculum.

Cornell Law School
International Policies
First Problem

September 22, 1952

Senator Majority, on entering his office in Washington for the first time after his election over the incumbent, Senator Minority, finds the following four letters on his desk:

The first is from Mrs. Beulah Clubwoman, writing as President of the Women's Club of the county seat in one of the less populous counties of the Senator's state, which is located between the Rocky Mountains and the Mississippi River. She writes:

> Many of your admirers back here are looking to you for action that they feel is long overdue. One of the things this country needs is a courageous, anti-Communistic secretary of state in place of that man Acheson. The press now reports that he won't let anyone, even Senators, see the files on the latest loyalty decision. Now that you've got the power of a U.S. Senator, let's see you get him out of there, and get the secret loyalty files released.

The second letter was from Roy Pulitzer, writing as the corresponding secretary of the Rocky Mountain Chapter of a powerful veterans' organization. He says:

> As you know, our chapter worked hard to help in your election. We feel free, therefore, to call on you in an emer-

gency that has just arisen. The press reports this week that the occupying powers in Western Germany are planning to return property to the head of the Krupp family. How can they forget so quickly the part that family played in helping Hitler and his plans? Krupp guns and Krupp shells killed thousands of our buddies. Please take all possible steps to see that Krupp does not get back his property either in Germany or in this country. At the same time we are going to get in touch directly with the Western German Government to convince it to do something about this plan.

The third letter is from Patrick J. O'Murphy, the Senator's campaign manager. His letter says:

That old business about a Presidential representative at the Vatican is getting people steamed up again. Now you know where I personally stand on it, but most of the voters in our state are Protestants and strongly opposed to the idea. You'd better come out against it strong, because me and my family aren't going to get you re-elected without those Protestant votes. If I were you, I'd introduce some kind of bill to prevent it. That'll show 'em where you stand.

The fourth letter comes from Richard Banker, writing as President of the Chamber of Commerce of the largest city in the Senator's state. It says:

We've heard that there has been concluded, or is about to be concluded, some kind of treaty or other agreement with Switzerland, Canada, Argentina and other foreign countries, to the effect that a U.S. citizen who owns property in any of those countries and by oversight forgets to pay a tax bill there can be investigated and prosecuted right here in the U.S., and perhaps be extradited to the foreign country as a tax evader. Now we all know that the government spends a lot of time persecuting honest business men, but this goes so far that I, for one, just cannot believe it. Here in Bloomfield we cannot find out what is true about this story. Would you be good enough to enlighten us? And if there are such outrageous treaties, it goes without saying that your constituents here, many of whom have business subsidiaries and other property abroad, or hold a little nest egg for friends or relatives in other less fortunate countries, expect you to take remedial action.

The Senator's reaction is that he ought to go along with all four of these pleas. He calls in his assistant, who has been around Washington a long time, and tells himhe wants advice on (1) exactly what he can do about each proposal, (2) whether these expressions of view by constituents should lead him to seek any special committee assignments, (3) where he can get the best information on each of the subjects, and (4) how to answer each letter.

If you were his assistant, what would you tell him?

Second Problem

October 1952

Ruritania is a small but strategically important European country having frontiers with both Communist and NATO powers. Her people are predominantly Catholic, her economy predominantly agricultural, and her system of government is far from being democratic. She contrived to remain neutral during the recent war and was fiercely accused by both combatants of being a base for hostile activities.

This policy of neutrality was continued into the post-war era when she decided neither to seek nor accept aid under the Marshall Plan. She is not a member of The Organization for European Economic Cooperation and does not receive aid under any U.S. aid program.

This year's wheat crop, upon the surplus of which she depends to trade for other goods vital to her economy, has been almost a total failure. As a result, she is faced with a large prospective balance of payments deficit for the coming year. Last year American Protestant Missionaries who had been operating rural schools in Ruritania for many years were forced to pay a heavy tax on the school property. The tax was paid under protest, and the U.S. diplomatic mission has been trying to get relief from it for this year, acting through the Foreign Office.

In view of her strategic position, U.S. officials have been vainly negotiating for some months for the right to build air bases on her territory. This has been hampered by the traditional dislike of the Ruritanians for foreign entanglement, and they have only been brought to the conference table by the prospect of substantial financial gains.

Although it is well known that the country has an agrarian

economy, and is poor, she has a good record, and has not defaulted on her international financial obligations during the past thirty years.

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The Admiral Motors Corporation is a large manufacturer of various types of motor vehicles, tractors, and military tanks in the United States. Mr. Ford, the Washington representative of the corporation, goes to the office of a noted law firm in Washington, Webster, Hughes, & Stimson, and presents the following problem:

Admiral Motors has decided that it would be a profitable enterprise for them to operate a factory in Ruritania, making passenger automobiles, trucks, and tractors for the European market, and military tanks for the North Atlantic Treaty Powers. They are worried, however, that their profits may not be able to be transferred into United States dollars. They are also concerned over the possibility that there may be insufficient steel available in Ruritania or other countries of Europe at prices that would enable them to carry on a profitable business. They also recognize that because of educational deficiencies in Ruritania there will be a lack of technicians with sufficient basic training to act as foreman, engineering assistants, and the like.

Mr. Ford asks the law firm the following questions:

1. Is it possible to get a United States Government guaranty to assure the transferability of profits into dollars?

2. Can this guaranty cover more than the profits, so that the principal could also be guaranteed as to transferability in case of sale or liquidation of the project?

3. Although his company has not asked him to inquire further, he would like to know, for future reference, whether there is any other kind of guaranty that the company might obtain.

4. With respect to the availability of steel, his company thinks it would be a good idea for Ruritania to establish a steel mill. It is well known that iron ore available in Ruritania is of high quality. Mr. Ford says that his company has not yet proposed this to anyone in Ruritania, because they would first like to know whether they can tell the Ruritanians that they can obtain assistance from the United States to help pay for the construction of the factory and the imported materials needed to get it in operation. Mr. Ford asks the law firm what answer he can give his company.

5. With respect to technicians, Admiral Motors is proposing to have promising students brought from Ruritania to the United States for additional training in the necessary technical skills. Mr. Ford asks whether these students can be brought to the United States with the help of funds appropriated for Point 4 activities.

6. Mr. Ford expresses a personal concern over the kind of entanglement that this operation may mean for his company. He speculates over what might happen, for example, if there should be nationalization of industry in Ruritania after the project has gotten a good start. He wonders what kind of protection the company can get in such a situation, and whether there is any impartial forum to which appeal can be made in case of a dispute. He also calls attention to the difficulties of the American Missionaries, and wonders if that might lead to congressional restrictions in case aid were to be rendered in Ruritania.

The partners of Webster, Hughes & Stimson, with whom Mr. Ford has been talking, assure him that these questions can all be answered promptly, and suggest that Mr. Ford come back in a couple of days for another talk. As soon as he leaves, the partners call in their large staff of assistants and law clerks and tell them to get the answers to Mr. Ford's questions as quickly as possible. They warn the staff that they must not only be able to tell Mr. Ford whether some of these things can be done, but how, and what agencies must be interviewed in order to get the project going. They also point out that, for such a big project, there is no reason why Congress could not be asked to amend existing law in order to permit it to be carried forward. They should advise where such amendments are needed and what their form should be in order to further the interests of their client.

Third Problem

October, 1952

The management of a large department store, Rothspater & Co., seeks advice as to what can be done about the following problem:

The store's buyer of woolen goods has received a very attractive offer of a shipment of high quality sweaters made in Czechoslovakia from the best quality cashmere wool. He has been warned that the U.S. Tariff Commission is at present considering a complaint by U.S. wool interests that the low duties on woolen goods are injuring them by permitting the importation of low cost goods from abroad. These interests are seeking a higher tariff. The store's management wants to know what arguments can be as a matter of law against such a raise.

The same U.S. wool interests have pointed out that the Czech government buys dollars from Czech exporters at an exchange rate of 5 crowns for one dollar, while the official rate for other transactions is three for one. They claim that this violates international agreements to which the U.S. and Czech governments are committed, and therefore the sale of the sweaters would be a means of furthering such violation. Would it?

The buyer suspects that the wool may have originated on the Chinese side of the Himalayas and that it was originally purchased from Chinese producers. They wonder whether this has any effect on their desire to buy the sweaters.

The Czech merchants have advised that they may not complete the transaction unless at the same time they can buy from someone in the U.S. a lot of men's shoes approximately in value to the sweaters. Rothspater's can obtain shoes of the desired type and quantity, and will send them over if there is no objection as far as U.S. law and regulations are concerned. They are worried, in addition, over the question of public relations, so they do not want to do anything contrary to U.S. foreign policy in connection with the deal.

Fourth Problem

Hans Gschaftlhuber, a naturalized citizen of the United States who had come to this country from Germany in 1900, died in 1945. He left an estate consisting of first-class American securities valued at $1,557,567.85.

G was survived by 4 grandchildren, all of whom were over 21 years old at the time of his death, to wit:

(1) Hilda, who has lived in Leipzig, Germany, since her birth;

(2) Helmut, who has lived in Munich, Germany, since his birth;

(3) George, who has lived in Japan since 1938 (he was born in this country but renounced his U.S. citizenship in 1940); and

(4) John, a native born citizen of the U.S. and a life-long resident of Buffalo, N.Y., who is presently a student at a law school having a good International Program.

All 4 grandchildren are still alive.

Before his death, G was a resident of Grand Forks, New Oregon, and his Will was duly probated there. The Will left all of G's property to the First National Bank of Grand Forks, to be held in trust during the life of John, the remainder upon John's death to be paid over to Cornell University. The income of the trust was to be paid annually in equal shares "to those of my said four grandchildren who at the time of each respective annual payment shall be found capable of receiving such payment under the laws of the State of New Oregon."

Since long before 1945, the State of New Oregon has had a statute making "persons living in a country with which the United States is at war" ineligible to receive any payment or other benefit as beneficiary of an estate or testamentary trust.

For each of the income periods since Gs death, the trustee paid one fourth of the income of the trust to John. Now, for the first time, the trustee has filed an account in the Probate Court of Grand Forks. The motion to approve the account is returnable in two weeks. John feels that he should have received more than one fourth of the trust income during all or some of the past income periods, and would like to object on this ground. He seeks our advice whether he has a right to demand more than one fourth, and, if so, how much more and for what years.

PROF. JOSEPH DAINOW (Louisiana State University Law School): In relation to the talks of yesterday, my comments this morning are very earthy. I am not going to lead you through any global interactions of pressures or ideas, and I do not bring any beautiful ideas of new vistas, but concern myself rather with the local variety of clay, with which we have to work, and with the problem of trying to make something out of it.

To begin with, as has already been mentioned, students do not want the course in international law, and, in fact, an even earlier problem is to get the course in the curriculum, which is already very crowded. I repeat these facts because they are

the circumstances in which we have to attract students and stimulate their interest and co-operation. On the one hand, the teacher feels the responsibility of making a minimum elementary coverage of the subject, and on the other hand, the students' inclination, small as it is, leans towards discussing current issues of international scope.

My plan has been to try to capture this little bit of student interest and to use it as a starting point, and at the same time to harness it for some of that general program which they really do not want. This combination of general coverage and advanced seminar sounds inconsistent on its face. Yet I feel that it has been the necessary formula, at least in my case, for the establishment and retention of our program.

In telling you about our experience at Louisiana State University, I cannot say how good it is. All I can say is that I am satisfied with the results thus far, but I expect to continue experimentation in whatever direction may indicate itself. The course we have is an elective course of three hours in one semester. Naturally we do not get a very large enrollment. It has a range from about eight to fifteen, so that with a small group it is treated as a seminar.

My approach at the very beginning has been to make the students partners in the planning of the program, with an explanation of the scope of responsibility—particularly my responsibility—in getting a certain amount of general elementary coverage, and the scope of flexibility, with reference to the nature of our so-called seminars; the topics to be used for those seminars; the use of films and the choice of films; the opening up of some of our meetings to the rest of the students in the law school; and encouraging them to think in terms of the kind of thing which developed this past year. The class itself sponsored a series of evening programs on subjects in which they were interested, as supplementary to our course and for the purpose of inviting other students, particularly from the law school, and getting persons from outside the law school to give these lectures and lead the discussions.

For example, one which the students developed this past year was on international trade and its implications for international law, and was given by one of the professors from our College of Commerce. Another was on a wider interest in the history of international organization than we could cover in our course, and they got a professor from the Department of Political Science. In that way, I have tried to combine the inconsistent elements of elementary work and advanced work, working from

the discovered interests of the students. I start right at the very beginning of the very first class, or certainly not later than the second meeting with the group, and ask each student then and there to write down a list of current questions of international concern or interest which he thinks might be material for seminar topics to be worked on later in the course.

That preliminary list serves a number of purposes. To begin with, I look them over and consolidate the topics, and then at the very next meeting of the class I spend some time discussing them with the view of pointing out the irrelevancy of some of them to our immediate purpose and eliminating these from further use in our course. Now, that may sound negative, but I feel that it serves a psychological purpose of establishing some contact with a point of interest in the students' minds and eliminates from further concern the problem of their saying, "Well now, why doesn't he take this up, and why doesn't he take that up?"

The more important purpose that I use this preliminary list of questions for, however, is to move in the direction of selecting such topics for seminars (in which they will do their own research and prepare papers) as will tie into an urge emanating from themselves. Whether many of those topics are ultimately used or not does not really matter, because if some of them are used it establishes a point of contact between the students and me, it gives them some confidence in what we are doing, and a sense of participation which carries with it some measure of responsibility.

Likewise, I enlist their assistance after they have spent some time in the course and have begun to feel that it is opening up new horizons that previously did not seem to exist for them. They are appreciative, and are glad to help me open the same kind of horizons for other students. I recognize as a fact that there is no salesman who can be as effective with hoped-for student registration as fellow students. There is no amount of selling a faculty can do that will equal what other students can do, nor is any amount of faculty salesmanship competent to counteract the negative influence of students, especially if the course is a luxury course which at best only a few can fit into their schedule. So at the end of the course, or somewhere along the course, I solicit their evaluation and suggestions. I let them write these down and I put them away in a sealed envelope, not to be touched until long after grades are completed and reported, with the understanding that they are helping to spread the gospel, so to speak, by conveying their own ideas and suggestions. They have even come through with suggestions as to

how to change the description in the law school bulletin so as to make it reflect more fully some of the more interesting aspects of the program.

Actually, I have found that in order to combine these two inconsistent elements of elementary coverage and advanced seminar a good deal would have to be left to their own reading. I explain that to them and tell them the material we have to cover. Last year we used Bishop's book, which I found helped a great deal to convey the idea very early that international law is real; this is one of the big general problems that has to be overcome before making progress on any specific score. We picked out the areas of the book that I felt we would be able to cover, and I said, "Now, that is it. You are responsible for this much material in the book. Whether we ever get to discuss it in class or not, it constitutes so many pages, which makes an average of so much per week, and that is a standing assignment."

Now, in order to encompass in our work the things in which they are more particularly interested, we have to use about half of our time on the seminars, so that during the week when they do not have an individual assignment for a seminar they can be catching up on some of their reading. When a student has a seminar assignment it keeps him pretty well tied up for that week, or maybe two or three weeks. And I cannot say how or why, but this past year it worked. We had about half our time for these so-called seminar and film programs, and, wherever I could find appropriate films, I tried to combine into a single unit of instruction the book material with class discussion, the film and a seminar; not always all three, but sometimes two out of the three, that is, the book work and the class discussion together with either a film or a seminar.

One of the first things that we get started with, in connection with the international community and member states, is naturally the United Nations; and most of them are interested in learning a little more about it, because they feel a need in that area. Well, there are a number of films that can be used, all of these put out by the United Nations or under its supervision, and I have made use of the following: "Patterns for Peace," which is a twenty-minute film and outlines charts with diagrams and explanations of the organization; a film called "The Peoples' Charter," which runs twenty minutes and goes into a little more of the organization and the functioning of the units; "Searchlight on the Nations," which emphasizes the free press and its significance throughout the world; "United Nations and World Disputes," which runs twenty minutes and shows the

actual scenes in Indonesia, Palestine, India, and Korea, where the United Nations did bring about some alleviation of the tension and cessation of hostilities. There is also a good film "On Human Rights."[1]

In connection with war crimes, I always use the "Nuremburg Trial" film, which was made by the Army; it is a long film that runs about an hour and a half. Almost invariably the class has requested that we put that on in the evening, so that it could be opened to the rest of the school and anybody else who wanted to attend, and generally we get a substantial attendance for that film because it already has some reputation. In advance of its schedule, there are often students outside of the course who ask, "Are you going to have the Nuremberg film this year?" It has always served as a drawing card, because I know at least one or two of my eight students this year who registered for the course by reason of having seen that film and some of the others in previous years.

I combined the films with the book material and class discussion, which always comes first; the film together with a half hour of explanation before and after makes a two-hour session, generally at night; and then always a two-hour seminar in which two, three, four, or five students work up the material on some or other of the topics that are pertinent for the Nuremberg trials (jurisdiction of the court, the ex post facto issue, aggressive war, the conspiracy counts, and so on). Sometimes we bring in the Tokyo trial, too, and in nearly all cases, the seminar topic is framed into a controversial issue, so that the two sides are presented in opposition to each other, and it always provokes a better kind of discussion among the students.

Sometimes I assign one student to serve as moderator, and it is his function to introduce the general subject before the contestants appear with their advocacy of one position or the other; and it is his job to write up a report, or sometimes an opinion in the form of a judgment, which is his written assignment. The students do their own research, and in that process I make it my business personally to see that each one, either individually or in groups, becomes acquainted with and handles the books in the international law section of the library. At one point, I manage to divide the class into two or three groups, and each one works on a recent case of the International Court of

1. The most available sources for information about these films are the following: local public libraries; Dept. of Public Information, UNITED NATIONS, New York; Area Army Headquarters (for Nuremberg Trial); Prof. R. N. Cook, Western Reserve Univ. Law School, Cleveland, Ohio.

Justice, so that they have got to handle all the materials on one case.

Now, it is true that, under the circumstances, my target is nowhere as elevated as perhaps some teachers think it ought to be. I am not trying to make specialists in international law out of any of these students. It is way beyond a possible target, and I try to keep the target somewhere a little above what I think can be accomplished, so that if they are not specialists in international law, they nevertheless get their horizons broadened into a wide scope. For one example, I might cite the comment of a student who just graduated. He told me, after a couple of months in the course, that he found that his reading of the current weekly news- magazines had completely changed, and that where for many years he had been reading the front part about national affairs and the back part about sports and science, he now found that he was spending most of his time in what was much more interesting, in reading the middle parts which brought information about countries in other parts of the world.

Well, I do not know what more gratification can be expected at that stage and at that level of instruction in international law, where our real purpose is not to prepare people for the State Department or the Foreign Service, but to expand the horizons of these young people who are going out into their little communities through the country, I mean the countryside communities, and will in due course become the leading citizens of their towns.

And so in the course of our program we do get them into a variety of current topics, and this is the way I have insisted on their doing it, so as to combine the area of responsibility with the area of flexibility—that we have to cover such and such ground in the book at the same time that we have the seminars.

Now, we can have seminar topics on current subjects, but they have to be related to something in our book. Thus, when we are taking up jurisdiction, there is a selection of topics developed from their suggestions and my suggestions, and I let them make their choice. There cannot be any harm done, because any one is perfectly satisfactory to me, and they have picked out such topics as the British-Norway Fisheries case. One student, or sometimes a team of two students, will present the case for the United Kingdom, the side for Norway will be presented by the others, and in that seminar, we had somebody serve as judge. After the oral presentation and discussion in seminar, they each submit a written report (within the next week or ten days) to complete their assignment and, of course, all this gets totalled into their final grade in the subject.

Another problem that they once picked out on jurisdiction is nationalization of resources, and they went into the materials particularly with reference to Mexico and Iran. Immunities from jurisdiction have included the political asylum case between Peru and Colombia, and the materials in the International Court. Sometimes there are combined topics of jurisdiction and international agreements, and we have had the St. Lawrence Waterway as a matter of discussion.

In connection with territory, we take up such problems as territorial acquisition in the Arctic and the Antarctic areas. We were very fortunate to have in class this year a student . who had spent nearly a year with the Admiral Byrd Expedition of 1946 -1947.

We have also taken up the sector principle, we have gone into the tidelands, and next year we will probably take up what was discussed in the Cornell law court recently, the United States Air Force Floating Radar and Weather Station, anchored to the continental shelf about 150 miles off shore. And so on, we go through with the technique of having the seminar topic within the general subject of what we are covering in the book, for which they have the reading assignment whether we discuss it in class or not, but I give them a chance and a responsibility to do a concentrated piece of work on a current problem which captures their interest. In nearly every instance, they do a lot more work on it than they ever expected, but they feel gratified when they are done that they have learned something and they have reached beyond what had previously been their limited horizon.

In that respect, I say I feel satisfied with the results we have had. It may be a little different from what was done elsewhere and the conditions that exist elsewhere. I expect to continue with experimentation, and I would particularly be interested in hearing from any others who may have been experimenting with the use of films. It is an area that enlists a certain amount of interest, which is then useful for the more basic things that we really want to do.

W. W. BISHOP, JR. (University of Michigan Law School): Here at Michigan we have a seminar of 12 to 20 law students, all of whom have had a first course in international law. (Incidentally, we have 140 to 200 law students in our introductory course[1]—166 in 1955— which we believe to be the largest enrollment in inter-

1. Discussed briefly in Bishop, "Scope and Method of International Law Courses," a talk at the American Society of International Law, April 22, 1954. Copies as reprinted in University of Washington, Institute of

national law of any law school in the country, and which means that about three out of four graduates of our law school have had at least an introduction to international law. We have a separate seminar in Legal Problems of International Organization.) The grade for the International Law Seminar depends primarily on each person's individual research paper on which he works for the semester.

At our weekly sessions we spend some time on discussion of current problems and various books, of which I have found Philip Jessup's Modern Law of Nations particularly stimulating to the group; usually I start out by asking each person what he disagrees with most strongly in Jessup's book, and we get good discussion! We bring in some philosophy by having each student make a written and oral book review for the seminar on some book on theory and philosophy of international law. But most of our classroom time we devote to discussion of problems, with the answers usually written out ahead of time and turned in. You have some of these before you.[2]

The first, on sources of international law, we find useful in trying to give concrete content to Article 38 of the International Court of Justice Statute—how do we go about looking for a rule of international law? Problem 2, concerning the difficulties of John Smith and his shrimp boat with the Mexican Government, gives the student a chance to think through the whole problem of the breadth of territorial waters, as well as the status of real or possible claims to fishing controls over waters outside those classed as territorial. (Here we pre-view tomorrow's discussion by this group.) Problem 3 gives an international-claims or state-responsibility set of facts, involving various types of liability-creating conduct, Calvo clause, and the rest.[3]

Then in Problem S-1 we give a set of facts under the Rumanian Peace Treaty involving United Nations' property in Rumania, war losses, nationality of claims, stockholder's claims,

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International Affairs, Bulletin, no. 12, July 1954, p. 11, were distributed at this session.

2. A set of these problems, distributed at this session, follows as an appendix to these remarks.

3. These three problems have been successfully used in my introductory course, together with a problem on immunities, questions on nationality laws, questions to be answered by study of a commercial treaty, etc. When there are too many students for the teacher to go over written papers, I have found that such problems at least afford a better means for class discussion of casebook materials than merely reciting on each case.

and the like. We ask the student how it would come out under this treaty, and how it would have come out if the Treaty of Versailles had been used instead, or in the absence of treaty under rules of international law. We show how this may still be of importance in view of "satellite" enemy assets in the United States.

We usually give some treaty-drafting work, and find it particularly interesting to get each member of the seminar to draft an article on some subject for a hypothetical commercial and consular treaty with Canada. They have to work out the reasons for a provision, decide what solution is desirable, and then draft language to accomplish their purposes. We find such problem work and drafting exercises both interesting and valuable.

INTERNATIONAL LAW PROBLEMS,
University of Michigan Law School

PROBLEM 1—SOURCES OF INTERNATIONAL LAW

(The major purpose of this problem is to see how an international court goes about finding what is the applicable rule of international law, rather than to determine the actual law on the subject of diversion of waters. In consequence some liberty is taken with the facts.)

The Whitewater Draw, of the Yaqui River is a small nonnavigable stream which flows from Arizona southward into Mexico, and whose waters have long been used to irrigate farms in Mexico near the international boundary. In 1954 the State of Arizona built a dam across the Draw about five miles north of the boundary to impound water for the use of a new city water supply in Arizona, which greatly diminished the water available for the Mexican users. Mexico, which has signed the "Optional Clause" of the Statute of the International Court of Justice (Art. 36, paragraph 2), accepting compulsory jurisdiction of the Court, brings in 1955 an action against the United States before the International Court, seeking compensation for the damages suffered by the Mexican farmers. What weight (if any) should the Court give to each of the following "evidences" of international law put forward by either side in its efforts to establish the existence of an applicable rule of international law?

Evidences of international law set forth by Mexico in favor of her contention that international law forbids such a diversion to the injury of lower riparian users: (a) the "law of nature" that the flow of a stream should continue as it did naturally;

(b) a statement by Grotius that the natural flow of a stream should not be diverted; (c) the private law rule of "western water law" (prior appropriation) in force in Arizona; (d) the treaty of 1909 between the United States and Canada, providing that no stream flowing across the boundary between those countries should be diverted in the upper riparian state without the permission of the International Joint Commission established by the treaty between the United States and Canada; (e) a decision of the Permanent Court of International Justice in a similar case between France and Belgium; (f) Mexican protests in 1895-1906 against American diversion of the Rio Grande, which resulted in a treaty between Mexico and the United States which permitted the United States to divert the Rio Grande at Elephant Butte Dam but specified that Mexico should receive annually 60,000 acre-feet at the head of an irrigation canal on the international boundary; (g) a series of protests by Egypt between 1850 and 1950 against any diversion of the upper Nile by either Ethiopia or by British authorities in the Sudan, as a result of which the two upper riparian countries always agreed that there should be no diminution of the normal flow of the Nile into Egypt; (h) the statement in H. A. Smith, Economic Uses of International Rivers (1931), that there is no place in international law for the doctrine of the absolute supremacy of the upper riparian sovereign.

Evidences of international law set forth by the United States in favor of her contention that international law does not forbid such a diversion even though there may be some injury to the lower riparian users of an international stream: (m) the principle that a stream should be used for the greatest good of the greatest number, coupled with proof that many more people would use the water for domestic purposes in Arizona as a result of the diversion than would have used it in Mexico for farms; (n) an opinion by U. S. Attorney General Harmon in 1895, holding that under international law territorial sovereignty enabled the United States to divert the Rio Grande without regard for Mexico's interest; (o) the fact that the 1906 treaty with Mexico providing for delivery of the water in exchange for the Elephant Butte diversion contained a stipulation agreed to by Mexico and the United States that: "The delivery of water as herein provided is not to be construed as a recognition by the United States of any claim on the part of Mexico to the said waters; and it is agreed that in consideration of such delivery of water, Mexico waives any and all claims to the waters of the Rio Grande" between specified points; (p) the fact that although Mexico protested the diversion of water from the Colorado at and near Boulder Dam

(Hoover Dam), a 1944 treaty between Mexico and the United States recognized the right of the United States to divert 15,500,000 acre-feet annually, guaranteeing Mexico a flow of one-fifth that amount; (q) the "general principle" that states may within their own territory do anything which is not specificially prohibited by a rule of international law; (r) a 1902 decision of the United States Supreme Court in a case between Wyoming and Colorado involving an interstate river; (s) the fact that in the 1909 treaty between the United States and Canada, and the 1944 treaty between the United States and Mexico relating to the Colorado River, it was provided that use for domestic purposes should be given priority over uses for irrigation; (t) the principle of Roman law that the proprietor of a farm may do what he wishes with a stream which flows across it, without regard to the interests of a lower riparian owner; (u) the fact that a Bolivian protest in 1921 against Chilean diversion of the Rio Mauri was rejected by Chile, which continues to divert the stream; (v) a 1933 decision of an Austrian court that lower Hungarian users had no right to object to a diversion of the Leitha River in Austria authorized by the Austrian Government; (w) the opinion expressed in Simsarian's monograph on Diversion of International Waters (1938) that the upper riparian state may divert as it wishes so long as the water is employed for a useful purpose and not merely wasted.

What difference, if any, would it make if the United States and Mexico agreed that the International Court of Justice should decide ex aequo et bono? What difference, if any, would it make if instead of the International Court of Justice this dispute were referred to arbitration before a special ad hoc tribunal authorized and directed to decide "according to international law, justice and equity"?

PROBLEM 2

John Smith, an American citizen, owns a shrimp-fishing vessel, the Heron, which is registered in the United States and flies the American flag. In 1955 this vessel was engaging in fishing operations off the Mexican coast when it was seized by a Mexican gunboat and taken into a Mexican port, where it was condemned in a Mexican court and ordered forfeited to the Mexican Government for failure to have a tax receipt issued by the Mexican Government. It appears that under a Mexican statute all foreign or domestic vessels engaged in shrimp-fishing "within Mexican waters" are required to pay certain taxes in advance of

engaging in fishing operations, and that the penalty for non-compliance is forfeiture. The American Embassy in Mexico is investigating in order to fix the exact point of the seizure, and to ascertain how near to the Mexican shore the Heron had come prior to its seizure. The owner and master of the Heron swear that the vessel was fifteen nautical miles from shore at the moment of seizure, and that they had not previously gone within twelve nautical miles of shore. The Mexican authorities state that at the moment of seizure the vessel was eight nautical miles from the nearest point of land, and thus well within the limit of nine nautical miles of territorial waters claimed by Mexico since before Mexican independence.

John Smith has brought the seizure to the attention of the Department of State and of his Senators and Representative in Congress calling it a gross violation of international law as a seizure well outside the three-mile limit. The Mexican Government insists that its actions were entirely in accordance with international law. The facts make this seem a suitable case for the United States to take to the International Court of Justice, provided that the Court is likely to hold that the Mexican seizure was in violation of international law.

You, as an Assistant to the Legal Adviser of the Department of State, are directed to prepare a memorandum regarding the probability of the International Court of Justice finding in favor of the American contention if the case should be submitted to that Court.

PROBLEM 3

John Doe, an American citizen, was employed as a meat inspection officer by the Mexican Government under a contract providing that he should serve for five years for the salary of $12,000 per year, that in case his employment contract should be terminated for any reason he should receive his full contractual salary (earned and unearned), and that "John Doe hereby undertakes that under no circumstances and under no pretext shall there ever be any resort to diplomatic protection or intervention or the presentation of any international claim on his behalf with respect to events which may take place in Mexico, whether such events arise in connection with this contract or otherwise."

After Doe had worked under the contract for two years, he had difficulty with a Mexican ranchman, Ferdinand, whom he had directed to kill certain cattle as a precaution against the spread of hoof-and-mouth disease on his ranch. Doe thereupon asked

the Mexican government to furnish him a police escort for his next visit to Ferdinand's ranch, but the Mexican government failed to do so. On that next visit Ferdinand stabbed Doe, severely injuring him, and then on Ferdinand's complaint the Mexican authorities arrested Doe on the charge of malicious destruction of Ferdinand's cattle which Doe had ordered killed. Doe was held in an unsanitary Mexican jail for two years, without further proceedings being taken in the case, and was then released with merely the statement that Ferdinand had withdrawn his criminal complaint. Meanwhile no action had been taken to prosecute Ferdinand for the stabbing, and the running of statute of limitations now prevented prosecution. As soon as Doe was arrested the Mexican Government cancelled his contract of employment, and refuses to pay Doe any salary for the period after the date of arrest.

In April, 1956 there is re-established between the United States and Mexico a Mixed Claims Commission, similar to the General Claims Commission which functioned between the two countries under the convention of 1923 to adjudicate claims according to international law. Doe thereupon comes to you as his lawyer, seeking advice regarding his claim, if any, against Mexico. Prepare a short legal opinion for Doe, indicating the legal issues involved, the arguments which should be made on his behalf, the probable defenses to be raised by Mexico which you should be ready to meet, your estimate of the decision which is likely to be rendered by the Commission in case the United States Government should present the claim to the Commission, and the chief points on which you would need further information from Doe.

PROBLEM S-I

A and B are two residents of Detroit having business interests in Rumania who consult you about their losses arising out of the war. In 1938 they formed a partnership in Detroit (in which each had a half-interest) to own and operate an oil refinery in Rumania, under the name of Michigan Refineries. At the outbreak of the war the plant of Michigan Refineries was valued at $200,000. On December 31, 1941, the plant was taken over by the Rumanian Government, together with $30,000 worth of gasoline and oil on hand. The plant was damaged in an American air raid on Rumania August 31, 1943. The Rumanian Government still holds the plant, but the oil and gasoline have disappeared and cannot be accounted for. It is estimated that

the present cost of repairs to restore the plant to its pre-war condition would be $120,000, of which roughly $90,000 represents the damage caused by the air-raid, and the remainder wear and tear and lack of upkeep during the time that the plant has been occupied and operated by the Rumanian Government. In 1939 and 1940 the annual profits of Michigan Refineries averaged $30,000, the Company has received no information regarding any earnings of the plant in 1941 or since.

A also owned 500 shares of stock out of 1500 shares total capital of Transit Holding Co., incorporated in 1935 under the laws of Switzerland. Transit Holding Co. owns 1200 shares out of 1600 shares total capital of Bucharest Bus Lines, which was incorporated in 1938 under the laws of Rumania. Bucharest Bus Lines suffered during the war losses of its equipment amounting to $200,000 worth of buses removed by German forces and carried off to Germany in March 1944, which cannot now be traced, $100,000 worth of buses and equipment destroyed by shellfire in the course of the brief fighting in Rumania in 1944 between Soviet forces on the one side and German and Rumanian forces on the other (no available information indicates what proportion of the damage by shellfire was due to Allied artillery and what proportion to Axis), and $300,000 worth of buses taken by Soviet forces to the Soviet Union in June of 1945 as "war booty," regarding the present condition and whereabouts of which no information can be obtained by Bucharest Bus Lines.

B received in 1938 a Rumanian patent on certain well-drilling machinery, which under Rumanian law was to run for 16 years. On December 31, 1941, the Rumanian Government revoked this patent on the ground that B had become an enemy alien, under Rumanian law which deemed enemy aliens to include all persons residing in the United States and who had declared their intention to become American citizens, regardless of their actual nationality.

A was born in Switzerland of Swiss parents in 1900, came to the United States in 1935, declared his intention to become an American citizen in 1940, and completed naturalization as an American citizen January 8, 1944. B was born in Rumania in 1905 of Rumanian parents, and remained domiciled there until 1938, when he came to the United States. He declared his intention to become an American citizen June 25, 1941, and completed his naturalization October 1, 1945.

A and B seek advice regarding their rights with respect to the property interests referred to, including what action they should take. Prepare a memorandum to be used in advising them

at their next interview. (Assume they have sufficient reason for delay until now.)

Also indicate very briefly how far A and B, respectively, will be better or worse off under the Treaty of Peace with Rumania than they would be under the rules of international law in the absence of any treaty, or under the relevant provisions of the Treaty of Versailles in case such provisions had been substituted for those contained in the Treaty of Peace with Rumania.

(Note: Article 24 of the Treaty of Peace with Rumania, signed February 10, 1947, and effective September 15, 1947, is appended hereto. The full text of the treaty is in TIAS 1649, on reserve at Law Library desk. On the status of such claims in the absence of treaty, see V. Hackworth's Digest 682-709,802-851, see also, Bishop's casebook, 518-527.)

TREATY OF PEACE WITH ROUMANIA, Feb. 10, 1947 (effective Sept. 15, 1947)

PART VI Economic Clauses. Article 24

1. In so far as Roumania has not already done so, Roumania shall restore all legal rights and interests in Roumania of the United Nations and their nationals as they existed on September 1, 1939, and shall return all property in Roumania, including ships, of the United Nations and their nationals as it now exists.

If necessary, the Roumanian Government shall revoke legislation enacted since September 1, 1939, in so far as it discriminates against the rights of United Nations nationals.

2. The Roumanian Government undertakes that all property rights and interests passing under this Article shall be restored free of all encumbrances and charges of any kind to which they may have become subject as a result of the war and without the imposition of any charges by the Roumanian Government in connection with their return. The Roumanian Government shall nullify all measures, including seizures, sequestration or control, taken by it against United Nations property between September 1, 1939, and the coming into force of the present Treaty. In cases where the property has not been returned within six months from the coming into force of the present Treaty, application shall be made to the Roumainian authorities not later than twelve months from the coming into force of the Treaty, except in cases in which the claimant is able to show that he could not file his application within this period.

3. The Roumanian Government shall invalidate transfers involving property rights and interests of any description belonging to United Nations nationals, where such transfers resulted from force or duress exerted by Axis Governments or their agencies during the war.

4. (a) The Roumanian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph I of this Article. In cases where property cannot be returned or where as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Roumania, he shall receive from the Roumanian Government compensation in lei to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Roumanian nationals.

(b) United Nations nationals who hold, directly or indirectly, ownership interests in corporations or associations which are not United Nations nationals within the meaning of paragraph 9 (a) of this Article, but which have suffered a loss by reason of injury or damage to property in Roumania, shall receive compensation in accordance with sub-paragraph (a) above. This compensation shall be calculated on the basis of the total loss or damage suffered by the corporation or association and shall bear the same proportion to such loss or damage as the beneficial interests of such nationals in the corporation or association bear to the total capital thereof.

(c) Compensation shall be paid free of any levies, taxes or other charges. It shall be freely usable in Roumania but shall be subject to the foreign exchange control regulations which may be in force in Roumania from time to time.

(d) The Roumanian Government shall accord to United Nations nationals the same treatment in the allocation of materials for the repair or rehabilitation of their property in Roumania and in the allocation of foreign exchange for the importation of such materials as applies to Roumanian nationals.

(e) The Roumanian Government shall grant United Nations nationals an indemnity in lei at the same rate as provided in sub-paragraph (a) above to compensate them for the loss or damage due to special measures applied to their property during the war, and which were not applicable to Roumanian property. This sub-paragraph does not apply to a loss of profit.

5. The provisions of paragraph 4 of this Article shall not

apply to Roumania in so far as the action which may give rise to a claim for damage to property in Northern Transylvania belonging to the United Nations or their nationals took place during the period when this territory was not subject to Roumanian authority.

6. All reasonable expenses incurred in Roumania in establishing claims, including the assessment of loss or damage, shall be borne by the Roumanian Government.

7. United Nations nationals and their property shall be exempted from any exceptional taxes, levies or imposts imposed on their capital assets in Roumania by the Roumanian Government or any Roumanian authority between the date of the Armistice and the coming into force of the present Treaty for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or of reparation payable to any of the United Nations. Any sums which have been so paid shall be refunded.

8. The owner of the property concerned and the Roumanian Government may agree upon arrangements in lieu of the provisions of this Article.

9. As used in this Article:

(a) "United Nations nationals" means individuals who are nationals of any of the United Nations, or corporations or associations organised under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status at the date of the Armistice with Roumania.

The term "United Nations nationals" also includes all individuals, corporations or associations which, under the laws in force in Roumania during the war, have been treated as enemy,

(b) "Owner" means the United Nations national, as defined in sub-paragraph (a) above, who is entitled to the property in question, and includes a successor of the owner, provided that the successor is also a United Nations national as defined in sub-paragraph (a). If the successor has purchased the property in its damaged state, the transferor shall retain his rights to compensation under this Article, without prejudice to obligations between the transferor and the purchaser under domestic law,

(c) "Property" means all movable or immovable property, whether tangible or intangible, including industrial, literary and artistic property, as well as all rights or interests of any kind in property. Without prejudice to the generality of the foregoing provisions, the property of the United Nations and their nationals includes all seagoing and river vessels, together with their gear and equipment, which were either owned by United Nations or

their nationals, or registered in the territory of one of the United Nations, or sailed under the flag of one of the United Nations and which, after September 1, 1939, while in Roumanian waters, or after they had been forcibly brought into Roumanian waters, either were placed under the control of the Roumanian authorities as enemy property or ceased to be at the free disposal in Roumania of the United Nations or their nationals, as a result of measures of control taken by the Roumanian authorities in relation to the existence of a state of war between members of the United Nations and Germany.

ARTICLES FOR TREATY OF COMMERCE, NAVIGATION AND CONSULAR RIGHTS BETWEEN UNITED STATES AND CANADA

You are to prepare a draft article on one of the subjects listed, for inclusion in a Treaty of Commerce, Navigation and Consular Rights between the United States and Canada, together with a brief justification for the wording you propose, indicating the principal precedents and the reasons for changes in the language used in previous treaties.

The references listed below for each article are far from exhaustive but may help you get started on the problem. All students should read the pertinent materials on all of these subjects in the Treaty of December 8, 1923, between the United States and Germany (U.S.T.S 725, 44 Stat. 2132, or 4 Treaties, etc., of U.S. 4191), and in the treaties which have been handed out to you. The brief references in Hyde's International Law may help in getting in mind the problems dealt with by each article. Other treaties which may be helpful include: Treaty of Friendship, Commerce and Navigation between the U.S. and China, signed November 4, 1946, T.I.A.S. 1871, 63 Stat. 1299, Treaty of Friendship, Commerce and Navigation between U.S. and Italy, signed February 2, 1948, T.I.A.S.1965, 63 Stat. 2255, Consular convention with Costa Rica, signed January 12, 1948, T.I.A.S. 2045, 1 U.S. Treaties, etc., 247, Consular Convention with Ireland signed May 1, 1950, T.I.A.S. 2984.

TOPICS AND REFERENCES:

1. ALIENS' RIGHTS IN WRONGFUL DEATH ACTIONS and/or WORKMEN'S COMPENSATION. See I Hyde 658; III Hackworth 625-629, 571-4; IV Ibid. 825-6. Germany, 1923, Art. II; China, 1946, Art. XIII; Italy, 1913 (3 Malloy, Treaties 2699); Poland, 1931, Art. II, U.S.T.S. 862, 48 Stat. 1507, 4 Treaties 4572; China, 1946, Art. XIII; Italy, 1948, Art. XII. See also Maiorano v. B. & O.

213 U.S. 268, 1909 For. Rel. 391; 1910 For. Rel. 657; Liberato v. Royer, 270 U.S. 535 (1926); Vietti v. Fuel Co., 109 Kans. 179, 197 Pac. 881 (1921); Frasca v. Coal Co., 97 Conn. 212; Antosz v. State Comp. Com'r, 130 W.Va. 260, 43 S.E. (2d) 397 (1947); Dobrin v. Mallory S.S.Co., 208 Fed. 349, Madonna v. Wheeling Steel Corp. 28 F.(2d) 710 (1928); Norella v. Maryland Casualty Co., 216 Ky. 29, 287 S.W. 18; Lukich v. Dept. of Labor and Industries, 176 Wash. 221, 29 P.(2d) 388 (1934).

2. ALIENS' ACCESS TO COURTS. See I Hyde 879-881; III Hackworth 562 et seq.; Germany, 1923, Art. I, paragraph 3; China, 1946, Art. VI, paragraph 4; Spain, 1902, Art. VI, 33 Stat. 2105, 2 Malloy, Art. 23, 1 Malloy, Treaties 976; Switzerland, 1850, Art. I, 2 Treaties 1703; Italy, 1948, Art. V, paragraph 4; Italy, 1871, Malloy Treaties 1764, Hanover, 1846, Art. X, 2 Malloy, Treaties 894; Netherlands, 1782, Art. 7, 2 Malloy, Treaties 1233; Valk v. U.S., 29 Ct. Cls. 62, 168 U.S. 703; U.S. ex rel. Buccino v. Williams, 190 Fed. 897; U.S. ex rel. Falco v. Williams, 191 Fed. 1001.

3. ALIENS' RIGHT TO ENGAGE IN OCCUPATIONS. See II Hackworth 153-160; III Ibid. 612-626; II Moore's Digest 181-4; I Hyde 656-662; Germany, 1923, Art. I; China, 1946, Art. II, paragraphs 2 and 3; Poland, 1931, Art. I, 48 Stat. 1507, U.S.T.S. 862, 4 Treaties 4573; Italy, 1948, Art. I; Netherlands, 1782, Art. 9 (2 Treaties 1233); Switzerland, 1850, Art. I (2 Treaties 1763); Asakura v. Seattle, 265 U.S. 332; Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392; Poon v. Miller, 234 S.W. 573; Bobe v. Lloyds, 10 F. (2d) 730; Pearl Assur. Co. v. Harrington, 38 F. Supp. 411, aff'd 313 U.S. 549. See A. R. Hunt, 52 Mich. Law Rev. 1184 (1954).

4. INHERITANCE OF REAL AND PERSONAL PROPERTY. See III Hackworth 666-678; IV Moore 6, 39-41; I Hyde 650-653; Germany, 1923. Art. 4, China, 1946, Art. VIII, Italy, 1948, Art. VII; Great Britain, Conv. of Mar. 2, 1899, 31 Stat. 1939, 1 Malloy, Treaties 774; France, 1778, Art. XI, 1 Malloy, Treaties 471; Netherlands, 1782, Art. VI, 2 Malloy, Treaties 1233; Sweden, 1783 Art. VI, 2 Malloy, Treaties 1725; Prussia, 1785, Art. X, 2 Malloy, Treaties 1477, Clark v. Allen, 331 U.S. 503, Nielsen v. Johnson, 279 U.S. 47; Duus, Adm. v. Brown, 245 U.S. 176; Sullivan v. Kidd, 254 U.S. 433, Olsson v. Savage, 119 Kans. 603, 240 Pac. 586; In re Yano's Estate, 188 Calif. 645; In re Romaris' Estate, 191 Calif. 780; Meekison, 44 A.J.I.L. 313 (1950, personal property); Boyd, 51 Mich. Law Rev. 1001 (1953, real property).

5. FREEDOM OF RELIGION. See II Hackworth 147-153, III Ibid. 559, 647-650; II Moore's Digest 171-181; V Ibid. 452-461, 831-833. Germany, 1923, Art. I and Art. V; China, 1946, Art. XII; Italy, 1948, Art. XI; Netherlands, 1782; Art. IV, 2 Malloy, Treaties 1234, Prussia, 1785, Art. XI, 2 Malloy, Treaties 1480, Tripoli, 1796, Art. XI, 2 Malloy, Treaties 1786; Tripoli 1805; Art. XIV, 2 Malloy, Treaties 1791; On Tripolitan treaties, see 2 Miller Treaty volumes, 371, 384. See also I Hyde 702-707.

6. LIABILITY TO MILITARY SERVICE. See III Hackworth 598 et seq.; IV Moore's Digest 51-66; II Hyde 1157-1159; III Hyde 1744-1755. France 1788, Art. XIV, 1 Malloy, Treaties 495; Costa Rica, 1851, Art. IX, 10 Stat. 916, 1 Malloy, Treaties 344; Switzerland, 1850, Art. II, 11 Stat. 587, 2 Treaties 1764; Spain, 1902, Art. V, 33 Stat. 2105, 2 Malloy, Treaties 1703; Germany, 1923, Art. VI; Siam, 1937, Art. I, 53 Stat. 1731, U.S.T.S. 940; China, 1946, Art. XIV; Italy, 1948, Art. XIII.

7. STATUS OF CORPORATIONS AND RIGHT TO PARTICIPATE IN CORPORATIONS. IV Moore's Digest 19-20; III Hackworth 429-434, 705 et seq.; I Hyde 662-663; Russia, Agreement 1904, 36 Stat. 2163, 2 Malloy, Treaties 1534; Siam, 1920, Art. V. 3 Treaties 2831; Germany, 1923, Arts. XII and XIII; China, 1946, Arts. III and IV; Italy, 1948 Arts. II and III. See also Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N.E. 152; Feilchenfield in 8 Journ. Comp. Legisl. and Int. Law (3d series) 260-261; Schuster, II Transactions of Grotius Society, 73-74.

8. FREEDOM OF TRANSIT. See IV Hackworth 355-356; I Hyde 618-624; Great Britain, 1871, Arts. 29, 30, 17 Stat. 863, 1 Malloy, Treaties 700; Germany, 1923, Art. XVI; Norway, 1928, Art. XV, 47 Stat. 2135, U.S.T.S. 852, 4 Treaties 4533; China, 1946, Art. XXV; Italy, 1948, Art. XXIII; Treaty of Versailles, Arts. 321-322; Barcelona Convention and Statute, 1921, 7 LNTS 11, of I Hudson, International Legistlation 625.

9. CONSULAR FUNCTIONS WITH RESPECT TO DECEDENTS' ESTATES. See II Hyde 1346-1356; V Moore's Digest, Sec. 722; IV Hackworth pp. 855 et seq.; 22 U.S. Code Sec. 75, as amended; Argentina, 1853, Art. IX, 10 Stat. 1005; 1 Malloy, Treaties 23; Belgium, 1880, Art. XV, 21 Stat. 776, 1 Malloy, Treaties 99; Colombia, 1850, Art. III; 10 Stat. 900, 1 Malloy, Treaties 316; Finland, 1934, Arts. XXVI, XXIX, 49 Stat. 2659, U.S.T.S. 868, 4 Treaties 4148; Germany, 1923, Arts. XXIV, XXV; Norway, 1928, Arts, XXIII, XIV, 47 Stat. 2135, U.S.T.S. 852, 4 Treaties 4536; Peru, 1870, Art. XXXVI. 2 Malloy, Treaties 1425; Mexico,

1942, Arts. VIII,IX, 57 Stat.800, U.S.T.S.985; Ireland, Consular Convention, 1950, Art. 18 and Protocol. See also In re Lobrasciano, 38 Misc. (N.Y.) 415, 77 N.Y. Supp. 1040; Rocca v. Thompson, 223 U.S. 317; In re D'Adamo's Estate, 212 N.Y. 214, 106 N.E. 81; Santovicenzo v. Egan, 284 U.S. 30; Coudert in 13 Columbia Law Rev. 181; Puente in 23 Illinois Law Rec. 635.

10. CONSULAR IMMUNITIES FROM TAXES. See IV Hackworth 774 et seq.; 2 Hyde 1337-1340; Harvard Research, Consuls, 26 Am.J.Int.Law, Supp. 346-354; Irvin Stewart, Consular Privileges and Immunities, p. 102 et seq., especially 110-116; Germany, 1923, Art. XIX, Mexico, 1942, Arts. III, XIII, 57 Stat. 800, U.S.T.S. 985, Costa Rica, 1948, Arts, III-IV; Ireland, 1950, Arts. 12-14; Habana Convention on Consular Officers, Art. 20, 47 Stat. 1976, U.S.T.S. 843, 4 Treaties 4741; "M.T.7," U.S. Internal Revenue Bulletin, Apr. 11, 1943, no. 7, p. 107.

11.CONSULAR IMMUNITIES FROM LOCAL JURISDICTION OF COURTS. See IV Hackworth 726 et seq.; 2 Hyde 1340-1343; Irvin Stewart, Consular Privileges and Immunities, p. 137 et seq., especially 164-167; Harvard Research, Consuls, 26 Am. J. Int. Law, Supp. 338-341; Germany, Art. XVII; Mexico, 1942, Art. II, XIII; Costa Rica, 1948, Art. II; Ireland, 1950, Arts. 8-11; Habana Convention, 1928, Arts. 14, 15, 16, 17, 22.

12. CONSULS - NOTARIAL FUNCTIONS. IV Hackworth 838 et seq.; II Hyde 1361-1364; Harvard Research, Consuls, 26 Am.J. Int. Law, Supp. 257-263. France, 1788, Arts. IV, V, VI, 1 Malloy, Treaties 492; Germany, 1923, Art. XXII; Mexico, 1942, Art. VII; Costa Rica, 1948, Art. VIII; Ireland, 1950, Art. 17. If available, cf. Gauss, Notarial Manual for Consular Officials.

13. CONSULS - JURISDICTION OVER VESSELS. See IV Hackworth 876-883; II Hackworth 209-210, 230-235, 248-235, 248-255; Moore's Digest, Secs. 206, 728; II Hyde 1356-1361, Jessup, Territorial Waters, 192-193; Germany, 1923, Art. XXIII; Mexico, 1942, Art. X; Costa Rica, 1948, Arts. X-XII; Ireland, 1950, Arts. 21-27; Belgium, 1880, Art. XI, 21 Stat. 776, 1 Malloy, Treaties 97; France, 1788, Arts. VIII, X, XII, 1 Malloy, Treaties 494. See also Wildenhus' Case, 120 U.S. 1; Tellefsen v. Fee, 168 Mass. 188; The Hanna Nielsen, 25 F.(2d) 984; The Roseville, 11 F.Supp. 151; The Taigen Maru, 73 F.(2d) 922.

14. EXCEPTIONS TO MOST-FAVORED-NATIONAL TREATMENT. See V Hackworth 294-296; Germany, 1923, Art. VIII,

last paragraph; Norway, 1928, Art. VII, last 3 paragraphs (4 Treaties 4531); China, 1946, Art. XXVI; Italy, 1948, Art. 24, paragraph 3; Yemen, 1946, Art. V, TIAS 1535; Great Britain, 1815, Art. II, last paragraph, 1 Malloy, Treaties 626; Spain, 1902, Art. II, last paragraph, 2 Malloy, Treaties 1702; Sweden and Norway, 1827, separate article, 2 Malloy, Treaties 1755; Brazil, 1828, Art. II, 1 Malloy, Treaties 134; Poland, 1931, Art. VI, last paragraphs, 4 Treaties 4577; Honduras 1927, Art. VII, last paragraph, 45 Stat. 2618, U.S.T.S. 764, 4 Treaties 4309. See also Snyder, Most-Favored-Nation Clause, pp. 106-185 (1948).

15. ALIENS' RIGHT TO OWN LAND. See III Hackworth 671-689; Germany, 1923, Art. I; Argentine Treaty, 1853, Art. 9, 10 Stat. 1005, 1 Malloy, Treaties 23; Siam, Treaty of 1937, Art. I, 53 Stat. 1731, U.S.T.S. 940; China, 1946, Art. VIII; Italy, 1948, Arts. I and VII; France, Treaty of 1853, Art. VII, 1 Malloy, Treaties 531, 10 Stat. 996; Great Britain, Convention of Mar. 2, 1899, 1 Malloy, Treaties 774, 31 Stat. 1939; Terrace v. Thompson, 263 U.S. 197; Hauenstein v. Lynham, 100 U.S. 483.

PROF. JAMES O. MURDOCK (George Washington University Law School): Before discussing seminars, may I make a remark with regard to the preliminary course. This is obviously a most important survey course, because it opens the mind of the student to a whole new field of law. The way it is taught may determine whether the student will do seminar and practical work in international law.

The student must be thoroughly introduced to the materials of international law. How different they are we all know. There is an entirely different library and different ways of finding and using materials. The simplest way to introduce students to these new sources is to require a brief term paper which necessitates the use of international law materials. Class discussion of term papers should call attention to the sources used and how they were found. The term papers add depth to the survey course.

I would suggest that we add to the "musts" in the preliminary course a thorough resume of claims and pacific settlement procedures. In addition to the substantive rules of international law, a lawyer must know how to proceed.

This preliminary course, while it should go with greater

depth into some topics than others, must of necessity be a survey course, so that the whole corpus juris of international law is covered. The student learns the relationship of international law to municipal law. He fits it into the seamless web of the law, which we hope will rule the world community when we become sufficiently civilized. Of course, this preliminary course should be a prerequisite to seminar courses which we are discussing at this phase of the program.

Seminar courses obviously depend on the maturity of the students, the extent of their backgrounds, their interests, and the time available. I was particularly interested in what Professor Dainow said about securing from the students their reactions, so that they feel it is a co-operative enterprise. By the time a student decides to go beyond the preliminary course in international law, he doubtless has ideas of his own and is prepared to do independent research.

A preliminary suggestion to stimulate and facilitate research is to have a seminar room which is filled with the international law reference books that are often used. This makes it much more convenient to proceed without delay in getting off to a practical start.

There are two types of seminars, or two types of approaches I would like you to consider. One is the co-operative study. The other is the group study of a broad problem. Let us consider first the co-operative study. The problem of international law which you are going to consider is fitted into the general context of the related problems which surround it. For example, a good illustration is the Hull Trade Agreement Act of 1934. Suppose the students are going to study the implications of preparing this measure for Congressional action. We know the predominant implications of the Hull Trade Agreement Act are political. The next consideration is economic. The legal side is one in which Department of State representatives worked with the Treasury and Commerce Departments, with Customs laywers, with members of Congress, and with the private citizen in order to bring about a co-ordinated program. The work of the lawyer in this matter is one of co-operating with other groups and co-ordinating the results in a draft bill. The lawyer must often act as co-ordinator and legal draftsman to bring into focus the results of various points of view.

In Washington we have a number of mature students who are with the Government. They have had some experience. They are often interested in undertaking a co-operative study, because that is probably what they will have to do in more advanced gov-

ernment service. For example, in the Department of State, those of us who have worked there know that the Legal Adviser does not decide many matters. He advises the Secretary of State, the political divisions, the economic and other divisions. At times he goes down on the Hill and works with the Foreign Relations Committee. He is in a position to advise, to co-ordinate and to draft, but rarely to decide.

This co-operative study can be stimulated as far as possible in the law school seminar. The first step is to get the students to do their own reconnaissance, before you bring in experts or specialists in different fields from the outside or from other faculties. So much for the co-operative study approach, in which you bring together the political, economic, cultural, legal, and other factors. The lawyer must learn to work with others in government and corporate work. Statesmen and executives wish him to advise how they can do things lawfully. A co-operative study seminar should help students do this more effectively.

The other type of research seminar for your consideration is a group study of a legal problem. With several students working on one topic, the work can be divided analytically and geographically according to world regions. This enables the seminar to work, not in a spirit of rush, rush, but in the spirit of thoroughgoing work; if necessary, resorting to original research, finding data which is not in the published materials by going to records and archives, and seeking information by correspondence from various parts of the world for their basic data. If they are doing this not in the spirit of a deadline, but in the spirit of sustained, useful work, then you can take the work of one seminar and turn it over to the next seminar. The seminar in a particular topic can thus continue with new personnel the next year. That is a technique used in Europe. The idea is to produce creative results which are useful.

In selecting topics, it may be desirable to discuss questions informally with individuals in the Department of State, in Congress, or in foreign trade or finance, so that useful topics may be explored with outside co-operation. Department officials and business executives are often too busy to undertake research that needs to be done at the time. A good illustration of this type of group topic is the one I spoke about yesterday morning—the development of international law for individuals.

This topic is the one a continuing seminar at The George Washington University Law School is working on from the standpoint of the development of international commercial law and courts for individuals.

GENERAL DISCUSSION

PROF. MYRES S. McDOUGAL (Yale Law School): I should like to express certain reservations with respect to the principal speeches we have heard today and also offer some remarks in answer to Mr. Lissitzyn and others.

Professor Jessup stated, as I understood him, that the purpose of an introductory course is to offer the student a general understanding and to train him for leadership. I listened with amazement, however, to what Professor Jessup would omit from a course designed for such a purpose.

Among the omissions suggested were territory, nationality, succession of states, subjects of international law, acts of state, and the laws of war.

How a student could, with all these omissions, be given a general understanding of the world power process and of the interrelations of the world and national power processes is beyond me. If one omits territory and nationality, how can any conception of the bases of power of nation-states be offered? If state succession be omitted, how can one describe the modes by which decision-makers external to any particular body politic police internal elites to require conformity to world standards? If the "acts of state" prescriptions, the prescriptions which embody the tolerances which decision-makers accord the governmental acts of officials in other bodies politic, are omitted, only one set of the hydra-headed doctrines about jurisdiction can be offered. If the laws of war, with their contemporary prohibition of violence, are omitted, we turn away from the most important problem of our time. And so on.

It is not, however, the particular omissions which so much puzzle me. The question is how, with such omissions, the student can acquire a sense of the world, and lesser community, power, and social procésses which condition and are affected by the decisions being studied. It is not superficiality, but indispensable realism, to seek to relate particular decisions to context. The trees are just as important as the leaves, and commonly determine the type of leaf. (We had some good examples of getting lost in the leaves last night.) The choice is not between penetration and coverage, but between contextual analysis and anecdotalism. Without appropriate high level generalization, the study of details out of context may offer neither penetration nor understanding.

This emphasis upon the need for having some criteria of importance brings me to Mr. Lissitzyn's remarks. As I under-

stood him, Mr. Lissitzyn objected to the absence of a hierarchy or ordering of values in the analysis we proposed, and feared that emphasis upon values might lead to arbitrary or totalitarian decisions. The demand for an abstract ordering of values completely misconceives the purpose of our proposal. The assumption from which we move is that different decision-makers bring very different predispositions, in terms of value demands, expectations, and identifications to decision, and make their choices between value alternatives in many different contexts, requiring preference now for certain values and now for others. It is totalitarian law, and not a law of human dignity, which posits a rigid hierarchy of values and demands blind adherence to it. It is our belief that the more explicit the relation between decision and values can be made, the greater the degree of conscious insight the decision-maker can achieve, and the more rational the decision is likely to be. Certainly, the greater the degree of explicit relation and insight, the greater the degree of control the constituency of the decision-maker can exercise. In international law, with external opinion and relations of reciprocity and retaliation playing such important roles, the importance of enlightenment about value consequences is especially accentuated.

It was suggested by Professor de Vries and others that when factual problems are examined carefully, value questions become clear. Let us test this by taking, for example, a case of oil expropriated in one country. Some of the oil is transported to another country and the former owner is claiming it. Who should get the oil? The man who can decide this, by simply exposing the facts, without an explicit and detailed canvas of all the alternatives in international and national policies, has a crystal ball which I do not profess to have. It is of course impossible even to define a factual problem without talking in terms of value changes.

It was suggested, I believe, by Professor Sohn that "freedom, justice, and order" offer sufficient criteria for the comparative study of international organizations. For some years I have been using Professor Sohn's book in my classes, but I would find it a much more effective book if it had a more homogeneous organization in terms of power processes and if he offered more operational indices for his criteria of criticism. As I suggested yesterday, freedom, justice, and order are at such a high level of abstraction that they are commonly used even to justify decisions which promote human indignity.

It was vigorously asserted by Professor Dorsey yesterday that we have all ignored the main point and that we should be

concentrating attention upon some mysterious "living law." For some decades we have had much beating of the breast about "living law," but I have yet to see from Ehrlich or any of his disciples, any indication of how one can in detail study this living law—of how one can relate it to the flow of authoritative decisions taken in the name of the community and with community coercion behind them, or how one can study its effects on community processes. If anything more is meant by the label than that apparent authority is not always authority and that the decisions which are in fact taken in a community are influenced by many variables and conform in varying degree to authoritative community expectation, I say that what is meant has been left utterly mysterious.

In answer to Prof. Wright, perhaps I should say that I had no intention of suggesting that decisions not made in accordance with community expectation, even though made by authorized decision-makers, were lawful. Thus, if in making an agreement with another country, the President should include a provision that all professors of international law named Wright should be banished, I would not hesitate to describe the decision as unlawful, though made by a man of authority.

PROF. OLIVER J. LISSITZYN (Columbia University): I just want to correct a misapprehension. I did not say that what is wrong with the Lasswellian framework is that it has no single hierarchy of values. I said that it does not adequately provide for differences in hierarchies of values. It seems to me that this is reflected among other things in the failure to recognize the ambiguities of the symbol or standard of human dignity, and how much can be concealed under it. It also fails to disclose fully the very serious difficulty that different hierarchies of values do create for the decision-makers.

PROF. McDOUGAL. Would you spell that out?

PROF. LISSITZYN. Probably no two decision-makers have exactly the same set of values, which they can be depended upon to follow. Since the decision-makers are constantly interacting, this obviously creates difficulties. That is why I think you have to have restrictions and rules and doctrines, which would to some extent control their actions. That is where I should like to have more information, more knowledge, than we have at present on this very point. It seems to me that you are making a lot of assumptions as to what actually does or does not control

human behavior. While these assumptions may be perfectly correct, they need further study, criticism, and empirical confirmation.

PROF. CHESNEY HILL (Department of Political Science, University of Missouri): I teach a basic course in international relations that has each semester about 300 students—freshmen, sophomores and juniors. That course is a leader course for a course in international organization and another course in international law. I find that many of the students who take those courses go later to our law school. Many of the students acquire an interest in international affairs early in their college career. They take some courses in international politics, international organization, international law, American constitutional law, English constitutional history, and other history courses, that form a background to the international field. It seems to me that if our law schools would try to establish a course in international law they would have no problem in student interest. Our law school, however, has not touched the field.

What I am suggesting is that in many places where the law school is attempting to establish interest in international law they would get great assistance as a practical matter by talking with the advisers of the arts and science students who indicated interest in the law. If the law school would tell the adviser of these undergraduates more definitely what they want the student to take, we could guide the student early in the preparation of international subjects for a wide general background. Our law school bulletin indicates only that they want excellent students with general excellent preparation in everything. As a result, it is very difficult to find out what they actually do want.

PROF. McDOUGAL: I would like to say that we have all enjoyed the discussion of seminars. There have been some very, very constructive suggestions. My reservations go to the two main speeches, to introduce some remarks in answer to Mr. Lissitzyn of yesterday, forestalling a suggestion that the professor completely demolished my position.

I think that Professor Jessup has retrogressed in considerable degree from the very enlightened position he took yesterday. As I understand him, the purpose of the introductory course was to give the student general understanding and to train him for leadership, and I listened with amazement to the statement we will omit from the course, territoriality, nationality, secretaries of state, war, etc. Now, if you omit territoriality, nationality, how

can you give the student any conception of the basic power of national states or the sections underlying their national laws? If you omit the state succession, how can you give them any notion of the behavior of external police, the behavior within the country to conform to world standards? If you omit the subject of acts of state, you eliminate the field of jurisdiction, the complementary principles that balance the claims under nationality and territoriality. You give the student just a half-view of that part of the process.

PROF. QUINCY WRIGHT (University of Chicago): I want to add a word to what Mr. Hill said. Most of what has been said has been about law school teaching. It has been pointed out that in law schools international law is a luxury subject, and students state that it is not law, it is not useful, and it is not important.

The situation is different in the graduate schools and the political science departments. International law usually is a required subject for advanced degrees. It is looked upon as very important by the student. I do not think it is necessary for a professor in a political science department or in a Committee on International Relations to advertise his course.

I presume you would find that practically all professors of political science had a course in international law while they were students. On the other hand, I imagine a large proportion of lawyers in the country have never had any contact with international law at all either as students or in practice. I suppose if you canvass professors of international law, you would find 95% of them against the Bricker Amendment. It appears from the American Bar Association that a large number of lawyers are for the Bricker Amendment. I do not know whether that has anything to do with exposure to international law, but it may. It may also flow from a different point of view toward international law in law schools and political science departments.

In the law school, international law is thought of as a branch of national law, related to torts, contracts, criminal law, conflict of laws, and the other law school subjects. In political science departments, it is thought of as a branch of international relations. It is related to international politics, international organization, political geography, diplomatic history, and the sociology of international relations. Naturally, when international law is related to these subjects, it presents different aspects than when related to the ordinary law school subjects. Perhaps this explains the inconsistency which Mr. McDougal pointed out. He urged emphasis upon the broad aspects of the subject, those

which the voting citizen should have in mind and which are usually emphasized in political science courses on international law. On the other hand, Professor Jessup was talking about international law as a law school subject, emphasizing aspects which might engage the professional attention of the practicing lawyer.

Now, while political science departments and Committees on International Relations should be concerned with citizenship and public opinion in offering courses on international law, they should also be concerned with enlightening the student on the legal way of thinking. For many college and graduate students international law may be the only law subject they will ever get. This course should introduce them to the legal way of thinking. In my course, mainly for graduate students in political science and international relations, I use a method like that Mr. Bishop referred to. I acquired it from George Grafton Wilson—the method of hypothetical cases. I give the students a hypothetical case, and for a week they hunt through Moore, Hackworth, the Annual Digest, Hyde, Oppenheim, and other texts and sources on open reserve shelves. The solutions which they prepare in a dozen typed pages are graded, returned, and discussed. I think this gives them some idea of the legal approach as well as extensive acquaintance with the sources of international law. But, in addition, I discuss in lectures the role of international law in international relations—how it figures in the functioning of foreign offices, in diplomatic history, in the causation of war and the conditions of peace. There are two other points of view about international law that ought not to be neglected.

International law may be thought of as a philosophy. It is a way of thinking about the world community. It is thinking of the world community as a rational society, rather than as either a jungle world of fighting nations or as a moral world of harmonious nations—as the world of Grotius rather than the world of either Machiavelli or Erasmus.

International law is often thought of by students of international relations as a bridge between idealism and realism. Students may get the "new realism," the Machiavellian point of view, in the courses on international politics. They may get the "new idealism" in courses on international organization. But in the course on international law they should get a due proportion of both realism and idealism. International law is grounded in the past, its rules and principles are real and practical; but at the same time it conceives of men and governments as in a measure rational and capable of agreement to moderate the struggle for existence in the common interest.

International law can also be conceived as an aspect of history. Only at certain periods of world history has a system of international law developed like that of the Western world since the Peace of Westphalia. One can point to such a system in the Confucian period of Chinese civilization, in the period of the Buddha in Indian civilization, in the Periclean period of Greek history, in the Hellenistic period after Alexander, and in the Italy of the late middle ages. In these periods of history many territorial states were so closely related that systems of international politics and international law developed. In other periods the international or world situation was different, regulated by what Toynbee calls a universal state, a universal church, or a wandering of peoples. Differentiation of these systems in the course of world history indicates the conditions under which international law develops and declines. Such a study may assist in appraising our period of history and our system of international law with reference to long-run trends.

These aspects of international law illustrate its importance not merely as a professional subject for the lawyer, but as a science, philosophy, and history which every citizen ought to know something about.

MR. ROGER FISHER (Covington and Burling, Washington, D.C.): I am one of that small group of practicing lawyers who are fortunate enough to be spending a large part of their time on questions of international law in the narrow sense—the law as among governments. I recognize that working on the concrete problem of resolving differences between governments is a far easier task than teaching the broad field of international law. I hope my comments as to teaching will be taken in that light.

The topic for discussion is defined as "The Introductory Law School Course in International Law." This statement of the question seems to imply that the introductory law school course in the international field should be a course in international law. If "international law" is used in the traditional sense of the law among nations, I believe the statement of the question not only implies the answer, but implies the wrong answer.

I believe that the introductory course to the field of international legal studies should not be a course in the law among nations. International law is, as Mr. Wright just suggested, a philosophy. Its teaching means the teaching of a broad public law course. The introduction of the law student to the international field should not be a course which considers only the

resolution of problems after they have reached the stage of intergovernmental differences. In domestic law, the student first takes torts and contracts and property. He studies the law as it applies to individuals. Later, in the second or third year, he takes the public law courses, such as constitutional law, which consider restraints on the activities of a government.

I would suggest that the same order should be followed in the international field. The introductory course should be one which would consider how foreign laws and foreign facts affect individuals. It might be taught in a number of different ways. The object would be to alert the student to the additional types of legal problems that are raised whenever foreign elements are involved. To some extent such a course would be a bread-and-butter course. It would teach the law student to be on the lookout for those international features which more and more frequently will arise in practice.

If the student's interest in international legal problems is sufficient, he may wish to go on and find out how those problems are resolved where governments disagree. He may wish to consider those restraints on a government that stem not from domestic constitutional limitations, but from involvement with other nations. He may wish to pursue the study of public international law.

One difficulty in interesting students in the international field is that the rather metaphysical course in classic international law has been considered a prerequisite to other work in the area. I would suggest that this is the result of historical accident and should not be continued. I would urge that the students be introduced to international legal problems by infiltrating such problems into other courses and by special courses designed to highlight the additional issues raised where a foreign or international element is present. In short, I would suggest that the law school course introducing students to the international field should not be a course on the law among nations.

PROF. JARO MAYDA (University of Wisconsin Law School): I would like to make a few comments on what we are doing at Wisconsin, because we are trying there to cover the traditional subjects in the course of international law, yet to inject some of the new concepts, analysis, and materials.

I have been using a syllabus which uses the materials available in Mr. Bishop's book and some additional mimeographed materials as they fit in. We start with an attempt to outline the

present set of problems in international law, as distinguished from the very traditional and conservative approach to the field, and to isolate the most important trends in modern development-usually under three headings: democratization of international law, the problems of enforceable outlawry of aggressive war, and the problems of peaceful change.

Within the first section we try to get across some notions about the attempts to apply international law on a broad scale, not only to states but also to individuals and other international bodies, and to deal with problems of majority rule in international organization and related questions. When speaking about the implications of international law on a broader scale, we get into the recent problems of conventions or declarations of human rights, and the various cases which deal with the position of individuals and the protection of individuals by international law. Then we take up something which may be labeled "how international law works," and there the bulk of the traditional subjects are dealt with.

And, finally, in the last section, we try to get across some idea about the development of international law, especially through international organization. I try to bring out always the idea that international law does not simply happen, that it depends on the underlying social, economic, and political elements, that they lead to tensions and power conflicts, and there are two alternatives: either war, or agreement for arbitration and establishment of a norm. I try to relate the work of international organization to these various stages of development, the manipulation of the substratum through the specialized agencies, the legal framework and sanction of the United Nations organs, and the interpretation and adjudication through the World Court.

I am sure that this course, which has now been developed over a period of three years, is not yet what we want it to be, but I think we are trying to combine the traditional approach with the injection of some of the new subjects, about which we heard so much yesterday.

MR. WILLIAM LESTER GRIFFIN (Department of State, Office of the Legal Adviser, and also Lecturer at the Law School of American University):

On the basis of a year and a half full-time, and three and one-half years of part-time, law teaching (none in the international law field, I might add, although eight hours a day at my office in the State Department seems to take care of that aspect), but having taught almost a dozen of the other private and public law

courses—the fundamental courses in the law school curriculum—I have come to several tentative conclusions, which, when I add them together, lead me to one large conclusion that seems to me quite radical. Yet I want to toss it out here to see whether others have had similar thoughts and whether this conclusion is sound, aside from the fact that it would require all of us—social science and law school teachers, and college and university administrators as well—to reorient our thinking so radically that I doubt the idea would get serious consideration.

It seems to me that what is really needed, looking at the educational process as a de novo problem, is a single school in our universities—a school of social sciences or humanities, under one combined administration, and under one combined faculty of teachers of law and the other social sciences, the same teachers we now have, of course, in the present liberal arts college and law school faculties.

Briefly, it seems to me that in such a combined school the various degree requirements and programs would continue to be substantially as they now are in the separate schools. The first three years of undergraduate work would be substantially as at present. But about the last half of the junior year, the liberal arts student could elect a course in legal method or introduction to law, whatever you wish to call it, and then branch out into the law subjects—Constitutional law, Labor Law, International Law, and others—customarily taken as fourth-year college subjects. At the end of his fourth year he would receive his usual Bachelor's degree and could then go on into the usual graduate social-science or law-degree programs.

I think that this approach would solve many of our problems with respect to what to put into the international law and international legal studies courses and seminars, as well as save a good deal of time, prevent duplication of courses and administrative functions, and reduce the pressure for the three and one-half and four-year law school curriculum. It would also bring about, I believe, a higher level of intellectual performance and lead to a greater appreciation of the essential unity of the social sciences.

PROF. GRAY L. DORSEY (Washington University Law School): If Professor Jessup had gone back forty years, instead of thirty or thirty-five, he would have reached a period in which we had homogenous international communities. Since that time we are in danger of having no integrated and ordered international community at all. There is revolution at work and this

threatens international order. When this is so, then the primary questions are: What is it that maintains social order? What are the facts that make possible human co-operation?

To be sure, to get to the new vista, we must go from rules to problems. I would go all the way with Professor McDougal, but I would not stop where he does. He says we must be selective about the problem, and we must have rigid categories so we know what we are talking about when we define the problem. But he stops where we must truly step in with the new vista, namely, what is the criterion by which you make decisions, after you have got the problem actually defined? I believe that criterion must be the conception of the nature of man that a people hold. I do not mean just an intellectual construct. What I refer to begins as an idea, but then seeps into the consciousness of the people until it becomes not a conceptualized picture of reality, but reality itself. When that has happened, the conception, or "belief," directs and controls human behavior.

Different people will come out with slightly different opinions, yet those opinions will so far coincide that it makes co-operation possible. "Belief" releases the human energy that gives the power to society, because it makes people willing to act to achieve the common goal. It makes decentralization of decision-making possible, because decisions add up to re-enforce each other. This is the heart of co-operation, and this is the essence of constitution-making in its most essential meaning.

I think the international community is faced with the same problem. It is absolutely essential that it be solved, it must be solved. The ordinary problems of international intercourse are "practical," of course. But revolution puts in question the criteria by which these ordinary problems are solved. At such a time nothing is more "practical" than to re-examine basic theory and reach a sound decision on basic principles. I am concerned that so much scholarship is directed to further delineation of rules of international law based upon principles which may not be adequate to our present beliefs and needs.

PROF. PAUL SAYRE (State University of Iowa Law School): I have two things that occur to me particularly. One is what the gentleman spoke up for, that there is inadequate background for the forming of democratic international opinion. I think I agree very heartily. His solution seemed to be further studies and further research. We agree with that, too.

I suggest for the moment, we need more information about

how people live in the world, and to make it available to the average citizen, if there is such an animal. I would think of the newspaper, I would think of reports, perhaps one every day, thirty a month, from thirty capitals, that would set forth the factual situation, cultural if you like, leaving out controversial things. It would be wise for us to know the normal things that come into play in other nations, so we know how people live, just live in the world internationally. Knowledge is like the idea of law itself. I believe we do need that, and we do need immediate action. I have talked with international editors and newspaper editors and so on. They see no impossibility about it, but they do not do it.

The second thing. Perhaps in keeping with what has been said, I will make a different division as to value or non-values. I would suggest that all international law which we are concerned about is in the future. You can say the present, but the minute you say present it is past. I do think that working out ethical concepts, if you like, of what you are to do in the future, is very practical. The past is surely not going to operate literally in the future. You have got to have something else. It is our business to consider it.

CONTEMPORARY DEVELOPMENTS CONCERNING INTERNATIONAL AGREEMENTS

CONTEMPORARY DEVELOPMENTS CONCERNING INTERNATIONAL AGREEMENTS

Brief presentations and extemporaneous questions and comments on pre-announced topics.

Friday, June 24, afternoon

Question 1: What factors determine whether the United States makes a particular international agreement as a "treaty" approved by the Senate, a "Congressional-executive agreement" by the President plus both Houses of Congress acting by majority vote, or as a purely "executive agreement" by the executive alone?

MR. CHARLES I. BEVANS, Assistant Legal Adviser for Treaty Affairs, Department of State (it was indicated by the Chairman and by Mr. Bevans that he was speaking personally and not expressing the official views of the Department of State): On this first question, I would like to call attention to some of the procedures that are followed in the Department of State, and in that connection I will quote part of what we call Department of State circular No. 25, issued May 15, 1953, on the subject of the proper exercise of the treaty-making power of the United States and the proper exercise of the executive-agreement-making power of the United States.1

In the first paragraph of the circular, we say:

> The purpose of this circular is to insure departmental co-ordination to the end that the treaty-making power of the United States be exercised within traditional limits and that executive agreements not be used when the subject matter should be covered by a treaty.

Then the Secretary of State referred to the policy which he had outlined before the Senate Committee on the Judiciary on April 6, 1953, in which he stated:

> "The Constitution provides that the President shall have power to make treaties by and with the advice and

1. Mr. Bevan distributed copies, and indicated that he would be glad to mail additional copies on request.

consent of the Senate. This administration recognized the significance of the word 'advice.' It will be our effort to see that the Senate gets its opportunity to 'advise and consent' in time so that it does not have to choose between adopting treaties it does not like, or embarrassing our international position by rejecting what has already been negotiated out with foreign governments."

With respect to executive agreements, he went on to say:

> . . . I am authorized by the President to advise this Committee, the Senate Foreign Relations Committee, and the House Foreign Affairs Committee as follows:
>
> > It has long been recognized that difficulties exist in the determination as to which international agreements should be submitted to the Senate as treaties, which ones should be submitted to both Houses of the Congress, and which ones do not require any Congressional approval.
> >
> > . . . the Congress is entitled to know the considerations that enter into the determinations as to which procedures are sought to be followed. To that end, when there is any serious question of this nature and the circumstances permit, the Executive Branch will consult with appropriate Congressional leaders and Committees in determining the most suitable way of handling international agreements as they arise.

Then the circular defines the scope of the executive-agreement-making power:

> Executive agreements shall not be used when the subject matter should be covered by treaty. The executive agreement form shall be used only for agreements which fall into one or more of the following categories,
> (a) Agreements which are made pursuant to or in accordance with existing legistlation,
> (b) Agreements which require Congressional approval or implementation for their execution, or

(c) Agreements which are made under and in accordance with the President's Constitutional power.

In order to make sure that this program of negotiating agreements was followed closely, it is also the requirement that:

> Negotiations concerning future executive agreements on matters of substance are not to be undertaken, or resumed after an interruption, until authorized in writing by the Secretary or the Under-Secretary.

And it goes on and specifies what procedures should be followed when there is a serious question as to whether an agreement should be in the form of a treaty, in the form of an agreement to be submitted to both Houses of Congress, or simply an agreement to be concluded by the President alone:

> When a substantial doubt exists as to whether an international agreement should be made in the form of a treaty or in the form of an executive agreement made by the President alone or with the consent of both Houses of Congress, the matter shall be brought to the attention of the Secretary by a memorandum prepared by the office responsible for the contemplated negotiations. This memorandum shall bear appropriate comments thereon by the Legal Adviser and the Assistant Secretary for Congressional Relations. Thereafter, whenever circumstances permit, consultation shall be had with appropriate congressional leaders and committees prior to determining the most suitable way of handling such international agreements, such consultation to be had by the office responsible for the negotiations with the assistance of the Assistant Secretary for Congressional Relations.

That was a circular instruction which was issued throughout the Department of State. The Legal Adviser's Office, in order to make sure that they were in a position to carry out the requirements of this instruction, also issued an order to all of the Assistant Legal Advisers. The pertinent part of that order, referring to executive agreements, is as follows:

> In each case where an executive agreement is decided upon, there must be a legal memorandum pre-

> pared, setting forth first (a) the legislative authority, if any, for the making of an executive agreement on the subject, or, (b) if relying upon the constitutional powers of the President, what powers they are relying upon, and the manner in which they will be applied.

Those are the normal departmental instructions which we have on that subject. Is there any question on that, up to that point?

VOICE: There was the matter this morning of the Secretary passing upon agreements.

MR. BEVANS: I would say the matter of the Secretary passing on each agreement was not followed, on the matter of making executive agreements, along that particular line. So far as I understand the whole procedure, that has been the procedure and practice of the Department. I would like to mention in that connection some of the criteria that have generally been followed in determining whether a treaty or an agreement should be used for a particular subject. These criteria are ones which have been followed in the Department so long as I can remember.

In negotiating the treaty or agreement, we have a number of criteria which are taken into mind. I do not mean to say they constitute the answer to the whole subject. The answer is something that I think is going to have to be developed as long as there is a government. It is one of those matters that you just do not sit down and define precisely. About the time you have it defined, you find something has been left out or is misdefined.

A treaty is considered necessary when the subject matter and the treatment thereof has been traditionally handled by treaty. Now that is not necessarily controlling in all instances, but it does require careful consideration before any departure therefrom. Of course, the executive agreements have developed to a great extent in the past several years, but I would like to point out that that development has been primarily and to a great extent as a result of war conditions, and as a result of legislation enacted by the Congress, specifically authorizing such agreements.

The second criterion which is considered in determining whether a treaty is necessary is when the subject matter and the treatment thereof are not wholly within the delegated powers of the Congress alone, and the action contemplated is not only not within the delegated powers of the Congress, but also not solely within the constitutional powers of the President. We have cer-

tain subjects, for example, such as treaty provisions relating to inheritance of property by aliens, which have been handled only by treaties up to this point in our government's history, and it is considered that without the treaty-making power it may not be possible for the Federal Government to regulate such matters by agreement.

Another criterion is when the agreement involves important commitments affecting the nation as a whole. The treaty-making power was put into the Constitution by the founding fathers. They intended it as the means whereby we would enter into important commitments with foreign nations. It was deliberately designed to assure that it would be exercised in such a manner that every state would have an equal voice in the decision as to whether we enter into a particular treaty or not, by reason of the equal representation in the Senate; and those considerations, the bases on which the treaty-making power was vested in the Senate, are carefully considered.

A fourth criterion is when it is desired to give the utmost formality to the commitment, with a view to requiring similar formality on the part of the other governments concerned, in the interest of faithful and continued respect for its terms.

A fifth criterion is when existing law specifies that certain actions shall be accomplished by treaty, such as the extradition of criminals from foreign countries and the granting of visas for the carrying on of trade. There are laws which specifically provide that these actions shall be carried out pursuant to treaties.

When an agreement other than a treaty may be used, carrying in mind the criteria which I have just mentioned, we may make an agreement other than a treaty or executive agreement, with legislative authorization: first, when a change in law is involved; secondly, when it is impossible to give effect to the agreement without legislation by the Congress; and thirdly, when the subject matter is within the delegated authority of Congress—making agreements without legislative authorization when the subject matter and the treatment that is to be given to it are within the constitutional powers of the President.

Now, perhaps you will say that does not answer the whole question. I know that. I would be very grateful for any comment you have in that respect. You see, there are two points we have to bear in mind about the making of these treaties and agreements. It is not just a matter of signing them, it is a matter of giving them effect and being able to carry them out.

PROF. QUINCY WRIGHT (University of Chicago): I was glad

to hear the speaker refer to the need of adequate power to carry out treaties which have been made. It seems to me that that is the crux of the matter. I think that the President, without the consent of the Senate or the Congress, is competent to make an executive agreement if he has constitutional power to carry it out. On the other hand, if he cannot carry it out through exercise of his existing powers, I do not think he should make it without the consent of Congress or the Senate.

[MR. BEVANS expressed concurrence in Professor Wright's remark, adding: "What good is it to be able to go out and make any kind of agreement with anybody, and take it home and find you cannot do anything with it? In all our discussion on the making of treaties or agreements, we must bear in mind that you must also apply them."]

PROF. MICHAEL H. CARDOZO (Cornell Law School): I am not sure that we will not be overlapping a little bit in some of this but I will go ahead. I would like to point out that I speak from personal experience that terminated completely in August, 1952, and my views, even if not entirely my own, cannot be attributed in any way to those now in power in Washington; and even though Charlie Bevans and I worked together, he speaks for himself, and I do not speak for him.

I would like to address myself to the question of how a lawyer or other office in the State Department decides whether an executive agreement or a treaty should be negotiated. This is a branch of the question that Dean Acheson, when he was Secretary, always asked when an agreement was brought to him for signature. He said, "By what authority do I sign this agreement?" And somebody there had to tell him the answer. But before that, somebody had to decide whether, as Mr. Wright has just pointed out, the President, which might mean the State Department or the Defense Department, or the Treasury Department, or any of the other agencies involved in foreign relations, can carry out the United States' part in the agreement without asking Congress for anything more. If they cannot do that, then they cannot agree to do it unless they specially reserve in the agreement a notion that something further has to be done. Now, if they can do it without asking Congress for anything, even for money, then it seems that the executive branch alone can go ahead and make the agreement. We have many examples of that kind of agreement, where they can act alone, and we also have examples of agreements where there is existing legislation that enables the executive branch to go ahead.

Now, Mr. Bevans has suggested that if we want the agreement to be very formal, and the other country to treat it as formally as we want, then maybe a treaty is more important; but I have great faith in Mr. Bevans' ability to deck out an executive agreement and make it look as formal, and even go through a ratification procedure without having to go to Congress, if he wants to get formality into it. I think that the wartime lend-lease agreements and the mutual-aid agreements that are now used, and the reciprocal trade agreements from our point of view, are just as important, although executive agreements, as if they were formal treaties.

In all of those cases there is legislation on the books, and we enter into the agreements without going back to Congress for anything else. Sometimes, however, where there is existing power, the Executive Branch has thought it wise to go back to Congress and ask for additional legislation. That is when someting new has come up since the legislation was passed in the first place. Perhaps a new weapon has been devised, and Congress never thought we would lend-lease it or give it under a mutual aid program of some kind; or the exchange scholarships are agreed upon before there is legislation like the Fulbright Act. We could have entered into the agreements, creating scholarships under the lend-lease and surplus property acts as they existed, but it was thought better to get specific legislation, because it was a long-term program. I think it probably has worked for the best, that the Fulbright legislation was put through before those programs were placed in full force.

Now, when should the executive agency decide that it cannot do something, and therefore cannot agree to do it? An example is the British loan of 1946, when the President could hardly have gotten three and three-quarter billion dollars to give to the British without going to Congress first. The lend-lease agreements are also examples. Despite the wide powers of the President as Commander-in-Chief, he probably would have trouble going out and buying a lot of things to give to other countries if he did not have some legislation backing it up. So, in that kind of operation, the President would normally go to Congress and get legislation, as always has been done for the various foreign aid programs. Agreements that override state law also should have some kind of legislative backing. There are some executive agreements, such as the claims settlement agreements after World War II, that seem to have had the effect of overriding states' rights, without having gone to Congress for specific action.

There are some cases where the formal treaty system has been used traditionally, even though it seems as though the executive agreement approach might be more logical and more simple. As Mr. Bevans pointed out, it is tradition that selects the treaty approach in some cases, but there are provisions in the friendship, commerce, and navigation treaties that could certainly be put into force without the normal treaty procedure. I think that the control of fisheries and marine fauna could be taken out of the treaty system, by the passage of legislation authorizing that kind of agreement, like the reciprocal trade program. The Senate Foreign Relations Committee would probably welcome something like that if they could be relieved from repeated sessions with fisheries treaties. Perhaps, the agreement should go to Congress to be looked at to give them a chance to veto it, as is done in the atomic energy field, before the agreement actually comes into force. This would give Congress a chance to say something about it without burdening them with the need of passing on things that the Executive Branch can perhaps better handle for itself. There are some parts of the double-taxation treaties that would be better if handled as executive agreements authorized by legislation; because both houses of Congress ultimately have to act on those provisions anyway, when the Internal Revenue Code has to be amended.

One word more. It is an interesting fact that until this year no treaty or agreement has in all our history been judicially held illegal or unconstitution. Even the recent Capps decision stood up until the Supreme Court reversed it on other grounds. I think no small part of the credit for this fact should go to the responsible people in the Executive Branch, who have been just as conscious of our constitutional requirements as the Judiciary would be. They have been responsible for thousands of agreements, and only a very few of them come under attack, even by the Bricker supporters. I think, in looking at this field, considerable credit should go to people like Charlie Bevans and other more anonymous bureaucrats and their more conspicuous superiors, who are also deeply concerned about our constitutional system.

PROF. MYRES S. McDOUGAL (Yale Law School): There are some of us who have very grave doubts whether the treaty power is any broader than the delegated powers of the Congress. I think a very good case can be made that anything can be done with the authorization of the whole Congress that can be done by the treaty power. I would call your attention to the history of the treaty power and the point that the present scope of the treaty

power is completely a judicial creation. It seems fantastic to some of us that all the broad delegated powers of the Congress cannot be construed to include as much as this one word "treaty." If there are any treaties required in our international relations that cannot be brought under some delegated power of Congress, I would like to hear about them.

QUESTION 2: "How far are executive agreements, made without participation or authorization by Congress or Senate, applicable internally in the United States today?"

MR. BEVANS: I do not think I will do more than open this question up. There are some things I would like to call attention to. The first Article of the Constitution provides that all legislative powers herein granted shall be vested in the Congress of the United States, which shall consist of the Senate and House of Representatives. We also have the provision in the Constitution that treaties shall be part of the supreme law of the land. I want to emphasize that word "part"; not "the only supreme law," not "the most supreme law," but they are part of it. We also have the statement in The Federalist, 59th paper, written by John Jay, that all constitutional acts of power, whether in the executive or in the judicial departments, have as much legal validity and obligation as if they proceeded from the legislature.

This question follows after what was said about Question no. 1; and the same criteria, and some considerations which were expanded there would apply in this particular case.

PROF. CARDOZO: I had thought that there was doubt as to the power of the executive branch, acting without the help of Congress, to make some kinds of provisions of executive agreements apply internally. As I mentioned before, the claims waivers after World War II, in the settlement agreements, were worded because of our doubts so that, for example, the French government would settle claims of its nationals against the United States, and the United States would settle claims of its nationals. We did not say the claims were waived or cancelled, because it seemed a bit questionable whether the Executive, acting alone, could constitutionally cut off the right of a French national to sue the United States and collect for goods taken for war purposes. It looked a bit like taking private property without just compensation. So we just said to the other country that we would, in effect, indemnify it. We were surprised to find, when one of the French claimants sued the United States in the Court

of Claims in just such a case (Etlimar), the judge saying: "Look at the agreement. That agreement has cut off the right of the Frenchman to sue the United States," and therefore dismissing the case. He acted as though the agreement said that the claim was waived, and treated it as though it was constitutional. So at least there is one court decision indicating that executive agreements have even more internal effect than some of us who negotiated them thought they had.

PROF. McDOUGAL: With all deference to Mr. Bevans, I think the Constitutional founding fathers did anticipate agreements other than treaties. The present powers of the Congress and President are meaningless unless they include the power to make agreement; and the agreements are not worth the paper they are written on unless they bind the national community. I would not think there could be any doubt about what is gathered from the Belmont, Pink, and other cases, that any agreement which is within the constitutional competence of the national government binds all of the internal units. It would be folly to hope for any international policy otherwise. The very reason for calling the Constitutional Convention was to get a national policy. I say this as a good "state's-righter" from Mississippi.

QUESTION 3: How far are treaties and agreements which do not conform to a nation's constitution nevertheless "internationally binding?"

UNCONSTITUTIONAL AGREEMENTS IN INTERNATIONAL LAW

(Quotations and problems by Prof. John Dalzell, University of North Carolina Law School)

Various Possible Rules.

1. (Article by G. G. Fitzmaurice). ".../S/ tates have no concern whatsoever with, and cannot as a general proposition be held to have any knowledge of each other's laws or constitutions; ... a state which purports to become regularly bound by an international engagement ... must be presumed to have complied with all necessary internal constitutional requirements, and ... other states are entitled to assume that this is so. If it afterwards turns out that such requirements have not in fact been complied with, the state must nevertheless be regarded as being internationally bound: any state whose executive has placed it in this

position.... cannot plead that the treaty is void ab initio." (Fitzmaurice, "Do Treaties Need Ratification," 15 British Year Book of International Law (1934) 113, 136).

2. (Harvard Research, "Law of Treaties," Article 21). "A State is not bound by a treaty made on its behalf by an organ or authority not competent under its law to conclude the treaty; however, a State may be responsible for an injury resulting to another State from reasonable reliance by the latter upon a representation that such organ or authority was competent to conclude the treaty." (29 AJIL Supp. 1. c. 992)

3. (Tentative text, U.N.G.A. International Law Commission, "Law of Treaties," Article 2). "A treaty becomes binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State, in accordance with its constitutional law and practice through an organ competent for that purpose." (U.N. Document A/CN.4/L.55, May 10, 1955, p. 3).

4. (Text suggested to International Law Commission by Special Rapporteur, Mr. Lauterpacht). "A treaty becomes binding by signature which is not subject to confirmation, ratification, accession, acceptance, or any other means of expressing the will of the parties, through a competent organ, in accordance with the provisions and practice of their constitution." (U.N. Document A/CN. 4L.55, May 10, 1955, p. 3).

5. An inter-state agreement approved by the executive of a state creates an international obligation in accordance with its terms, even though it is contrary to the constitution of the state, except as against a state which is plainly chargeable with knowledge of such unconstitutionality.

Illustrative Problems

6. Israel and Egypt sign a treaty, which states that it is to take effect at once, establishing an enlarged de-militarized zone on each side of the Gaza boundary. The Egyptian plentipotentiary, or its Minister for Foreign Affairs, has expressly affirmed his competence to make such an agreement. Israel destroys its armaments in the agreed zone. Egypt repudiates the treaty because its representative did not have constitutional authority to make it. (Except for names, comes from Harvard Research draft,

which concludes that Egypt would not be bound by the treaty but would be obligated to compensate Israel for its loss in reliance thereon. 29 AJIL Supp. l.c. 1008)

7. President Huey Long of the U.S.A., without the advice or consent of the Senate, makes an agreement with the United Kingdom to exchange the Hawaiian Islands for Malta.

8. An agreement between the U.S. and Italy provides that any American citizen having a contract of employment with the Italian government may be dismissed summarily, without a hearing, if the Italian government determines that continuance of his employment is inconsistent with the security of the state.

9. The president of the United States, without consulting the Senate, enters into an agreement with the Spanish government, to extradite any persons accused of membership in the Spanish Communist party, or of conspiracy or activity or rebellion against the Spanish government.

Abstract questions

10. Does it make any difference whether the constitution is written or unwritten?

11. Does the answer depend in any degree upon the type of agreement concerned—peace treaty, territorial cession, political and military alliance, commercial treaty, reciprocal income tax concessions, regulation of air travel or radio communication, disarmament, multilateral treaty, charter of international organization, sale of surplus army supplies?

12. Do constitutional restrictions as to content of treaties have the same effect as restrictions on the treaty making procedure? (See Jones, 35 AJIL l.c.475-476).

13. Does registration of the treaty pursuant to Article 102 of the U. N. Charter bar the defense of unconstitutionality?

14. If the international validity of a treaty depends upon its constitutionality, will the international tribunal have to interpret the national constitution? Will its interpretation be supreme as international and national law? Or will it be controlled by the national tribunal? Or will it be supreme in international law only, leaving the national tribunal supreme in its field?

PROF. WRIGHT (referring to the compilation of texts by Professor Dalzell): Several conflicting principles are involved. The first principle is that a state is never bound to a new rule without its own consent, and that a state can only consent through its constitutional process. Therefore, a state is never bound by a treaty unless that treaty is in accord with its constitution. I think this principle is generally carried out in Points 2, 3, and 4 of the texts which you have before you.

That is in conflict with the principle underlying Texts 1 and 5, which I think proceed from this line of reasoning: a state can deal with other states only through its government, and other states must assume that a government's interpretation of its own constitution is correct. Therefore, a state is entitled to assume that a treaty or agreement concluded by the government of another state is made in accordance with that other state's constitution. That is what one might call the international solution. It was the position taken by Secretary of State Marcy in the Dillon case (1854).[1] which concerned the immunity of a consul from subpoena as a witness in a criminal trial. It was claimed that under the Sixth Amendment to the U.S. Constitution, French consul Dillon was liable to be subpoenaed as a witness. Secretary Marcy recognized that France was entitled to suppose that a provision in its treaty with the United States exempting consuls from supoena was valid. Marcy took the position that the treaty was unconstitutional and could not be executed, but internationally it was binding and therefore the United States should make amends to France for its failure to execute.

It seems to me that there have been four different types of effort to get around this difficulty. There is one which I set forth in my book on The Control of American Foreign Relations in 1922 (pp. 52-56). I took the position that provisions in the Constitution directly concerned with the treaty-making power are supposed to be known by other states, but that other states can not be expected to know about remote provisions which may limit the exercise of the treaty-making power. Such a provision as the one referred to—the right of defendants in criminal trials to compulsory process for obtaining witnesses guaranteed by the Sixth Amendment—France could not be expected to know about, and therefore France was entitled to consider a treaty which neglected this limitation internationally binding.

Question has arisen over the provision in the Constitution by which the Federal Government guarantees the territory of the States of the Union. Lord Ashburton raised the question

1. Moore's Digest, Vol. 5, pp. 80, 167.

whether the proposed treaty for determining the Maine boundary required the consent of the State of Maine because of this provision. That was a case where the other party was actually aware of a possible Constitutional limitation even though it had not been called to his attention by the American negotiator, Daniel Webster. Because of doubt on the question, Webster actually obtained the consent of Maine which was referred to in the treaty.

There is another possible reconciliation. It may be said that substantive provisions of the Constitution are not presumed to be known by the other country, but that procedural provisions are. This does not differ greatly from the solution just discussed, because Constitutional provisions directly concerned with treaties usually describe the procedure for making them.

A third distinction is between provisions in the Constitution having to do with the making of treaties and those having to do with the execution of treaties. It may be said that foreign countries are supposed to know only about those provisions that concern making the treaties, but not with those concerning their execution. Therefore if a government makes a treaty by the Constitutional process, but finds it is unable to execute it because of inadequate or adverse legislation, violation of Constitutional guarantees or other circumstances, the state is internationally bound. Its failure to execute means that unless the legislature enacts appropriate legislation or the Constitution is amended to permit execution, the state must make reparation.

Finally, there is the position that where there is an insoluble conflict then the treaty may be valid under international law but invalid under Constitutional law, and cannot be enforced by the courts. This position recognizes that Constitutional law and international law may be in conflict with one another on the question of validity of treaties. The issue of the ultimate priority of international and municipal law has been argued between "dualists" and "monists."

My opinion is that there is such conflict in theory. In international law the position is that stated by Fitzmaurice, that a treaty which is made under the authority of the organ constitutionally established to represent the state in international relations is a valid treaty. The only avenue for a foreign state to get authoritative information about the Constitution of the United States is through the President, and if the President says that under the Constitution the United States is capable of making this kind of treaty, I think a foreign government is bound to accept that statement and that in international law the treaty is

valid. In international law one can say, supported by the International Court of Justice in the East Greenland case (1933), that an agreement made by the foreign minister on behalf of his government in regard to a matter falling within his province is binding upon his country. A treaty made against the Constitution of a state and invalid in national law may be valid in international law. Nevertheless, we have to realize that practically this principle cannot be pushed too far. Foreign governments usually know a lot more about other constitutions than what they are told directly by the Chief Executive. If they think the Chief Executive or foreign minister has overreached himself, they should raise the question to avoid subsequent difficulties in the execution of the treaty. Legislative bodies are prone to attach more importance to the Constitution than to international law and national courts are usually obliged to.

MR. BEVANS: In looking over the authorities on this topic I see a great array on both sides. It seems as though the weight is slightly in favor of the group which would hold that the treaties were not binding if they were contrary to the constitution, or if the procedures specified therein for making them were not followed.

In the matter of jurisprudence we will find numerous national courts holding that the treaty is not binding if it did not observe the Constitution, because the courts are bound by the Constitution and must follow its dictates. The decisions in international tribunals are quite few. We should bear in mind, however, in this case, as we should bear in mind with any of these general rules we try to state, that there are always going to be some exceptions we must be aware of. For example, where you have a treaty of peace, how could you hear a state coming along and saying, "That is contrary to our constitution, we do not have to carry out the provisions of the treaty of peace." Where some state had to surrender unconditionally in a war, how could they be heard to say that some condition in the treaty of peace is contrary to the constitution. Or in the case of an award of an international tribunal where some state suffered damages or had to give up part of its territory as the result of such award, in that instance they would have to tailor their constitution to the new agreement they had been ordered to make, in order to meet the requirements of the international community.

I mention those three instances just as an example. We al-

2. World Court Reports (Manley O. Hudson Editor), Vol. 3, p. 192.

ways have to watch out for something in the background. We may state general rules, there may be rules which have been in existence a long time, but we always have to address ourselves to the problem in every instance, and not get so much concerned with the rules that we forget about these exceptions.

MR. WAYNE D. WILLIAMS (Denver Bar): In responding to this question, I offer two propositions which are, I think, generally accepted, and a third which, although disputed by the writers, is, notwithstanding this embarrassment, valid in my judgment.

The first is that once a treaty has been made by competent parties, a change in the constitution of a party, or enactment of subsequent legislation will not affect the international obligation which has arisen; however, it may alter the effect of the treaty in municipal law.

The second is that a treaty is deemed internationally binding even though its implementation may require action by one of the parties, within the constitutional competence of that party. Such action may take the form of legislation, or if a taking of property has occurred, may be through payment of compensation to satisfy a constitutional requirement—as Professor Cowles in his still timely Treaties and Constitutional Law has demonstrated.

The third, and possibly controversial proposition, is that a reaty which at the time it is made contravenes the constitution of a signatory state is not internationally binding upon that state, whether the defect arises from the procedure followed, the subject matter of the treaty, or the impact upon the constitutional division of powers in a federal state.

The views of writers upon this last question are widely divergent. G.G. Fitzmaurice, in the British Yearbook (1934), contends for validity regardless of constitutional barriers. So, I take it, does Article 23 of the Harvard Research, making no distinction between constitutional barriers existing at the time the treaty is made, and those erected afterward. Professor Hyde, and other American writers, argue for invalidity, admitting an exception only where the constitutional barrier was not known to the foreign state and was not discoverable by reasonable diligence (Hyde, 2d ed., vol. II, pp. 1383-6).

The central difficulty with the argument for validity is that instances of international usage, accepted as law, are to fragmentary and inconclusive to be of much value. Professor Lauterpacht, writing in the January, 1955, issue of the American Journal

of International Law (p. 18) states it as follows:

> There is a wide and unresolved divergence of views and practice as to the effect of the disregard of constitutional limitations on the part of the organ which ratifies or otherwise accepts a final treaty obligation on behalf of the state.

Lacking affirmative evidence of usage favoring validity of treaties in the third category I have mentioned, and with just the suggestion of a nod toward the opinion in the Lotus case, I think the conclusion of invalidity to be wholly admissible and proper.

Having stated what the law is, in my opinion, I would add one or two further observations. The first is that where the constitutional barrier derives from the authority of the agent, or the procedure followed, ratification by conduct of those who are constitutionally competent may validate a treaty otherwise invalid. Perhaps a merciful Providence will save international lawyers from the hopeless confusion of void ab initio concepts of the common law at this point. My second observation is that whatever the constitutional barrier, a plain duty to restore or give compensation for benefits received under a treaty invalid because of constitional barriers would seem to arise from even primitive considerations of fair play.

Finally, in evaluating these views let us fully sense the vital importance of maintaining the integrity and sanctity of national constitutions, written and unwritten. This, after all, is the cornerstone-principle of sovereignty in the people and of representative government; and the respect and regard which international law will continue to receive may depend in part upon the accommodation of international law to this principle. If constitutions are to be altered in the development of international life—and I frankly concede this necessity—then let them be altered by prescribed constitutional means.

PROF. JAY MURPHY (University of Alabama Law School): There are two mainly held views. View one is that adopted by the Harvard Research in International Law that no such treaties are binding, but that possibly damages may be given where a state relies to its injury upon the acts of agents held out by another state. Among the various reasons given for view one are the following: the authority of some writers, the existence of present practices, the existence of an international custom which requires states to inquire into the competency of agents of other states, the fact that states generally deny the binding force of

unconstitutional treaties, and the fact that view one tends to promote mutual respect among nations.

View two is the view adopted by Professor Fairman and, in general, by Professor Wright. This view is to the effect that such treaties are binding if a state reasonably relies upon agents put forward by another state as competent. View two likewise is supported by various reasons, some of which coincide with reasons for view one. These reasons include the authority of some writers, one adjudication (the Eastern Greenland case), the precept that international law is superior to national law, the proposition that view two promotes stability of relations among nations and that the requirement of mutual respect demands good faith acceptance by one nation of the agents of other nations. Lastly, view two holds that one nation lacks the facilities for examining in detail the constitutional complexities of other nations.

I shall speculate concerning a few possible causes for some changes in views since the publication of the Harvard Research. Professor Hyde, who was relied upon by view one adherents, altered his position toward view two in his 1945 edition. Professor Fairman's article in 30 AJIL was in the direction of view two. View one relied upon John Basset Moore's general treaty position, but since the time of Judge Moore the treaty power has been subjected to considerable inquiry, and perhaps fundamental conceptions of the treaty power have changed in many quarters. The Constitution itself is almost a new document. Another factor possibly contributing to change in some views is that the United Nations has both intensified relations among nations and furthered the habit of representation by agents with responsibility to act. Perhaps the growth of administrative agencies among modern nations will give force to this habit. Lastly, it would appear to be increasingly important that nations be able to rely upon each other's agents since damages and compensation are generally inadequate remedies.

What ought to be the rule? Proponents of view one could say that their view upholds mutual respect, and promotes the dignity of a nation. View two adherents could say that their view certainly promotes respect among nations and inculcates an attitude of good faith reliance which is indispensable to peaceful relations. Perhaps both views achieve ends of equal validity. Maybe the main concern of such a rule should be to create certainty on which other relationships might be built if, in fact, certainty did result. View two says that nations cannot possibly enter into esotaric debates relating to constitutionality and that to do so would itself create ill will. View one might counter that

such inquiry into constitutional practice and theory among all nations might create better understanding not only of laws but of culture, and so help a nation more fully to understand the possible bases of agreement amongst themselves.

We cannot escape the business of deciding what values we hold. The rules of either view have no a priori significance. They should be judged by whether they promote our values. The test might be to choose the rule which best promotes stability, harmony, sharing of experiences, respect, and the development of man's capacities to approximate his potentialities in living. As a pragmatist I lean toward continuous inquiry and tentative value judgments as advocated by John Dewey. In practice, however, there are great areas for agreement with some natural-law lawyers. But we should all, I believe, approach the subject from fact and value seeking as opposed to rule seeking.

One final comment should be made as a lawyer. In answering this question my answer would vary depending upon my official role and the circumstances of the problem. My answer might vary if I were representing a state which sought to make, or to evade, or to enforce an agreement where the problem of constitutionality occurred. If my client were an actual (or potential) investor in a foreign country relying in fact upon the continued existence of a treaty, I believe I would wonder whether the foreign minister who negotiated the treaty had power to act, and about the nature of that power (including both substantive and procedural constitutional provisions), and how those provisions had been interpreted, and how they might be interpreted, and the attitudes of strong opposition groups within the country, if any, toward that treaty, in order to seek to anticipate any revocation which might be sought; and I would otherwise search for ways that a bad nation, to use a Holmesianism, could use to get out of a treaty on constitutional grounds.

PROF. JOHN P. DALZELL (University of North Carolina Law School): I am afraid I cannot add much to what Professor Wright and his colleagues, my predecessors in this discussion, have already said on this subject.

The rules to which reference is made are set out on the mimeographed sheets, which I hope most of you have before you. (See "Unconstitutional Agreements in International Law," supra pages 194-196; reference will be made to that material by paragraph numbers.)

The first rule there (paragraph 1), quoted from an article by Fitzmaurice, is that if the executive of a state indicates consent

on its behalf to an international agreement, the state is bound in international law regardless of any element of unconstitutionality. This I suppose might be called the old rule, probably originating with obvious justification in the days when the state was the king, and the king made the treaties, so that there was really no question of constitutionality involved in the treaty-making power at all. In theory that view certainly even today has great appeal to all of us who want to see international law universally respected and international obligations recognized. It has been generally admitted, however, that there must be some modification of that rule.

The Harvard Research Draft "Law of Treaties," Article 21 (see paragraph 2 of appended material), took the view that an unconstitutional treaty was not binding as a treaty, but that it might impose an obligation in favor of the state which had reasonably relied upon a representation of authority to make the treaty, an obligation to compensate for any losses suffered in reliance upon that representation. As illustrating that situation, the Harvard Research Draft used the example, which is set out in paragraph 6 of the appended material, of a treaty for a demilitarized zone between Israel and Egypt (except that the Harvard Draft referred to states "A" and "B" instead of "Israel" and "Egypt"). The demilitarized zone agreement having been made between Egypt and Israel in reliance upon the assurance of the Egyptian minister for foreign affairs that he or his representative had authority to sign that treaty, and Israel having carried out its undertaking and destroyed its military armament in that zone, is then faced with the Egyptian claim that the treaty was unconstitutional because the Egyptian minister had no constitutional authority to make any such representation or to bind the state to those terms.

If the Egyptian minister had exceeded his constitutional authority, according to the Harvard Research Draft (see paragraph 2, appended material), the result would be no treaty, but Egypt must compensate Israel for any reasonable reliance on the representation of authority. If there was a reasonable reliance on the representation of authority, then it is difficult for me to see why it is not reasonable to hold the treaty binding. If there is any international obligation at all imposed upon Egypt as a result of reasonable reliance upon the representation of authority, why should not the obligation be that which Israel reasonably supposed was being created, the treaty, rather than an obligation to compensate for loss suffered in reliance upon the representation?

The recent tendency, however, has been in the opposite direction, toward even greater limitation on the effectiveness of unconstitutional treaties. The tentative text suggested by the International Law Commission, on the "Law of Treaties," and also a suggested amendment thereto (see paragraphs 3 and 4, appended material), would deprive a treaty of any legal effect as against the state if the treaty is unconstitutional as to that state.The result of this rule might well be, for example, that the Yalta agreement between Stalin, Roosevelt, and Churchill would place no obligation on Russia. The Russian constitution in Article 49, seems clearly to give the power to ratify treaties to the Presidium of the Supreme Soviet; if this is the proper interpretation, unless there was such ratification, then, if the Russian constitution is to control, it seems that Russia would not be bound by the compact made by Premier Stalin at Yalta. Of course subsequent acquiescence might create an obligation as of 1955; but the question might have arisen before any acquiescence, or it might come up with reference to an agreement made by Stalin's successor at Geneva on July 18th next. None of us, I should suppose, would feel that there was any justification for Russia to claim that she was not bound by an agreement approved by Stalin or his successor at a Big Four conference. At least, if that agreement did not purport to be subject to ratification, we would feel that any such claim based upon the Russian constitutional provision was an attempt to evade an obligation.

It seems to me that the problem is not different from an agency problem which we meet frequently in commercial law. Here I betray my common law background. Do we not have here simply a question of apparent or implied authority to make a treaty? Should not that be the test—was there apparent authority, based upon conduct and communications for which the state is responsible, to make the agreement in question? Should not the treaty create an international obligation binding upon the state if there was reasonable ground to believe that the representative acting for the state had authority to represent the state in that negotiation? It seems to me that some such rule supplies the most reasonable standard, the rule in paragraph 5 of the appended material is aimed in this direction.

Mr. Bevans has already mentioned the possibility of an amendment of the constitution after a treaty has been adopted. He expressed his complete confidence that no pre-existing treaty obligation could be terminated by any such amendment, which is probably correct. But this leads to another conclusion of some

importance. It means that even if we adopt the extreme rule suggested in the International Law Commission tentative text (paragraph 3 appended), we do not thereby establish complete consistency between the treaty obligations contemplated and legalized by the constitution of a state and the treaty obligations to which it is subject in international law. We cannot reach that consistency without recognizing in international law the unlimited right of change by amendment which is recognized in constitutional law.

It should also be remembered in this connection that some of the modern constitutions can be changed by a mere legislative enactment, which, I believe, does not even require the two-thirds majority usually necessary for the amending process. The question of interpretation suggested in paragraph 14 of the appended material also points to the same difficulty or impossibility of full consistency between internal and international law as to treaty obligations.

PROF. WILLIAM G. RICE (Wisconsin Law School): In speaking on this topic I must first express my indebtedness to Michigan, in the person of Lawrence Preuss, who has enlightened us greatly in his writings on the relation of treaties to internal law in many countries, to which our own topic is closely related.

There are two kinds of discord that may arise between treaties and national constitutions: (1) that a particular organ or person is not the nation's representative to treat for the nation; (2) that some substantive term of the treaty is forbidden by the nation's law. The first question raises really a phase of recognition, and I do not discuss that. On the second question, it seems to me that Quincy Wright expressed the views that I should set before you, at least the conclusions. In other words, a country, by dealing, warrants that it has authority to deal, and for any person or court outside of the nation to question what its agent or organ of communication represents to be its power is to intrude into internal affairs.

This principle, it seems to me, it is necessary to maintain unless we consider that nations can communicate with one another by other than the usual diplomatic routes. Can we say that there is judicial communication by broadcasting as well as executive communication by the diplomatic channel to the outside world? I am going to do something which I know international lawyers think is heresy, that is, refer to some constitutional adjudications in the United States.

Between the states of our union we do not have diplomatic

channels of communication. We are used to communication without formality. Courts of every state are constitutionally bound to give full faith and credit to pronouncements of the courts of other states, and the Federal courts follow suit and have confirmed this policy through the doctrine of the Erie R.R. Co. v. Tompkins, 204 U.S. 64. Justice Reed, concurring in West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 32 (1951), said the rule should apply to interstate treaty-makings. The West Virginia Supreme Court having held that the compact concerning the Ohio River violated the Constitution of West Virginia, he said there was no doubt that "state court interpretation of state law" bound all courts, including the United States Supreme Court. But he added that despite the West Virginia holding that the compact was invalid by West Virginia law, "compacts may be enforced despite otherwise valid state restrictions." Here he was upholding the superiority of the national law concerning inter-state compacts over state constitutional provisions as authoritatively determined by the state courts. Justice Jackson said substantially the same thing: "West Virginia, for internal affairs, is free to interpret her own Constitution as she will.... But after Congress and sister states have been induced to alter their positions and bind themselves to terms of a covenant, West Virginia should be estopped from repudiating her act....Whatever interpretation she may put upon the generalities of her Constitution, she is bound by the Compact" (341 U.S. 22, 35, 36).

This seems equally correct as law between nations: no national adjudication that the nation acted ultra vires in terms of its constitution can drain the international treaty of its legal force.

But Jackson and Reed were not the court. The reasoning of their concurring opinions is not that of the majority, which preferred to overrule the state court's construction of the Constitution of West Virginia. In its position of appellate tribunal, the United States Supreme Court held it could reappraise the alleged conflict between the state constitution and the compact, and on such reappraisal it concluded there was no conflict. Thus, by denying this conflict, Justice Frankfurter, writing the opinion, avoided the issue of enforcing a contract contrary to the state constitution. "We are not here concerned, and so need not deal," he said, "with specific language" of the West Virginia constitution prohibiting such a contract; and general language of that constitution should be interpreted, contrary to the state court's view, as not precluding the terms of the compact.

But there is no system by which the decisions of a national

court may be reviewed by an international court, as the decision of the West Virginia Supreme Court was reviewed by the United States Supreme Court. So the power of replacing West Virginia's interpretation of its constitution by that of an interstate or superstate body—the United States Supreme Court—cannot be transferred to the international stage. There, it seems to me, the view of Jackson and Reed must prevail—that the state's own interpretation is conclusive. But on the international stage it is certainly the executive and not the judicial organ of a state that makes this interpretation. It is neither convenient nor customary, indeed in most countries it is probably impossible, for the State B to obtain from the supreme organ of constitutional interpretation (for internal purposes) of State A, its interpretation of State A's constitution with regard to treaty-making. State A and State B deal with each other through executive, or possibly legislative, agencies. State B is entitled to take, indeed must take, as the authoritative word of State A what State A's executive or its legislative organ says. That within State A they do not have the last word, but the last word is pronounced by an organ which is inaccessible to State B, is a rule of internal housekeeping that does not concern B or C or any international body.

Frankfurter's reinterpretation of the West Virginia Constitution to make it fit with the Ohio River compact illustrates a usual and genuine effort of courts to harmonize statute and statute, treaty and treaty, constitution and statute, and constitution and treaty. The effort is made in order to avoid defining a rule of precedence between these several categories of law.

Like the courts that seek to reconcile such differences, let us as reasonable inhabitants of the political world be careful to avoid conflict in treaty-making between treaty and constitution. So for our own constitution it is not too hard to avoid such a conflict when we consider that the constitution is not a scheme of government that is utterly rigid, but one that the courts treat as reasonably adaptable to new circumstances, even without formal amendment. And secondly, let us be aware that if such conflict cannot be sidestepped, an international court or other authority is likely, by reason of its international origin, to give priority to the treaty as an expression of international law.

And now that the constitutions of several important nations—France, Germany, the Netherlands, for example—expressly recognize this priority, and their courts have applied it as a rule of domestic law, it becomes utterly improbable that the contrary rule would be applied abroad, with respect to those nations; and in my opinion almost as unlikely that any international organ or

organ of another state would apply a contrary rule with respect to any nation, even one whose courts do not internally give treaties priority.

PROF. CARDOZO: I thought it might be interesting to know that as a matter of practice one branch of the United States Government is doing something that is inconsistent with our attitude on this subject. The United States Government has always, as far as I know, taken the position that if the United States State Department official or ambassador abroad says that the United States and its particular representative involved, have authority to enter into an agreement, then that will be binding on the United States; and we do not expect the other country to ask for some proof as to the authority by which we say it. However, when the Export-Import Bank is making a loan agreement with a foreign government, it has, at least up until August, 1952, made a practice of asking the other government to give a legal opinion, prepared either by private lawyers or by government lawyers, showing by what authority the representative of the other government is binding his government to repay the loan. And it asks that even though the ambassador from the other government has said that the representative involved has authority to enter into that particular loan agreement.

QUESTION: Many modern treaties, including the Charter of the United Nations, provide for ratification in accordance with the constitutional processes of the signatories. How does this provision affect the different arguments which have been advanced here? Does such a clause imply an incorporation by reference of the constitution in toto so that every part of the constitution may be relied upon to contest the validity of ratification? One or two of our recent treaties of political character provide for performance in accordance with the constitutional procedures of the contracting parties. Does that mean such a treaty incorporates by reference all of the constitutional provisions of the contracting parties concerning the power to implement a treaty of this kind, and therefore that state could invoke something in its constitution to justify non-fulfillment of its treaty obligation? In case of such a treaty which provides for ratification or execution according to the constitutional procedures, how long is such a clause valid? How long can it be relied upon by the contracting parties, and who is competent to verify or to challenge ratification on the ground that it does not comply or it did not comply with the constitutional procedures of one or the other of the contracting parties?

MR. BEVANS: I will try to answer these questions. The first is as to the meaning of provisions in the Charter of the United Nations and other treaties that they shall be ratified in accordance with constitutional procedures. Normally those provisions are not put in with a view to looking towards the treaty being effectively binding in international law as a result of proper completion of all those procedures; but in order to satisfy the individual ratifying bodies in each of the respective states, to assure them that each state expects the other to approve in accordance with its constitutional procedures and take all measures necessary in order to be bound. It is somewhat in the nature of an admonition. Whether or not that would have any bearing on the question whether they could be relieved if all those procedures were not followed through, I would not attempt to answer.

As for the provision about carrying out some of these military assistance agreements in accordance with constitution procedures, my understanding of those is that you will not be expected to carry out a particular obligation under the treaty until you have satisfied yourself that you have completed your constitutional procedures. It may be something of a condition on the obligation which you have made, and until you do carry out those constitutional procedures the other state cannot validly expect you to go forward with the action contemplated.

PROF. WRIGHT: May I ask a question concerning the proposed Federal-state clause. It says, I understand, that a federal state is not bound by the treaty except in respect to measures which would normally be within the constitutional competence of the federal government. If an international tribunal had to interpret such a clause, it seems that it would have to interpret the constitution of the federal state. First it would have to decide whether it is a federal state, and second it would have to decide what are the powers of the central government.

MR. BEVANS: We have to consider those things, but where a provision like that is in a treaty, I believe they would be required to rely very strongly, if not entirely, upon what the state itself said was the competence of its federal government.

PROF. WRIGHT: Do you think if such a case came before an international court, that whatever at that moment the government of the federal state said would have to be accepted by the international tribunal?

MR. BEVANS: Yes, I believe it would have to be accepted in the first instance.

PROF. CARDOZO: By what authority?

MR. BEVANS: By the authority that a state itself is the best judge of what its constitution means, and what its authority is.

MISS MARJORIE WHITEMAN (Assistant Legal Adviser for Inter-American Affairs, Dept. of State): I do not wish to attempt to answer the question being discussed at present. I only wish to point out that the last time I looked at that Federal-state clause, the gist of it was that it would not affect powers as between the states and the federal government. The balance of power was not to be changed by the fact that the agreement was in treaty form.

MR. BEVANS: We have talked here this afternoon as though all these things are determined and defined by precise legal rules and norms, but all of you know that just is not so. To say where the line should be drawn between the political, the policy, and the legal, is often not only difficult but impossible to do. One shades into the other like daylight into the night. You cannot tell where one entirely begins and the other leaves off. You might be able to recognize one extreme and the other extreme, but how much one overlays the other it is impossible to say. We may pursue the legal aspects of something for a hundred years and we could not come to the right answer, unless we took into account all these other influences and forces which at the same time are going to take part in the consideration of the treaty.[1]

Question 4: To what extent are states bound internationally by declarations or resolutions of conferences or international assemblies (such as the United Nations General Assembly), especially when they vote in favor of such declarations and resolutions?

Question 9: In what, if any, way is the United Nations a "law-making body"?

1. An unidentified inquirer, and Mrs. Esther Frankel of Paterson, New Jersey, both asked about the status of treaties entered into as a result of force or coercion: whether, in conflict with the constitution of the vanquished state or not, under modern international law the victor is entitled to impose whatever conditions it wishes upon the vanquished. The Chairman commented that the validity of treaties exacted under duress or force was a problem that had been considered for possible inclusion in the agenda, that it raised many broad questions and would require a considerable time for adequate discussion, and therefore had not been included in the agenda despite its great importance.

(Questions 4 and 9 were discussed together.)

PROF. HERBERT W. BRIGGS (Cornell University): I have worked on this topic long enough to add it to my list of yesterday as one of those topics which should be studied about two years by a team of experts. A short answer to the question "To what extent are states bound internationally by declarations or resolutions of conferences or international assemblies (such as the United Nations General Assembly), especially when they vote in favor of such declarations and resolutions?" would be that they are bound to the extent that they may be regarded as having accepted any obligations contained in such declarations or resolutions. There may be some distinction between an ad hoc diplomatic conference, on the one hand, and an organ like the United Nations General Assembly. However, in both the ad hoc conference and an organ like the General Assembly, the adoption of a resolution or declaration, in order to have binding effect as an international legal transaction, must meet certain requirements. The transaction must be within the competence of the conference or organ. As far as the diplomatic conference is concerned this may present no great problem, since the competence of the conference to draft treaties for immediate acceptance, or for future ratification, or to adopt a legally binding resolution, is conferred by the participants in the conference. The competence of an organ like the General Assembly, however, while perhaps ultimately derived from states, is circumscribed by the terms of a constituent act like a charter, a covenant, or maybe several treaties.

If we can assume for the moment—and this is part of the problem—the competence of a conference or an organ to adopt legally binding resolutions, the problem then becomes one of determining in what circumstances a particular state is bound by the decision of the conference or organ, that is, by the adoption of the resolution. Before examining those circumstances, some general propositions should be considered. In order to determine whether an instrument like a treaty—and I am using it in the broadest generic sense of an international agreement—imposes legal obligations on the parties, regard must be had to its form and the formalities surrounding its conclusion, to its content, that is, does it purport to set forth an agreement, and, perhaps, to the intent of the parties.

While international law is less explicit than systems of private law as to the form in which particular legal transactions shall be cast, it has developed rules with reference to the au-

thentication of the texts of international instruments and the aceptance of the international agreements there recorded. Both of these functions, authentication and acceptance, are implicit in the definition of a treaty. We may state, and I state it with some temerity, that a treaty is an agreement expressed in an authenticated instrument or instruments, by which states or organizations of states establish legal relationships under international law between the contracting parties. I have dodged several theoretical questions in that definition. What are the means by which states establish such legal relationships? More specifically, what do we look for as evidence of acceptance? If the intent of the parties is clearly expressed, then we have little difficulty, but where intent is not clear, what has evidential value as to acceptance?

We look at the form of the instrument itself. Is it a highly formal treaty? Is it a relatively informal exchange of notes? Is it a unilateral declaration by one state, such as Mr. Adenauer made at London, of which other states formally take note? Is it drafted in the form of a conference resolution? We also look at the formalities required to give effect to the instrument. Do the terms of the instrument or the surrounding circumstances suggest that an exchange of ratifications is required, or do they permit the conclusion that a promise which has been taken up, or an offer, can be regarded as having legal effect if accepted? In the latter case, are we justified in concluding that if the parties sign a Final Act, recording a promise such as Mr. Eden made at the London Conference on Germany and taking note of it, that a contractural relationship has thereby been established?

Obviously, the form of the instrument and the formalities surrounding its conclusion do not alone provide an answer to our question whether a particular instrument creates obligations under international law. We must also look to its content, because we find, for example, that the Final Act of the 1907 Hague Conference was a very formal instrument, but it contained no obligations; and therefore we look to see whether the instrument contains words which can be regarded as envisaging an agreement in certain circumstances, such as acceptance. By this method, we or a court, I submit, can reach a conclusion that international law assigns legal force and effect to certain transactions, such as an agreement, a promise, an offer and aceptance, provided certain forms are employed. Or if you prefer to phrase it another way, we are justified in presuming the intent of parties to conclude the legally binding agreement, from the performance of certain acts and the observance of

certain acts and the observance of certain forms by them. Is this not what a court does when it assigns legally obligatory force to the conclusion of a treaty? Is that not what the World Court did when it assigned legally obligatory force to the Ihlen statement in the Greenland case?

I see that I have used up my time, Mr. Chairman. I have some further comments regarding general assembly resolutions; but I can conclude on the international conference that it becomes largely a matter of acceptance, and whether or not evidence suggests that aceptance has been given.

PROF. LOUIS B. SOHN (Harvard Law School): I agree with Professor Briggs that the first basic question here is—have the states agreed to be bound by such a declaration to be issued by a particular conference?

Of course they can agree in two ways. They can agree in advance, which is the proper way to do it, and they sometimes have done so. We have seen, for instance, that when the members of the Conference on the Peace Treaty with Italy got into trouble they put into the treaty with Italy an agreement that if they could not solve the problem other ways, then the General Assembly of the United Nations would be requested to adopt recommendations on the subject which would be binding on all the parties concerned; and as the events have turned out, the General Assembly has adopted such resolutions. They were very interesting ones, recommending two federal constitutions: one for Libya, and another one for Ethiopia and Eritrea. All those resolutions were accepted with no trouble at all.

States might agree that certain international conferences change constitutions of international organizations, and they have done so. The Food and Agriculture Organization has such provision in its constitution, and practically every year some changes are made in it. It is quite interesting from the point of view of the United States. The FAO constitution, after all, is part of the law of the United States, the original constitution having been pulished as such. The amendments to the constitution, which are being adopted every year, have not, as far as I know, been published in this country. (They are only mentioned in a footnote in the treaty annotations published by the State Department, which, I regret to say, seem to be at this point not being published any longer.) You have similar provisions in some other international constitutions.

There is another point at which states might go even further. They may say with respect to certain technical subjects that they

would acept decisions of international organizations as binding, provided they are limited to the specified topics. We have that kind of provision in the World Health Organization, and many interesting regulations have been adopted under it which previously required formal conventions. For instance, instead of international sanitary conventions we have now international sanitary regulations, which come into force for all states except those which have made reservations or have notified the Organization of their rejection.

It is very interesting to note what happens. In the old days when a sanitary convention was adopted it took ages to have it properly ratified by everybody. Now, the WHO Assembly adopts the regulations, says that they will come into effect on October 1st next year, and they come into effect on October 1st with respect to fifty-eight states, because they did not say anything contrary. Then, some twenty-one states, I think, made reservations; some of them were acepted, and the regulations, therefore, became binding on those states. A few did not accept, and with respect to those few states the regulations did not come into force. This is certainly a very easy way of having an agreement accepted in the future by states.

The other way to consider the problem is that states might acept as binding something that already has happened by simply saying that they do not believe it is binding; and the International Court might declare they would be bound by what the organization already has done. There is an interesting article on the subject in the British Yearbook of International Law for 1948 by Mr. Sloan, "The United Nations and the Recommendations of the General Assembly," and he recites several instances in which things like that have happened. I might mention two: one on Southwest Africa, in which South Africa was found to be bound by certain changes from the League of Nations to the United Nations, because of the fact that they had voted for them in the Assembly of the League and for some resolutions in the Assembly of the United Nations, and also made some additional statements since then. Aso, in the case of Reparations for Injuries to United Nations' Officials, the World Court looked at the practice of states and said that by their practice they had accepted the fact that the United Nations is an international organization, and that from this acceptance flow some new obligations and duties for states. Interestingly the Court even accepted the theory of objective personality of the United Nations, which must be recognized by states who are not members of the United Nations.

MR. WAYNE D. WILLIAMS (Denver Bar and University of Denver Law School): In my judgment, the United Nations is not a law-making body. It may be a law-encouraging body or a body which gives opportunity for development of law; but my general point of view is that as an entity the United Nations essentially is not law-making but recommendation-making. Of course, I would exclude the International Court of Justice, which makes law in the same sense that courts generally make law.

I am wondering whether it is not true that the history of the past ten years will record it as a time of widening rather than of narrowing the gaps which exist in international law. This is, perhaps, suggested by the article of Professor Lauterpacht[1] in which he calls attention to the great number and variety of instances in which there is really no well-developed international usage sufficient to constitute a precedent or to be cited as a rule of law. I would go further and say that it is perhaps a fact that in the United Nations, all too often, decisions have been made with undue regard for political considerations and little or no regard for legal considerations. I would take, for example, the disregard of what might have been called traditional norms in decisions upon the question of domestic jurisdiction in the United Nations.

There is a lack of any rushing business for the International Court of Justice. There is possibly a tendency to hold in less regard decisions of that court. The tendency in the General Assembly is to overlook legal considerations. Finally, perhaps, even in the International Law Commission decisions are all too often reached upon political rather than legal considerations. May it not be that the United Nations thus far in its history has been as much a law-dissipating organization as a law-making organization? Should we not place special emphasis, as Secretary Dulles has, on the fact that all too little consideration has been given to matters of international law and justice in the preparation of the Charter, and that although in the United Nations there has been erected a wide forum for the expression of political views there has still been all too little upon a legal basis.

If we might go outside for a moment, there are other gaps in international law which appear to be widening rather than narrowing. I refer to the gap left by the development of new weapons and new methods of warfare. Even here, we have been stating that we may frankly have to face the possibility that regional rules of law may be the development of the coming

1. H. Lauterpacht, "Codification and Development of International Law," 49 AJIL 16 (January, 1955).

years, rather than rules of universal application.

Now, I would not, of course, ascribe all of this to the existence of the United Nations. Other world-shaking facts must naturally be taken into acount: the East-West struggle, the development of a widespread feeling of anti-colonialism, the development of the H- bomb and other weapons. I would raise the question whether, in the light of these developments, we are finding that the problem of reverence for traditional principles of international law is not assuming greater and greater proportions, and likewise the need for establishing a legal order.

PROF. PAUL SAYRE (State University of Iowa Law School): Historically, the question of whether a sovereign's representative had certain powers or not was determined by the sovereign. Modern international law grew up in a period of intense nationalism, as we know, and anything that would imply a limitation on a sovereign was anathema—no one would think of such a thing. Therefore, it was for the sovereign to say what his representative did or did not do, what his powers were, and you could not enlarge them or change them. I do not agree with others that we have got beyond that a little bit; but if there is a clear interpretation of what the sovereign intends the executive or the treaty-making power to do, and what it is representative of at this particular conference or general assembly or other body, then within reason, that would prevail.

The next question is, is that changed substantially, by the wording of the agreement? I think it would be. In the instance of our own Constitution the states had representatives at the Constitutional Convention, but it was very clear that the Constitution was adopted only upon action of the particular states; it was not done by the representatives at the meeting. So we can say that if it is not indicated in any way that the state is to act, then you could fairly imply powers according to the grants given to the representatives to bind the state. Perhaps that is about as far as one can go in a practical sense. As an instance of limited powers, however, take Article 10 of the UN Charter: "The General Assembly may discuss any question or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for, and...may make recommendation to the Members of the United Nations or to the Security Council or to both on any such questions or matters." It seems clear that the Charter itself did not intend the representatives in the General Assembly to pass on actions under Article 10. They intended it to be a direct recommendation to that nation,

and that it should act.

There are several reasons for that policy. I think it is fairly conceded that the United Nations Charter involved a federal scheme of government, if you like, similar to our own, unlike the French or most continental countries. They intended that. For example, Chapter 8, treating Regional Agreements, deals almost exclusively with individual members carrying out largely their own policies there, except as in conflict with the Security Council and so on. It very definitely contemplates the activity of the individual nations, and it would be unwise if we did not give effect to that. We must strengthen the United Nations, but we must first strengthen the capacity of the individual nation to take its proper place there. The whole is weak if the parts are not strong; and the scheme of things involves federalism and localism where that is a proper and vigorous activity by the nations themselves as well as by the group.

Hence, in the article given, if they wanted the individual nation to grow in the capacity to make its own decisions it would not further general policy to have it committed irreparably by the action of the representatives. Members can discuss the subject and reach conclusions upon their discussion, but they are not bound by that. They intended each nation to pass on it as a unit. Then you have the general condition of not hamstringing the sovereign, and his construction is conclusive.

You have particular schemes of things in which the bare implication may be to let the representatives control it, or in other cases to let them discuss it and bring out something to present to the separate nations, but have the latter determine it. Which of those two you really want at the end, would turn a good deal on this. Is this an activity that contributes to the proper strength of the United Nations as a unit? If so, you would resolve it that way; but it may be that you would strengthen the United Nations itself by giving intiative and power to the individual, in keeping with federalism, not centralization.

PROF. WRIGHT: I agree in general with Mr. Sayre that actions of the General Assembly are merely recommendations. We also want to bear in mind the point Mr. Sohn brought out, that you may have a special treaty by which such an action is given a greater force, as, for instance, the Treaty of Peace with Italy, which gave a legal force to the General Assembly recommendations concerning the disposition of the Italian colonies. There has been a question whether the Assembly resolution concerning Palestine was of that character. Secretary-General

Trygve Lie thought the resolution had a binding character because the mandatory had turned the issue over to the Assembly. I want to raise the question whether an assembly resolution may not have an effective character when it constitutes a general recognition of status.

When the General Assembly admits a member to the United Nations on the recommendation of the Security Council, that is a recognition that the new member is an equal sovereign state according to the principle stated in Article 2(1). That would seem to be an act of general recognition, which would mean that all members of the United Nations and perhaps all members of the family of nations should regard the new member as a sovereign state. I think that is true, for instance, of the Ukraine and Byelorussia. They are equal sovereign states, and perhaps it would be a good thing if we treated them as such.

I would also like to raise the question whether a resolution of the General Assembly declaring that an entity is no longer a non-self-governing territory under Article 73 is not such an act of recognition. Does not such a declaration establish authoritatively that the territory has the status of "self government" if not of "independence?" You might have a reverse situation. Suppose the General Assembly passed a resolution to the effect that the Andaman Islands are "non-self-governing territories." Would that impose upon India the obligation to report on them under Article 72? I think it is a very interesting question whether the Aseembly has the capacity to recognize what are and what are not self-governing territories.

The treatment of Assembly resolutions concerning status as acts of general recognition could be justified by the general practice of states at least if approved by substantial unanimity. States have often acorded recognition to new states by resolution in international conferences. General recognition normally takes place by action of governments seriatim, but there is no reason why it should not be accomplished collectively through action of a general international conference.

Similarly, and this is in regard to Mr. William's point, is not the General Assembly competent to make definitive judgment in regard to its powers, under the domestic jurisdiction clause? Of course, under the League of Nations, the question was specified as one of international law and the same was true at Dumbarton Oaks. The word "international law" was, however, withdrawn from the text at San Francisco. It may have been the intention to make the issue a political matter. Does not that permit each political organ of the United Nations including the

General Assembly to judge definitively on its own competence?

I am therefore raising the question whether the General Assembly may not be competent to make definitive judgments binding at least on all members of the United Nations on questions of the status or capacity of states and other entities.

PROF. McDOUGAL: I would like to suggest that all three of these questions are so ambiguous that one must expect ambiguous answers. If you try to give an operational meaning to this word "binding," as under even the most traditional approach you would be likely to, you would have to conclude that some resolutions were not "binding."

MR. JOHN WILLIAMS (Lakewood, Ohio, Western Reserve University Law School): I would like to raise one point concerning the powers of the General Assembly; namely, the provisions of Article 17, paragraph 2 (that the expenses of the United Nations shall be borne by the members as apportioned by the General Assembly), do give something akin to true legislative power to the General Assembly. There is probably no sanction behind it other than, perhaps, expulsion, or after three-year non-compliance, withdrawal of the member's right to vote. There, and perhaps in the provisions for regulations concerning the term of employment of the Secretary-General, Secretariat, and various other UN internal regulations, we have something that is approaching legislation in the General Assembly.

PROF. BRIGGS: I would like to say to Professor McDougal that I do not think we would get different results if we used his method. There are a great many resolutions of the General Assembly which are binding. There are resolutions with regard to apportioning expenses. There are even resolutions in which states are called upon to do certain things, such as that of February 12, 1946, in which the Assembly made regulations regarding the transfer of League of Nations' assets and funds to the United Nations. I would agree with Mr. Wright on most of the resolutions which he suggested. I believe we get the same result as Professor McDougal although his approach to it might be a bit more involved, or my language may be a bit more traditional.

PROF. McDOUGAL: Would you suggest that what you say is true of all resolutions?

PROF. BRIGGS: Not all of them. Some are binding, some

have legal consequences, and some have no legal consequences.

PROF. SOHN: I think Mr. McDougal is concerned about something mentioned in my statement. I spoke of three cases in which decisions are considered as binding. I might also remind you that in the judgment of the International Tribunal at Nuremberg, some resolutions of the League of Nations were considered as stating that certain things were international crimes. You can go further and probably say that the same effect can be given to the declarations of the General Assembly. The existence of an international crime could be thus established in a way similar to an international rule developed through a convention which has not been ratified by all states. If such a general declaration of the General Assembly should come before the International Court, it would constitute evidence of the fact that an international decision had recognized the existence of an international obligation.

Question 5 on treaties: "To what extent must one state's reservations to a multilateral treaty be accepted by other parties to that treaty, for the reservation-making state to be a party?"

PROF. JAMES O. MURDOCK (George Washington University Law School): This question, of course, is not raised in connection with bilateral treaties. Where there are only two parties to a treaty and there is a reservation by one of them, it is in effected a counter-offer; it has to be either accepted or rejected by the other. It arises in connection with multipartite treaties, where there are a number of countries concerned. It might arise at the time of negotiation, it might arise at the time of signature, it might arise at the time of ratification, or it might arise when a country which was not a signatory might wish to acede to the treaty with reservations.

There is a notion advanced by the Soviet Union and its satellites that a nation may deposit any reservation it sees fit, and that other nations will have to like it. I know of no civilized nations that have accepted that concept. Let us talk about the matter from the standpoint of Western law rather than so-called Soviet law.

The real difficulty, if any, is when you try to be dogmatic about the subject. It is a very simple problem, unless you attempt to formulate an inflexible rule. As an example of inflexibility there is the League of Nations' rule, developed at a time when there was a nation attempting to accede with reservations to a treaty. The League of Nations developed the rule that all

parties to the treaty must agree to the reservation of the party who wishes to accede. This is too inflexible, because there are many different kinds of treaties and reservations.

There is the Pan-American rule, which is at the other extreme of flexibility. This rule provides that for those nations who sign the treaty and ratify it as signed it is binding between them as signed. For those who wish to append a reservation it is binding between them and the nations who accept the treaty as modified by that reservation. Between those who append a reservation and those who do not accept the reservation there is no treaty relationship. There is one advantage to the Pan-American rule in addition to flexibility. This is that they do not accept the deposit of ratification until all nations have been notified and the reaction of each nation has been obtained. On some occasions that procedure has resulted in the withdrawal of the proposed reservation of a particular nation as a result of further negotiations.

Then we come to the rule that the International Court of Justice tried to develop, what you might call the compatibility rule. Here the question applied to the problem is: Is the reservation proposed by a particular nation compatible with the objects of the treaty? The difficulty is that this rule raises a number of subjective problems: what are the essential objects of the treaty? and, what is compatible and what is incompatible? Consequently, the United Nations, after receiving this Advisory Opinion, accepted the decision in connection with the Genocide Convention under consideration, but were unwilling to accept it generally. The United Nations rule now is that when reservations come in, the Secretary-General will receive them, circulate them to all parties, and let each party decide for itself whether it will accept the reservation or not. That practically gets you back to an even more flexible rule than the Pan-American rule, since it is left open to each nation to decide.

I suggest that it is desirable not to be dogmatic, not to try to set up an inflexible rule, because treaties cover all the gamut of human relations. There may be a treaty in which a nation is attempting to become a party to a particular international organization. It would be unfair for a nation to come in with all sorts of reservations, so that it accepts few responsibilities and yet secures a vote in that internationl organization. That would not make sense; it would destroy the very essence of the treaty. On the other hand, suppose you have a treaty which has a number of new international norms in it, undertaking to set forth a number of international standards for adoption. In

such a treaty, is it not desirable to secure ratification of some parts, if possible? Why not leave it to the parties to pass on cases as they arise?

One final remark. There is a wise provision in some treaties, whereby reservations which are made to the treaty by a nation at the time of signature or ratification may be unilaterally withdrawn. At times, nations fearful of some of the obligations of a treaty when it is new will append reservations. Later on, experience shows that the obligations of the treaty are not as onerous as had been apprehended and reservations are withdrawn. This technique was developed in the General Treaty of Inter-American Arbitration of 1929. Some Latin-American states appended a number of rather ingenuous reservations to this treaty. Senator Borah took all of the Latin-American reservations, wrapped them up into one, and then added a few of his own to formulate the reservations for the United States in the resolution adopted by the United States Senate giving its advice and consent to the ratification of a treaty which it had thereby emasculated. The Department of State waited until Mr. Borah was no longer Chairman of the Senate Foreign Relations Committee, resubmitted the treaty, and got it through without destructive reservations.

In summary, a dogmatic solution is impractical. In some treaties it is apparent that all the parties should agree to proposed reservations before the state formulating them is admitted. In other treaties reservations may be accepted by some states and rejected by others. As to those states accepting the reservations, limited treaty relations are thereby established. Cautious procedure, negotiations, and full understanding may be employed to minimize reservations.

Question 6: May multilateral treaties be revised or modified by action of fewer than all the parties to such treaties?

PROF. OLIVER J. LISSITZYN (Columbia University): Policy makers are not infrequently faced with the problem of revision or termination of a multilateral treaty when it is impossible or difficult to obtain the express consent of all the parties to the treaty. This problem is not new; it existed in the nineteenth century, as those who have read Tobin's book on the termination of multipartite treaties will recall. The problem, however, has been accentuated in the twentieth century by the proliferation of multilateral treaties and by the rapidity of political and social change.

The orthodox doctrine, of course, is that no state may be deprived of its rights under a treaty without its consent. This doctrine has been and continues to be reiterated not only by most writers, but also by governments and the courts. Quite recently, for example, the Court of Appeal of the International Jurisdiction of Tangier invoked it in upholding certain capitulatory rights of the United States. It continues to exercise, moreover, a very real influence on the behavior of governments. Great pains are often taken to obtain unanimous consent to the revision of a treaty, and the absence of such consent sometimes delays or prevents revision. Special clauses, moreover, are sometimes inserted in advance to permit revision by some specified procedure which would obviate the necessity of obtaining the specific consent of all the parties. Yet the international community, or certain parts of it, on occasion cannot afford to comply strictly with the doctrine of unanimous consent. Practical needs may require revision when express unanimous consent is unobtainable or difficult to obtain. Recognition of this situation and its consequences has led some writers, notably Scelle, de Visscher, and Jenks, to question the doctrine of unanimous consent. What has actually happened in practice? Let me give a few examples.

In 1936 a conference was held at Montreux to revise the 1923 Lausanne Convention concerning the regime of the Turkish Straits. Italy, a party to the Lausanne Convention, was invited but refused to attend. It reserved its rights but did not object in principle to revision. The Conference proceeded to draw up a new convention, inconsistent with the old, which was put into operation without the express consent of Italy. The procedure caused uneasiness to some governments, notably the British, but was defended by Turkey, which argued that the old convention had lost force anyway because of changed circumstances, and by Greece, which insisted that practical considerations must prevail. Italy did not object very strenuously and two years later adhered to the new convention.

A more recent example is the revision of the Italian Peace Treaty. In 1951, Italy, pleading changed circumstances, asked to be released from the armaments clauses of the peace treaty of 1947. The Western powers, led by the United States, readily acceded, taking care, however, to specify that they were releasing Italy insofar as their own rights were concerned. The Soviet bloc and Yugoslavia took an adverse position. Ethiopia, so far as I know, either did not reply or the reply has never been made public; but there is no indication that it consented expressly.

Despite the lack of unanimous consent, Italy, having obtained the consent of a majority of the parties, considered itself released. So far as the rights of the Soviet Union were concerned, Italy took care to address a formal note stating that it was suspending the performance of its obligations under the treaty toward the Soviet Union on the ground that the latter had violated its obligations under the treaty by vetoing Italy's admission to the United Nations. No such justification, however, seems to have been available with regard to the other non-consenting parties which included Poland, Czechoslovakia, and Yugoslavia.

The status of Trieste was recently changed by agreement of Italy, Yugoslavia, and the Western Allies with the belated blessing of the Soviets, but without the express consent of all the parties to the peace treaty. There were apparently no objections. Care was taken, however, to have the agreement provide for the transfer of administration rather than sovereignty, and it was marked by studied informality.

Still another example: In 1948 a conference at Belgrade proceeded to draw up a new convention on the regime of the Danube. Two of the parties to the previous convention, Belgium and Greece, were not invited. The conference was dominated by the Soviet bloc. Britain and France, parties to the previous convention, refused to accept the new one, which was put into force in the face of their protests. In the discussions, the Soviet delegates referred to previous revisions of the Danube conventions and to the exclusion of Russia from the post-World War I Danube settlement. Strangely enough, Vyshinsky, who always insisted so strenuously on the rule of unanimity in the United Nations, here questioned whether unanimous consent was necessary to the revision.

Numerous other recent instances in which a strict interpretation of the unanimity doctrine was not allowed to stand in the way of desired revisions could be cited. They would include certain of the revisions of the Treaty of Versailles, modifications in the international regimes of certain rivers and territories, e.g., Tangier; the termination of the occupation regime in Japan by the peace treaty of 1951, and transformations of certain international organizations and the corresponding conventions after World War II. In my presentation I have in part relied on the work of a research seminar at Columbia last fall in which some of these examples were thoroughly explored, but many other cases remain to be studied. We found that states, by and large, are not willing to challenge directly the orthodox doctrine of unanimous consent. After all, the doctrine is observed in numerous instances, and a frontal attack on it might disturb the

stability of treaty relations under normal circumstances. Rather, when the occasion arises, states prefer to invoke, if necessary, other doctrines or prescriptions to facilitate revision without express unanimous consent. Justification may sometimes be found in the concepts of implied or tacit consent, e.g., when a party simply fails to object to a revision. This is particularly common in cases of states having no real interest in the subject-matter of the revision. When this justification is not available, grounds may be found for alleging that the non-consenting state no longer has rights under the old treaty anyway; doctrines such as rebus sic stantibus, impossibility of performance, the effect of war, or of prior breach by the non-consenting state, may be invoked, or the old treaty suitably reinterpreted. The disappearance, if only temporary, of the non-consenting state may be alleged; or the fact that it has no recognized government, as in the case of Russia after World War I, may be invoked. Finally, the legal question may simply be passed over in silence.

The upshot of this very brief discussion of a fascinating problem is that the title given to it, "May multilateral treaties be revised or modified by action of fewer than all the parties to such treaties," is not really the most fruitful formulation of the problem. Rather, it should be something like this:

> How, and by what techniques, have multilateral treaties been revised or modified by action of fewer than all parties to such treaties? How can it best be done?

As so stated, the problem, I believe, can be further explored very usefully.

PROF. JARBO MAYDA. (University of Wisconsin Law School): May multilateral treaties be revised or modified by action of fewer than all the parties to such treaties?

Prof. Lissitzyn has covered the main scope of the problem so well that it remains for me only to make a few marginal remarks. If I interpret him correctly, he suggests that the doctrine of unanimous consent still applies and that it may be undesirable to do away with it in a wholesale manner; that, however, multilateral treaties have been changed and the requirement of unanimous consent has been circumvented in that process, or manipulated, or questioned; and, finally, that the problem is not whether such treaties may be revised or modified, but how it has

to be done, and how it can be done best.

It seems to me that by the last formulation or re-formulation of the question he came back, at least by implication, to the most important point of the question as it was posed originally: what is the desirable policy of the problem rather than merely what was the past practice of nations.

I should like to follow up a little on this point and discuss it with some reference not only to what is or was, but what ought to be and what may be perhaps expected in the future. The problem is obviously this: if unanimity of consent is necessary to conclude a treaty, is it also indispensable for its revision or modification? Obviously those original parties which are not in existence at the time of the proposed revision, or the status of which has changed so far that had it been such at the time the treaty was concluded they would not have become parties to it, these parties do not have to consent to the revision; and, unless we want to be quite formalistic about it, the consent of the remaining parties will still be considered unanimous.

On the other hand, there is a question which is very much with us at the present time: is it still true that a unanimous consent in the full sense is necessary for the conclusion of a multilateral treaty or a convention? Or, to put it in different words, is a multilateral treaty valid, and under what conditions, if it is signed, ratified, or aceded to with reservations? The greatest possible minority of the World Court argued in the dissent appended to the Advisory opinion of May 28, 1951 on the Genocide Convention, to which Professor Murdock referred a while ago, that "the practice of governments has resulted in a rule of law requiring the unanimous consent of all parties to a treaty..." But the majority of the Court was guided by a different consideration: the fact of the majority rule in international organization. And the opinion centered around the idea of the "integrity of the convention as adopted"—that means the validity only of such reservations that do not "frustrate or impair, by means of unilateral decisions or particular agreements [one may want to insert: of less than all the parties] the purpose and raison d'etre of the convention."

This opinion was reached in a context different from our topic, and it obviously cannot be applied directly to our problem. An explicit or implied clausula rebus sic stantibus in a long-term multilateral treaty can make all the difference. But I wonder if the time element alone, the duration during which changes in circumstances induce efforts to modify or revise a treaty, is such an absolute value as we may sometimes under-

stand it. Is not an effort to ratify with reservations, if exercised by a sufficient group of signatories or even a single very powerful and influential state, an effort to revise or modify a treaty, although the time element may be a very short one and the changed circumstances may refer only to the political climate in the given capital or capitals? I am thinking, of course, of reservations which affect the substance of such a treaty, and not some minor points.

Drawing on the situation in the field of reservations for an analogy, it seems to me that we may consider with profit, in addition to the various criteria and techniques mentioned by Professor Lissitzyn, the criterion of compatibility which the Court suggested in the opinion on the Genocide Convention. Is the revision proposed by the less than total of the original signatories compatible with the original purpose of the convention? If so, the treaty obviously should be revised even without the consent of all the parties. I am thinking of such a situation as has been created by the first application of the 1949 Geneva Convention, and of a hypothetical present proposal to revise those articles of the convention which have been flagrantly misconstrued in the Korean repatriation situation. Obviously, such a revision should be possible, even if the Soviet Union and her satellites did not consent, because the original purpose of the convention was apparently different from the interpretation its text has allowed.

If there is not an agreement on revision, or an obvious compatibility of the sought modification with the original treaty, then we have the question of the rights of the minority under the treaty; the question whether, in fact, the treaty has been breached and a new treaty concluded by way of these revisions, and the various consequences of this situation. In the case of most political treaties, these are matters of power and interest before which the established rules will have to bend. (The problem itself may soon arise in connection with the future attempted revisions of the Charter). But there are other types of treaties—economic, social-normative, technical-regulatory, etc. —where the question of revision or modification allows for and requires much greater elasticity. In any case, if the Court were engaged to deliver an opinion or a judgment on our problem, it is not unlikely that it may construe a judicial standard parallel with the doctrine of the Advisory opinion on the reservations to the Genocide Convention I discussed earlier.

Question 7: Does violation of a treaty by one party entitle

the other party (or another party) to terminate the treaty unilaterally, or to suspend performance?

(Due to lack of time, Question 7 was not discussed.)

Question 8: How far do "third states" (not parties to the treaty) have rights or duties under treaties?

PROF. WADE NEWHOUSE (Creighton University Law School): First, as to benefits. It is generally conceded that a treaty may confer rights upon third states if that is the intent of the parties to the treaty. However, such is not to be lightly presumed. And if a right is conferred, it is said that the right is not irrevocable. Neither can a party to the treaty be "estopped" on some theory of "detrimental reliance" from denying the benefit. Thus, the "right' is at best a rather precarious one. Nevertheless, as long as the treaty remains in force it may be the source of actual benefit to the third state. The strict constructionist attitude of the past is illustrated by the Panama Canal Toll-Rate Treaty of 1901 between the United States and Great Britain, which purported to guarantee that the Canal would be open to "all nations," free from discriminatory tolls. United States authorities took the view that the treaty did not create any enforceable rights in third states.

Current state practice indicates that states continue to include stipulations in favor of third states in treaties, but the stipulations are so phrased in some instances as to indicate a different result from that reached under the Panama Canal Toll-Rate Treaty. For example, in the 1947 Italian Peace Treaty, Articles 27 through 32 confer certain benefits on Albania, although Albania was not an original party to the Treaty. In Article 29 Italy "formally renounces in favor of Albania" certain property rights and interests, and, in addition, the economic clauses of the treaty are made available to Albania. Assuming the treaty to be in force, could Albania have legally enforced the benefits conferred? The question became moot when at a subsequent date Albania was permitted to adhere to the Treaty.

Another current example is found in the 1952 Peace Treaty with Japan. Certain provisions of that treaty, if carried out, will result in actual benefit to Germany since under Articles 8(c) and 19(c) Germany would receive valuable economic rights. As long as the treaty remains in force, has Germany any enforceable legal rights here? One might well conclude that it has if it were not for Article 25, which provides that "The present treaty shall

not confer any rights, titles, or benefits on any state which is not an Allied Power as herein defined. . . ." Does Article 25 indicate an intent on the part of the states parties to the treaty that Germany as a third state is to have no legally enforceable rights, a result similar to that reached under the Panama Canal Toll-Rate Treaty? Is it the intent of the parties that Japan owes a duty only to the parties to the treaty, which duty if performed will result in a "gratutitous" benefit to Germany? To the contrary, note that Article 21 provides:

> Notwithstanding the provisions of Article 25 . . ., China shall be entitled to the benefits of Articles 10 and 14(a) 2; and Korea to the benefits of Articles 2, 4, 9 and 12 of the present Treaty.

Apparently Article 21 expresses a clear intent to confer legal rights on third states. Thus, for example, Korea would enjoy certain most-favored-nation rights for a limited time in relation to Japan.

These selected examples of current state practice indicate that states act upon the assumption that rights may be conferred on third states, and that those rights may be of actual benefit to such third states as long as the treaty remains in force. But suppose the Japanese Peace Treaty was terminated or modified so as to withdraw the third states' benefits? No suggestion is made that the rights were intended to be irrevocable. Finally, the current treaty provisions may be distinguished from provisions in past treaties such as the Panama Canal Toll-Rate Treaty in that the benefiting third state is expressly specified, so that the presumption against the creation of such rights is overcome.

But what of the second aspect of the question? Does current state practice conform to the orthodox view that treaties may not confer obligations upon third states? What implication has Article 30 of the Italian Peace Treaty, which, in addition to conferring benefits on Albania as a third state, also provides that "Italian nationals in Albania will enjoy the same juridical status as other foreign nationals." It is questionable whether that rule could have had legitimacy, in the absence of the subsequent adherence to the treaty by Albania. That adherence rendered the question moot.

But the question concerning Article 2, paragraph 6, of the United Nations Charter is not moot: "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security."

While the provision is ambiguous, one may reasonably interpret this provision as purporting to impose legal obligations upon non-members. If the orthodox rule that treaties may not confer obligations upon third states is to stand as good law, then Article 2, paragraph 6, cannot be in conformance with international law. I suggest that the particular circumstances present a situation in which the orthodox rule must give a little to the necessities of international life, so that Article 2, paragraph 6, may be said to have, at the very least, a "quasi-legal" status. For the lack of a better term, rules created in such circumstances by such treaties might be designated de facto rules of general international law binding on all states, non-members as well as members. The problem presented by Article 2, paragraph 6, of the Charter is similar to that presented by the Briand-Kellogg Pact of 1928 and faced in the Nuremberg Trials. Such current practice of states indicates that any "modern" system of international law must be adapted to fit the realities of international life in which the concept of sovereignty clashes with the interest of the community in self-preservation.

CHALLENGE OF THE ATOM TO INTERNATIONAL LEGAL STUDIES

CHALLENGE OF THE ATOM TO INTERNATIONAL LEGAL STUDIES

A PANEL DISCUSSION OF KEY QUESTIONS IN INTERNATIONAL LAW RAISED BY PROGRAMS OF PEACEFUL USES OF ATOMIC ENERGY

Presiding — Professor Samuel D. Estep, University of Michigan Law School

Panel Members — Dean E. Blythe Stason, University of Michigan Law School
Roy B. Snapp, District of Columbia Bar

The panel discussion was directed toward eleven specific questions which were set up in mimeographed form and placed in the hands of the members of the conference. The members of the conference were also given pertinent excerpts from the Atomic Energy Act of 1954, and in addition they received a copy of the Agreement for Cooperation concerning the civil uses of atomic energy between the government of the United States of America and the government of the Turkish Republic. These materials constituted the subject matter of the panel discussion.

PROF. SAMUEL D. ESTEP: Our topic for discussion this evening is the atom and international legal studies. It is the view of the members of the panel that atomic energy is one of those unique areas of activity within which we are just beginning to develop international activity and international legal problems.

In introducing the members of our panel I wish to state for them that they disclaim distinction as experts in international law. They do, however, know atomic energy and the legal problems which it is presenting; and they will raise questions of international import which the members of the audience, being experts in international law, will doubtless be able to answer. Dean Stason is the Dean of the Law School of the University of Michigan. In addition, he has from a very early stage been interested in the legal problems of the peacetime use of atomic energy. Within the framework of the University of Michigan's Phoenix Project, a program on the campus dealing with all

phases of research in atomic energy, he developed a project for the study of legal problems of peacetime uses of this new form of energy. He is the head of a three-law-professor team working in this field. He has also acted as a legal consultant to the Dow-Detroit Edison group which has been formulated for the purpose of building a large-scale nuclear reactor for the production of electric power. Finally, he is currently Managing Director of the Fund for Peaceful Atomic Development, an agency sponsored by foundation and other private funds for the promotion of understanding and the encouragement of the use of peaceful atomic energy abroad.

The other member of the panel is Mr. Roy B. Snapp, a member of the bar of the District of Columbia. Although he is now engaged in the active practice of the law, he has in the past acted in various capacities with the governmental development of atomic energy. He was legal adviser to the original Manhattan Project while it was under the command of Lt. Gen. Groves. Later he was Secretary of the Atomic Energy Commission. His current interest in the field is exemplified by his extensive public appearances and articles on various phases of the subject matter. We believe that these panel members can bring before you an enlightening picture of atomic energy as it interests international law students, practitioners, and professors.

We will take up the questions in the agenda, asking Dean Stason to anwer some of the questions and Mr. Snapp certain others. We hope for questions and discussion from the audience. The first question is this:

> Can we look forward to substantial international trade in the peaceful utilization of atomic energy? What articles of commerce would be included in such trade? What are the economic expectations in the field?

Dean Stason, will you respond to this question?

DEAN E. BLYTHE STASON: I am going to begin by presenting a little factual background for the purpose of indicating that we are dealing with an area of potential industrial expansion which undoubtedly, in the course of a generation or so, will be a major item in international affairs. Otherwise we could hardly expect it to raise very significant international questions.

Let us ask ourselves then what kind of things might enter

into the export and the import business in the range of atomic enterprise. We can dispose of this by simple enumeration. International trade will take place in reactor parts and indeed entire reactors (packaged reactors, so called), radio-teletherapy apparatus for hospitals, isotope laboratory equipment for those who are working with tracers, radiation sources, and various other types of isotope applications, particle accelerators, Van de Graaff generators, cyclotrons, and all the rest. There is a whole host of minor equipment items: heat interchange equipment, Geiger counters, scintillation counters, spectroscopes, pumps, control apparatus, fuel elements, shielding materials. A considerable inventory of material will enter into international commercial transactions because foreign nations will need it for their own atomic programs. And then there is the matter of exporting certain skills, the skills of reactor designers, construction engineers, and supervisors for hospital installations and isotope laboratories. This exportation of skills is going to become a factor, and it will create a part of our international law problems.

We are going to export something else which enters into the atomic scene. We are going to export knowledge; we call it data. There is unclassified information and there is classified information. We are going to be exporting both types; and certain international law problems will be presented in connection with that phase of the program. So the business of import-export in this field will involve the handling of tangible, concrete things —equipment and the like—as well as intangibles—skill and knowledge.

Are the people around the world going to want all of this? Are we going to receive export orders? Let us take just one illustration—the matter of electric power is one that looms large in the field. I have before me a tabulation of the electric-power needs of half a dozen countries in Europe and four or five countries elsewhere in the world; and just a few typical figures may serve to illustrate the demand that is going to exist in the future for the kinds of things that are here involved.

Denmark, for example, has a coal supply that will be exhausted in about twelve years, a hydro-electric supply that will be exhausted in less than that—in about six years. Denmark does not use very much electricity, only about 700 kilowatt hours per person per year. It is a country of relatively low utilization. But at the same time it is a country in short supply of the basic fossil fuels and in the energy of falling water. In

the United States, just by way of comparison, the per capita utilization of electric power runs to about somewhat in excess of 2,000 kilowatt hours per year. (We often say that the standard of living of peoples depends upon and is concurrent with the rate of consumption of electric power.) So we can see that Denmark is one country which will need fission fuels: its fossil fuels will be exhausted, and there is plenty of room for development of its electric power demand. Incidentally, at the present time in Denmark it costs about 13 mills per kilowatt hour to generate electric power; 13 mills is easily competitive at the present time with the cost of generating electric power by the use of fissionable fuels.

I can refer to other illustrations. Sweden, France, Italy, Portugal, Belgium, Turkey are all countries in which the existing fossil fuels and hydro sources are vanishing rapidly. The relative amount of utilization of electric power is low; the opportunity for expansion is great. Yet these are not the only areas of the world where the problem exists. In Mexico the present rate of consumption is about 212 kilowatt hours per person per year. There is practically no coal supply, the hydro supply will be exhausted inside of ten years, and the demand curve is going up at the rate of about eight per cent per year. Brazil is similar, the Philippines worse, and Japan still worse. We can say with a great deal of confidence that with reference to electric power alone there is in our generation going to be a substantial demand for the facilities that permit the utilization of fissionable fuels.

This is just power. We could by appropriate illustration go beyond that and establish the fact that other features of the atomic utilization will likewise be in demand and will constitute a sizeable share in the international trade business. So there are these commodities to export and there is the need for them. Obviously they comprise the seeds of an important import-export business for the future. There is a potentiality, in other words, with a tremendous lot to it for our children and for our children's children.

Now, this international trade will not be like trade in automobiles, television sets, refrigerators, or airplanes. It will be different because of the fact, first, that there are tremendous military potentials in the atom, and second, that it is a dangerous thing, which calls for close regulation in the interest of public health and safety. All of this is intended to give a very brief factual background of the type of business that is the subject of discussion for the evening.

PROF. ESTEP. From this brief and necessarily sketchy summary of types of products we may export it is clear that there is going to be an atomic energy international business. Because we are going to be the chief exporter, it seems appropriate to analyze what the limitations are upon the exporting of this material, knowledge and technique, not to mention personnel. We have to take cognizance in detail of the 1954 Atomic Energy Act, and we have asked Mr. Snapp to give us a summary of these limitations as we find them in the Atomic Energy Act. We will now ask Mr. Snapp to tell us the limitations imposed by the Atomic Energy Act of 1954 upon the export and import business, specifically:

(a) Upon authority to export or import "source materials" (Section 64 of the Act);[1]

(b) Upon authority to export or import "special nuclear materials";

(c) Upon authority to export or import "by-product materials" (Section 82 of the Act);[2] and

(d) Upon authority to export or import "component parts" or other equipment (Sec. 11 p. and r., Section 57 (a) (3),[3] Section 103, Section 104).

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1. Section 64. Foreign Distribution of Source Material. "The Commission is authorized to cooperate with any nation by distributing source material and to distribute source material pursuant to the terms of an agreement for cooperation to which such nation is a party and which is made in accordance with Section 123. The Commission is also authorized to distribute source material outside of the United States upon a determination by the Commission that such activity will not be inimical to the interests of the United States."
2. Section 82. Foreign Distribution of By-Product Material.
   (a) "The Commission is authorized to cooperate with any nation by distributing by-product material, and to distribute by-product material pursuant to the terms of an agreement for cooperation to which such nation is a party—
   (b) "The Commission is also authorized to distribute by-product material to any person outside the United States"... if not "inimical to common defense and security."
   (c) "The Commission is authorized to license others to distribute by-product material to any person outside the United States under the same conditions except as to charges as would be applicable if the material were distributed by the Commission."

(Footnote continued)

MR. SNAPP. A first question might be "What is source material?" Basically we consider that natural uranium and and natural thorium, two elements as found in nature, constitute source materials as far as this discussion is concerned. To export a source material you have to have a license from the Commission. As a matter of fact, to engage in any activity listed under (a), (b), or (c) of the question, a license is required to be issued by the Atomic Energy Commission, otherwise you are in violation of the Act. Specifically, with reference to the export of source material, you need a license based upon a determination by the Commission that such an activity "will not be inimical to the interests of the United States."

To take the second item, the export of special nuclear materials is forbidden to private persons under the Atomic Energy Act. The export is not permitted by any person in this country. It can only be accomplished by the Commission.

Going on to the export of by-product materials, the first question that arises is, "What is a by-product material?" For the purposes of our discussion let us identify such materials as radioisotopes,i.e., materials that are used in the hospitals, in agriculture, in medicine and industry, materials that are produced in the atomic pile. They are the debris, the ashes, or materials that are made radioactive in the atomic pile itself. These materials have nothing to do with the detonation of atomic weapons. Nevertheless, to export a by-product material you need a license from the Commission, based on the Commission's determination that such a distribution "will not be inimical to the common defense and security."

The next question deals with the component parts or other equipment, "component parts" meaning important components of a reactor—the machine that will produce fissionable materials. To export the component parts of a facility you again have to have a license, based on the Commission's determination in writing that each such export "will not constitute an unreasonable risk to the common defense and security."

(Footnote continued)

3. Section 57(a)(3). Prohibitions. It shall be unlawful for any person to "directly or indirectly engage in the production of any special nuclear material outside the United States except (A) under an agreement of cooperation made pursuant to Section 123, or (B) upon authorization by the Commission after a determination that such activity will not be inimical to the interests of the United States."

In each case I have quoted a phrase from the Act, and I will have to go back and reread these same phrases, because I would like to point out that the Commission may in certain cases have four applications in front of it and has to make several different findings with respect to them. But notice how slight the variation is in the finding that has to be made by the Commission in each instance. In the case of source materials, i.e., uranium or thorium, you have to have a finding that the activity "will not be inimical to the interests of the United States." For the by-product materials you have to have a finding that the activity "will not be inimical to the common defense and security." To export component parts you have to have a finding that the export "will not constitute an unreasonable risk to the common defense and security." To engage in certain personal services and do other things covered by Section 57(a)(3), you have to have a determination that such an activity "will not be inimical to the interests of the United States."

If anyone has an ambition to be a Commissioner, and would like to decide on the same day what constitutes something that is not inimical to the interests of the United States, what is not inimical to the common defense and security, and what constitutes an unreasonable risk to the common defense and security, all in the same series of applications for a license, he is a very hardy lawyer indeed. Frankly, I do not know how to reconcile the fine distinctions that are drawn in the Atomic Energy Act.

QUESTION FROM THE AUDIENCE. In the light of what we read in newspaper articles as to the very dangerous waste materials that may be discharged by the use of reactors, what impact will this have on our willingness to, or the desirability of, our exporting fissionable material to other countries, which necessarily will increase the use of these materials and increase the discharge of these wastes?

MR. SNAPP. You are quite correct in characterizing the products of atomic reactors as highly toxic, highly dangerous, and highly radioactive. This is one of the reasons that we need to look very closely at the Atomic Energy Act, and one of the reasons that it has a very direct and important bearing on international law. Because you will be exporting and importing, there will be an exchange between countries of this highly radioactive material. It is an inherent product of a reactor. It has to be disposed of or converted to useful purposes. In the international interchange between nations there will have to be built up a body

of law and of rules and of regulations governing the handling of these materials as between the countries.

QUESTION FROM THE AUDIENCE. What is your reaction as to whether the existence of this dangerous waste material will prevent the flow of this kind of material in international commerce?

DEAN STASON. We have learned to live with the automobile which kills how many? 40,000 a year on our highways? And we have learned to fly in airplanes. I think we will learn to live with the atom very comfortably indeed. After all, the atom telegraphs its hazards. Geiger counters can effectively detect radioactivity and, therefore, we have a safety device which, if used properly, will help us a great deal—a safety device that we do not have, I may say, with respect to the products of General Motors, Chrysler, and Ford.

QUESTION FROM THE AUDIENCE. If these are such dangerous by-product materials, we obviously have been creating them for at least the last ten years. What have we been doing with them in our own country?

MR. SNAPP. We have been storing them, and we have been trying to convert some of them into useful materials to be used in industry, agriculture, and medicine. The great problem in this country has been that of storage. There are enormous quantities of highly radioactive substances stored in this country. This is one of the great problems in creating atomic power. How are you going to dispose of the ashes? How can you dispose of them economically? Obviously the hope is to turn them into something that is commercially useful as you attempt to do with any other waste products. In the United States we have had a very careful control exercised by the Commission. We have had only relatively minute quantities of radioactive substances shipped around the countryside. The main United States reactor farm, the main atomic reactor station, at Hanford, Washington, is in just one place. But when you start building power reactors from one end of the world to the other, the waste products inevitably will pile up in the highly industrialized nations like the United States, or Britain, for reprocessing, for further processing, and for disposal. This means that we will be trans-shipping across national boundaries, across the high seas, material that is not only immediately toxic, but can create toxic conditions in sea

life, in microscopic sea life, which in turn can be eaten by the fish, which in turn can be eaten by man, and can remain toxic for very long periods of time.

PROF. ESTEP. Now moving on to another question—Will the broad discretionary authority conferred upon the Atomic Energy Commission with respect to granting, revocation, and modification of licenses to export and import be likely to have a deterrent effect on the building of such business?

Because Dean Stason has had such a long-time interest in administrative law and because there is such a broad administrative discretion conferred by the act, we have asked him to give us his viewpoint on this question.

DEAN STASON. There is plenty of administrative discretionary authority conferred upon the Atomic Energy Commission. Let us look at the statutory provisions. For example, consider Section 82, dealing with the foreign distribution of by-product materials: "The Commission is authorized to license others to distribute by-product material to any person outside the United States under the same conditions except as to charges as would be applicable if the material were distributed by the Commission." There is no standard, you will notice, to govern the exercise of the authority to license—no standard, except the implied standard of reasonableness that applies to all public officers. So much for the granting of these licenses.

A somewhat similar question arises in connection with the revocation of licenses. Again a very broad discretionary power is given. Section 186(a) of the act reads this way: "Any license may be revoked for any material false statement in the application or any statement of fact required under Section 182," or because of any one of a number of other listed derelictions, or "for violation of, or failure to observe, any of the terms and provisions of this Act or of any regulation of the Commission." The broad power of AEC to revoke a license will therefore act as a quard over the utilization of atomic energy for peaceful purposes.

With respect to one other matter, consider the power to modify the license. It is provided in Section 187 that "The terms and conditions of all licenses shall be subject to amendment, revision, or modification by reason of amendments of this Act or by reason of rules and regulations issued in accordance

with the terms of this Act." Again there are no standards set up to guide the Commission in the exercise of its discretionary power, and therefore we find that the Commission control is very powerful indeed.

Concededly, all this power is necessary in the interest of protecting national security, and indeed it is usual to find such discretionary authority in new areas of administrative functioning. But the fact is that we have here a business which is subject to very potent administrative control. The question of interest to us is whether or not it is likely to affect the building up of an export business. Each individual export license, when it is executed, will of course be fait accompli and subsequent revocation or modification will be of no consequence. Business and financial institutions are going to be reluctant, however, to support the building up of all the apparatus of an export business so long as it is subject to this potent power of the Commission. This is one of those facts of life with which atomic business must live, at least for the present; but I think it is worth pointing out that it is a hazard that will undoubtedly increase the cost of capital and increase the amount of governmental red tape that will accompany this new business that we are discussing this evening.

QUESTION FROM THE AUDIENCE. If an American corporation producing heavy machinery that is needed for a reactor had the machinery ready for export by an American company, could the regulations be avoided by getting the nuclear material and fissionable material or the radioactive by-product material from Great Britain?

DEAN STASON. It could be done if the bilateral agreement, which we will discuss in a few moments, pursuant to which the reactor is to be constructed in some other country, is so phrased as to permit the purchase of the nuclear fuels from some other source than this country. I think we may say that there has been no experience in respect to this point. Presumably, as the business settles down, bilateral agreements that are entered into will give an increasing measure of freedom with respect to this matter.

PROF. ESTEP. Could it be possible also, Dean, that the United States Atomic Energy Commission would not authorize the shipment of the component parts unless given assurance that these would be used in accordance with our standards, even though they obtain the special nuclear materials essential to it from some other country?

DEAN STASON. That will be a part of the bilateral agreement. It all depends upon the shape of the bilateral agreement under which the export is permitted.

PROF. ESTEP. Now, I think we should move on to the next question, which is:

> What restrictions are imposed by the Act upon the export of information with respect to nuclear materials?
> (a) Upon transmission of unclassified data?
> (b) Upon transmission of classified data?
> (c) Under what circumstances, if any, can a private United States citizen (for instance, a reactor construction engineer) transmit classified or unclassified data to a foreign country which is a party to a bilateral agreement?

Roy, would you comment on that?

MR. SNAPP. First, I wish to refer to a section which is involved in the question, Section 57(a)(3), which states that no person can, "directly or indirectly, engage in the production of any special nuclear materials outside of the United States except (A) under an agreement for cooperation made pursuant to Section 123, or (B) upon authorization by the Commission after a determination that such activity will not be inimical to the interests of the United States." The application of this to the unclassified field is a very difficult matter. The line is not clear. I am sure that in the coming months there will be some clarification of the provision, some reliable statement as to what constitutes engaging "indirectly" in the production of fissionable material abroad. This same provision was found in the Atomic Energy Act of 1946. It was a provision under which one person was given to understand that he could not teach physics in a foreign university because he might be considered as having engaged indirectly in the production of fissionable material abroad.

I would like to give an example. I could see no difficulty in the University of Michigan sending a transcript of this session of our conference and this discussion to anyone in the world who asks for it. It is unclassified data. It has to do with nuclear affairs. But I do not see that sending it out would be "engaging indirectly in the production of fissionable materials." It seems to me, on the other hand, that if the University of Michigan Law

School undertook under an arrangement with a foreign university to assemble all the unclassified information it could in the atomic energy field and to ship this unclassified library abroad, this might amount to engaging indirectly in the production of fissionable materials abroad.

PROF. QUINCY WRIGHT (University of Chicago, from the audience). Section 57(a)(3) says it applies to "any person" who engages in the production of nuclear materials outside the United States. Does this Act intend to give the United States jurisdiction over persons abroad who may violate this provision even if they are aliens? Does the Act tell you how you define "person?" In the American Banana Company case (213 U.S. 347, 1909) the Sherman Act, though general in terms, was held not to apply to acts done by an American company in Panama. The Supreme Court read into the Sherman Act that it applies only to acts done in the United States.

PROF. MYRES S. McDOUGAL (Yale Law School): The Aluminum Company case 148 F.(2d) 416 (2d cir. 1945), suggests a different result. In that case Judge Learned Hand accepted and elaborated the impact theory of jurisdiction. There, acts done abroad had an impact on business in the United States and were held to give the United States jurisdiction over defendants caught within the United States. I question whether there is anything in international law to preclude the United States from taking jurisdiction over such acts.

PROF. WRIGHT. I respectfully beg to disagree. This law, if its terms are read literally, prohibits a foreigner from doing something in England. Then if he comes to the United States he is in peril that we will put him in jail. I do not think that we by our legislation can impose that peril on an Englishman for doing in England something which is perfectly legal in England.

PROF. ESTEP. Just to get the record straight, let me state the issue. The section referred to purports to deny "any person" the right to send this unclassified data to foreign countries. And the definition of "person" in the Act (Section 11n) is broad enough to include a foreign person or agency or country; so are we not in our law trying to prevent, for example, a British citizen from transferring what we would classify as classified data? Does the Atomic Energy Act of 1954 contemplate that a British citizen who reveals information which we would consider as

classified matter, or unclassified matter included under Section 57(a)(3), contrary to what an American citizen could do under our statute, is covered by our Act; and, if so, is it possible under principles of international law for Congress so to attempt to regulate the British citizen? Let us just assume that Congress meant to cover that kind of situation. Is it possible for Congress under these circumstances to attempt to punish a person not a citizen of the United States for actions physically taking place somewhere else, but which do have an impact on United States activities, for instance pursuant to a bilateral agreement between Great Britain and ourselves? I would like to ask Mr. McDougal to express his views on this question, and then I would like Mr. Wright to express his view on it.

PROF. McDOUGAL. I have very grave doubts about the assumption that the territorial principle of jurisdiction has the vigor today that sometimes is alleged. That doubt is based in part upon a very considerable series of decisions by the Federal courts in this country, most of them since the American Banana Company case. The case which would most clearly support jurisdiction in the situation under discussion is the Aluminum Company case where Judge Hand rendered a decision in the Circuit Court of Appeals, which was "in lieu of a decision" by the United States Supreme Court. This case and other cases stand for the proposition that if agreements are made or other restrictive trade practices engaged in outside our country, in Canada or in Switzerland for example, which interfere with internal economic activity of a kind that the Sherman Act was designed to protect, then our courts, our Government, can, within world prescription and within national prescription, assert jurisdiction over such activities if our officials can catch the defendants or their wealth in this country.

Now, my point with respect to the dissemination of atomic information would be similar; that if these measures to protect our economic well-being under the Sherman Act authorize us, within world prescription, to penalize an agreement made in Switzerland or Canada about activities occurring abroad, then it is not a far-fetched stretch of the imagination to say that we have jurisdiction to penalize activites having impact here in such a way as to interfere with our national security. I would put a higher priority in this context on security than upon economic well-being. Now, I would say that it might not be politically desirable for us to assert this degree of power—I think this is a fantastic statute in many ways. But the point would be this: that

it would be a self-denying act, a suicidal act, for us to say that we do not have such power, that these are matters which should be regulated by agreement. We lose our bargaining position if we ourselves decide that we do not have the power. We have no position from which to coerce an agreement out of the other people if we simply admit that we lack jurisdiction in these premises —that we cannot punish these persons who violate our policies. I simply say that I do not know of anything in international law which would preclude us from doing this if it is really seriously intended. I hope it is not seriously intended.

PROF WRIGHT. I think I would begin with the Harvard Research on International Law, which took the position that you could exercise "universal jurisdiction" only over piracy and other offenses against the law of nations, and that you could exercise "protective jurisdiction" only over offenses directed against the security of the state. I think Professor Dickinson's draft recognizes only those two circumstances under which you could exercise criminal jurisdiction over a foreigner for an act committed abroad. In the case of the Lotus, the P.C.I.J. held that the burden of proof was on the defendant to show that there was a rule of international law that prohibited a particular exercise of jurisdiction. Criminal jurisdiction was said to flow from state sovereignty. International law was not a source of jurisdiction but a limitation upon it. Now, it may be that if an act by a foreigner abroad was in violation of an agreement which the United States had made on the atomic energy matter, you could say it was an offense against international law and that we could exercise jurisdiction over it if committed in territory of a party to the agreement. That is a possible way of bringing it within the Act; but as the Act is worded, it seems to me that we are saying that every Russian who is engaged in Russia in nuclear enterprises there, and every Englishman who is engaged in Australia or in England in the making of nuclear materials, is liable under our laws. We are threatening that if those people come within our territory, any of them, we hold ourselves free to punish them. That can come only under the protective theory. Acts of the Russians might be directed against the United States. It is unlikely that acts of our friends in England would be directed against the United States. I do not believe that we can say that the Englishman who engages in the making of nuclear materials in England is definitely intending to threaten our security in such a way as to make it possible for us to punish him under the protective theory or under the Lotus theory.

I would be inclined to suppose that a foreign government could protest against a proposition of that kind or against the passage of an act which authorizes it. This act threatens punishment of persons beyond our jurisdiction as defined by international law. It seems to me the mere passage of such an act is something that would justify an international protest. If the situation were reversed, and Russia passed an act threatening to punish an American for an act committed in the United States which Russia regarded as hostile to its interests, I think we would object.

DEAN STASON. May I insert a footnote to this discussion? Perhaps it will answer some questions about the meaning of Section 57(a)(3). As Managing Director of the Fund for Peaceful Atomic Development, I am arranging to send a library to Karachi in Pakistan and when I looked at Section 57(a)(3), being a man of good judgment and great caution, I went to the Atomic Energy Commission Legal Counsel's office for advice. I was advised to file a communication with the Commission asking for the authorization to which reference is made under Section 57(a)(3). This I have done. The library might contain a few textbooks on nuclear engineering with a chapter or two here and there on reactor design, and this is the reason why it was felt that this authorization should be sought.

MR. SNAPP. May I just underline the Dean's statement when he was describing the procedure that he went through in connection with furnishing this library to Pakistan. He was not advised by the Commission lawyers that this would be a foolish gesture. He was advised to go ahead and file his application or file his statement.

PROF. ESTEP. The implications to an academic group, I take it, are clear.

PROF. MICHAEL H. CARDOZO (Cornell Law School). I suggest that foreign people who might otherwise come to this country to help us in the further development of atomic energy as they have in the past—most of the developments seem to have come from foreign-born people—might take a look at this section and stay away; because if they once put foot in this country, then went out and did something covered by our law, and then came back, they would be closer to being subject to the jurisdiction of the United States and might be in worse trouble even than those who had never come here. That might mean, for the future, that

we will get less help from people like that than we have had in the past.

PROF. OLIVER J. LISSITZYN (Columbia University). I want to ask why the Act was drawn in such an ambiguous way?

MR. SNAPP. This act is a vast improvement over the former provision. The old provision merely stated that you could not engage directly or indirectly in the production of fissionable material abroad. The new Act says that you may not engage directly or indirectly in the production of fissionable materials unless the Commission determines that such activity will not be inimical to the interests of the United States. So you do have an out as long as you have a Commission determination that your activity will not be inimical to the interests of the United States.

PROF. LISSITZYN. It still leaves it ambiguous as to what materials are covered.

PROF. ESTEP. We now come to the subject of international agreements, and we are going to address ourselves to several questions. They are as follows:

> The Atomic Energy Act makes certain specific provisions to facilitate and encourage interchange with other nations. In fact such encouragement is one of the expressed purposes of the Act. What arrangements are available to carry out this objective?
>
> (a) Bilateral agreements under Section 123.
> (b) International arrangements under Section 124.
> (c) International co-operation under Section 144.
>
> Section 124 constitutes a limitation upon the treaty-making powers of the President in the atomic field. Also the section seems inconsistent with another section of the Act, i.e., Section 121. What are the limitations, if any, upon the President's power to enter into international arrangements?
>
> What has actually been acomplished under the provisions of the Act for international agreements and arrangements?
>
> (a) The Turkey agreement (copies distributed).
> (b) Agreements with other countries pending.

(c) The International arrangement (see Ambassador Patterson's address of April 4, 1955).

Dean Stason, we will ask you to undertake to answer these questions.

DEAN STASON. This will be a rather tedious description of the various ways in which we may proceed to enter into pertinent international agreements to open the doors which will permit persons to engage in the export business to which we have referred, a business to be carried on only under Commission license.

There are two terms with which we must now become familiar. One is the agreement for co-operation and the other is the international arrangement. Those two terms are defined respectively in Sections 11(b) and 11(k) of the Act: "The term 'agreement for co-operation' means any agreement with another nation or regional defense organization authorized or permitted by Section 54, 57, 64, 82, 103, 104, or 144 and made pursuant to Section 123."—a formidable array of limiting sections. The "agreement for co-operation" is more frequently in common parlance called "the agreement." Then the other type of arrangement is covered by Section 11(k): "The term 'international arrangement' means any international agreement hereafter approved by the Congress or any treaty during the time such agreement or treaty is in full force and effect, but does not include any agreement for co-operation." Those are the terms with which we must be familiar; and the two ways in which we can get into this international business are by the bilateral agreement for co-operation and the international arrangement. Let us look at them more closely.

Section 123 of the Act sets up the characteristics and specifications of the agreement for co-operation; it reads:

> "No co-operation with any nation or regional defense organization pursuant to sections 54, 57, 64, 82, 103, 104, or 144 shall be undertaken until [And, incidentally those respectively deal with special nuclear materials, source materials, by-product materials, commercial licenses, research licenses, and Presidential authority] (a) the Commission or, in the case of those agreements for co-operation arranged pursuant to subsection 144 b, the Department of Defense has submitted to the President the proposed agreement for co-operation, together with its recommendation

> thereon, which proposed agreement shall include (1) the terms, conditions, duration, nature, and scope of the co-operation; (2) a guaranty by the co-operating party that security safeguards and standards as set forth in the agreement for co-operation will be maintained; (3) a guaranty by the co-operating party that any material to be transferred pursuant to such agreement will not be used for atomic weapons, or for research on or development of atomic weapons or for any other military purpose; and (4) a guaranty by the co-operating party that any material or any Restricted Data to be transferred to unauthorized persons or beyond the jurisdiction of the co-operating party, except as specified in the agreement for co-operation; . . ."

Subsection (b) of 123 provides that before this agreement becomes effective the President must approve the agreement. Subsection (c) provides that the proposed agreement for co-operation together with the President's approval must lie before the Joint Committee of Congress for a period of thirty days and during which Congress is in session. This, then, is the agreement for co-operation or the so-called bilateral agreement.

Several things about the agreement for co-operation are quite interesting. The agreement originates not with the President, not with some other agency, but with the Atomic Energy Commission. The President is authorized to approve or disapprove, but he is not an active party. Then, the Joint Committee of Congress has its measure of control. The Joint Committee, as you know, is a committee created by Congress under the Atomic Energy Act made up of members of both the House and the Senate, and established for the purpose of virtually living with the Atomic Energy Commission. The Joint Committee retains its hand on agreements for co-operation. Those are the interesting characteristics of this agreement.

QUESTION FROM THE AUDIENCE. The section does not say expressly that the Joint Committee has the power to disapprove these treaties. Could you comment on that?

DEAN STASON. It is true that there is no such provision, yet the Joint Committee can recommend to Congress and Congress can take such action as it deems appropriate under the circumstances; so the Committee has a substantial control in fact although not a direct authority in law to veto the agreement.

Then we turn to the other device, the international arrangement. That is set up under Section 124 of the Act. Here the President comes into action.

> "The President is authorized to enter into an international arrangement with a group of nations providing for international cooperation in the nonmilitary applications of atomic energy and he may thereafter cooperate with the group of nations pursuant to sections 54, 57, 64, 82, 103, 104, or 144 a.: Provided, however, That the cooperation is undertaken pursuant to an agreement for cooperation entered into in acordance with section 123!'

In other words, the President is given the authority by this section to set up the atomic pool to which reference was made by him in his memorable address before the United Nations on December 8, 1953. This was the message that was heard around the world. By Section 124, the President is authorized to proceed with the creation of such a pool, provided, however, that this pool when it is created by an international arrangement shall be pursuant to an agreement for co-operation entered into in accordance with Section 123. This means that the international agreement route of setting up the atomic international agency is subject to the Atomic Energy Commission, 123(a) and to the Joint Committee, 123(c) with whatever power the Joint Committee has. So this is the other device.

There is one other section to which reference ought to be made, and that is section 44 of the Act on international cooperation. It reads:

> "a. The President may authorize the Commission to co-operate with another nation and to communicate to that nation Restricted Data on:
>
> (1) refining, purification, and subsequent treatment of source material,
> (2) reactor development,
> (3) production of special nuclear material,
> (4) health and safety,
> (5) industrial and other application of atomic energy for peaceful purposes, and
> (6) research and development related to the foregoing

> "Provided, however, That no such cooperation shall involve the communication of Restricted Data relating to the design or fabrication of atomic weapons; And provided further, That the cooperation is undertaken pursuant to an agreement for cooperation entered into in accordance with section 123, or is undertaken pursuant to an agreement existing on the effective date of this Act."

This permits the President to transmit Restricted Data relative to reactor development and the production of special nuclear material and other important elements necessary to permit the building up of a nuclear business in some other state or nation. Then 144(b) goes on to authorize the Department of Defense to do certain things.

The important points to note are these. The President's power under Sections 124 and 144 is subject to Commission control under Section 123. It is likewise subject to the Joint Committee control under 123. We might ask ourselves, does this create a Bricker Amendment by statute, and impose limitations upon the President's power that we have hitherto thought would have to be accomplished by constitutional amendment?

I believe that it does not impose a Bricker Amendment. I hope not. I would rather regard it as merely an alternative way of doing things. That it can be treated as an alternative is made manifest by examination of another section that deals with this same international agreement and arrangement proposition, Section 121. It is there provided:

> "Any provision of this act or any action of the Commission to the extent and during the time that it conflicts with the provisions of any international arrangement made after the date of enactment of this act shall be deemed to be of no force or effect."

And an international arrangement by definition in Section 11(k) includes two things: first, the international arrangement approved by Congress, presumably by joint resolution, and second, a treaty. So what we have set up in Sections 121, 123, 124, and 144 is really an alternative arrangement pursuant to which we can enter into international understanding—not by treaty, not by executive agreement, but by the device of the international arrangement or the agreement for co-operation. The important feature of the alternative arrangement is the close control retained by the Atomic Energy Commission and the Joint Commit-

tee. These, then, are the devices that are available for entering into international arrangements to promote international business in atomic energy.

Now, what has been done, what has been actually accomplished under these provisions? I wish to summarize this very briefly. On May 3, less than two months ago, the first agreement for co-operation was entered into between the United States and the Turkish Republic. This agreement is a very simple affair, consisting of only ten sections. It might be worthwhile to look at it, because it is an historic document. It sets up the international understandings necessary to permit Turkey to proceed to erect a research reactor, not a power reactor, but a small apparatus for research purposes. Article I of the agreement permits an exchange of information with respect to design of reactors, health and safety, and use of radioactive materials. Article II does several things, but most importantly it states that the United State Government will lease to the Government of the Turkish Republic U-235 to the extent of six kilograms, not to exceed 20% U-235 concentration.

PROF. LOUIS B. SOHN (Harvard Law School). Is this source material or special nuclear material?

DEAN STASON. The term source material means uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of Section 61 to be source material or ores containing one or more of the foregoing materials in such concentration as the Commission may by regulation from time to time determine. Special nuclear material is defined to mean plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material that the Commission decides, so an enrichment automatically makes a special nuclear material.

To continue outlining the Turkish agreement, Article III deals with other types of reactor materials that might have to be shipped. Article IV[1] makes it clear that private individuals and private individual operations are permitted within the framework of the agreement for co-operation. Article V makes it clear that Restricted Data are not transmitted.

1. ARTICLE IV. It is contemplated that, as provided in this Article, private individuals and private organizations in either the United States or Turkey may deal directly with private individuals and private organizations in the other country. Accordingly, with respect to the subjects of agreed

(Footnote continued)

PROF. CARDOZO. I would like to call attention to the provision in Article IV. That would require Turkey and people in Turkey to observe the applicable laws of the United States, this means that if we changed them after the agreement Turkey would have to observe our laws as changed.

DEAN STASON. Articles VI[2] and VII[3] deal with the safeguards against improper use, carrying out the guaranties that are required by Section 123(a) 2, 3, and 4—safeguards to protect against the use of the materials for weapons purposes, to prevent material getting to unauthorized persons or going beyond the jurisdiction of the receiving contracting party. Article VIII gives the term of the agreement, ten years subject to renewal, and Article IX is important because of its forward-looking character. Article IX expresses a hope of the parties that this initial agreement will make way for a consideration of further co-operation leading to design, construction, and operation of power-producing reactors. Of course that is a pious hope rather than anything else, but still that is the wave of the future. Well, this is the Turkish Agreement entered into less than two months ago. Since that time there have been twenty-one other bilateral agreements consummated at least to the extent of being laid before the Joint Committee for ultimate approval.

I have the complete list here minus the last nine, and I am going to ask Eric Stein, who is on the staff of the State Department, to provide the names of the last nine. These things happen overnight. I have in my hand a clipping that was taken from a newspaper of about a week ago, and at that time we had agreement with Britain, Canada, Belgium, Turkey, Lebanon, Israel, Italy, Spain, Switzerland, Denmark, Colombia, Brazil, and Argentina. Eric, will you supplement that with the latest word from Washington?

MR. ERIC STEIN (Dept. of State): The additional list includes the Philippines, Venezuela, Netherlands, Chile, Pakistan, Japan, Greece, and Portugal. I should tell you a story because it is quite a propos. One day recently the State Department

(Footnote continued)

exchange of information as provided in Article I, the Government of the United States will permit persons under its jurisdiction to transfer and export materials, including equipment and devices, to, and perform services for, the Government of the Turkish Republic and such persons under its jurisdiction as are authorized by the Government of the Turkish Republic to receive and possess such materials and utilize such services, subject to:

scheduled about six of these signings, formal ceremonies which take fifteen minutes each. We had the waiting room crowded, creating complete confusion. After one of the signings, one of the ambassadors who signed the agreement came to us and said, "Well, you gentlemen should be congratulated. The United States has intoduced mass production methods into the production of automobiles and airplanes. Now you have really arrived—you have introduced mass production efforts into treaty-making."

A. Limitations in Article V.
B. Applicable laws, regulations and license requirements of the Government of the United States, and the Government of the Turkish Republic.

2. ARTICLE VI.

A. The Government of the Turkish Republic agrees to maintain such safeguards as are necessary to assure that the uranium enriched in the isotope U-235 leased from the Commission shall be used solely for the purposes agreed in accordance with this Agreement and to assure the safekeeping of this material.

B. The Government of the Turkish Republic agrees to maintain such safeguards as are necessary to assure that all other reactor materials, including equipment and devices, purchased in the United States of America under this Agreement by the Government of the Turkish Republic or authorized persons under its jurisdiction, shall be used solely for the design, construction, and operation of research reactors which the Government of the Turkish Republic decides to construct and operate and for research in connection therewith, except as may otherwise be agreed.

C. In regard to research reactors constructed pursuant to this Agreement the Government of the Turkish Republic agrees to maintain records relating to power levels of operation and burn-up of reactor fuels and to make annual reports to the Commission on these subjects. If the Commission requests, the Government of the Turkish Republic will permit Commission representatives to observe from time to time the condition and use of any leased material and to observe the performance of the reactor in which the material is used.

3. ARTICLE VII. Guaranties Prescribed by the U.S. Atomic Energy Act of 1954

The Government of the Turkish Republic guaranties that:

A. Safeguards provided in Article VI shall be maintained.

B. No material, including equipment and devices, transferred to the Government of the Turkish Republic or authorized persons under its jurisdiction, pursuant to this Agreement, by lease, sale or otherwise will be used for atomic weapons or for research on or development of atomic weapons or for any other military purposes, and that no such material, including equipment and devices, will be transferred to unauthorized persons or beyond the jurisdiction of the Government of the Turkish Republic except as the Commission may agree to such transfer to another nation and then only if in the opinion of the Commission such transfer falls within the scope of an agreement for co-operation between the United States and the other nation.

DEAN STASON. This is the "agreement for co-operation" side. Now what has happened with respect to the "international arrangement" under Section 124? There have been no international arrangements consummated as of the present date, at least so far as the general public is aware. However, Ambassador Morehead Paterson, who is in charge of this part of the program, delivered an address at San Francisco on April 4 in which he outlined the potentialities of the international arrangement, giving a listing of the things that might be done pursuant to it, and closed with this short paragraph:

> "We have made definite progress in drafting a statute for the agency which takes into consideration many suggestions made by a number of states to us both directly and into the debates in the United Nations last fall. Perhaps I could summarize the existing status of the agency by saying that it is about to pop."

So the international agency which will create the atomic pool for international development is about to "pop." In this case a group of nations is proceeding by international arrangement to set up an international development agency, even though they may later have to work through the bilateral agreement process.

PROF ESTEP. Now we will raise some of these questions. I am going to ask Mr. Snapp to give us one other brief bit of information, that is, to comment on the question:

> Can private enterprise in foreign countries benefit by international agreements and arrangements with the United States, or is such benefit limited to the foreign contracting states? Reference is made here to the recent Italian experience.

MR. SNAPP: As long as a private U.S. person acts within the framework of an agreement for co-operation, and as long as he is authorized as a person entitled to deal abroad, and the person that he wishes to deal with abroad is authorized by his government—and by authorized I assume that his government would follow essentially the same kind of security procedures as those of our Government—then the U.S. person should be able to do business with a foreign company, using a very rough analogy, in the same way American businesses can engage in commercial activities with each other here. For example, Consolidated Edison, as you all know, is planning to build a

power reactor. In the process of doing this they have consulted, let us say, with Babcock and Wilcox, General Electric, Westinghouse, and the other American companies. They have done this on a classified basis, they have done it by direct company-to-company negotiations, with the Atomic Energy Commission playing a small, or essentially no role. In the international field I am sure that the Commission and foreign atomic energy boards or commissions will play a somewhat larger role, but at the same time I can see no reason why there cannot be a fruitful and profitable business being done on a classified basis between U.S. firms and foreign firms in the atomic energy field.

DEAN STASON: I think we should add a brief footnote to that. I hope that what you say is being understood generally by foreign nations. At least one foreign nation has not so understood it, or at least did not in the first instance. The attitude taken before the Italian Parliament when a bill was introduced by the government was this: that the atomic business in Italy had to be a government monopoly because otherwise it would not be possible for Italy to obtain the benefits of agreements for co-operation with other nations including the United States. In other words, the Italians misconstrued the meaning of Section 123. I think it is clear that you stated the true intent of Congress, because Congress would hardly open the door to private industry in the United States and close it to private industry abroad. But this misinterpretation has in fact taken place, and it does seem desirable that the misconstruction of Section 123 ought to be corrected so far as it is possible to do so.

PROF. ESTEP: Now before we close I would like to raise a general question in connection with an international law problem that seems to be inevitably involved in international commerce in these products. In connection with the transportation of radioactive materials and special nuclear materials, we have to recognize that necessarily we are going to cross international waters, international land boundaries, international air boundaries. What if radio-active material is in a solution form, and the tanker that is carrying it has an accident and deposits the material into the ocean where it contaminates the fish, which are eaten by people; or suppose you are traveling in a plane and it crashes and radioactive products contaminate the land; or you are on a train or a bus or a truck and you have an accident in which the material is discharged—a very poisonous, very dangerous kind of material. The question I ask is this:

> When we get into international commerce, is there not very clearly some kind of an international problem as to what the liability is going to be or under what rules we are going to apply it? Does it make a difference if it is a private company shipping it or if it is an international pool?

I would like to call upon Professor McDougal to comment on this.

PROF. McDOUGAL. One must check carefully with the municipal or national decisions for analogies on questions of this type. The Trail Smelter case is of course the international decision which is closest in point. It may be cited to the effect that there is liability for unreasonable injury to another nation state by pollution. Most nation states go along with this test of reasonableness in their internal law. We must here come back to the basic notions that underlie most civilized systems of law. The situation is thus not entirely clear, but, drawing upon analogy of municipal decisions, this is probably the position in the nuisance cases.

The key word is "reasonable." Hence if the activity which causes loss is undertaken with reasonable precautions, the same standards as one would apply in internal activities, there might be no liability. On the other hand, the whole context including the activity which causes the harm and the type of activity interfered with, the values interfered with and the value of the activity being undertaken—all of these would be taken into account by a decision-maker in passing upon whether an activity is reasonable or not. I do not think there is anything particularly difficult about the problem. Each case would have to be handled in the light of all the variables in its context.

PROF. ESTEP. Would that also apply in the case of an international pool arrangement in which the employees of the international pool were guilty of some negligence and something happened? Who would be responsible?

PROF. McDOUGAL. Much would depend upon what was said in the charter of the pool.

PROF. ESTEP. Assuming that the charter said nothing about liability for acidents, then what happens?

PROF. McDOUGAL. This is something which ought to be provided for in the charter setting up the pool. I do not think

such questions should be left to customary doctrines, but in this case one would be thrown back upon the usual tests of scope of authority, reasonableness, etc.

DEAN STASON. If, however, a privately-owned power reactor in Canada were to do what the Chalk River reactor did, namely, cut loose and distribute radioactive materials around the countryside and across national boundary lines, then I suppose the Trail Smelter case would be perfectly applicable, would it not? But if it is set into a picture involving large public operations and major considerations of public welfare, it may well tip the balance the other way.

PROF. McDOUGAL. Yes. Considering the whole context it would appear not unreasonable to say that this activity was authorized. Under some circumstanes, however, this might be answered differently. It might still be lawful to carry on the activity but you might have to pay damages. I would be reluctant to come to the conclusion that a great public enterprise could be carried on in peacetime without the liability to pay those who are necessarily injured by it.

PROF. ESTEP. There is one other example that the panel is particularly interested in and maybe somebody else could comment on this, perhaps Professor Bishop of our own faculty could do so. Mr. Bishop, do you see any international problems involved in case the international pool, or some other nation, one of the signatory countries to the international agreement, should dispose of waste material in international waters beyond the territorial shelf or the three-mile limit in cement caskets, and then the caskets should break open and pollute the waters. Are there international principles that could be applied to that kind of situation?

PROF. WILLIAM W. BISHOP, JR. (University of Michigan Law School): We have not had anything exactly in point, but it seems to me that the same principles Mr. McDougal has referred to could well be used. Those responsible for taking the action do it at the peril of having to pay damages, particularly where it is found that the precautions taken were not sufficient. We are speaking here with very little to go on, since the earlier problem of pollution of the sea by oil remains uncovered by any treaty now in force despite efforts over the last thirty-five years to deal with the problem. I think, however,

that the general principles common to the laws of civilized countries would apply. There would be liability if the damage were done by unreasonable acts or if it would be unreasonable not to pay for the consequences of doing a highly dangerous act, taking up the Fletcher v. Rylands idea of liability without fault.

PROF. ESTEP. There is one point that we might suggest. It is extremely difficult to determine exactly when any particular radiation exposure occurred, where it came from, and how much it added to the injury. There are some difficult problems of evidence, whether they be concerned with local or international disputes. If you drop a casket in one part of the ocean and currents start taking it around, you do not know which fish got which man's radioactive material and which people ate which current's fish, and so on; so there are some real problems simply from the standpoint of legal proof. But now our time has run out and we must adjourn, without, however, solving all of the potential international problems of the atom.

ADAPTING INTERNATIONAL LAW TO NEW NEEDS AS EXEMPLIFIED IN THE FIELDS OF HIGH SEAS FISHERIES, CONTINENTAL SHELF, AND TERRITORIAL WATERS

June 25, 1955

ADAPTING INTERNATIONAL LAW TO NEW NEEDS AS EXEMPLIFIED IN THE FIELDS OF HIGH SEAS FISHERIES, CONTINENTAL SHELF, AND TERRITORIAL WATERS

The following mimeographed documents were distributed and used as a basis for discussion:

DOCUMENTS FOR DISCUSSION ON HIGH SEAS FISHERIES, CONTINENTAL SHELF, AND TERRITORIAL WATERS

INTERNATIONAL LAW COMMISSION, 1953 DRAFT ARTICLES ON HIGH SEAS FISHERIES (Report of Fifth Session, UN General Assembly Official Records, 8th sess., supp. no. 9; A/2456; 48 A.J.I.L. Supp. 39)

"Article 1. A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged, may regulate and control fishing activities in such areas for the purpose of protecting fisheries against waste or extermination. If the nationals of two or more States are engaged in fishing in any area of the high seas, the States concerned shall prescribe the necessary measures by agreement. If, subsequent to the adoption of such measures, nationals of other States engage in fishing in the area and those States do not accept the measures adopted, the question shall, at the request of one of the interested parties, be referred to the international body envisaged in article.

"Article 2. In any area situated within one hundred miles from the territorial sea, the coastal State or States are entitled to take part on an equal footing in any system of regulation, even though their nationals do not carry on fishing in the area.

"Article 3. States shall be under a duty to accept, as binding upon their nationals, any system of regulation of fisheries in any area of the high seas which an international authority, to be created within the framework of the United Nations, shall prescribe as being essential for the purpose of protecting the fishing resources of that area against waste or extermination. Such international authority shall act at the request of any interested State."

INTERNATIONAL LAW COMMISSION, 1953 DRAFT ARTICLES ON CONTINENTAL SHELF (Ibid.)

"Article 1. As used in these articles, the term 'continental shelf' refers to the sea-bed and subsoil of the submarine areas contiguous to the coast, but outside the area of the territorial sea, to a depth of two hundred metres.

"Article 2. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.

"Article 3. The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas.

"Article 4. The rights of the coastal State over the continental shelf do not affect the legal status of the airspace above the superjacent waters.

"Article 5. Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not prevent the establishment or maintenance of submarine cables.

"Article 6.

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or fish production.

2. Subject to the provisions of paragraphs 1 and 5 of this article, the coastal State is entitled to construct and maintain on the continental shelf installations necessary for the exploration and exploitation of its natural resources and to establish safety zones at a reasonable distance around such installations and to take in those zones measures necessary for their protection.

3. Such installations, though under the jurisdiction of the coastal State, do not possess the status of islands. They have no territorial sea of their own and their presence does not affect the delimitation of the territorial sea of the coastal State.

4. Due notice must be given of any such installations constructed, and due means of warning of the presence of such installations must be maintained.

5. Neither the installations themselves, nor the said safety zones around them may be established in narrow channels or on recognized sea lanes essential to international navigation.

"Article 7.

1. Where the same continental shelf is contiguous to the territories of two or more States whose coasts are opposite to

each other, the boundary of the continental shelf appertaining to such States is, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, the median line every point of which is equidistant from the base lines from which the width of the territorial sea of each country is measured.

2. Where the same continental shelf is contiguous to the territories of two adjacent States, the boundary of the continental shelf appertaining to such States is, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, determined by application of the principle of equidistance from the base lines from which the width of the territorial sea of each of the two countries is measured.

"Article 8. Any disputes which may arise between States concerning the interpretation or application of these articles should be submitted to arbitration at the request of any of the parties."

INTERNATIONAL LAW COMMISSION, 1953 DRAFT ARTICLE ON CONTIGUOUS ZONE (Ibid.)

"On the high seas adjacent to its territorial sea, the coastal State may exercise the control necessary to prevent and punish the infringement, within its territory or territorial sea, of its customs, immigration, fiscal or sanitary regulation. Such control may not be exercised at a distance beyond twelve miles from the base line from which the width of the territorial sea is measured."

INTER-AMERICAN JURIDICAL COMMITTEE, DRAFT CONVENTION ON TERRITORIAL WATERS AND RELATED QUESTIONS, Nov. 1952 (Pan American Union, Dept. of International Law)

"Article 1. The signatory States recognize that present international law grants a littoral nation exclusive sovereignty over the soil, subsoil, and waters of its continental shelf, and the air space and stratosphere above it, and that this exclusive sovereignty is exercised with no requirement of real or virtual occupation.

"Article 2. The signatory States likewise recognize the right of each of them to establish an area of protection, control, and economic exploitation, to a distance of two hundred nautical miles from the low water mark along its coasts and those of its island possessions, within which they may individually exercise mili-

tary, administrative, and fiscal supervision over their respective territorial jurisdictions.

"Article 3. When two or more continental shelves, or areas of protection and control, overlap, the States to which they belong shall limit the scope of their sovereignty or jurisdiction by mutual agreement or by submitting the question to the procedures established by the Parties for the settlement of international controversies.

"Article 4. The principles of customary or treaty law heretofore recognized between the parties with respect to territorial waters, and specifically those referring to the exploitation of natural resources and the rights of navigation are applicable to the continental shelf.

"Article 5. Taking into account the fact that the laws and practices of the signatory States show divergences with respect to the demarcation of the continental shelf and the area of protection, and with respect to the definition and scope of their rights thereover as regards the utilization thereof by another State, the Parties agree to study these matters jointly in order to obtain, as far as possible, a uniform system."

"TRUMAN PROCLAMATION"; PRESIDENTIAL PROCLAMATION 2688, Sept. 28, 1945, on Coastal Fisheries Policy. (59 Stat. 885)

"Whereas for some years the Government of the United States of America has viewed with concern the inadequacy of present arrangements for the protection and perpetuation of the fishery resources contiguous to its coasts, and in view of the potentially disturbing effect of this situation, has carefully studied the possibility of improving the jurisdictional basis for conservation measures and international co-operation in this field; and

"Whereas such fishery resources have a special importance to coastal communities as a source of livelihood and to the nation as a food and industrial resource; and

"Whereas the progressive development of new methods and techniques contributes to intensified fishing over wide sea areas and in certain cases seriously threatens fisheries with depletion; and

"Whereas there is an urgent need to protect coastal fishery resources from destructive exploitation, having due regard to conditions peculiar to each region and situation and to the

special rights and equities of the coastal State and of any other State which may have established a legitimate interest therein;

"Now, therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to coastal fisheries in certain areas of the high seas:

"In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale.

Where such activites have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulations and control of the United States. Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements. The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected."

INFORMAL DRAFT, Nov. 1953

"Article 1. The nationals of every state shall be free to fish anywhere on the high seas subject to the limitations herein set forth.

"Article 2. Any state may regulate the fishing activities on the high seas of its own nationals and of the vessels flying its flag. Any two or more states may by agreement regulate the fishing activities on the high seas of their own nationals and of the vessels flying any of their flags.

"Article 3. If the state or states whose nationals are the only fishermen substantially exploiting a stock of fish imposes limitations on its or their own nationals with respect to a stock

of fish wholly or partly on the high seas, other states entering the fishery shall impose the same regulations upon their nationals, provided (a) the stock of fish involved will be depleted as a commercial resource unless the fishing based thereon is restricted, (b) the regulations are reasonable, based upon appropriate scientific findings, and designed to produce a maximum sustained yield from the stock of fish, and (c) the regulations by their terms are subject to change to conform with changes in the stock of fish or fishery.

"When a stock of fish is contiguous to a coastal state or states such coastal state or states, even though their nationals do not engage in fishing that stock, shall be entitled, upon conforming to the same obligations assumed by the regulating state or states and participating in the research and discussions concerning the fishery, to participate on an equal basis in the establishment of the conservation regulations for the fishery in conformity with the standards laid down above.

"Article 4. If a state, or a combination of states, is making reasonably full utilization of a fishery upon a sustained yield basis, and it or they are imposing fishery restrictions upon its or their own nationals to produce maximum sustained yield, and the maximum sustained yield from the fishery will not be substantially increased by the introduction of new fishermen, then all other states shall require their nationals to abstain from engaging in such fishery, provided that in the case of a fishery contiguous to the coast of a state or states such coastal state or states shall not be required to abstain from engaging in such fishery.

"Article 5. Any dispute as to the interpretation or application of these articles, which is not settled as a result of negotiation, shall be submitted at the instance of any of the states concerned in such dispute to international arbitral or judicial settlement—either in accordance with general obligations for compulsory pacific settlement; or preferably under a specialized system providing for determination by arbitrators chosen by each side to the dispute, and umpires chosen by mutual agreement or named by the President of the International Court of Justice, which arbitrators and umpires shall have special competence in matters of international fisheries conservation."

INTERNATIONAL LAW COMMISSION, 1954 REPORT ON TERRITORIAL WATERS (Report of Sixth Session, UN Gen. Ass. Official Records, 9th sess., supp. no. 9; A/2693; 49 A.J.I.L. Supp. 1)

Excerpts from report

"68. On the question of the breadth of the territorial sea, divergent opinions were expressed during the debates at the various sessions of the Commission. The following suggestions were made:

(1) That a uniform limit (three, four, six or twelve miles) should be adopted;

(2) That the breadth of the territorial sea should be fixed at three miles, subject to the right of the coastal state to exercise, up to a distance of twelve miles, the rights which the Commission has recognized as existing in the contiguous zones;

(3) That the breadth of the territorial sea should be three miles, subject to the right of the coastal state to extend this limit to twelve miles, provided that it observes the following conditions:

(i) Freedom of passage through the entire area must be safeguarded;

(ii) The coastal state may not claim exclusive fishing rights for its nationals beyond the distance of three nautical miles from the base line of the territorial sea. Beyond this three-mile limit the coastal state may prescribe regulations governing fisheries in the territorial sea, though the sole object of such regulations must be the protection of the resources of the sea;

(4) That it should be admitted that the breadth of the territorial sea may be fixed by each state at a distance between three to twelve miles;

(5) That a uniform limit should be adopted for all states whose coasts abut on the same sea or for all states in a particular region;

(6) That the limit should vary from state to state in keeping with the special circumstances and historic rights peculiar to each;

(7) That the basis of the breadth of the territorial sea should be the area of sea situated over its continental shelf;

(8) That it should be admitted that the breadth of the territorial sea depends on different factors which vary from case to case, and it should be agreed that each coastal state is entitled to fix the breadth of its own territorial sea in accordance with its needs;

(9) That the breadth of the territorial sea, in so far as not laid down in special conventions, would be fixed by a diplomatic conference convened for this purpose.

69. The Commission realized that each of these solutions would meet with the opposition of some states. However, agreement will be impossible unless states are prepared to make concessions."

Draft Articles (excerpts)

"Article 17 Meaning of the right of passage

1. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering inland waters, or of proceeding to inland waters, or of making for the high sea from inland waters.

2. Passage is not innocent if a vessel makes use of the territorial sea of a coastal state for the purpose of committing any act prejudicial to the security or public policy of that state or to such other of its interests as the territorial sea is intended to protect.

3. Passage includes stopping and anchoring, but in so far only as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress."

"SECTION A: VESSELS OTHER THAN WARSHIPS

"Article 18 Rights of innocent passage through the territorial sea.

Subject to the provisions of these regulations, vessels of all states shall enjoy the right of innocent passage through the territorial sea."

"Article 19 Duties of the coastal state

1. The coastal state is bound to use the means at its disposal to ensure respect in the territorial sea for the principle of the freedom of communication and not to allow the said sea to be used for acts contrary to the rights of other states.

2. The coastal state is bound to give due publicity to any dangers to navigation of which it has knowledge."

"Article 20 Right of protection of the coastal state

1. The coastal state may take the necessary steps in the territorial sea to protect itself against any act prejudicial to the security or public policy of that state or to such other of its interests as the territorial sea is intended to protect, and, in the case of vessels proceeding to inland waters, against any breach of the conditions to which the admission of those vessels to those waters is subject.

2. The coastal state may suspend temporarily and in definite areas of its territorial sea the exercise of the right of innocent passage on the ground that that is necessary for the maintenance of public order and security. In this case the coastal state is bound to give due publicity to the suspension."

"Article 21 Duties of foreign vessels during their passage

Foreign vessels exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal state in conformity with these regulations and other rules of international law and, in particular, as regards:

(a) The safety of traffic and the protection of channels and buoys;

(b) The protection of the waters of the coastal state against pollution of any kind caused by vessels;

(c) The protection of the products of the territorial sea;

(d) The rights of fishing, hunting and analogous rights belonging to the coastal state."

"Article 22 Charges to be levied upon foreign vessels

1. No charge may be levied upon foreign vessels by reason only of their passage through the territorial sea.

2. Charges may only be levied upon a foreign vessel passing through the territorial sea as payment for specific services rendered to the vessel."

"Article 23 Arrest on board a foreign vessel

1. A coastal state may not take any steps on board a foreign vessel passing through the territorial sea to arrest any person or to conduct any investigation by reason of any crime committed on board the vessel during its passage, save only in the following cases:

(a) If the consequences of the crime extend beyond the vessel; or

(b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or

(c) If the assistance of the local authorities has been requested by the captain of the vessel or by the consul of the country whose flag the vessel flies.

2. The above provisions do not affect the right of the coastal state to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign vessel lying in its territorial sea, or passing through the territorial sea after leaving the inland waters.

3. The local authorities shall in all cases pay due regard to the interests of navigation when making an arrest on board a vessel."

"Article 24 Arrest of vessels for the purpose of exercising civil jurisdiction

1. A coastal state may not arrest or divert a foreign vessel passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the vessel. A coastal state may not levy execution against or arrest the vessel for the purpose of any civil proceedings save only in respect of

obligations or liabilities incurred by the vessel itself in the course or for the purpose of its voyage through the waters of the coastal state.

2. The above provisions are without prejudice to the right of the coastal state in accordance with its laws to levy execution against, or to arrest, a foreign vessel in the inland waters of the state or lying in the territorial sea, or passing through the territorial sea after leaving the inland waters of the state, for the purpose of any civil proceedings."

"Article 25 Government vessels operated for commercial purposes

The rules contained in the preceding articles of this chapter shall also apply to government vessels operated for commercial purposes.'

"SECTION B: WARSHIPS

"Article 26 Passage

1. Save in exceptional circumstances, warships shall have the right of innocent passage through the territorial sea without previous authorization or notification.

2. The coastal state has the right to regulate the conditions of such passage. It may prohibit such passage in the circumstances envisaged in Article 20.

3. Submarines shall navigate on the surface.

4. There must be no interference with the passage of warships through straits used for international navigation between two parts of the high seas."

"Article 27 Non-observance of the regulations

1. Warships shall be bound, when passing through the territorial sea, to respect the laws and regulations of the coastal state.

2. If any warship does no comply with the regulations of the coastal state and disregards any request for compliance which may be brought to its notice, the coastal state may require the warship to leave the territorial sea."[1]

PROF. WILLIAM W. BISHOP, JR. (University of Michigan Law School): This will be a somewhat more experimental and

1. Copies were also distributed of National Fisheries Institute Flashes, no. 446 (May 17, 1955), containing the Report of the International Technical Conference on the Conservation of the Living Resources of the Sea to the International Law Commission, May 10, 1955; and of Department of State Press Release no. 262, May 12, 1955, containing the address by Hon. Herman Phleger, Legal Adviser of the Department of State, before the American Branch of the International Law Association, May 13, 1955, also found in Dept. of State Bulletin (May 1955).

impromptu program than previous ones. The entire performance will be unrehearsed and without any previous written schedule. We will have discussion on a field of international law that is both old, and very new and rapidly growing. We have long been deeply concerned with problems of territorial waters and fisheries, and are now becoming concerned with problems of the sea bed and subsoil. Within the last decade we have seen rapid changes in the law. We hope today we can see the application of international law principles and institutions as they grow to meet new technical needs in the world. We hope to see the established practice at the present time, how well that established practice meets the needs of the world, and how it is growing. We will start with the general problem of territorial waters very briefly, look at the question whether there is or is not agreement on a contiguous zone for special purposes beyond territorial waters, look briefly at the international law problems of the continental shelf, and spend most of our time on the fisheries problems.

Our principal participants will include Edward W. Allen, of the Seattle Bar, member of various international fisheries commissions; Donald Chaney, General Counsel of U.S. Fish and Wild Life Service; W. M. Chapman, Tuna Research Foundation; William C. Herrington, Special Assistant to the Under Secretary of State for Fisheries and Wild Life Matters; Professor Philip C. Jessup, Columbia University; Montgomery Phister, General Counsel and Vice President of the Van Camp Sea Food Company; Professor Stefan A. Riesenfeld, University of California Law School; William Terry, Fish and Wild Life Service; and Marjorie Whiteman, Assistant Legal Adviser for Inter-American Affairs, Department of State.

I would like to start by putting the question: Is three miles the accepted limit of territorial waters, at least as of 1945, and is it the accepted limit as of 1955?

PROF. PHILIP C. JESSUP: I think the answer is no, that three miles is not the accepted limit as of 1955, and I do not think it was the accepted limit as of 1945 if we interpret the word "acceptance" to mean a general concurrence of all of the nations of the world. It seems to me that this does not dispose of the question.

If you follow the traditional logic, I see no escape from the fact that as one moves out from the shore into the ocean you reach a point a mile from shore, and you ask everyone, are you in territorial waters, and everyone unanimously says yes. You move out two miles. Am I still in territorial waters, yes; two and one-

half, yes; two and ninety-nine one-hundredths, yes; three and one-half, well, maybe—some say yes and some say no. In other words, there is unanimity that as long as you are within three miles of the coast you are within what is known as territorial waters of the State. As soon as you pass the three-mile limit you enter into an area of controversy in which some states may assert you are still within territorial waters and others emphatically deny it. This is clearly a situation where it is necessary for some kind of international agreement. The International Law Commission has come back time and again to the conclusion that there is no unanimity of view at the present time on three, six, nine, or twelve miles. They have been driven to the point of saying, "Well, anyhow, it should not be more than twelve," but have not yet been ready to suggest a definite limit in terms of miles. This is clearly a matter for international negotiation.

When you come to the international negotiation there are certain facts which must be kept in mind, and these are the essential interests not only of coastal states, but of all of the states of the international community. One recognizes, and I think there is no challenge to this proposition, that the coastal state has certain particular interests and certain particular necessities in the waters adjacent to its shore, and that these must be recognized, and the state must be clothed with sufficient power and legal authority to protect those legitimate interests. On the other hand it is equally recognized that the group of states forming the international community as a whole have certain rights and interests in the high seas.

When one begins to analyze what these interests are one finds that they are various. There are the interests of fisheries, interests in the exploitation of mineral resources of the continental shelf adjacent to the coasts, and interests in navigation. There are also interests in the protection of the state against illegal activities, not to mention the questions of neutrality and protection of defense interests of the state in time of international conflict. The problem is clearly one of how to reconcile the interests of the coastal states with the interests of other states; and in attempting to find this balance, one finds the problem differing vastly as one takes up one interest after another, the problem is not the same when one deals with fisheries as it is when one deals with the exploitation of oil; and neither of those problems is identical with the problem of international navigation.

Leaving aside the collateral problem of the control of air traffic over waters adjacent to the state—which is now a matter

of prime importance—you must have and will have fundamental agreement that there is a belt of water on the high seas, adjacent to coastal states, which is within the territory of the coastal state. Within that area the coastal state has all of the attributes, the power, and the authority which attaches to it on its own land, subject to any particular exceptions such as the right of innocent passage, which do not affect the main principle.

One must also clearly recognize that under present practice and under the terms of any arrangements which may be made, states are recognized to have and will be accorded certain rights in those waters, under those waters, and over those waters, outside of whatever may be considered to be its territorial belt. Our problem is really to define the magnitude, the extent, and the nature of these powers and rights which will be attributed to the coastal states in the waters adjacent to its territorial sea. No matter whether you get agreement on three, six, twelve, or even twenty miles, you still have situations on certain coasts of certain states throughout the world in which their vital interests would require that they be accorded the privilege of taking certain action outside of that particular limit, on waters recognized to be the high seas.

The problem of the international lawyer and statesman today is to find a basis of agreement which will take into account the rights and interests of the whole international community. This includes, of course, in the particular matter of fisheries, the interests of one state or its nationals in fishing near the coasts of another state, as well as fundamental questions of navigation.

An agreement which will take into account these general interests and balance them against what is frequently the predominant interests of the coastal state itself must be entered into. In my opinion, this can never be done by any conformity of agreement which will be exactly the same in terms of mileage and in terms of specification of rights on all coasts of all countries throughout the world. The configuration of coasts, the nature of the marine resources, and other elements make the problem on each coast or on many different coasts very different from that which obtains in other areas of the world. I therefore see no ultimate solution, save in an elastic approach to the problem, which will probably result not in one single code which can be elaborated by the International Law Commission, but in one which will take into account scientific investigation, as at the recent Rome Conference, and one which will determine what agreements and rules will be applicable to particular coasts or

particular areas. These codes will form in the future the actual international law under which states will operate.

PROF. BISHOP: That is one view as to the way in which the problem may best be solved. It is not necessarily the view taken by all countries of the world. Some of our Latin-American republics seem to approach the matter in a somewhat different fashion. In our mimeographed material we find a draft convention prepared by the Inter-American Juridical Committee, interesting in that it recommends the extension over a two-hundred-mile belt of the same control which exists over territorial waters. May I ask Miss Whiteman if she could say anything about the Latin-American attitude as exemplified in the views and actions of some of the republics to the south.

MISS MARJORIE M. WHITEMAN: Please understand that what I say represents my personal views only and not necessarily those of the Department. I recall the 1930 Codification Conference at The Hague, called by the League of Nations to discuss responsibility of states, nationality, and territorial waters. At that time Hunter Miller, the United States representative on the Commission of Territorial Waters of that Conference, stood for three miles. I think the Conference at that time could have agreed upon, we will say four miles, but for the position taken by the United States and Great Britain for three miles. Such was the position the United States Government had taken and continues to take. I should say that the Latin-American countries were not largely represented at the Conference and were not particularly active in respect to the subject of territorial waters. The next thing that I would like to remind you of would be the 1945 Proclamations of the United States. Shortly thereafter, Argentina announced that on basis of the Proclamation concerning the continental shelf she was claiming her continental shelf and the water above. That was followed by Peru, Ecuador, and Chile claiming that they have the right to the waters above their continental shelf and setting the distance at a minimum of 200 miles from shore. The attitude of the Department is that there is an international law existing with respect to the high seas; but at the time the Truman Proclamation on continental shelf was announced the law of the continental shelf was in a vacuum. We therefore had a right to say how we would treat the continental shelf; but it is something else again for states to claim rights with respect to the high seas concerning which there is well-accepted law, attempting to change that by unilateral act. The Inter-American Council of Jurists in 1950 called upon the Inter-American Juridical Committee to consider the subject of territorial waters. The Jurid-

ical Committee prepared the draft referred to, its tenor being that the continental shelf, the water above, and the air above that, all belong to the coastal state. When the text was presented to the Inter-American Council of Jurists in Buenos Aires in 1953, what many people said they wanted to do, and were prepared to do, and were obviously under instruction to do, was to lay down new international law immediately and go to the facts afterwards. We managed to convince a few people that what was needed was to look into the technical aspects of the thing first. Then in 1954 at Caracas it was accepted within the Organization of American States that there should be a technical conference on fisheries and related matters, first called for 1955, but not to be held, I think, until early 1956. We will then also have a meeting of the Inter-American Council of Jurists to consider the subject of fisheries. The Department has been active in urging that these bodies not meet before the International Law Commission has completed its draft of this year, so that the Organization of American States may have the benefit of its work.

The suggestion was made yesterday that we could perhaps handle fisheries matters by individual state legislation rather than by treaty or agreement. Frankly, I do not think it would work. How could you be certain that other states would adopt similar of identical legislation? If they consider their present proclamations in harmony with the Truman Proclamations, they might consider their legislation in harmony with ours! And as a matter or considerable importance, the United States would want countries to be bound by the position taken only if it were a correct position and not merely subject to legislation which could be amended.

PROF. BISHOP: There may have been a misapprehension of a point made by Mr. Cardozo yesterday. Am I correct in understanding that Mr. Cardozo's proposal was that we in the United States should have a single statute and then so-called congressional-executive agreements made under that statute, rather than to take each fisheries agreement to the Senate as a treaty? Was not that the gist of Mr. Cardozo's proposal, rather than that we have separate national legislation in each country?

PROF. MICHAEL H. CARDOZO (Cornell Law School): Yes, I suggested that we could get legislation and save the Senate from having to handle each fisheries agreement as a treaty.

MISS WHITEMAN: My point still prevails. We might prefer to see the foreign countries have treaty obligations rather than executive agreements with us on the subject.

PROF. BISHOP: I think we may have brought out enough to show that the three-mile limit is not today accepted international law, whatever it was in the past. It is interesting to note that the International Law Commission this summer recognizes the present situation in very cursory fashion. It makes three points: (1) that international practice is not uniform on recognizing three miles as the absolute limit of territorial waters, (2) that international law does not justify extension of territorial waters, as a belt subject to complete sovereignty, beyond twelve miles, and (3) that without taking any decision as to the breadth of territorial waters, it considers that international law does not obligate other states to recognize any extension of the territorial sea beyond three miles.

If we start with the premise that three miles is not universally accepted as the sole limit of jurisdiction, we should look at another question, that of the contiguous zone raised by the International Law Commission 1953 draft. The ILC suggests that on the high seas adjacent to territorial waters, the coastal state may exercise control for various purposes to prevent infringement of custom, immigration, or sanitary regulations, but not for more than twelve miles out from the base line from which it draws its territorial waters. This is somewhat like the twelve-mile principle of our own hovering laws. Is there a general view that legislation of this type violates no international law rule, legislation under which the coastal state exercises control over a twelve-mile zone for purposes of preventing infringement of its laws within its territory or its accepted territorial water?

PROF. STEFAN A. RIESENFELD: It is very clear that that was a great "concession" on the side of some nations.

PROF. BISHOP: I understand that the English said this summer that the proposal on contiguous zone would be acceptable, with the exception of fisheries.

Some years ago Professor E. D. Dickinson, in his article, "Jurisdiction at the Maritime Frontier," 40 Harvard Law Review 1 (1926), pointed to the need for flexibility. We must recognize that the English have been slow to agree to it, but that many countries have adopted this sort of legislation. Can this be put aside as a point on which agreement is rapidly developing, although there may still be lack of consent on the part of a few nations?

Can we look for a moment at the problem of the continental shelf itself, not involving the waters above it? Since the time of the United States Continental Shelf Proclamation of 1945, limited to "jurisdiction and control" over the resources of the sea bed

and subsoil of the continental shelf, we have had many countries asserting jurisdiction over the resources of the shelf itself, primarily interested in oil. Would you be inclined to say that international law today is in accord with the provisions in the 1953 draft recognizing that the coastal state may extend its jurisdiction over the sea bed and subsoil beneath its continental shelf, measuring that either by the depth of 600 feet, 200 meters, or the limit of practicable exploitation?

VOICE: I think there is a geographical question here. It seems to me this ought to be defined by distance from the coast as well as by depth. We ought to have the advice of the geographers as to how far out the depth of 200 meters would be reached off all the coasts of the world.

PROF. BISHOP: It would obviously be different in many cases. There are places off the South American coast where it would not go beyond the three-mile limit, and there are other places where it goes two hundred miles or more. Should the limit of control be measured by distance out from the coast, or in terms of what is usable as based on present technology?

PROF. RISENFELD: While on principle I am in full agreement with the views advanced in Professor Jessup's lucid and thoughtful exposition, I am pessimistic and much concerned about the prospects for workable and effective implementation. After all recognition of a need for international "negotiation" does not solve problems unless there is an auspicious climate for accommodation and adjustment, and some constructive guidance for fruitful action. Otherwise, "flexibility" will only result in anarchy.

I must confess that I am somewhat disillusioned by the haphazard and almost casual approach which the International Law Commission seems to have taken and which reflects itself in the loose language of the proposed drafts. Take, for instance, the Draft Articles on the Continental Shelf, as adopted by the ILC at its Fifth Session (1953). Article 2 of this proposal reads:

> "The coastal state exercises over the continental shelf its sovereign rights for the purpose of exploring and exploiting its natural resources."

In the official comments by the Commission we read that the formulation was a compromise between the terms "control and jurisdiction," which were used in the original draft of 1951, and "rights of sovereignty," which were advocated by some members of the Commission. I feel that the expression "sovereign rights for numerated purposes" is a legal novelty which neither possesses inner consistency nor amounts to a real adjustment of two

opposing positions. Again, take the history of the words "natural resources." The Commission has waivered between limiting the rights of the adjacent states to "mineral resources" or extending them to "natural resources," including within the latter term also sedentary fisheries in the technical sense, but not bottomfish. Reading the "Summary Records" of the discussion, one cannot help feeling that there was more willingness toward a manipulation of terms than a true effort at codification or, at least, progressive development. At any rate, I fail to see any detached and really informed grappling with the problems.

MR. JAMES N. HYDE (New York Bar): I want to raise one question in the light of what Professor Wright has said. He has suggested one might approach the problem of the continental shelf either from the point of view of a distance from the shore of the coastal state or from the point of view of depth. Then you, Mr. Chairman, have suggested that the depth selected might be either 600 feet or possible exploitable limits.

There is a tremendous difference between selecting 600 feet and possible exploitable limits. I suggest that it is a serious difficulty to pick any number such as 600 feet or 1,000 feet, without doing careful research in the future scientific possibilities for working the resources of the subsoil. There is a report, for example, from the Oceanographic Institute in California that there are large quantities of high-grade magnesium in the tops of volcanos in the Pacific, the only difficulty being that the tops of the volcanos are 5,000 feet below the surface of the sea. These matters are not entirely science fiction. They need thought before the United States finally indicated what it thinks of the International Law Commission draft.

In my opinion the Commission has gone rather far in indicating acceptance of the 600-foot principle. I would see even more serious difficulties in attempting to point to a certain distance from the shore of the coastal state. As Professor Wright points out, the shelf drops off at a different rate in different parts of the world, and the entire subsoil of the Persian Gulf is less than 600 feet.

PROF. RIESENFELD: Again I would like to call attention to the evolution of the draftsmanship of this section. When the International Law Commission first considered the subject of the continental shelf at its second session in 1950, it took the position that a state should be entitled to control and jurisdiction over the sea bed and subsoil of the submarine areas situated outside its territorial waters for purposes of exploration and exploitation,

regardless of whether or not these areas were part of the continental shelf in the geological sense of the term. It also took the position that the rights to the submarine area did not extend to the superjacent waters. This decision constituted an important departure from, and important development in, the existing continental shelf doctrine. As you may recall, this doctrine was first advanced in 1918 by the Argentinean writer, José Leon Suarez, mainly for the purpose of delineating the outward boundary of the territorial waters especially with regard to fishing rights. It was reiterated by his fellow-countryman, Segundo R. Storni, in his comments on his draft-codification of the international law of territorial waters submitted to ILA in 1922, again with particular reference to the fisheries, and became subsequently a widely accepted view of South-American and Central-American writers. The Truman declaration of 1945 was the first authoritative assertion of this doctrine. In initiated to a certain extent the differentiation between the rights in the natural resources of the subsoil and the maritime resources of the superjacent waters. But it still clung to the geological concept. The position of the I.L.C. which dispensed with that requirement in order to avoid inequalities was therefore an important step.

Originally the ILC considered at the proper outward boundary for the rights of the adjacent state in the submarine area the line where exploitation ceases to be feasible. It retained this stand in the "Draft Articles on the Continental Shelf and Related Subjects," tentatively adopted at the third session in 1951, although the special rapporteur, Professor Francois, had suggested in his "Second Report on the High Seas" that a definite line, such as the 200 metres or 100 fathoms line might have a number of specified advantages. A substantial number of the governments supplying comments on the Draft Articles joined the latter view, and as a result the ILC modified its position at its fifth session and in its last draft adopted the 200 metres depth line as the outward boundary of the submarine area, still styled continental shelf.

Although it is true that the majority of the govenmental replies criticized the "exploitability test" as "lacking precision," being susceptible to abuse," and "likely to generate controversies," I wonder whether all the short-comings of the three-mile rule are not going to repeat themselves and whether a truly progressive development of international law should not forestall such issues. Moreover, I fail to see any rational connection between the limits which might be appropriate for monopolistic rights in oil and mineral resources, and those which should

apply to the exploitation of the sedentary fisheries.

PROF. BISHOP: The United States Continental Shelf Proclamation of 1945 rather cautiously avoided definition of the continental shelf, declaring that the natural resources of the subsoil and sea bed of the shelf shall be considered as appertaining to the United States and subject to its jurisdiction and control. The accompanying press release suggested that generally the submerged land contiguous to the continent and covered by no more than 100 fathoms is considered the continental shelf. It is since that proclamation that a variety of Latin-American and Middle Eastern countries, and a few in other parts of the world including the United Kingdom, with respect to certain Caribbean territories, have used the term "continental shelf" to describe the character of underwater land over which they are asserting jurisdiction for special purposes.

Leaving aside the somewhat compromising type of wording we get in the 1953 ILC draft, do we think the general principle of control over the continental shelf by the coastal state has been sufficiently accepted so that an International Court decision would probably say it is all right? For example, if a French company wished to come and drill for oil some twenty miles off Texas where the water had not yet reached the depth of 100 feet, and the United States said that this could not be done without getting permission from the appropriate American authorities (whether Federal or Texas), do you think France would have much basis for insisting that the French company might come over here and take this action on the high seas?

PROF. JESSUP: I think they would lose the case, but not necessarily because the continental shelf doctrine is an established part of international law.

PROF. RIESENFELD: I do not think that France has or should have the right for her nationals to drill for oil on the continental shelf of the United States if the United States is unwilling to make such a concession. International law does not impose unreasonable burdens and does not condone anything unreasonable.

PROF. BISHOP: May I ask why we would find it easier to come to that conclusion with respect to oil off the Texas coast than we might with respect to fishing controls off the coast of Mexico or Peru? Why is the continental shelf doctrine more

likely to be accepted when action is taken and defended with respect to oil than corresponding jurisdiction of the coastal state with respect to fisheries?

MR. W. M. CHAPMAN (American Tunaboat Association): It is a matter of practicability.

MR. WILLIAM C. HERRINGTON: I am not a lawyer, but the best definition of international law which I have heard is that it is the practice of nations. Control over the resources of the shelf, to the best of my knowledge, has been contested by no country, except that I believe Japan may have different views. However, many countries like to go beyond that and apply it to the waters above the shelf. With respect to jurisdiction over the resources themselves and over the waters above the shelf, the situation is quite different. On that there are many protests and reservations.

PROF. MYRES S. McDOUGAL (Yale Law School): I believe some of our discussion begins unconsciously with the assumption that there is a prohibition against the assertion of national authority beyond the limit of territorial waters. I do not think there is any such prohibition in the decisions of the last three hundred years. I agree that the authoritative doctrine protects navigation and fishing against interfering usage, but it also protects the interfering usages—despite the British view. Even the British go beyond the three-mile limit for security purposes. Complementary authoritative doctrines are made compatible and rational by an overriding policy in favor of the fullest utilization of a great common resource. When one poses a question whether a claim to the continental shelf is valid, eventually one comes back to the question whether the claimed uses unreasonably interfere with other claims to navigation, fishing, security, and so on. Technologically, it is much easier for a coastal state to exploit oil and some of the other resources; that is not true of fishing. Because of the technological difficulty of drilling for oil, the elaborate installations required, the permanence of the installations, etc., the coastal state may reasonably feel that its security is being impaired if ten, twenty, thirty miles off the shore some other country installs a permanent installation that might be used for many purposes other than the obtaining of oil. That is the difference between claims to fish and to some of these other resources. One can reasonably expect to observe in the future flow of mutual tolerances and reciprocities between foreign offices that states will honor each other's claims on the continental shelf.

VOICE: May I suggest that these matters of continental shelves and fisheries all become the property of the United Nations? The United Nations has no money, it is always passing around the hat to keep it going. That would give it enough money.

PROF. JOSEPH DAINOW (Louisiana State University Law School): I would like to ask Mr. Riesenfeld why he is so disturbed by Mr. Jessup's suggestion of individualization of the extent and nature of control in different parts of the world, when our own Supreme Court has already laid the framework for different limits in the degree and extent of state control within our own country. On the basis of the recent Supreme Court decision concerning the Submerged Lands Act (Tidelands), it is evident that the historic boundaries of Louisiana are not the same as the historic boundaries of Texas.

PROF. RIESENFELD: The supreme test of international law is that it is necessary to find some accepted or acceptable standards or tests of reasonableness, and of basic interests, like security. True, what is reasonable may be different at different parts of the globe. But so far as this test for regional solutions is concerned, I am afraid that regionalization can go too far. Of course there is a great deal of inducement for individual groups of nations to get together and to say "Let's settle our fisheries problems." But there might be other powers in the world who will not like these settlements if they affect them. I do not for a moment think that the other powers of the world will sit still and let the United States settle her fisheries questions with each South American nation. If that would work it would be wonderful. But I fear there is a great potential danger that other nations might feel that such action infringes or might eventually infringe on some other vital interest of theirs, especially their security. The technology of today is not the technology of tomorrow. At that point we are compelled to go back to the common foundations of an international legal order. We might differentiate fishing and oil and other natural resources, but we must do so on the basis of some common standards for the accommodation of the interests of the international community and the coastal state.

PROF. BRENDAN BROWN (Loyola Law School, New Orleans): I should like to support Professor Riesenfeld in this debate, on a philosophical basis, by saying that unless we do adopt an overall idea of reasonableness, and get back to an objective concept of international law as a basic international relationship,

then we shall be obliged to say that each nation will be completely sovereign, not only in a legal but also in a moral sense. And with this we shall come to the regrettable position of sovereignty which has long blocked the development of international law. If we view this question merely in terms of a balancing of interests, we adopt a pragmatic position which ultimately is reducible to power politics. If we go back to the works of Grotius and his predecessors we shall see that international law has been based upon the stability of some kind of objective melange of moral ideas as distinguished from specific rules. Unless we have the authority of this type of thinking, it seems to me that all of our institutions relating to fisheries and territorial waters will be equated to expressions of power.

MR. CHARLES I. BEVANS (Assistant Legal Adviser for Treaty Affairs, Dept. of State): I want to address my statement to Mr. Herrington's remarks on the question of differentiation between the exploitation of oil off the coastal state and the fisheries resources. I understand that one of the principal differentiations between this matter of exploitation for oil and fisheries is that for centuries throughout our recorded history vessels have been moving from one country to the ocean off the coasts of other countries and taking fish. That is a custom which is very well rooted throughout the world. Vessels have never been moving to the coasts of other states and taking things from the subsoil; so in developing this concept of the control of fisheries beyond the normal territorial limits, we must bear in mind this custom of states who have a history of taking fish off the shores of the other countries as, for instance, the Newfoundland banks, where the Portuguese and Italians have for centuries been taking fish. In considering this development in international law we must keep in mind this cutom as something that cannot lightly be stopped.

PROF. BISHOP: This reinforces Professor McDougal's point of the factual difference between exploitation of fisheries off somebody else's coast, where you can easily enough send a fishing vessel across the ocean, and the difficulty of exploiting oil off somebody else's coast without permission of the sovereign on shore. I think one sees in the 1945 Truman Proclamations some recognition of this difference, perhaps based on the fact that as of that time, at least, nobody had ever tried to drill for oil three-and-a-half or ten-and-a-half or any other number of miles off the shores of a foreign state on its continental shelf without getting the permission of that soveriegn state, while for centuries they have gone fishing as close to the other country's shores as they could get away with.

PROF. JAMES O. MURDOCK (George Washington Law School): Some of the heat generated by this discussion may not be so much due to divergent points of view as to a desire to over-simplify the problem. It is invitingly simple to think of a three-mile limit to territorial waters as having been established for all purposes past, present, and future and then to stop thinking. Other types of jurisdiction, however, have emerged in practice that are not concerned with the idea of territorial waters or its underlying resources. The exploitation of maritime and continental shelf resources requires a fresh approach in the light of modern technology, economic pressures, and food conservation problems. It is essential not to mix national defense with fisheries or petroleum exploitation problems.

DEAN MIRIAM T. ROONEY (Seton Hall Law School): Could anyone here undertake to give us information about the drafting of the 1945 Proclamations on the extent of the Continental Shelf, as to whether any distinction was intended between fisheries and minerals?

PROF. BISHOP (after being unable to get others to speak up on this point): This puts the chairman in an embarrassing position. I did have the job of working on this for some years. I think we may say that the two proclamations resulted from very different pressures of differing industrial and economic groups, and therefore political groups. The two were issued in unison but were kept distinct in their approach. In the case of oil the real problem was whether some type of authority could be proclaimed and relied upon, on the basis of which investment would start. Further, the whole problem was inevitably tied in with the question of state versus Federal control, dealt with both in the California decision and the Texas case. There was no indication of probably objection on the part of any other state, if for no other reason than that nobody's toes got trod upon. Nobody had anything but a theoretical right, if that much, to come and drill for oil at such a distance as twenty miles out from shore.

In the case of fisheries, guided and aided by the fishing industry of the United States and everybody else whom the Department could find who might be of help, the Department attempted to make up its mind as to the policy with which it wished to come out. It did try to come out with something which would not be at variance with existing international law any further than it had to be, if at all. The proclamation on oil is a unilateral declaration of control by the coastal state. In the fisheries proclamation we find

recognition of two principles as of equal importance: contiguity and actual fishing. In other words, the fisheries proclamation took account at all times of the countries that had build up a fishing industry off another state's coast, and said that regulation of such fishery must be by joint action of the coastal state and the fishing state. In blunt economic terms, this would take care of shrimp and tuna fisheries, where Americans fish off somebody else's shores, as well as halibut and salmon, where others wanted to fish off our shores. A reasonable policy seemed to be that those who have fished and those who are interested by reason of contiguity should join in regulating the fishery, without worrying about those who have neither fished or are contiguous. I think the drafting history shows an attempt all the way through to deal with the two problems of oil and fisheries as factual problems which are entirely different.

VOICE: Has there been any implementation of the fisheries proclamation?

MR. HERRINGTON: Since the time of the fisheries proclamation we have negotiated a number of fishery conservation agreements that can be considered as carrying out the premises laid down in the proclamation.

PROF. BISHOP: Would you be inclined to say that the Northwest Atlantic Fisheries Agreement, our work in the Pacific with Japan and Canada, our work with Canada on salmon and halibut, and our agreement on tuna with Costa Rica and Panama are what you have in mind? Is the conservation regime for North Pacific halibut to be taken to some extent as a prototype of what was meant by the proclamation?

MR. CHAPMAN: I think the United States has been going towards this policy contained in the proclamation since 1911, and since the time of the proclamation has gone more rapidly, providing for conservation treaties where they were necessary.

VOICE: In contrast with fisheries agreements, have you any unilateral conservation zones established under the proclamation?

MR. CHAPMAN: There have been none.

PROF. BISHOP: The principles of the proclamation have merely been followed in the agreements referred to.

PROF. RIESENFELD: Will the chairman summarize the action taken in these conventions with respect to tuna, halibut, and salmon?

PROF. BISHOP: I would prefer to have some people active in the field talk about it. I think we can say, for the benefit of the uninitiated, that the halibut convention provides for bilateral regulation by the United States and Canada. The same is true to a somewhat more limited extent of the sockeye salmon agreement. As for the Northwest Atlantic, the regime is on regulation, through panels consisting of the state to whose shores the sub-zone is contiguous and states that have fished substantially in that sub-zone. There are a number of sub-zones, extending from off New England up to off Greenland. Like the halibut and salmon conventions, this Northwest Atlantic Treaty provides for research first, and then for regulation. If I am correctly informed, the tuna convention with Costa Rica, to which other states are acceding, provides at present only for research but might be extended to a pattern of co-operative regulation. The North Pacific Convention between the United States, Canada, and Japan provides not only for research but also for the possibility of regulations being approved. It has a more novel feature, providing for abstention by states which have not previously engaged in fishing in certain fisheries which are closely protected and fully utilized, abstention by the non-users from fishing in those fisheries at all.

PROF. CARDOZO: Am I right in my assumption that none of these conventions purports to exclude any non-signatory from fishing in the areas covered by the conventions and that the United States has enacted no statute concerning people from other countries fishing in the areas covered by the proclamation?

MR. HERRINGTON: We have no such explicit provision in any of these conventions. However, we do have in the Northwest Atlantic and North Pacific Conventions provisions concerning the activities of non-signatory states which affect adversely the operations of the agreements or the carrying out of the objectives of those conventions.

PROF. BISHOP: Mr. Allen, have we ever had difficulties with other countries wanting to enter the area of Pacific halibut fisheries protected by the United States and Canada?

MR. EDWARD W. ALLEN: We have had difficulties, but we

have successfuly met them. A few years before the war, I believe in 1938, there was an attempt on the part of the British and Norwegians to send "mother ships," big refrigerator ships accompanied by fleets of fishing vessels, to go up to the British Columbia coast and to stay three miles off shore while exploiting the fishery that had been very largely restored by the cooperative effort of Canada and the United States. They were ready to destroy practically all the accomplishments under the halibut convention. Canada and the United States both made vigorous protests, and the expedition was withdrawn.

We have felt that this constituted an example which could not and should not be overlooked. It has been said that international law is state practice. This is one instance in which a protest of this character, the assertion of special rights which Canada and the United States established by the Conservation of this commercial fishery, was respected.

VOICE: May I ask whether we were objecting to their coming in on our monopoly, or were they expecting to infringe regulations with respect to seasons and hours and conservation of the fishery?

MR. ALLEN: We objected to their entering the fishery at all.

PROF. BISHOP: Particularly since it was a fishery which has been built up by long-time conservation.

PROF. QUINCY WRIGHT (University of Chicago): We seem to be entering an area in which future developments are difficult to see. There is a great difference between the subsurface resources and fisheries, and it is largely this, that the exploitation of subsurface resources is a question of technology and capital. It takes a lot of money and technology to exploit magnesium or anything else deep under the sea. When we get a considerable distance from the coast, I should not think a state should have a priority merely because it is geographicaly nearer.

There may be a subsurface volcano in the middle of the Pacific, with a lot of magnesium in the crater, 5,000 feet under water. It may be possible to expolit that, but the possibility would depend upon a corporation with sufficient money and technology. If the volcano happened to be only 100 miles from the coast of one state and more than 1,000 miles from the coast of any other state, that should not have any particular effect on who should have a prior claim to exploit the resource. It is only the more technologically advanced countries who would be able to exploit it in any case.

If one wants to think of exploitation of subsurface resources it would be more reasonable to say that within a reasonable distance from the coast the subsurface of the ocean is open to acquisition by discovery and occupation; that means any corporation having the capacity to make the discovery, to set up the machines, and to provide the capital to exploit ought to be able to get a priority. I would raise the question, however, whether it would not be a good thing to say that beyond a reasonable distance from the coast, the subsurface of the ocean belongs to the United Nations, which may give licenses to anyone who has the capital and locates the resources to exploit them. That seems to me to be a very reasonable agreement to enter into.

As you know, there have been proposals that all claims to the Antarctic be ceded to the United Nations. It may be that if the Antarctic continent and all the subsurface of the ocean today beyond fifty miles from the coast were ceded to the United Nations, an opportunity would be afforded to build up this institution, and perhaps to ameliorate rivalries which exist. I throw out this suggestion as a possible solution of a problem of exploitation of the subsurface distant from any coast.

Within a reasonable distance of the coast, the claim of the adjacent state to priority of exploitation should be recognized; but it seems to me that limiting it to a fixed depth is not a very good idea. The surface of the ocean floor is undulating, there are mountains and valleys, but the interests of the adjacent state should be measured not in terms of the continental shelf or of depths, but in terms of distance from low water mark, perhaps twenty-five miles, perhaps fifty miles.

In regard to fisheries there is a difference. It is necessary through conservation to prevent the extermination of fisheries, which could multiply and serve the uses of mankind. It is my impression that there are great advantages in international regulation of fisheries beyond a certain distance from the coast, such as for protecting whales and the preservation of seals in the Bering Sea. On the whole that has worked pretty well.

I would again pose the question, whether in the case of fisheries it would not be best, beyond a moderate distance where the adjacent state can best preserve them, to utilize the United Nations for the conservation of various species of fish on the high seas.

MR.. HERRINGTON: Mr. Chairman, I have in mind particularly your early question, in which you started discussion of the continental shelf. I refer you to the record of discussion in the

1953 General Assembly, the 1954 General Assembly, andthe UN Legal Committee which discussed this matter.

In 1953 the United States, together with a number of other sponsors, submitted a resolution in support of the draft of the ILC on the continental shelf. There was organized opposition by certain other countries on the ground they could not determine their position on the shelf until they knew what were to be the recommendations of the International Law Commission concerning the breadth of the territorial seas. This group was able to get support for a resolution that the General Assembly should take no action on the continental shelf or any other part of the general question of the regime of the high seas, until the International Law Commission had completed its study and its report to the General Assembly covering the whole matter. The continental shelf question was taken up again in 1954. Again a bloc of nations were in opposition, but out of this came a resolution requesting the ILC to complete its study of the regime of the high seas in all its aspects and submit its recommendation to the General Assembly by 1956. That was a compromise resolution which went through with very little opposition. Again the members reaffirmed their position that the General Assembly should consider no part of the matter until they had the ILC report on the whole thing.

Another matter that had been considered here is that of regional international law. From the point of view of conservation of international fisheries there is no justification for the regionalization of principles. You can develop a satisfactory set of world-wide principles that will take care of the conservation problem.

Finally, with respect to the United States proclamation on the continental shelf and the natural resources therein, the position of the United States is that this covers the mineral resources and the attached living resources. The reason for confining this to the attached living resources is a biological one.

PROF. SAMUEL D. ESTEP (Michigan Law School): I should like to make one comment in the interest of atomic energy. We have heard about fish and oil, and the difference between them. Once there was mention that there might be a security difference between them. It seems to me that the security interests of the United States, Russia, Canada, or of any other country have a very serious impact in the light of today's technology of guided missiles and atomic weapons on these very questions of where we are going to let people fish. I submit that in terms of present

technology it is just as dangerous, if not more dangerous, to let a fishing vessel with atomic weapons come within three or twelve or fifty miles of shore. It seems to me that the United States cannot afford to make a policy on fishing vessels without considering the question of who is going to send out the fishing vessels and how far they will be sent.

MR. ALLEN: I had this problem in mind myself. May I add that the last world war already showed its pertinence. We had the Japenese fishing vessels off our coast, making a thorough survey of our coast and everything pertaining to it. I think the matter of foreign fishing vessels off your coast is a matter of security as much as the oil in the continental shelf.

PROF. CARDOZO: As a related problem, there is the radio broadcasting vessel. How close to the shores of an unfriendly country is it going to be permitted to go, and how close to the shores of a not-so-friendly country will radar stations be permitted to be erected in the high-seas area? We seem to assume that it is all right for friendly countries to let us broadcast from those countries, and let us create radar stations there, but what if we sought to do that on the high seas on the periphery of an unfriendly country?

MISS WHITEMAN: In commenting in part on the question raised with reference to security and now atomic problems, I would merely like to throw out the thought that our discussion last night may have been within too narrow limits. To meet the new problems we may have to change our concepts to a greater extent that we have on possibly any other subject in relation to international law. This security problem may be even greater than any of the security problems that we have dealt with in the past. So far as international law is concerned, it may not be a matter of security for the United States or security for any other country; it may mean the security of the world. For that reason, these concepts that we have about the freedom of the seas may become even more important. We may have to adjust our thoughts to a brand new idea.

PROF. McDOUGAL: I agree entirely with the remarks of Professor Estep and Miss Whiteman. There is no question that boats may pose security problems, and that states even in peacetime, may have to impose certain regulations upon the approaches to their shores much beyond any limits which have

yet been mentioned. I suppose you are familiar with the regulations concerning approaching aircraft. I see no difference in whether the approach is made through the air or on the surface insofar as the reasonableness of regulation may be concerned. There is, however, another difference that I would like to point out. There is a great difference between regulations that a state might reasonably take to protect security interests, and regulations that it might take to seek to monopolize a resource that has been a common resource for several centuries. In determining reasonableness that difference must be taken into account. And as Mr. Riesenfeld says, this concept of the freedom of the seas has been used for several centuries to protect common interests in the fishing. I think one can distinguish that purpose from the security purpose.

PROF. RIESENFELD: One has to be very careful not to mask claims which are essentially and perhaps justifiably monopolistic interests, with the security screen. We must first clarify in our own mind what we need for the purpose of security. It would be an obstacle to international good will and understanding if we were to claim rights in the name of security which must appear to others to be merely monopolistic interests. We must also always remember that the fishery question has two aspects: one is the subject of conservation, the other the matter of exploitation, monopolistic exploitation to a certain degree. In formulating our policy one should start with the quaere as to what the industry would like to see as being the over-all American fishing policy; then we must square these aims with our own security interests, and finally try to reconcile our self-interest with the legitimate needs of the world community. I would like, for instance, specific information on the proportion of the total world catch in tuna which is taken by the United States to the amount that is caught in waters which we try to look at as the high seas.

MR. CHAPMAN: The American tuna industry catches about half as much tuna as the Japanese tuna industry does. Neither the Japanese tuna industry nor our own are by any means the only ones in the world. There are tuna caught in the Bay of Biscay, the northeastern part of the North Sea, and the Mediterranean. My memory is that the United States catches 22% to 25% of the tuna caught in the world.

The problem is more one of the successful exploitation of an exceedingly enormous protein resource. The Pacific con-

tains large quantities of commercially abundant tuna from Panama to the China coast, between the Tropics of Cancer and Capricorn. There are immense resources of tuna in that area, and somewhat to the north and south. We work on one side of that resource, to the extent of perhaps as much as 500 miles from the coast in some cases. The Japanese work on the other side of it, in some cases to as much as 1,500 miles from land but ordinarily within 300 or 400 miles of the coast. The reason why neither of us is able to exploit the larger resources of the Central Pacific, which are going to waste, is because it is beyond our economic reach to do so. Both of us know the tuna are there, where they are, and how they are to be caught. We cannot catch them and bring them to shore, in either case, at a price which the consumer is willing to pay. The situation in the Pacific is duplicated in the Indian Ocean, and also to a considerable extent in the Atlantic Ocean. There are vast resources which are not now being brought to production solely because of lack of economic ability of the fishermen. I think it may be better to put no barriers in the way of the fishermen bringing the resource to shore than are unnecessary except for the purpose of conservation; that the fishermen should be left free to develop methods of harvesting the resources that are now going to waste so long as the concepts of conservation are in no way violated.

PROF. BISHOP: We started with a look at the question of territorial waters, a zone over which the state exercises sovereignty. We saw that, in the eyes of many, one document will not suffice for all purposes, and that we should be more selective and examine on a purpose-by-purpose basis how much control by the shore state over the sea is desirable or necessary. We have looked at the enforcement of customs and revenue laws. We have looked at the control of the state over the mineral resources of the sea bed of the high seas adjacent to it, not too deep to use. Then we got into the problem of who may control fisheries when you get outside what everybody concerned regards as territorial waters. Before looking at the latest draft of the International Law Commission it is well to clarify a few principles and ideas.

We have two different problems, first, who may control for conservation purposes? And second, may anyone establish a monopoly in taking fish from a particular fishery?

Let us start by putting the easier questions first. Does anyone see any serious international law objection likely to

arise when a state regulates its own nationals and its own vessels on the high seas? Is any trouble likely to arise from the international law standpoint if the United States tells Americans we do not care what foreigners do, but if they fish for this particular type of fish anywhere in the world they have to obey those regulations we lay down? If one state may do that with its own people, is there any international law objection to two nations agreeing to do the same thing with respect to their own peoples? The idea is that if the United States and Canada want to agree that neither Americans nor Canadians may fish for a particular kind of fish in a particular area during a closed season, does anyone else have any objection to make?

Then getting into a little more of a problem, since by the vessels of a state we may mean the vessels which have that state's national character as determined by the right to fly the flag or by ownership, is there any real trouble in a state making its laws applicable to the actions of its own vessels on the high seas?

PROF. McDOUGAL: Suppose you had a regulation that nationals of one state should not register ships in another state. You might have difficulty between the state claiming the individuals as nationals and the state of the registration of the vessels.

PROF. BISHOP: May I make my question more precise and ask if there is likely to be any difficulty in a state enforcing its own fishing conservation laws with respect to the activity of its own vessels on the high seas?

PROF. WRIGHT: I do not understand how it conserves the fish if one state regulates its fishermen and other states do not have the regulations. I do not see how you can deal with the question without a regulation which considers all fishermen in the area.

PROF. BISHOP: You are quite right. We will come to that. So far as international law is concerned, if the United States wants to make punishable an action by an American on a foreign vessel on the high seas, when that American comes back to the United States is his tie with that foreign vessel sufficient to give that foreign state an international claim against the United States?

MR. DONALD J. CHANEY: I am not going to answer that

question directly but I would like to call attention to something that happened in connection with a whaling agreement. A serious objection was made by one of the countries subsequently signing the whaling convention, to restrictions by another country which prevented the second country's whalers from being employed in whaling by any other country's vessels. That question was never resolved in connection with the whaling industry, but it did raise a quite serious question as to whether or not in some instances the activities of one nation in its control over its own citizens may not in fact affect international law.

PROF. BISHOP: I think that is a point that should be borne in mind. When you have nationals of State A operating on vessels of State B you may have some question as to which law takes priority. This, however, has not been the problem with which we have been confronted in most of the serious disputes.

Quincy Wright has anticipated the point we should look at next. Suppose there is actually a fishery somewhere on the high seas where no one but Americans are fishing, and the United States passes a statute regulating that fishery. Has any other country an objection under international law to the United States telling the Americans what to do? And might that not be a reasonably effective statute as long as nobody else fishes there?

PROF. WRIGHT: If the United States has rigorous regulations governing fishing by its own vessels in an area of the high seas, and there are a lot of fish there, that would probably be an encouragement to vessels of other nations to come in and poach.

PROF. BISHOP: Then the real question would be, I suppose, is it economically practicable for outside fishermen to come in and violate the fishing regulations? The reason I stress this is because it seems to me that our thinking about conservation agreements must start with some countries. When we start thinking about conserving Pacific halibut, we are not terribly interested in the attitude of Ethiopia. When we start thinking about conserving fisheries in the North Sea, we do not care as much about Ecuador as if we were interested in tuna fisheries off Ecuador. As a practical matter, it may often be possible to work out effective conservation regulations for a particular fishery without requiring the acquiescence or active agreement of some eighty countries in the world. If everybody who wants to fish there is in the picture, the problem is much easier than in Professor Wright's case where somebody else would like to

go and poach. That brings us down to the serious difficulty, how far may one state or some states make regulations which the nationals of other states not joining in the regulations are required to follow? How far can regulations be made effective against this would-be poacher, when the would-be poacher's government has not seen fit to join in a treaty setting up those regulations? This is in addition to, and separate from, the question whether the outsider can be kept out even if he is willing to abide by the fishing regulations.

PROF. CARDOZO: There is a related question that we might come to first: how far can signatory countries bind their own nationals in the way they have in the Northwest Atlantic Fisheries Convention. Under that treaty an American national could be found guilty of a violation and subject to prosecution under our law, although the regulation that he violated was adopted over the adverse vote of the American representative serving on the governing body under the treaty.

Can Americans be prosecuted for regulations adopted by other countries on the high seas?

MR. CHANEY: It seems to me that in the specific agreement to which you refer the several countries have protected themselves against that very happening. The Commission decides upon a regulation on the basis of the scientific data, and recommends it to the signatory governments, which must adopt it. The United States, as you use the illustration here, could very well decline to accept the recommendation of the Commission if the United States is a member of the panel. You will recall that the Northwest Atlantic area is divided under the convention into a number of sub-areas, and each of the countries party to the agreement may designate their particular interest in a sub-area. The panel makes a recommendation to the Commission, and the Commission in turn may recommend to the governments the adoption of a set of regulations. Those regulations are also enforced by the panel members after a specific time in which they could object.

PROF. CARDOZO: In a case where the United States was not on the panel, would the regulations still apply to American?

MR. CHANEY: Not necessarily. There is a point of timing involved here as well as the fact that the Commission itself does not adopt regulations nor does it enforce regulations. The

Commission merely formulates proposals which must be adopted by member nations and put into effect unilaterally. Likewise, recommendations may be rejected by member nations both through their right to vote on all proposals as members of the Commission, and through action as members of a panel if the proposal affects only a sub-area and the objecting nation is or becomes a member of the panel concerned with such sub-area. As a member of the panel, a nation may follow the procedure specified in Article VIII, paragraph 9, of the Convention, and effectuate a termination of its acceptance of the Commission's proposal or of a proposal already adopted by other member nations. There also must be kept in mind the intention of the Convention to include within panel membership all nations which actually participate in fishing in the sub-area with which a panel is concerned.

MR. HERRINGTON: My understanding is a bit different. If a panel on which the United States is not a member recommends certain regulations to the Commission, and if the Commission (including the U.S. section) approves those regulations (which approval must be unanimous), then when the governments which are members of the panel have approved these regulations, they go into effect and apply to all of the signatories of the convention. That is a new concept, a new principle, and we consider it a step forward. This means that if our fishermen should enter this area they must observe the regulations in effect. Once we begin fishing in the area we can become panel members and have a vote. But prior to that time our government does not have a veto on the particular regulations.

PROF. McDOUGAL: I think that Professor Cardozo deserves an answer to his question upon the facts as he put them, because this is a point that the Bricker Amendment people have been making with great vigor. Their attitude may interfere with agreements which our government might need and wish to make in the future. The best I can make of the reasoning of these people is that by some mysterious notion this government would be delegating power to the Commission if our nationals were subjected to such regulations. I would like to suggest that so long as our government preserves some mode of terminating the agreement, of withdrawing in case regulations contrary to our interests or our Constitution might be attempted, there is no real delegation of power. There is no more delegation of power than in broad statutes conferring powers upon the Presi-

dent. We have gotten rid of this erroneous concept in constitutional law and there is no reason why it should be given new life in international law. There is little, if any, more delegation of power in this situation posed than in any agreement to arbitrate and submit the rights of American citizens to external judgments. The arbitrator and people on commissions of the type here in question are working within relatively rigid policy limits. Finally, the government submits to the application of customary international law, including some prescriptions to which we have not explicitly consented, to its citizens all the time. Hence, I think the correct answer is that there is no problem.

PROF. CARDOZO: The reason I asked the question is that when I first saw the procedure in the Convention I welcomed it as an example of the United States agreeing to a kind of international legislation. It looked like a step in a direction we had not gone before.

PROF. BISHOP: I understand Mr. Cardozo's point to be merely a question of United States constitutional law about how far there is power to delegate to a commission, rather than a question as to whether one state may have a right to object to action taken by another state under international law.

How far is a state that does not want to abide by unilateral regulation, or a state that does not want to abide by treaty-made regulation to which it is not a party, free to avoid compliance entirely and wreck the conservation measures, or how far may it be compelled against its will to abide by the regulation? That seems to be the point on which there is the greatest need for guidance.

PROF. CARDOZO: I do not see why you limit it to a country that is not willing to abide by the regulation. I am thinking of the example of the British being kept out of the Pacific halibut fishery. Suppose they had been willing to abide by the conservation measures, might they not point to various agreements in the world today to the effect that restrictive practices on access to raw materials is contrary to the interests of world-wide economy; and might they not say, "You cannot keep us out as long as we are willing to abide by the conservation measures?"

PROF. BISHOP: Then we really have two separate problems, who may regulate in order to conserve, and who may regulate to exclude others from fishing.

PROF. WRIGHT: Apart from a state's regulation of its own nationals, anyone can fish on the high seas as he sees fit. Thus I do not see how you can possibly say that if certain states get together by agreement and make regulations for a fishery they can keep fishermen of other states out. As the world shrinks and more and more people of different nationalities want to fish in every fishery in the world, there will be no way of protecting the fish excepting a system of universal legislation. That is what is contemplated in Article 3 of the International Law Commission draft. I do not see how we can approach this matter from the point of view either of national regulations or of regulations agreed to by a limited number of states. I think we have to have some system whereby a universal authority is regulating the fisheries in such a way as to bind every potential fisherman.

PROF. BISHOP: When you want to go beyond your own people and your own vessels, is it necessary to get world-wide consent or at least the consent of any state that might be affected by the regulation? I would like to hear the views of some of the people who have worked on this from the fisheries standpoint, to get clear why at least some people in the fisheries field are of the opinion that global universal regulation is not feasible.

MR. ALLEN: I want to throw out this thought, that this illustrates the difference between theoretical international law and practical law. While you are trying to get the theoretical universality of fisheries, some of the fisheries will become extinct; some of us think it is better to preserve the fisheries than preserve the theory.

MR. CHANEY: In connection with the development of conservation there seems to be some recognition of a distinct interest in a resource by a state or states. Conversely, if we start with the propostion that wherever you may want to regulate you must take into consideration the views of all the states who might come in, if you try to recognize that principle, then you have really given to each state of the world a vested interest in a resource. It seems to me it is fairly well recognized now that only those states which have an interest in the fishery, historically, or which may wish to attain an interest in the fishery, should be parties to the conservation agreement.

MR. HARRINGTON: I will confine my remarks to the general question of the interest of various states in conservation on the international scene.

In the matter of fishery conservation, probably the United States and Canada have gone farther than any other countries. We have between us seven international conventions, in some cases including other countries. We have faced nearly all these problems, and have worked out solutions which appear to be practical solutions, ones that work, that are consistent with our laws, and we think, with international law.

The nations of the world have four types of interest in the fisheries of the high seas. You have the interests of the consuming states that resources should be preserved and be productive. They are not concerned about the specific regulations. I think we are ready to grant they should be able to challenge us in our fishing of the high seas: Are we carrying out sufficient conservation measures that the resource be continued?

The next group of states are those that are not fishing in the area, but which may wish to do so some day. They are interested in much the same thing, consumers' interest; second, they want to see the stock of fish preserved, so if some day they wish to participate it will still be there. They have the same interest in the regulatory program, it is only in the overall program; they again are not concerned with detailed regulations.

We have a third category, the coastal states whose territorial waters are adjacent to the waters you are talking about. The regulations and fishing operations in this area may affect the resources inside their territorial waters. These people have an interest in maintaining the productivity of the stock; they also may have an interest in detailed regulations. They should therefore be able not only to say what happens in their territorial waters, but should be able to participate in determinations as to what regulations go into effect outside such territorial waters.

Finally, you have the fourth class, the fishing nations. Part of their economy depends on these resources. They are concerned about the detailed regulations, because these regulations may be sound in theory but in practical effect may make fishing impossible.

Out of this, therefore, I can suggest that the fishing states and the adjacent coastal states should be entitled to participate in the conservation program and regulations. The other states should not be allowed to participate in the conservation system

with respect to regulation, but should be able to question the fishing states as to whether they are carrying out an over-all proper conservation program.

That was discussed in preparing the present draft of the International Law Commission. Fishing states and adjacent coastal states may participate in the regulatory program. The other states may question the way the fishing states are carrying out the conservation program.

PROF. WRIGHT: Do your regulations present a technical question or political question?

MR. ALLEN: This is a technical question. The United States' position is that we start from the point of conservation, what is the proper conservation to maintain maximum productivity.

PROF. WRIGHT: On technical questions, is it necessary to give a right to all or to particular states to participate in making regulations? It seems to me that on technical questions it should be possible to set up an international authority to employ technical experts to make regulations for any particular fishery. The regulation should then be applicable to every present and potential fisherman there, at least unless some state objected. I do not see why, if the issue is only technical, a right to participate in the making of the regulations should be insisted on by states.

VOICE: I am not quite sure I understand the situation about regulating Pacific halibut fishing off Canada and the United States. Did we take the position that we could arbitrarily exclude nationals of all other countries, or was it that we would be willing to permit other nationals to come in and fish in that area providing they complied with the reasonable regulations? If it was the latter, it seems to me that it would be in accord with the principles of international law. On the other hand, if we were asserting an absolute right of exclusion, I should think we would want to review that carefully. It would seem to me that we would be arbitrarily going aginst one of the fundamental principles that we had adhered to and proclaimed, particularly in the Atlantic Declaration, equitable access of all to the raw materials of the world.

PROF. BISHOP: May I leave that question to this afternoon when we discuss what has been referred to as the "abstention principle," and add that the particular halibut fishery

concerned is a heavily regulated fishery with quantative limitations on the annual catch.

PROF. McDOUGAL: I suspect that the precedents Professor Wright is summarizing under the concept of freedom of the seas do nothing more than strike down monopoly, and that they do not strike down regulation in the name of conservation. That certainly was true of the protests 300 years ago which established the concept of the freedom of the seas. The concept was used to fight monopoly, it was not used to fight conservation. Whether this has been true in more recent cases, I do not know. I would like to hear from the experts. Even assuming one can find some precedents that freedom of the seas precludes conservation, I can still suggest that there has been such a change in conditions since the "freedom of the seas" was formulated, such a change in technology and in population growth, that it is reasonable for a decision-maker today to reject these old practices and applications in terms of the policy which underlies the "territorial sea" and the decision in the Anglo-Norwegian Fisheries case. There are certain special interests in coastal states, and it is a reasonable application of the international law of the seas to say that such states may adopt regulatory measures, and that they may enforce such measures against non-signatories. I think one might make a case for the reasonableness of this, just as I think one can make a case for reasonableness of the unilateral use of the seas in the hydrogen and atomic bomb tests.

When the session reconvened after lunch, copies had been distributed of the International Law Commission draft of proposed recommendations, made in June, 1955. The principal provisions read as follows:

INTERNATIONAL LAW COMMISSION. DRAFT OF PROPOSED RECOMMENDATIONS, June, 1955.

Chapter III: Freedom of fishing

Right to fish

Article 28(new)

All States have the right to claim for their nationals the right to fish on the high seas, subject to their treaty obligations and

to the provisions contained in the following articles concerning conservation of the living resources of the high seas.

Conservation of the living resources of the high seas

Article 29

A state whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged, may adopt measures for regulating and controlling fishing activities in such areas for the purpose of the conservation of the living resources of the high seas.

Article 30

1. If the nationals of two or more States are engaged in fishing in any area of the high seas, these States shall, at the request of any of them, enter into negotiations in order to prescribe by agreement the measures necessary for the conservation of the living resources of the high seas.

2. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure contemplated in Article 35.

Article 31

1. If, subsequent to the adoption of the measures referred to in Articles 29 and 30 nationals of other States engage in fishing in the same area, the measures adopted shall be applicable to them.

2. If the State whose nationals take part in the fisheries do not accept measures so adopted, and if no agreement can be reached within a reasonable period of time, any of the interested parties may initiate the procedure contemplated in Article 35. Subject to paragraph 2 of Article 36 the measures adopted shall remain obligatory pending the arbitral decision.

Article 32

A coastal State having a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts, is entitled to take part on an equal footing in any system of research and regulation in that area, even though its nationals do not carry on fishing there.

Article 33

1. A coastal State having a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts, may adopt unilaterally whatever measures of conservation are appropriate in the area where this interest exists, provided that negotiations with the other States concerned have not led to an agreement within a reasonable period of time.

2. The measures which the coastal State adopts under the first paragraph of this article shall be valid as to other States only if the following requirements are fulfilled

(a) that scientific evidence shows that there is an imperative and urgent need for measures of conservation;

(b) that the measures adopted are based on appropriate scientific findings;

(c) that such measures do not discriminate against foreign fishermen.

3. If these measures are not accepted by the other States concerned, any of the parties may initiate the procedure envisaged in Article 35. Subject to paragraph 2 of Article 36, the measures contemplated shall remain obligatory pending the arbitral decision.

Article 34

1. Any State, even if its nationals are not engaged in fishing in an area of the high seas not contiguous to its coasts, but which has a special interest in the conservation of the living resources in that area, may request the State whose nationals are engaged in fishing there, to take the necessary measures of conservation.

2. If no agreement is reached within a reasonable period, such State may initiate the procedure contemplated in Article 35.

Article 35

1. The differences between States contemplated in Articles 30, 31, 33 and 34 shall, at the request of any of the parties, be settled by arbitration, unless the parties agree to seek a solution by another method of peaceful settlement.

2. The arbitration shall be entrusted to an arbitral commis-

sion, whose members shall be chosen by agreement between the parties. Failing such an agreement within a period of three months from the date of the original request, the Commission shall, at the request of any of the parties, be appointed by the Secretary-General of the United Nations in consultation with the Director-General of the Food and Agriculture Organization. In that case, the Commission shall consist of 4 or 6 qualified experts in the matter of conservation of the living resources of the sea, and one expert in international law, and any casual vacancies arising after the appointment shall equally be filled by the Secretary-General. The Commission shall settle its own procedure and shall determine how the costs and expenses shall be divided between the parties.

3. The Commission shall, in all cases, be constituted within five months from the date of the original request for settlement, and shall render its decision within a further period of three months, unless it decides to extend that time limit.

Article 36

1. In arriving at its decisions, the Arbitral Commission shall, in the case of measures not unilaterally adopted by coastal States, apply the criteria listed in Article 33, paragraph 2 according to the circumstances of each case.

2. The Commission may decide that pending its award the measures in dispute shall not be applied.

Article 37

The decisions of the Commission shall be binding on the States concerned. If the decision is accompanied by any recommendations, they shall receive the greatest possible consideration.

PROF. BISHOP (summarizing briefly these provisions, article by article): I think the points where we will want to spend our greatest amount of time on these articles may be as follows: How far their objective "criteria of reasonableness," to use Professor McDougal's term from this morning, is set forth in Article 33, paragraph 2? How far is the procedure of Article 35 suitable for this type of controversy? How far is the regulation initiated by the coastal state a desirable scheme? Doubtless you will think of many others as we go along.

At the beginning it might be helpful to ask for a brief comment from Mr. Herrington, concerning whether this draft

seems to carry out the thinking of the Rome Conference of fisheries experts.

MR. HERRINGTON: I would say that in general this does carry out the conclusions of the Rome Conference. It goes beyond the conclusions and recommendations of the Rome Conference in certain respects, because that conference considered itself not competent to decide questions involving the granting of special rights to any state or group of states. The problem contained in Article 33 was outlined, but no solution was offered by the Rome Conference. The provision for the Commission in Article 35 does follow out the Rome Conference fairly well.

MR. ALLEN: Is not that compulsory, while in the Rome Conference the idea was not compulsory resort to arbitration?

MR. HERRINGTON: The Rome Conference concluded that certain problems could be handled if states did these things, but it did not recommend that they should be forced to do them. The International Law Commission proposed that the nations should do these things, so it is going a step beyond the Rome Conference.

There are several ideas here which I believe are unique in international law. One is Article 31, which provides that when nationals of other states engage in fishing in the same area the measures adopted shall apply to them. We have that covered in voluntary agreements like the Northwest Atlantic Convention, which we discussed this morning. Article 33, is of course, a new concept. The provision in Article 35 is not new. I think the first example of such a provision is in the North Pacific Convention, which provides that if we have specific problems on which the Commission does not reach agreement, the governments will set up a special body to which the matter will be referred and the Commission must accept the decision of that expert body.

This draft omits certain other matters. There should be a definition of the objectives of conservation, because the term "conservation" may be used in different ways. Unless we know for certain what the objectives are, I doubt whether we would agree to some of the articles. We might agree if there are certain objectives, but not agree if the objectives were different. There is another point where I believe there is a gap, in Article 33. If a state unilaterally proclaims certain regula-

tions which are submitted to an arbitration committee, and the arbitral committee finds the regulations do not meet the criteria set forth, I do not see anything which prevents the state from issuing a new set, which would mean going on and on through the same procedure over and over again.

PROF. RIESENFELD: May I inquire as to the breadth of Article 34? Would, for instance, this provision mean that the USSR could say, "We have a 'special interest' that the fisheries of Costa Rica are not depleted," and give as the reason that any depletion of resources in one area would have repercussions on the distribution of the remaining supply? Is that fact sufficient for making a claim under Article 34 initiating the implementing procedures?

MR. HERRINGTON: The intent there was that a consuming state should have the right to ask a fishing state whether it is taking proper measures for conservation. In other words, anyone fishing on the high seas has an obligation to carry out conservation. It was pointed out at the Rome Conference that any state depending on certain products which are important to it has an interest. For example, the West Indies buy codfish from Newfoundland. If the codfish were over-fished and production wiped out, the consuming state would suffer from the lack of codfish. Therefore, they would have a right to see that the cod fisheries on the Newfoundland banks are subject to proper conservation.

PROF. FIESENFELD: How about the definition of the term "area?" Can the claiming state pick out an area artificially? Who determines the area? Is there any understanding as to how large or how small it can be, or can any nation select a zone at random and then say, "Go on and arbitrate it?"

MR. HERRINGTON: They can if they have the proper interest, and the other state is abusing the right of fishing on the high seas. Everybody fishing on the high seas has an obligation to see that conservation is practiced.

PROF. RIESENFELD: It goes further than that. It gives the outside state the power to initiate proceedings, does it not? Would it not be possible to find a more specific circumscription of the geographical or, perhaps, ichthyological frame and to make some provision as to what aspects must be present to give a claimed interest the requisite "special" character.

MR. CHAPMAN: I was going to say the same thing, that this whole list of articles should be read in connection with the Rome report, because the International Law Commission drew its material rather strictly from the recommendations of the Rome Conference. The Rome Conference and the International Law Commission had in mind, not areas but stocks of fish, however, some fisheries are fishing on eight or ten species of fish at the same time, and in such a fishery as that you almost have to deal with area. It is generally understood among scientists that you cannot break down into separate species for regulations under such conditions. You have to deal with the regulation of the total fishing in that particular area, so in order to cover this general case it was necessary to refer to area.

PROF. CARDOZO: In commenting on what seems to be an interesting result of Article 34, suppose a country of Europe depends to a considerable extent on canned sockeye Pacific salmon. These fish breed in the upper stretches of rivers. Suppose Canada is going to make a dam for electric power. Under this article, it sounds as if an European country which gets some of its food from these fish could object to the kind of dam Canada is making in its rivers.

PROF. BISHOP: Is not Article 34 limited to high seas?

PROF. CARDOZO: In order to have the high seas fisheries of this particular kind continue to be plentiful, the fish must be able to breed in the upper reaches of the river. It says that a state which is not fishing but which has a special interest in the conservation of the living resources in that area may request the state whose nationals are engaged in fishing there to take the necessary measures of conservation, that is, build certain kinds of dams that do not impede the fish.

PROF. BISHOP: Would it be a reasonable construction of Article 34, that it is intended to apply even to what happens inland in a country?

MR. CHAPMAN: It was not considered at the Conference. There are probably several other technical problems of that same sort lying around loose. There is a saving clause in each of these new departures, providing that if there is not agreement it should go on to peaceful settlement. The International Law Commission is not capable, sitting in Geneva, of under-

standing all these special cases that might arise, so they provide elasticity by means of an arbitral tribunal.

PROF. BISHOP: Do I understand that Articles 30, 31, 32, 33, and 34 talk about fisheries on the high seas only, or those inside territorial waters, or in inland streams?

MR. CHAPMAN: They talk about high seas fisheries only, but as Mr. Cardozo points out, in salmon there are no fisheries in the high seas unless we permit them to breed in the tributaries. The whole thinking of the draft was in terms of regulation upon the high seas.

PROF. CARDOZO: You have to bring to mind that the Pacific salmon are a special breed of fish. They are caught on the high seas, and they are caught on the lower reaches of the river. When they get to the upper reaches of the river they are no longer desirable to catch, but you have to let them get there and then let the little ones get down.

MR. ALLEN: It was my impression at the Rome meeting that there was considerable sentiment that in the regulation of a fishery you cannot be too arbitrary in distinguishing when fish are inside and outside territorial waters. Therefore, the regulation outside territorial waters might have a direct effect on internal waters.

PROF. ROBERT R. WILSON (Duke University): I should like to ask about the meaning of the word "fisheries" itself. I notice that in the current pattern of our commercial treaties we make an exception with respect to national fisheries and marine hunting. Does the last-mentioned term comprehend activity separable from fishing?

MR. HERRINGTON: In the Rome meeting it was agreed that when the term fishing was used it meant acquiring the product, the living resources of the sea, in any manner, including hunting for whales, hunting for seals, gathering seaweed, and all the rest. I imagine the International Law Commission is using "fishing" in the same sense. It is the harvesting of the live resources.

PROF. BISHOP: Although Article 34 seems to be something newer, Articles 31, 32, and 33 tie in more closely with the

usual case we were discussing this morning, how far regulation by less than all of the parties interested is to be binding upon someone who did not take part in making the regulations, or who did not agree to them. May I ask again, does it take the agreement of everybody in the world who wants to fish in a place to make conservation regulations that the world has to respect?

PROF. WRIGHT: As I understand this draft, it maintains the position of international law relating to fisheries, which permits a limited number of states to make regulations binding upon their own nationals. They do not bind the nationals of any other state. If such other nationals subsequently come into the fishery, they can either agree to the regulations, or if they do not agree then they are entitled to this form of arbitration, which can decide upon regulations which will be binding upon the nationals of this other state. I would like to ask what the nature of that arbitration is? Can this arbitral commission give consideration to the objections of an outside state and perhaps modify the regulations which the initial states have made, and then as a legislative act issue the new regulation, which then becomes binding upon everybody? Do they become binding on the initial state and the objecting state, or would they be binding on any subsequent state that comes into that area? Is there a legislative authority for this so-called arbitral commission to lay down regulations that would be binding on everybody?

MR. CHAPMAN: That was considered in extenso by the International Law Commission. They made provision in Article 37 for both instances. In the first case, it was considered that if under these criteria the regulations are clearly discriminatory against foreign fishermen, the arbitral tribunal could make a decision to that effect and the regulations would not be binding with reference to foreign nationals. In the second case you bring out, where the regulations might possibly be amended in order to correct inequities, this might be done in the form of recommendation by the arbitral tribunal. Recognizing that they are getting into a new field here, and not wishing to tie down the hands of the arbitral tribunal too tightly, they have given two forms of reporting: one, a decision which would remand to the United Nations, and two, recommendations which would not be binding but which would be given as much weight as possible, for modification or moderation.

PROF. WRIGHT: Suppose after you had this arbitration and all was settled with the state that had objected another state came in; would you have to go through it all over again?

MR. CHAPMAN: You might have to. The new state would have the right to object.

PROF. WRIGHT: If he objects, then he can fish until it is decided.

MR. CHAPMAN: He can bring a new action, but I would assume that in the course of a little time there would be a body of jurisprudence on the subject. Once you had settled a particular case with respect to a particular fishery, a new country coming in would not raise exactly the same question that had been settled before.

PROF. WRIGHT: Therefore, you would contemplate that probably after you had had one of these arbitrations, and the regulation had been approved by the arbitral tribunal, all other states fishing in the area would have to observe it?

MR. CHAPMAN: Yes. I should judge that if it was a reasonable decision, other states would consider themselves bound by it.

PROF. BISHOP: May I point to an important difference here from the draft of 1953. Article 3 of the 1953 draft provided that all states should be under a duty to accept any system of regulation worked out by an international authority under the United Nations. And the 1953 draft provided that in case of controversy there should be a reference to this body which could be in effect legislative. The 1955 draft provides merely for arbitration between the parties concerned to the arbitration. Are we also quite correct in understanding that the commission or arbitral tribunal, under the 1955 draft, does not itself lay down rules, but merely finds whether these criteria, of Article 33, paragraph 2, are met?

MR. HERRINGTON: This draft gives the arbitral body the authority to determine whether these conditions are met. This draft does not provide any way to handle the problem of a coastal state immediately issuing a new set of regulations. It may develop in redrafting that a mechanism will be worked out to provide the kind of answers that have just been discussed.

PROF. KENNETH S. CARLSTON (Illinois Law School): Are these intended to be declaratory of a desired development in international law, rather than provisions in a draft convention?

MR. HERRINGTON: I discussed with members of the International Law Commission how they thought these articles should be brought into effect. There are two possible ways. One is to have the General Assembly approve these articles in the form of a resolution which would have moral force but not be binding. The other would be to recommend that the United Nations approve the articles in the form of a draft convention to be circulated for signature, the signatories to be bound by the provisions therein.

PROF. CARLSTON: In that event, then the regulations themselves would presumably be reasonable as a means for developing the resources of the sea. But on the point at issue with which this body is concerned, namely, the existing background of international law and its insufficiency, I would point out the consequence resulting from the proposed article 33, namely, the imposition unilaterally of such regulations by a state, and not by international authority or by an international body acting under the United Nations. I would suggest that this decentralization of the world international community is a backward step, and that thus to impose third-party obligations through the act of a single state is rather an extraordinary step. There appears to be a compulsory reference to arbitration and compulsory acceptance of the decisions after arbitration. Therefore, it is a third-party obligation, is that correct?

If the parties do not agree upon appropriate procedures and regulations, the Arbitration Commission might be empowered to do so and could do so even against the consent of any one of the states concerned.

PROF. BISHOP: Is there anything in here that gives the Commission power to lay down regulations, or merely the power to pass upon the validity, under the terms of Article 33, paragraph 2, of regulations laid down by one or more states? The Commission is not to be a law-making body under the present draft.

MR. ALLEN: This Commission, consisting of one lawyer and four scientists—because I expect "experts" means scientists—is to be competent to make a decision which shall be

conclusive in both law and fact. This much is clear, that the drafting of Article 35 is so vague that it leaves open to disagreement its meaning and interpretation. If it was intended to be merely adjudicating validity of the regulations and nothing more, it is not so brought out in the statement.

PROF. McDOUGAL: May I as the "devil's advocate" suggest a very opposite interpretation from that offered by Professor Carlston. I think one possible interpretation of this language is that the principal grant of competence offers nothing startling; that it again simply illustrates the type of unilateral claim that states have made since time immemorial to authority in contiguous zones. That is, there are today assertions of authority and national interest beyond the territorial sea limit, wherever it is located; but at present this type of assertion of authority is passed upon by 79-odd decentralized decision-makers, in foreign offices all over the world, as to whether they will accept the assertions as legitimate under world prescriptions.

There is thus nothing novel at all about the provision for the assertion of claims of this kind, but I do think Article 35 is much more novel than Professor Carlston suggests; here, for the first time, we have established an international decision-maker to pass upon these claims from a broad community perspective and able to take into account policies and considerations that are not unique to any single national state. So I would regard this as a most progressive step.

PROF. JESSUP: With reference to the point Mr. Herrington made, it seems to me the procedural aspects of the arbitration are very much of the essence of this proposal. You may oppose them, or you may favor them, but they are of the essence. It would not be sufficient, then, merely to have them embodied in a General Assembly resolution. You would not have arbitration merely by the moral effect of a resolution. Therefore, it seems to me the practice which has been adopted in other connections by the Assembly, namely, submitting the document to the states for ratification, would be about the only procedure by which the decisions could be given effect.

PROF. LOUIS B. SOHN (Harvard Law School): I have just two points to make. In the first place, it seems to me that the Commission is going to create new rules of international law even if it is decided to give to it only the power to make rec-

ommendations. In the Bering Sea Arbitration there was given a power of decision and also the power of making recommendations about regulations, and it is quite interesting to note that the regulations were accepted. I suppose we are going to have some things like that here, and it is important to have a commission that would be of a permanent type, that would be able to build up jurisprudence on the subject after a while. This is preferable to having a commission created ad hoc for each case, very often after considerable delays, and to having each commission making new proposals unco-ordinated with those made by other commissions. Secondly, the commission should be constituted mostly of lawyers, with technical experts advising them on technical questions, under Article 33, paragraph 2 (a) and (b). The members of the Commission should be guided by the law and the facts, and I do not think technical experts will be qualified to do that.

MR. HERRINGTON: The permanence or temporary nature of the Commission has been discussed at very considerable length by the representatives of a number of countries who have a great deal of interest in the question. Among these people who have the practical problem of making these regulations work, the feeling is pretty general that there should be a body appointed to handle a specific problem. It has also been felt that the nature of the problem they are asked to solve—whether scientific evidence shows there is an imperative and urgent need for measures of conservation—is primarily a technical problem. So is the question as to what particular measures should be adopted to produce the effects desired. Even non-discrimination against foreign fishermen is to a large extent technical. Our various international commissions have been dealing with problems of this nature. These commissions are made up of a combination of lawyers and laymen, using a government man and one or more people picked from the area who are interested in its problems.

PROF. BISHOP: Mr. Herrington's point suggests to me that I should ask a man who has served on the International Fisheries Commission for a long time to give us some of his views of this draft and of the general problem which it brings up. I would like to call on Ed Allen because he has worked with the commissions in the northwest longer than any other person whom we have with us.

MR. ALLEN: In view of the fact that we have just been discussing the constitution of these arbitration commissions, I might say that after twenty-three years' experience on the International Fisheries Commission, fourteen on the International Salmon Fisheries Commission, and a year and a half on the International North Pacific Fisheries Commission, I have the greatest respect for the utility of scientists, but I would never pick a board of scientists to reach a decision on this issue.

There is one thing I would like to say first, and that is that one of the most difficult problems with which we are confronted in the practical administration of conservation is securing the interest of the people in the government who are in a position to determine national policies. I was talking one day to a representative of our government (I am going to tell you that he was very high up), and I said, "Well now, we are very keenly interested in the fisheries situation of the North Pacific, not merely because of the food that the fish provide, not merely because of the employment the fisheries give, but because of the international relations that are so keenly connected in the North Pacific with the question of fishers." He turned to me and said, "Mr. Allen, we have such important matters to deal with, we cannot pay any attention to such a matter as fish." I asked, "You are quite interested in the United Nations, are you not?" "Oh, mighty interested, very interested." "I suppose you are familiar with the Food and Agriculture Organization." "Yes," he said, "we are very enthusiastic about that organization, as I presume you know." I replied, "Fisheries are one of the three major divisions of the organization. I suppose you know that." He said, "I can't say that I do." I said, "They are, and your FAO fishery division has estimated that the annual production of ocean fisheries is some 40,000,000,000 pounds, now, I did not say million, 40,000,000,000 pounds, mostly food for the people of this world. Do you still think that can be brushed off without consideration?" He said, "I had no idea there was anything like that involved." That is something that we have run up against time and time again in connection with our own government.

I will not elaborate on the difficulty in dealing with international lawyers, but I have found many of them who do not have very much more knowledge of fisheries than that man. We are confronted with the difficulty that many of you people who have with the greatest sincerity taken a position in the subject of fisheries have not dealt too much in the field with which some of us are concerned. So let me say this, that there is a great

difference between the fisheries of this world, geographically, biologically, as well as historically. To put them all into one strait jacket in order to make them conform to some very nice-sounding and logically reasoned-out theory just will not work, if you want to preserve the fisheries.

Let us take a look at the Atlantic. Mention was made about the Newfoundland banks. People from Brittany and Spain are supposed to have been fishing there before America was discovered. You have a different situation on the northwestern coast, where Canada and the United States are the only people who have ever fished there since the fisheries were instituted. The historical background there is absolutely different. You cannot expect to weigh the things from the same standpoint as where you have for century after century had many peoples in a fishery. Why do you consider those two conditions together? You cannot take the two conditions which are so totally different and treat them in the same way.

Up in the North Pacific we have the question of halibut. We found that over-fishing actually depleted the fishery down to the point where it was hardly worthwhile for the fisherman even to go out. We put that fishery, which was engaged in only by the fishermen of Canada and the United States, under careful and effective management; and it has been built up to the point where last year our banks produced the biggest catch in history. Compare this to the Atlantic, where there was no management of that kind. We are now producing on our coast about 75% of the entire halibut catch of the world. Is it not worthwhile to take results into consideration, rather than be too technical about what Hugo Grotius or somebody else said several hundred years ago? When you come to that, I am not sure whether Hugo Grotius or the British Navy had more to do with the development of international law.

Some fisheries may be exhaustible, some may not be; some are, as we call it, subject to depletion, some are subject to actual destruction. The salmon fishery was mentioned here. If you cut off all the salmon to a stream you may destroy that entire run, because the salmon have to go up that stream to spawn. It is unlikely that you could fish out any halibut bank completely so as to catch the last halibut, because the halibut spawn at sea. You have a distinction there; but salmon can be completely destroyed. We have one case in the North Pacific, the famous sea-cow which was completely destroyed, absolutely rendered extinct, and that can be done as to seals. It can be done as to salmon. In other words, I think there are fisheries

which can be destroyed. We know and have proved that fisheries can be seriously depleted. Fortunately, we have also proved they can be brought back. Our halibut fishery has been brought back by the joint effort of Canada and the United States.

The sockeye salmon fishery has been mentioned. That is on its way back already. It has been brought back very substantially, so that the catch last year was the second largest in the entire history of the industry; and if the Commission is permitted to continue its work without interference either from the government or from abroad, I think that fishery will be re stored perhaps not only to the greatest extent that it was once, but I think possibly under careful management it can be increased beyond what it ever was.

So we have the matter of the regulation of the fishermen. How are you going to harmonize their actions with international law? Are you going to treat them from a theoretical standpoint, or are you going to treat them from the standpoint of human beings who unfortunately have human frailities? My good friend, Dr. Chapman, wrote the best exposition on that point I have read, in which he pointed out that if you are going to restrict and regulate the fishermen in a democratic country, you are going to have a hard time getting away with it unless they get the product of their restraint. He has pointed out very emphatically that the fishermen must get their reward for their restraint, and that if you do not give them that reward you are going to find it an impossibility to succeed with your regulation.

Why has our halibut commission been so successful? There are two basic reasons. First, we insisted upon thorough scientific research before we made any decision. We wanted to know the facts in the best way they could possibly be ascertained. Second, we have had the co-operation of the halibut men and the industry up and down the coast, because they have learned that by scientific management they were getting a distinct and positive benefit which could be perpetuated year after year indefinitely. At least, that was their belief. But is it correct to follow our International Law Commission and let anyone else come in to this fishery—which was solely developed by those fishermen, which has been maintained and built up with their co operation—on this theory of universal access to all natural resources?

MR. MONTGOMERY PHISTER: The problem the commercial fishermen have in dealing with conservation is that true conservation is the concern of the state. When the extension of

territorial waters off a state's coast is for the purpose of enabling it to establish a monopoly on fish resources, either a monopoly for the benefit of its own fishermen or a monopoly which can be used for the purpose of obtaining revenue for the state, we are greatly concerned. A commercial fisherman's interest in conservation is to attain with respect to any given fish population what we have called the maximum sustainable yield, not to establish a monopoly in the fishery.

Of course, we have not had an opportunity to study carefully the proposed draft, but the impression we have of it now is that, in general, it has answered in a practical way the claim which has been made by coastal states to the establishment of a monopoly on the fishery resources off its coast. At least it has gone a long way in relieving us from the possibility that the coastal state will be able to establish a monopoly which we cannot break, based upon pretended conservation or upon a group of regulations which it pretends are for the conservation of a fishery. Of course, that has nothing to do with the problem up in the northwest, to which reference was made a moment ago.

In going over the proposed articles without careful study or consultation with anyone on this point, it did not seem to me that the definition of conservation, the definition of maintenance of productivity, or the meaning of those two terms, was sufficiently clear in the articles. Those two things are of extreme importance to us, because we have discovered that language differences raise serious difficulties. Thus when the word "conservation" is translated into some other language, it has a different meaning entirely than is attached to it in the United States. We would be very happy if it were possible to have a direct statement in the articles, by definition in some way, to establish exactly what is meant by conservation, and by maintenance of productivity.

I think that the commercial fishermen have been somewhat opposed to the idea of the administration of the fisheries of the high seas of the world by a permanent body, because of their concern lest the permanent body would tend to adopt regulations for the sole sake of having regulations, and not for the purpose of actually maintaining the fisheries. I think that is the basis upon which we have been in opposition to that idea. If a permanent body could be set up that would not adopt regulations solely for the purpose of giving orders, rather for the purpose of actually maintaining the fishery population, we might not look upon the idea with such a jaundiced eye.

PROF. OLIVER J. LISSITZYN: (Columbia University) What sanctions are envisaged for the enforcement of conservation rules against nationals of states which are not participants in the regulations? Are third states under an obligation to abide by the regulations, or do the latter entitle the states which have entered into the treaty to stop, seize, and bring in vessels of their states?

MR. HERRINGTON: I refer to remarks made earlier, about how these principles might be put into effect. Unless a draft is circulated and signed by nations it will not bind those nations. If it were signed by nations then sanctions would presumably be of the same type as in any other treaties between nations.

PROF. LISSITZYN: Then they would not assist the United States in exercising conservation over whales on the high seas.

PROF. BISHOP: One of the things left out of the 1955 draft is the principle of the states regulating a fishery being able to exclude newcomers from a fully utilized fishery. The material distributed this morning contains an informal draft embodying this idea. I cite this merely as an example to show the type of thinking which seems to be back of the suggestion made this morning along the lines of the United States and Canada strongly urging Great Britain not to enter the Pacific halibut fishery. Can we look at this a moment. In that form or in the form of the abstention principle set forth in the North Pacific fisheries treaty, saying where there is a specific fishery in which a state has not participated and which is being fully utilized, the non-participating states are requested to keep out. Is there any justification for the idea of excluding the newcomer from such a fishery, even if the newcomer is perfectly willing to abide by the existing conservation regulations?

MR. HERRINGTON: Mr. Chairman, if I might, I would like to read from the report of the Rome Conference, paragraph 18:

> 18. Case 1: A special case exists where countries, through research, regulation of their own fishermen and other activities, have restored or developed or maintained stocks of fish so that their productivity is being maintained and utilized at levels reasonably approximating their maximum sustainable productivity, and where the continuance of this level of productivity

> is dependent upon such continued research and regulation. Under these conditions the participation of additional States in the exploitation of the resource will yield no increase in food to mankind but will threaten the success of the conservation programme. Where opportunities exist for a country or countries to develop or restore the productivity of resources and where such development or restoration by the harvesting State or States is necessary to maintain the productivity of resources, conditions should be made favourable for such action.

Now that is, briefly stated, the problem of halibut and salmon in the North Pacific, the problem as covered by the principle of abstention.

The report of the conference proceeds then to outline the way in which to handle this case. The principle of abstention is based on the argument of the need for conservation: that unless some such system is incorporated and put into effect, it is impossible to maintain an adequate conservation program. The application of the principle does not deprive anybody of something that they would have without the general conservation system.

The present report of the Law Commission provides that when a country or countries have a system of conservation in effect, such as in the North Pacific Fishery Convention, then any country entering such fisheries would observe the regulations. The question of abstention in certain cases then might become a matter for arbitration.

PROF. BISHOP: I would like to hear any comment on the abstention principle, as it may run counter to the idea of equal access to raw materials.

PROF. WRIGHT: It seems to me this applies the principle of discovery and occupation to a portion of the high seas, rather than the principle of freedom of the seas. What I gather it to mean is that those who get there first and exploit the resource are able to exercise a monopoly over it. That would be a considerable modification of the accepted theory of high-seas fisheries.

Mr. Phister told us that there are two interests involved, the interest of states to get there first and to have the right to monopolize, and the interests of the world as a whole in conservation. The general principle has been that the state can

monopolize within its territorial waters, and perhaps a little beyond them, but on the high seas beyond, there is no place at all for the principle of monopoly, that the principle of free opportunity of everybody to fish exists, and that the only limitation is the necessity for conservation.

I am inclined to think that is a sound principle. I would certainly suppose there would be great objection among many states to following the lines which are given in Article 4 of this informal draft, which does permit the first-comer to get a monopoly of the resource in the area. It also seems to me that there is more of the monopoly idea in the ILC draft of 1955 than there was in the draft of 1953. If you want to have complete freedom modified by conservation, I should think the general principle in the draft of 1953 would be the best, provided you can have full assurance that the very wide powers of legislation conferred on this international authority in Article 3 will be well exercised. If that is a body which can study the particular condition of each fishing area and make regulations solely in the interest of conservation, which will then become binding on everybody, and that is provided for in the general convention, that would be an easy way of accomplishing the object. It was pointed out that such a body might impose regulations just for the sake of regulating. I do not know why that should be the case. It is just a question of whether the countries of the world could create an international authority that would be regarded as fair by everyone.

The 1953 draft differs from the 1955 draft in that it definitely creates a legislative authority while the 1955 draft creates merely an arbitral authority and gives a certain prior opportunity for the initial occupants of the fishery to make regulations. Nobody else is finally bound by those; anybody can object, but the objector is under some difficulty. He has got to show through international arbitration that these initial regulations are discriminatory, are contrary to scientific standards, or that there should not be any regulations at all, or various other things. That places something of a burden upon the objector, and so it does give a certain advantage to the initial occupants of the fishery. But it seems to me entirely in accordance with principle to say that these initial regulations can prevail among the initial fishermen, and that others have the opportunity to object.

The 1955 convention would have to be a multilateral convention to conform to international law. No state can be compelled to submit to arbitration without its consent through some

formal instrument; so this clearly would have to be in the form of a treaty and I think it would be necessary to state just what the nature of the arbitration would be. I think that would have to be clarified. As I gather from the discussion, the issue would be: Are these regulations, which the initial occupants of a fishery have laid down, in accord or not in accord with the criteria which are set down in Article 33? If the tribunal held they were not in accord, then it could make recommendations. They might be accepted, but they would not be regulations of the kind provided for in Article 3 of the 1953 draft. That might prove a very cumbersome proposal. The states may not accept the recommendations. It is not at all clear in terms of Article 35 precisely what the nature of the decision would be. It might be interpreted as a legislative authority to propose certain modifications in the regulations. I am not convinced by the discussion that the more simple arrangement, setting up an authority to lay down regulations, would be unsatisfactory.

PROF. HERBERT W. BRIGGS (Cornell): I was impressed by what Mr. Allen had to say about conservation. What bothers me is the question of enforcement. If I might talk about the whales for a minute, I have here a translation of a Peruvian judgment of November 26, 1954, condemning the masters and owners of five Onassis Olympic whalers and fining them $3,000,000 (U.S.) for breach of certain specified articles of Peruvian national regulations prohibiting fishing or hunting without a Peruvian license in Peruvian coastal or "deep waters." The coastal or territorial waters claimed by Peru extend 200 miles from the coast and deep water hunting and fishing is defined as hunting or fishing beyond the 200 mile limit. By an agreement signed on August 18, 1952, Peru, Chile, and Ecuador undertook to ensure the conservation and protection of "their" natural resources, including "their" whales, off their respective coasts.

In the case I am discussing, the court found that the Onassis whalers had operated within Peruvian territorial waters without a license. It found as a fact that they were sighted 110 miles from the Peruvian coast and the Olympic Victor and Olympic Lightning were captured at a distance of 126 miles from the coast; although when we look at Mr. Herman Phleger's remarks in the June 6, 1955 Department of State Bulletin (p. 937), we find that according to information furnished to the Organization of American States by Panama (under whose flag the whalers were operating), the vessels were seized 160 miles

off the coast and the factory vessel was attacked by a Peruvian plane 364 miles off shore. In any case, the court found that these vessels should be fined $3,000,000 because they had not first obtained a whaling license from the Peruvian authorities.

This is the type of question which comes to my mind when we hear talk about the desirability of national conservation of the resources of the high seas.

PROF. BISHOP: I would like to ask Mr. Jessup for any comment with respect to the 1955 fisheries draft.

PROF. JESSUP: I do not have any particular comment to add to what has been said, except that I am not sure I understand how it is appropriate to try to settle certain of the differences of opinion through arbitration. For example, in Article 30, we have a situation in which there has not been perfected a scheme for regulation and conservation. The parties are merely unable to agree as to what these regulations should be. Yet, referring to Article 35, this arbitral commission is appointed, and one of the things that it is to do is to decide whether the regulations adopted are appropriate. It seems to me there is a certain inherent inconsistency in the proposals, and that in many respects this is not an arbitration commission as we have ordinarily understood it, but it is in effect calling in a special board of international experts who themselves draw up regulations for conservation in situations where the states have not been able to agree on such regulations.

MR. HERRINGTON: I share your opinion on that. The Rome Conference referred to the board as a body of experts, but when it reached the International Law Commission, it became an arbitral body. I raised that question with several of the members. Here is where the international lawyers and the technical people disagreed. I was informed that anything of this type was an arbitral body.

PROF. BISHOP: I would like to put one question. Why should we try to proceed in this fashion of having one state or a group of states making regulations, all the others objecting, and then finally, having arbitration? Why do we not wait until we can get a worldwide fishing authority set up by treaty which will either itself regulate or pass upon the cases in which states may regulate?

MR. PHISTER: Perhaps we have a slightly stronger idea of the necessity for conservation than actually exists. There are only a few fisheries or fish populations in the world which require any particular action with respect to conservation, at least at the present moment. So far as the fisherman is concerned, we believe that in those instances where conservation is necessary, it will not be difficult to assemble together those states who are interested in the fishery, either by reason of their being consumers or by reason of their being participating fishermen, and agree upon some sort of a measure which will properly maintain the fishery. We think that at the present time it is restricted to so few fisheries that it can well work.

MR. ALLEN: I believe on this particular point we are all in accord, both as to the Atlantic and the Pacific. I might just add this: Those who have been active in the last few years have had some experience with FAO which has not made them enthusiastic about that organization.

MR. HERRINGTON: I want to speak concerning the position of the United States Government on this. There has been an implication that the reason we are against the world body is because the fishermen do not like it. The point of view of the United States Government, for or against, is not based on whether the fishermen like it or do not like it, but on the reasons why the fishermen do or do not like it. If the reasons are valid, they should be considered by the United States Government. The U.S. position is against such a world body in the context of the ILC fishery articles. We do not think it practical.

These problems can be well handled by regional bodies. We do not see how a world body can do a better job or as good a job. What the world needs is some general principles under which it can operate. The responsibility of the fishing state is to carry out its proper conservation program. If you attempt to set up a world body and give it the job of research and regulation in all parts of the world, that body would become so tremendous that it would have to be set up in regional sections so as to be close enough to the problem. Regulations can do more damage than good if they are impractical. You can kill a fishery by regulations which may be theoretically sound but, practically, of no good at all. If you provide the regional body with a way of settling the few cases where the members do not reach agreement, we feel the regional bodies would do a proper job at much less expense and much more effectively than the world

body. This point of view is not held alone by the United States. It is held by the other countries with most experience in fishery conservation. It is not a position based on the whims of our fishermen; it is based on knowledge of the practical problems with which we are confronted.

PROF. WRIGHT: You have to have a convention in which all the nations of the world are involved. It may be that the particular administration of a fishery could be left to experts who are familiar with the region.

PROF. BISHOP: The inquiry is how can we get along without a worldwide body, bearing in mind such questions as those concerning whales.

MR. HERRINGTON: Whales are subject to an international whale commission that covers whales throughout the world. There is one world body, because our best information is that most of the whales are common, that is, not divided into separate stocks. There is one big stock and it must be considered from the world point of view.

PROF. WRIGHT: If you have a universal, multilateral convention, all countries will belong to it.

MR. HERRINGTON: I believe the various matters outlined in the ILC draft are general principles; they are not regulations but general principles under which the states would operate. Within this framework of general principles you would form regional fishery conventions which would then work out the detailed measures required for the particular fisheries within the framework of the international principles; but the regulations themselves would be much more detailed. It would be impossible for a world body, sitting in one headquarters, to work out the conservation measures required for all fisheries. Even in the United States alone it has been found better to have a convention to handle tuna, a convention to handle salmon, and one for the northwestern fisheries, than one convention for the entire United States. That question has been raised by the Senate and replied to by the State Department, as to why we have a number of conventions.

PROF. WRIGHT: What are you going to do when some poacher comes in? You cannot enforce the regulation nor, unless his state agrees, can you have a special arbitration.

MR. HERRINGTON: Under the 1953 ILC proposal, you would have such a broad and complex organization that you would get lost. The International Law Commission itself recommended that the General Assembly adopt the three articles, and then refer them to the FAO, which would draft the detailed convention.

PROF. CARLSTON: The question at issue is whether the term coastal state, as used in Article 33, is sufficiently identified as the agent of the international community to whom is to be entrusted the decision to be made by the international community, and whether the criteria of Article 33 are adequate for the purpose. In other words, two points: 1) is a coastal state the proper agent of the international community; and 2) is the language of Article 33 adequate?

With regard to the first point, Ed Allen is sufficient authority for the proposition that the need for conservation of these world fisheries is overwhelming. To entrust that decision to the discretion of a coastal state means that if this state does not act there is no one in the world with the power to act. There is then presumably no agent that can act for the international community. The answer to that question cannot be made without at the same time considering the adequacy of the language as to what is a coastal state. Is the United States a coastal state with respect to the fishing that might take place in the center of the Pacific? With respect to whales what is a coastal state? When does a state become coastal? May there not be gaps in the high seas where there are no coastal states; who there becomes the decision-makers for the international community?

May you not have more than one coastal state, as, for example, Canada and the United States with respect to the Pacific Ocean? In that case, you have a race for jurisdiction, whoever gets there first with his assertions becomes the custodian; or do you have conflicts in jurisdiction? These are some of the questions raised by the draft, which I think ought to be considered.

MR. BEVANS: In line with some of the things Mr. Allen was speaking of a while ago, I was thinking that we have had our halibut fishery convention with Canada for some thirty years, and in that time there has only been one instance of interference. The convention itself does not purport to keep anybody out. It does not attempt to discriminate against foreigners. We have had no difficulty in that respect, so we cannot lightly lay

aside this matter of making regional arrangements and of not attempting to impose any restrictions on outsiders. We do know that nations in the world today like to bear a reputation of gentlemen; we do not have to have an international law or a treaty or agreement on every subject in order to get them to stay out of other people's special bailiwicks, when they are so recognized.

PROF. McDOUGAL: This draft follows very much the lines of the argument I was making at the close of the morning session. Despite certain ambiguities, it looks like a move in the right direction. I would like to call attention to some of the sections of the 1955 ILC draft that you did not circulate, including a restatement on the regime of the high seas. I see a lot of questionable black-letter is continued in that brief statement which is relevant to our discussion, the very first section being that since the high seas are open to all nations, no state may subject them to jurisdiction. That is just plain myth in the most insidious sense. How this is made compatible with the very highly detailed structure of authorized claim we were considering this afternoon, I do not know.

MR. HERRINGTON: I feel it is necessary to get one comment in, regarding the implication of monopoly: first come, first served. If you will study the literature behind the North Pacific Convention, you will find it differs from that. If there were time, I could give you examples, where in the absence of suitable conservation principles in the world, resources have been neglected and do not now exist. Resources that could have been built up have not been conserved because the states which did so would not have been able to draw the benefits from their own act. There is a real problem here and unless the world finds a way to meet it, there will be a wastage of natural resources. It is not a matter of monopoly; it is a real matter of conservation, and that is what is behind the principle of abstention. Maybe it can be improved, but I believe there is a need for something of this sort, and until we find something better to meet the problem, the United States is supporting the principle of abstention.

The question was raised about what is a coastal state. I believe that Article 33 states that the coastal state is a state having special interest in the resources contiguous to its coast. There is your definition of the coastal state, a state having waters contiguous to the coast.

VOICE: How about those areas not contiguous to its coast?

MR. HERRINGTON: I believe Articles 30 and 31 take care of this. Article 33 is meant to cover special problems.

PROF. SOHN: Article 36 provides that in cases other than those relating to measures adopted unilaterally by the coastal State, the Arbitral Commission in its decisions under Articles 30, 31, and 34, shall apply the criteria listed in Article 33, paragraph 2, "according to the circumstances of each case." What criteria are to be applied here?

PROF. BISHOP: If they cannot reach agreement under Article 30, and it is referred to Article 35, does the Commission apply criteria of Article 33, paragraph 2, when they cannot reach an agreement at all? What does the Commission do, make recommendations, or what?

MR. HERRINGTON: I think this draft probably needs to be filled out in various respects to make those things clear. If a newcomer questioned a given regulation and took it to the arbitral body, the arbitral body would consider whether it was discriminatory, and if it found this to be true, the regulation would not apply to the third state.

PROF. BISHOP: If the states participating cannot agree, in circumstances of Article 30, then does the coastal state go ahead and do something about it first? Article 30, paragraph 2, says you apply to the procedure of Article 35, but does that mean that Article 33, paragraph 2, tells us what type of regulation should be laid down where there has been no agreement? That point may be unanswered. It may have been hinted that the arbitral commission would lay down regulations. This situation does not seem to be provided for as clearly as some of us might like.

THE FIRST DECADE
OF THE UNITED NATIONS

THE UNITED NATIONS AND LAW IN THE WORLD COMMUNITY

Leonard Meeker
Assistant Legal Adviser for United Nations Affairs,
Department of State*

The subject that has been set for discussion today—namely, accomplishments and evaluation of the United Nations' first decade—spreads over an impressively large part of the whole field of human political endeavor. That fact is a reflection of the generous ambitions which were entertained by those framing the United Nations Charter ten years ago. They were concerned about preventing another great armed conflict. They wanted to encourage and to make easier the peaceful and just solutions of international disagreements. They cared about the living conditions and status of individual people all over the world; this arose from humanitarian impulse and from a belief that oppression may beget conflict and even world war. The framers realized that world trade had a bearing on peace and on economic improvement. They thought it wise to continue international supervision of the affairs of peoples in mandated territories and to extend some supervision to other non-self-governing areas.

In furtherance of all these purposes, the framers hoped to devise international institutions which could carry on constructive enterprises of co-operation and which would emphasize, develop, and apply principles of law in appropriate areas of international life. Accordingly, as is usual with the business of lawyers, we are bound to be interested in a very wide range of affairs when we look at the United Nations.

During the last week, at San Francisco, the first decade of the United Nations has been talked about extensively and from many points of view by government representatives on the occasion of the tenth anniversary of the signing of the Charter. As Walter Lippmann noted before the San Francisco meeting,

*The speaker made plain that he was speaking personally and unofficially and not necessarily expressing the views of the Department of State.

more important than the speeches were the facts that governments sent their statesmen to the commemorative session, that membership in the United Nations is universally prized, and that the Organization is deeply rooted among the nations as an indispensable institution for preserving the universal society in the face of dangerous division and conflict between East and West.

Significance of the Organization

The United Nations stands as a symbol of human progress and of the rule of law in the world. Its meaning, to people in every country who know about the Organization's existence, is the meaning of an institution founded upon principle and dedicated to the rational pursuit of certain human values that are easily and generally recognized. The Organization and the specialized agencies related to it were designed to bring about fruitful international co-operation in many fields. These include health, agriculture, labor conditions, science and education, trade, finance, economic development, communications, weather reporting, and transportation. The United Nations was designed to do away with the use of force, at will, by national governments. It was designed to provide standards of conduct among governments, and by governments toward their peoples in regard to at least some matters—standards of substance and procedure which would take the place of shifting expediences and arbitrary actions.

Of course, seeking after the rule of law among nations did not begin with the United Nations Organization. The League of Nations had gone before. And, before the League, international law had been growing for several centuries. The United Nations is significant as it represents the present era's expression of a main current and purpose in the growing law of nations. The purpose of bringing about the rule of law in the world can be pursued in different ways. World government, equipped with ineluctable enforcement procedures, is certainly one kind of possibility. It is not the only kind. And the present United Nations Organization as an association of national states is not the only alternative to world government.

Appraisal of any given set of institutions designed to bring about the rule of law should not be based on their relative complexity, or on the quantity of direct enforement of standards which they reveal. Law, in any community, is more genuinely measured by the degree of its recognition and acceptance than

by the amount of visible enforcement. When we are looking at the United Nations, we should not simply think of it in comparison with a more elaborate form such as world government, and regard it as a stop-gap or inadequate substitute. We should consider the performance of the United Nations as the performance of an institution which, in its own right, may spread the rule of law and make it effective in the community of nations.

Character of the United Nations and Distribution of Powers

In general, the United Nations was constructed along the lines of the League, as an association or continuing diplomatic conference rather than a government. However, in the area of maintaining international peace and security, the new organization was nominally endowed with governmental powers. At the same time, the Charter imposed no obligation on Member States to go to the aid of a country under military attack.

If the founders of the United Nations back in 1945 could have looked ahead to the present time, they might have been most surprised at the fate of the Security Council. The Council was designed as an executive organ which would decide very important questions concerning the maintenance or restoration of peace, and then carry out necessary measures directly. This design rested on co-operation among the Great Powers, which was hoped for as a logical development of their joint efforts in wartime. Actually, there had not been a very close co-operation during the war between the USSR and its allies, and the course of the San Francisco conference of 1945 led through some heavy seas. Soon after the war ended, matters grew worse and the period of cold war began. Progressively, the Security Council became to a considerable extent incapacitated by great-power differences and the veto.

The institutions created by the Charter have proved remarkably adaptable in coping with the situation which developed in the Council. Quite early, the practice of abstention was invented to deal with cases where permanent members did not agree on a course of action. This was later extended to include the proposition that the Council could act if a permanent member were deliberately absent from the meetings. As time went on, however, there came a concentration in the General Assembly of political responsibility for the main questions brought to the United Nations. This the Assembly was able to undertake by virtue of Articles 10, 11, and 14 of the Charter. The fact

that the Assembly's deliberations could not produce decisions binding on the Members of the Organization is not necessarily a true gauge of its effectiveness in furthering the rule of law. We need always to keep in mind that the Security Council's resolution calling for resistance to the attack in Korea was no less effective because it was a recommendation and not a decision.

The real question is whether the processes of United Nations political organs have resulted in the formulation or application of standards which in fact gained acceptance and were acted on by governments. The record on this is mixed. There have been instances where a political and propaganda contest was conducted vigorously, with many countries entering the lists and debating main issues, and where a recommendation based on announced principles emerged and was recognized as an expression that ought to be followed. The several stages of the Korean case in the Assembly provide examples: there was the finding of Chinese Communist aggression, and the embargo; the resolution on non-forcible repatriation of prisoners of war; and the demand for release of United Nations Command personnel illegally held by the Chinese Communists. In several cases, Assembly recommendations have not been given effect—as in the case of human rights in the satellite countries and South Africa. Even there the resolutions were probably not al together futile; they declared for principles and announced standards which were recognized as valid in most of the world.

Then there have been other instances—perhaps these can be described as relatively few—where the Assembly merely witnessed routine propaganda performances and glossed over difficult issues without real give-and-take. This has happened with the North African cases and with Cyprus and Netherlands New Guinea. There is a great difference between an outcome reached after active and even heated discussion and a more or less automatic outcome which follows upon stereotyped consideration of a problem.

There may be reasonable ground for discouragement in what can be interpreted as some retrogression in the processes of the Security Council and General Assembly during the last few years. But those processes remain available, and the knowledge is abroad as to how they can and ought to be used. I wonder if it is not true, despite any recent history, that there is greater security in the world today with the United Nations than without it. The Organization repelled aggression in Korea and contributed powerfully to the stopping of hostilities in Indonesia, Kashmir, and Palestine. The guess may be hazarded

that these examples and the knowledge that the United Nations was there helped materially to prevent the outbreak of hostilities in other situations.

The Charter has laid an obligation on governments to try to settle international differences peacefully, by means of their own choosing. United Nations practice has been helping to establish the proposition that differences resisting settlement or urgent in character should be brought to the United Nations before a state takes unilateral measures. When a case does come to the Security Council or General Assembly, public debate of issues—in which statements of fact are made and differing points of view set forth—tends to focus interest and attention on issues and their merits. In debate, governments generally feel compelled to rest their case on principles. As the debate proceeds, the correctness of those principles is exposed to scrutiny, and the propriety of their application to the particular facts is held up for examination. This process promotes recognition and acceptance of the rule of law.

As I have noted earlier, the Security Council today is not performing its intended function of enforcing peace, and it is not likely to, because of great-power differences and the veto. Efforts to reconstruct the Council so that it could actually wield enforcement power—even if the efforts could succeed—appear to be of doubtful wisdom; even a somewhat enlarged Security Council could not sufficiently represent the whole membership of the United Nations. The Council, nevertheless, is still able to perform useful tasks in the pacific-settlement field, up to the point where the veto is used and frustrates constructive attempts at solution. Resort to Security Council procedures, and the various types of settlement mechanism which the Council as well as the General Assembly can provide, may frequently be worthwhile. But, where an expression of world opinion is sought on controversial issues in a case, the Assembly is likely to be a better forum.

International Supervision of Dependent Areas

Another area where the United Nations has been engaged in activity to further the rule of law is dependent territories administered by metropolitan powers. The international trusteeship system is a continuation of the mandates under the League of Nations. Conditions within a trust territory are brought to light by the submission of annual reports and of written petitions and by the hearing of oral petitioners. The

administering authorities are at pains to answer and justify their conduct or to correct an abuse. The visiting missions, sent to trust territories in succession, furnish a valuable first-hand supplement to the other means of knowledge available to the United Nations.

These United Nations activities, together with the less ambitious but no less difficult tasks of the Committee on Information from Non-self-governing Territories, probably exert a generally beneficial influence on the lives and affairs of people in politically dependent areas. Some practical accountability on the part of the metropolitan administering powers is enforced. The institution of accounting now follows fairly clear procedural rules, and substantive standards to measure the administration of a metropolitan power are developing. In the case of South West Africa, the Assembly has twice sought and received advisory opinions from the International Court of Justice on disputed legal questions concerning administration of the mandate. It is a matter for regret that the Union Government in South Africa has not yet been persuaded to abide by the conclusions which the Court reached.

While these operations of the United Nations in regard to dependent areas have worked fairly well in a technical sense, there has not consistently been in the forefront a broad vision of the future and an effective concern for each area in its own right. Some of the metropolitan powers, at least at times, have been grudging in their participation, apparently resentful that any authority outside themselves should have opinions concerning the administration of dependent territories. There has not been put aside entirely the image of territories that are to remain dependent and continue to exist as profitable possessions. A grave danger from the situation is that old-style nineteenth-century colonialism may be replaced directly by totalitarian Communist colonialism.

Asia is continuing to undergo great upheavals. A similar future seems to be in store for the continent of Africa unless evolution can work more quickly and perceptibly. There are immense possibilities for constructive United Nations action in the political and economic liberation and development of colonial and underdeveloped areas; in this way the Charter principles would have real life in these areas. The necessary machinery exists in the United Nations. The problem is, first, one of political willingness on the part of governments. The United States obviously has a great interest and the opportunity for great influence here.

The United Nations and Individual Rights

United Nations bodies, particularly the Human Rights Commission and the Assembly, have devoted substantial attention to protecting individual rights throughout the world. The Charter contains some general statements of principle, in Article 55, about human rights. The emphasis of the United Nations in its first ten years has been on refinement and codification of these statements.

First came the Universal Declaration of Human Rights. This, despite its vagueness and precautionary loopholes, could serve as an expression of goals to be striven after. But the two draft Covenants on Human Rights, intended as precise and legally effective instruments, are often uncertain in meaning. Not infrequently when the Covenants prescribe a minimum standard, it is too low, and one can only doubt that the present period is one in which Bills of Rights ought to be framed. The utility of the draft Covenants, and even the Declaration, for advancing human freedoms seems uncertain. Crystallization of standards in this field might better wait until there is a larger measure of agreement, and on higher standards, than seems possible currently. The United Nations might better devote its energies meanwhile to the exposure of factual situations in different parts of the world. This process can be a powerful force in creating an enlightened and vigorous opinion at work for the recognition and acceptance of higher standards.

The International Law Commission

Among its manifold tasks under the Charter, the General Assembly was given the responsibility of finding and proposing rules of international law by direct studies to that end. The Assembly was to initiate studies and make recommendations to encourage "the progressive development of international law and its codification." For this purpose the Assembly established an International Law Commission to be composed of 15 individual experts. The Commission was to prepare drafts, circulate them to governments, put the drafts in final form, and submit them to the Assembly.

Now, what were these drafts? They were and are drafts of treaties for signature and ratification by the individual United Nations Members. A few of the drafts have been finally processed by the Commission, but not a single one has been signed and ratified and made into law by treaty for even a very limited

number of states. This fact should not be considered a reflection on the quality of the Commission's work. I imagine the opinion is quite widely shared that the Commission has done careful and useful work on several topics. At the present time the Commission is busy with a series of inter-related maritime subjects of great general importance: the continental shelf, fisheries, and the regime of the territorial sea and high seas.

What I wish to suggest is that it may be a mistake to try to make international law at the present stage by codification and the conclusion of treaties containing codes of law. The great political difficulty of securing agreement by any considerable number of states on any single formulation is certainly increased by the fact that in the present state of international law much of the drafting must represent new law and not already accepted rules. International law is in a relatively primitive stage of development. According to the national experiences with which we are familiar, it does not seem ready for codification. To concentrate on the preparation of draft treaties in this field tends to deprive the International Law Commission's work of its practical value. If the treaties are not signed and ratified—as they have not been, and as few are likely to be—they lose standing through non-adoption. Their failure to be concluded has an adverse practical effect on the esteem in which their contents are held.

It might be more profitable for the International Law Commission to select areas of international law for study and to publish at the end of its study on each a carefully organized analysis of relevant precedents and authorities, together with any observations the Commission thought it possible and desirable to make on the rules of law which ought to be followed in deciding issues of law in the area. The process would stop there. Political approval by governments would not be sought for the Commission's analyses and conclusions. These would not be put in treaty form and submitted for formal approbation by the United Nations or by individual states. The Commission's reports would stand on their merits as joint statements by some of the most qualified persons in the field, and could serve as a source available to international tribunals and to governments in their conduct of foreign affairs. This kind of work by the International Law Commission would give scholarly support to the general purpose of the United Nations in furthering the rule of law. It would also organize and preserve in readily usable form the experience of operating United Nations bodies in framing and applying standards as they dispose of the problems that are brought before them.

The International Court of Justice

Let us turn now to the International Court of Justice, established in the Charter as the principal judicial organ of the United Nations. In a little more than nine years the Court has given judgments on the merits in 9 cases; it has rendered 9 advisory opinions. For its next session after it adjourns for the summer this year, the Court will have on its docket not a single contentious case or advisory opinion that will proceed to the filing of briefs and the hearing of oral argument.

Another factual observation that may be made concerns the jurisdiction of the International Court of Justice. Since the Court's early days, there have been no substantial accretions to its general jurisdiction through the deposit of acceptances of compulsory jurisdiction by states. In fact, some of the older acceptances have run out and not been renewed. Others have been withdrawn or limited. A number of the acceptances in force today are qualified by important reservations. In several of the contentious cases brought before the Court, states have sought to avoid judgment on the merits by raising objections to the Court's jurisdiction.

The United States, in some recent cases, has filed applications with the Court against countries that have not accepted compulsory jursidiction and have been unwilling to negotiate special agreements for the adjudication of United States claims arising out of the loss of aircraft. Great Britain has followed suit recently in filing applications against Argentina and Chile concerning Antarctic territorial claims. In due course, the Court will dismiss all these applications if, as now appears probable, the defendant states will not accept jursidiction. It is too early to gauge the effect of these actions in encouraging resort to the Court, or in clarifying issues and emphasizing those aspects of them which are most likely to lead to their peaceful settlement. The claims of certain South American countries, asserting a 200-mile width of territorial waters off their coasts, form an appropriate subject matter for adjudication by the International Court. But those countries have so far indicated a definite reluctance to accept litigation.

In surveying the record of the Court, one should not be discouraged simply by the small volume of cases. It could be true that only a few questions went to the Court because of a wide acceptance of and reliance on settled rules of law. It is certainly true that the cases going to The Hague are large and complex, and often require trial of facts as well as decision

on the law. But, to be candid, we must admit that there is room for much more litigation before the International Court of Justice. In failing to go to the Court, governments are not simply applying accepted and agreed standards to solve problems in which they become involved. Governments, both individually and as they are represented in international organizations, often seek to avoid obtaining impartial and authoritative answers to disputed legal questions. They prefer to wage their law, through diplomacy, economic controls, or straight use of physical power.

As for the International Court itself, it is not too much to say that the Court's processes are generally accepted as those of an able and objective judicial body. One may conclude that the Court is an intrinsically sound institution, capable of handling successfully a much larger volume of business than it has had. Judge-made law, coming out of controversies before the Court at the Hague, can make an important contribution in the realization of the United Nations' purpose to develop the rule of law in the world.

Conclusion

As we take a fleeting look back over the organs and activities of the United Nations, we see plain vestiges—and more than vestiges—of the old order based on force and expediency. Some large questions, like the conflict in Indochina, have not been brought to the United Nations at all. There has been disappointingly little use of the Peace Observation Commission. United Nations meetings are sometimes used merely for propaganda and advertising purposes, without commitment to real debate and its consequences. Resolutions adopted by United Nations organs do not always rest on a foundation of principle rationally applied to a given set of facts. Postponement or the adoption of an anodyne resolution may be the result of pressure politics in the corridors or in the capitals. Tasks may be foisted by the Assembly on the International Law Commission not because of their merit but because this seems a convenient way to dispose of some troublesome item on the Assembly's agenda. Members for the Commission and judges for the International Court may be chosen in elections which are sometimes obvious political trading, although of course the United Nations has no monopoly here. The proceedings of the Assembly's Legal Committee may not always inspire confidence. And legal questions may be kept away from solution according to rules and principles by a body equipped for this purpose.

Yet the very existence of the institutions of the United Nations shows aspiration and effort toward making the rule of law a reality. As the world public, in many countries, comes to know more about these institutions and scrutinizes their operation, the opinion of that public may compel government actions which will result in better use and functioning of the institutions. It is evident that they are young and in a relatively primitive stage of development.

In time there may evolve, without basic alteration in the present political structure of the world community, greater voluntary reliance on processes and agencies of international co-operation and larger acceptance of law in international relations. It is also possible that a world-wide community of interest, in a field such as disarmament, will be recognized and given effect in practical arrangements where an international agency may have greater direct responsibility and authority than any United Nations body exercises today. The functioning of the World Health Organization, in its proposal and promulgation of international sanitary regulations, may be a forerunner of analogous developments. On a regional basis, the European Coal and Steel Community is a going concern. Other approaches to European integration are in the making. Gradually there might grow up from similar beginnings on a world-wide basis some closer form of world political organization.

A large question undoubtedly exists whether law will become generally effective and order will prevail in the world without such growth. There are some who think that the existence of many nation states—some large and powerful, some small—is inherently inconsistent with the prevalence of law and order. Secretary-General Hammarskjold noted in a commencement address at Stanford a week ago that the era of nationalism had not passed, that new nations were still emerging. This continuing development may seem almost an anachronism, but it is a fact to be reckoned with. And the possibility of collisions among national states is equally real. World organization, in the form of the United Nations, helps to keep the contending forces of national states in friendly competition, according to rules that are understood by all.

It is still true that individual nations can bring rich gifts to efforts of co-operation by the world community. Affirmative projects of co-operation count among their consequences a contribution to peace by creating vested interests in it. A number of such international projects are going forward today, like technical assistance, the activities of the specialized agencies,

and now the projected establishment of an international agency for peaceful uses of atomic energy. These may be extended, in wider campaigns against disease and want, and in joint scientific undertakings such as the exploration of interplanetary space.

At the end of the first decade of the United Nations, there lies ahead a great future of unknown events. Its possibilities of promise are probably much less known than the threats to civilization which have become apparent since 1945. The United Nations today is a powerful force for keeping open the uncharted opportunities for life guided by law and by reason.

CONSTITUTIONAL DEVELOPMENTS OF UNITED NATIONS POLITICAL ORGANS

Eric Stein
Office of United Nations Political and Security Affairs, Department of State*

We have just heard an admirable tour d'horizon by my colleague and friend, Mr. Meeker. I shall attempt to develop in more specific terms some of the problems mentioned in his speech.

I am to talk about constitutional developments in the politi-cal organs of the United Nations over the first ten years of the United Nations' existence. Being a lawyer I must make it clear that I am using the term "constitutional" in the broadest sense. As Mr. Meeker pointed out, the UN is a loose associa-tion of sovereign states in a world fundamentally dominated by power considerations. We cannot analyze its problems in terms of an orderly community operating under a rule of law.

I

The Growth of the General Assembly Role in the Security Field

I should like to talk first about the constitutional develop-ments in what is perhaps the most important field of UN activ-ity, the field of maintaining peace and security. This function has an element of preserving status quo—preventing forcible change, repelling aggression.

The Security Council was given by the Charter the primary responsibility in this field. And the Council performed ad-mirably, for instance, in the Indonesian case where it not only helped to stop the cruel war between the Dutch and the Indo-nesians, but through an ingenious and imaginative use of varied means of conciliation brought about a negotiated settlement. For obvious political reasons there was enough agreement among the Great Powers to allow the Council to function as the founding fathers at San Francisco thought it should function.

*The speaker made plain that he was speaking personally and unofficially and not necessarily expressing the views of the Department of State.

But unfortunately there have not been many cases in which the Council was able to operate as it did in the Indoesian case.

The Greek case in 1947 is perhaps the first milestone in the shift of the "balance of power" from the Security Council to the General Assembly. A Soviet veto blocked Council action in defense of Greece against the aggressive infiltration and subversion by its Communist neighbors. As a result the case was moved to the General Assembly and this was the beginning of the steady growth of the General Assembly role in the security field. Mr. Dulles argued at the time in the Assembly with considerable impact that the principle of "compensation of power" among the UN organs must operate along with the principle of "balance of power" so that if one organ is incapacitated another must take over. And so the Assembly, originally intended by the Charter to be "the town-meeting of the world," for better or for worse began to move into the business of investigation, conciliation, and even recommendation of sanctions. As the cold war progressed, the development of these powers of the Assembly appeared to be the only alternative to a more or less complete abdiction by the UN of its role in the security field. The Greek situation marked in a sense a milestone also in terms of the U.S. policy toward the United Nations since the United States' military aid program to Greece and Turkey was not channeled through the United Nations. However, the United States legislation embodying the program contained a symbolic recognition of the UN authority in the Vandenberg Amendment. Under this provision, the President of the United States was directed to withdraw all aid if the General Assembly or the Security Council without regard to any veto should find that action taken by the United Nations makes United States aid unnecessary. From the viewpoint of American law this is an interesting instance of a revokable self-limitation which the U.S. imposed upon itself in deference to an international organization.

The Korean case in 1950 marks the second constitutional milestone in the development we are discussing. Because of Soviet absence the Council was able to lay the foundation for military action against the Communist aggression. But when the Russians returned to the Council and blocked further steps the Council retained only a symbolic role, and the real responsibility for further United Nations moves was taken over by the Assembly.

The third milestone was the Uniting for Peace Resolution of 1950 in which the Assembly, to use a very loose analogy,

codified the case law of the Korean case. In this resolution the Assembly made crystal clear its right to recommend collective action against aggression in the event the Security Council is blocked by a veto. The resolution set up the necessary emergency procedure; it set up the Collective Measures Committee, which has since worked out a set of principles based on the Korean experience, to be applied in the event of "another Korea"; and it set up a Peace Observation Commission, the "eyes and ears of the UN," which was to move into any area of international tension as a precautionary measure.

This shift from reliance on legally binding decisions of the Council to voluntary co-operation on the basis of Assembly recommendations was caused by Soviet obstruction of the Council. This obstruction was only one effect of the Soviet policy of aggressive pressures against the entire perimeter of the free world. Another effect of this policy was the emergence of defensive alliances in the free world, not linked organizationally to the UN but pledged to uphold its principles. Until the Korean case it appeared possible that these alliances might for all practical purposes take over the security functions of the free world with the United Nations acting as a forum for debate and conciliation. There were some who believed at the time - and there are some who believe today - that debate and concilation and nothing more should be the function of the United Nations in the security field. The United Nations' role in the Korean case had an important impact on this situation. It is not easy to estimate the long-range effect of this impact. But it may be useful to raise a question or two.

How did the Korean precedent and the Uniting for Peace concept stand up in the course of subsequent events? The Peace Observation Commission machinery was used only in one instance - in the Balkans. It was not sent to Indochina, a scene of large-scale fighting. The Russians considered the fighting in Indochina a civil war outside the scope of the UN, just as they viewed the North Korean aggression against the Korean Republic as a civil war. The French agreed that the Korean war was an international aggression but insisted that the Indochina fighting was their own domestic business not for UN consideration. The U.S. took the view that both the Korean and Indochinese fighting were international problems. These are interesting formulae and rationalizations, but the fact is that because of the French opposition and for other reasons the Indochina problem has never found its way before the UN. The fighting in Indochina has stopped following the Geneva Conference. It would be

interesting to speculate whether the free world would have achieved as good or worse or better settlement in the Assembly than that reached in Geneva. It is difficult to say whether the Uniting for Peace concept will have suffered in the long run by the fact that the Indochina conflict was not brought before the UN.

II

Efforts to Confer New Powers on UN Organs by Treaties

We have thus far analyzed the trend away from binding decisions. But there have been a number of efforts in the opposite direction in the early history of the UN. I shall mention only two instances where states agreed in a treaty to confer on UN organs new powers to make binding decisions not accorded in the Charter itself. One worked, the other did not.

In the Italian Peace Treaty the Western Big Three Powers and the Soviet Union agreed to confer upon the General Assembly the power to find a settlement of the question of the disposition of Italian colonies which would be binding upon the Four Powers. The Assembly did find a solution which was actually put into effect. The advantage, of course, was that the territories involved were outside the Soviet orbit and the Soviet Union could not prevent that settlement.

By way of another example, the parties to the Italian Peace Treaty conferred upon the Security Council the important power of electing a governor for the Free Territory of Trieste and of ensuring the integrity and independence of that Territory. The Security Council, by a formal resolution, accepted this responsibility in 1948 but was unable to agree on a Governor. The Free Territory in fact was never established in the form contemplated by the Treaty. After many meetings the Council, over violent Soviet opposition, decided to postpone any action pending the then proceeding negotiations between Italy, Yugoslavia, the U.K., and the U.S. These powers did reach an agreement on a partition of the territory. The Russians, in what was perhaps their first about-face after Stalin's death, accepted this settlement. From a legal viewpoint, we have a most curious situation of a multilateral treaty provision which was in fact superseded by an agreement concluded by only some of the parties to the multilateral treaty; the resoltuion in which the Council accepted the responsibility for the Free Territory is still on the books - but in fact there is no Free Territory any more. Those despairing over the untidy legal situation will no doubt console

themselves by the fact that after all we do have a generally acceptable political settlement of this troublesome problem. Of course only time will tell whether the settlement will work out to the best interest of everybody concerned. So much for the two examples of new powers conferred by a treaty.

There have been proposals such as the Douglas-Thomas resolution offered in the U.S. Congress in 1949 calling for a treaty which would confer upon the Assembly broad powers to make important binding decisions in the security field. But we cannot expect a reversal of the present trend away from binding decisions unless there is a radical change of the international scene. The situation might be different, for instance, if a general agreement should be reached for a safeguarded regulation of armaments. However, as we have seen, the present trend is not necessarily a bar to UN action in the collective security field.

III

UN Role in "Peaceful Change"

I should now like to talk briefly about some of the constitutional problems which have arisen in another field of UN activity, that of facilitating peaceful change of the status quo. The League Covenant was part of the Peace Treaties, and the League was tied in many ways to the status quo under these Treaties. The Charter of the UN is not tied to any peace treaties. There is also an important Article in the Charter, Article 14, which gives the Assembly a role in facilitating peaceful change; it specifically authorizes the Assembly to "recommend measures for the peaceful adjustment of any situation, regardless of origin which it deems likely to impair the general welfare or friendly relations." Finally, there is an entire complex of provisions strewn throughout the Charter calling for advancement and progress and change. These are the provisions mentioned by Mr. Meeker obligating the Members to co-operate in the promotion of universal respect for human rights, in the economic and social advancement of their people, and particularly in the progressive self-determination of dependent peoples.

Then, of course, on the other side we have the famous Article 2, paragraph 7, which forbids the UN to intervene in matters essentially within the domestic jurisdiction of states except when it comes to the application of enforcement measures in case of a threat to peace. Speaking in constitutional

terms we are, therefore, faced with a problem of reconciling on one hand the provisions conferring upon the Assembly broad powers to discuss any question within the scope of the Charter and to make recommendations for adjustments of any situation regardless of origin, and on the other hand, the injunction against intervention in domestic matters. Numerous analyses of the relevant Charter provisions have been written in articles and books. But again, what we have here is essentially a political problem. In terms of the raw reality of our changing world of which the United Nations is a part, the problem is to reconcile on the one hand the forces of change, i.e., nationalism, anti-colonialism, anti-westernism, with the forces of status quo standing for the maintenance of the prevailing conditions. In an important measure the maintenance of peace depends upon the reconcilation of these conflicting forces. The problem is complicated for the free world because the Soviet Union is all out for change in the free world but firmly committed to the unhappy status quo behind the Iron Curtain.

When a problem involving a conflict between these opposing forces is brought before the UN the first issue to be decided is whether or not the UN has jurisdiction to deal with the problem. If the answer is in the affirmative, the second question is what the UN can legally do and what if anything it should do as a matter of practical policy. The answers to these questions emerge as a rule only after a clash of political interests manifested frequently in bitter debate. The conflicting parties, while arguing on the basis of Charter provisions and at times in legal terms, basically press for what they consider is their national interest. Strong emotional motives are also frequently brought into play.

The best way of illustrating what I mean is to focus briefly on some of the concrete problems; and I suggest that we take a look at the agenda of the last Assembly. To add a further touch of reality to our discussion, I suggest that we view these problems from the point of view of the Secretary of State sitting in his office in Washington or, what is perhaps even more apropos, heading the U.S. Delegation to the Assembly in New York. The political problems on the last General Assembly agenda which may fall within the "peaceful change" category included: the Tunisian and Moroccan questions, the South African racial problems, the Greek-British controversy over Cyprus, and the Dutch-Indonesian controversy over West New Guinea. Everyone of these problems presents a series of dilemas to the Secretary of State. He, Ambassador Lodge, and their principal

advisers are subjected to concentrated pressures from a variety of foreign spokesmen representing conflicting national interests, as well as from domestic pressure groups. And it takes at times a real effort to reconcile the various views within our Government itself.

Take for instance the problems of Tunisia and Morocco. By treaties with local rulers France has acquired wide powers in these protectorates and has greatly improved the economic conditions. The nationalists under the banner of self-determination press for more voice in the government and for independence. The Arab-Asian group in the UN champions the nationalist case. France claims that the UN has no competence to deal with these matters. I shall never forget the biterness of the first Assembly debate of the Moroccan question in Paris in 1951, Foreign Minister Robert Schuman, speaking for France, and Foreign Minister Zafrulla Khan of Pakistan speaking for the Arab-Asian group, with the rest of the Assembly listening in an uneasy silence. Our Latin-American friends for instance were deeply torn between their traditional support of anti-colonialism and their love for la belle France; the pleasing locale of the Assembly in Paris only added to their difficulty. The Assembly, in a desperate effort to seek a way out, decided to postpone the consideration of the question whether or not to consider the question, a not very subtle way of postponing the whole business. Eventually both the Tunisian and Moroccan questions were put on the Assembly agenda and the Assembly with U.S. support went on record in favor of negotiations between France and the local authorities looking toward increased self-government.

The approach of the UN in dealing with these problems has been pragmatic and political. The Delegations frequently take a position in one case which is diametrically opposed to the position they took in a logically similar case. The United States, I may say with some pride, is perhaps the only one of the Great Powers with a fairly consistent record. As a rule one can find a pattern of consistency based on policy interests and not on a uniform application of identical provisions of the Charter. There are, however, a few principles which have been upheld in a number of instances although one cannot by any means say that they are now generally accepted.

First, there is a well-established practice that the General Assembly itself decides whether or not it is competent to deal with a problem. Many scholars and diplomats feel distressed that questions of competence are not referred by the Assembly

to the International Court of Justice for advisory opinion. They believe that unlike the political approach in the Assembly the Court would seek to establish legal standards for dealing with this vital matter. Some believe that the Court would have seen to it, had it been given a chance, that the UN proceed more cautiously in this delicate field. On the other hand there are those who believe that any advice from the Court would have frozen the line of UN competence much too early in its development to the prejudice of its sound growth; they feel that the problem is essentially a political one and that in any case there is no assurance that the Assembly would accept the Court's advice if it went against the strong feeling of the majority.

Secondly, there is considerable support for the view that mere discussion of the merits of a controversy does not constitute the type of intervention in domestic affairs that is prohibited by Article 2(7). On this theory the Assembly has been quite liberal in admitting cases on its agenda. But where does the prohibited intervention begin?

This query suggests a third point which I hestiate to offer as a principle. There is a fairly broad opposition to establishing special commissions of inquiry or conciliation in cases of this type, either on the pragmatic ground that such commissions would not help in the solution of the problem or because such action is considered to come perilously close to the prohibited intervention. Commissions were nevertheless established in the South African racial conflict cases.

It is not an easy task to evaluate the contribution of the Assembly in the field of peaceful change. To what extent, if any, for instance has the UN contributed to the conclusion of the recent agreement between the French and the Tunisians?

It is argued that the intemperate Assembly debates increase tension and violence. At times some discern a pattern of increased terrorist activities in colonial areas just prior to the Assembly debate on the problems of these areas. Some believe that the UN is being used and abused for the purpose of weakening Western influence in the colonial areas only to open the way for chaos and Soviet expansion.

Back in the eighteen seventies—it is interesting to recall—the Turkish atrocities in Bulgaria (or violations of basic human rights as we would put it today) caused a howl of indignation among the humanitarians of Europe who had previously confined their criticism to Siberia and the Czarist Government. In his farewll speech to the Commons, Disraeli, although deploring the horrible events, could not see why the British Empire

should change its traditional policy and expel the Turks from Bulgaria and Europe generally. He knew that the expulsion of the Turks would mean the arrival of the Russians on the shores of the Mediterranean Sea. Disraeli's great rival, Gladstone, on the other hand, was doing his utmost to whip up the humanitarian sympathies of the English people in support of a war which perhaps would have left Russia in command of the Bosporus and Dardanelles. This is an interesting historical vignette over which one might ponder,—since, had the UN existed in 1876 the Assembly would have discussed "The question of alleged Turkish atrocities in Bulgaria." As it was, the matter was handled by the Great Powers. But the Great Power concert collapsed early in this century and that was one of the reasons why we now have the UN in which most of the world's nations have a chance to express their opinion on a matter of this type.

In evaluating the UN role in this field of peaceful change one might profitably keep in mind that the forces of nationalism have not been created by the UN, and that they exist apart from the UN although they may derive support from it. The Assembly debates obviously produce political and moral pressure on colonial powers to make concessions to nationalism. At times, however, these debates have also a sobering effect on the nationalists. In the North African cases, for instance, the Assembly refused to endorse a call for independence of Morocco and Tunisia and the debate emphasized the need for orderly and peaceful change. At times as a result of a public debate the Government of a colonial power may find it easier, vis-a-vis its own public opinion and its own colonial pressure groups, to move in the direction of responding to reasonable nationalist aspirations. The alternative may be for the nationalist movement to go underground. Despairing over the lack of support from the free world, the nationalists may conclude that there is not hope for a peaceful change and may turn to the very same Communist ideology or terrorism which the colocial powers seek to keep out.

IV

Some Developments in UN Practices with Constitutional Implications

I should like to say a few words on some developments with constitutional implications in the practices and procedures of both the Security Council and the Assembly.

The Council, for instance, in an effort to avoid a Soviet veto developed the so-called "consensus procedure" applied in at least four instances in the Kashmir and Palestine cases. No formal resultion is submitted and voted upon. At the end of the discussion, however, the President offers an informal summary of the majority views expressed in the debate. This summary is included in the record as the consensus. If any Member objects, its objection is also included in the record. But this procedure is helpful generally only where, as in the Palestine and Kashmir cases, there is already in existence some commission or other machinery capable of functioning "on the ground" without further formal Council action. Nevertheless, this procedure is an interesting little phenomenon for us lawyers - a very delicate flower indeed and a symbol of the Council's ingenuity as much as of its impotence.

In the earlier years the Council and the Assembly frequently appointed Commissions or individuals to assist directly in negotiations for a settlement of controversies. In more recent years the Assembly, in dealing with a controversy, as a rule debates it in one of its Committees of the whole and in the plenary, comes up with a resolution calling for direct negotiations by the parties, and expresses general objectives and sometimes guiding principles for a negotiated settlement. Intense negotiations at times take place in the Assembly on the text of such a resolution, as was the case, for example, in the Korean question. But the actual negotiations between the parties are conducted outside the Assembly and without any assistance of Assembly commissions or organs. Thus in the Korean case the armistice negotiations were conducted in Korea for the UN side by the U.S. which was backstopped in Washington by a group of Ambassadors representing the nations with armed forces under UN command in Korea. This group met in the State Department and functioned under only a general guidance of the Assembly resolution.

Another example was the Military Committee composed of U.S., Thailand, Burma, and China, which was formed on U.S. initiative in response to the Assembly resolution calling in general terms for the removal of the Chinese irregular troops from Burma. This Committee managed to have thousands of these troops flown out of Burma but it had no direct connection with the UN. Again in the Kashmir controversy whatever efforts at a settlement were made in the last two years took place outside the UN and without the participation of the special UN Representative who has been available to the parties.

A great many international problems found their way in one form or other before the UN, but in recent years actual negotiations and settlement took place outside the UN. I might mention the Trieste problem, the Suez Canal base, Iranian oil, the Aus trian Treaty, etc. Of course the overriding consideration is to find a solution of a controversy, but we have here, for a variety of reasons including the cold war, a tendency away from negotiations in the UN. It would, however, be interesting to study to what extent the very existence of the UN has affected negotiations carried on outside the UN.

Another interesting modification caused primarily by the cold war took place in the role of fact-finding in the Assembly and for that matter also in the Security Council. Fact-finding in the past was considered an important component of negotiations and peaceful settlement. But the Soviets were unwilling to negotiate in good faith with or without facts, inside the UN or outside the UN, publicly or privately. Given the Soviet con tempt for facts, the laborious process of fact-finding may have been useful only to inform the free world and to preserve the integrity of its position. Exposure of facts may also have created some pressure on the Soviets. But through the long years of the cold war the free world has learned so much about the ways of Communism that the idea of formal fact-finding procedures appeared at times almost absurd. Due principally to Soviet opposition there have not been any recent formal fact-finding procedures. At times the Assembly may have given the impression, to quote from a recent book, of a succession of tableaux morts:

> "The curtain is lifted; the light flashes on; you are revealed either in a favorable and seemly posture or in an awkward one; the light goes off again, and that is that."

There is involved, however, a bit more than this. For example, in the brief proceeding during the last Assembly the Chinese Communists were revealed to the world at large in an exceedingly "awkward posture" by illegally holding 15 American fliers. This fact may have made it considerably more difficult for the Communitsts to persevere in their outrageous conduct.

The absence of fact-finding procedures underlines the political character of the proceedings. Less attention is paid both in the Assembly and Council to quasi-judicial approach,

precedent and form, than was the case in the League of Nations organs. The device of rapporteur who would organize and present the issues is not being used. The Council has never asked for an advisory opinion of the International Court of Justice, and the instances of the Assembly's requests are few and far between. The procedures are exceedingly flexible. This has its advantages in a young organization. The delegates time their speeches according to newspaper deadlines and telecasting schedules in what has been referred to as "diplomacy by loudspeakers." The importance of any statement is carefully measured in terms of the impact on domestic public opinion. But there is also abundant opportunity for private exchanges of views in the lounges and corridors.

V

Conclusion

There are a number of other problems bearing upon the constitutional developments of the UN. One is the question of admission to membership in the UN, a very fundamental question indeed. Another involves the relationship between the UN and the regional defense groupings, which was raised, for instance, in the Guatemalan case before the Security Council last year. Perhaps these questions will be brought up in our subsequent discussion here. At this time I should like to conclude with only two observations.

First, the constitutional shift from reliance upon binding decisions to voluntary co-operation under the Assembly's guidance might be considered by some a step backward on the road toward a better organized world community. But in a world as it is today there is a real question whether the UN could function on any basis other than voluntary co-operation of sovereign states acting in response to an informed world opinion. The Assembly, despite certain disadvantages of the one-member, one-vote formula, is perhaps the best body to provide for voluntary co-operative action which would give expression to the opinion of the community of nations.

And second, those of us who as lawyers have studied American or foreign or comparative constitutional law cannot remain unimpressed by the adaptability of the UN Charter to the changing realities within which it has had to function during the first difficult ten years of its existence.

TRENDS IN THE UNITED NATIONS

Clyde Eagleton
Professor of International Law
New York University

The United Nations has not developed exactly as was planned at San Francisco; there were many at San Francisco who did not at the time think it would develop as planned, or thought that it would take a great deal of luck if it did. Still, I doubt if there was anyone there who anticipated all the various lines of development which have since appeared.

The central principle of the Organization, as planned, was the responsibility of the five designated Great Powers for the maintenance of peace and security. Most of the states did not like the dominant position given to these five, nor the fact that no action could be taken against one of them if it were an aggressor. But they were the only ones able to enforce peace, and they would not take the responsibility except under their own conditions: the system would not work without them, and they would not take the job except on the basis of unanimity—so it had to be. It would be lucky if any five states could agree for even a few years, much less for the eternity envisaged in the Charter, for there was no way of getting one of the Big Five out unless by its own consent, since the veto applies also to the amending process. This is the worst part of the Charter, or of any Constitution: the worst thing any institution can do is to make change or progress legally impossible. The situation concerning Nationalist China in the Security Council not only illustrates this, but offers an opportunity for the bargaining without which no change in the Charter will be possible.

The unanimity required of course did not survive; apparently, 1948 was the turning point. The Soviet Union found a constant majority against it, and resorted more and more to the veto in defense against that opposition. The failure of the unanimity upon which the peace and security of the United Nations was founded has had at least three important consequences.

1. The Security Council as an organ has diminished in effectiveness and prestige almost to the point of impotence. This is not to say that it has not been useful, on the contrary, it may claim credit for the fact that there has been no important use of force, with the exception of Korea. Here, for the first time, the

organized community of nations halted aggression; but it was only by sheer luck that the Security Council was able to have any share in it. It was the response of individual Members on a voluntary basis, helped along by the General Assembly, rather than action by the authoritative Security Council, which secured what success there was in Korea. When one recalls the great hopes based upon the Security Council in 1945, and when one looks at the gradual deflation of that body and the assumption of its functions by the General Assembly, it must be granted that here a great change has occurred.

2. In the second place, the failure of unanimity has quite incapacitated the Charter provisions for what is called "enforcement action"—a misnomer, for the United Nations was not given authority to enforce any law or settlement, but merely to stop breaches of the peace. Chapter VII was the pride of the Charter, for it gave for the first time in history actual authority to use military action against an aggressor, and made it a duty of Members to contribute to this end. But all this was subject not only to the veto, but also to the making of the agreements for supply of forces by Members under Article 43. These agreements have never been made and I have always been sure that they never can be made. And the rule of unanimity, except for the lucky fluke in 1950, has prevented any enforcement action even in the limited fields where it was anticipated that it could be used, that is, in local actions such as those along the frontier of Israel.

The lack of enthusiasm among Members in accepting obligations for collective security is further illustrated by their rejection of Secretary-General Lie's proposal to build up the United Nations guards—which might have been the beginning of an independent United Nations military force. Furthermore, their lack of response to the inquiry of the Collective Measures Committee indicates their unwillingness to commit themselves in advance by pledging their armed forces in any amount whatever even of their own choosing.

But, remember, they did contribute in the one and only instance in which they were called upon; and in this case they were not called upon by authority, instead, action was recommended to them. The conclusion, then, would seem to be that the underlying principle of Chapter VII, the obligation of Members to supply armed forces when called upon by the Security Council, is without life. It would appear, however, that many Members may be willing to contribute to an enforcement action if each is left free to decide, upon an ad hoc basis, if and what it

should contribute. One reason for this trend, a disappointing retrogression from the viewpoint of many persons, is the realization that no matter what you pledge (or agree to under Article 43) you may have to send everything you have to back them up. Once you are in, you are into the limit. Between the veto and unwillingness to fix amounts of armed forces to be contributed by Members, the method of collective security provided in the Charter may be said to be dead; this is not to say that collective security is dead, for there was a surprising amount of support for it on a purely voluntary basis in the Korean affair.

3. A third consequence of the failure of unanimity is its effect upon the idea of the universality of the United Nations. An organization to maintain peace should have within its jurisdiction all states; but the United Nations of course did not have the strength to compel an unwilling state to join. Nor would a solution be found in providing that any state may become a Member automatically upon expression of its desire to be a Member; there would still remain to be decided the question whether the applicant is a state or not. Suppose, Tunisia, or the Republic of the South Moluccas or Long Island, should apply? Such a decision has always been a political vote, just as it is in the United States with Alaska and Hawaii; and until the atmosphere of cold war clears up somewhat, there can be little hope for the admission of other Members. This, however, does not seem to me to be so bad, since under Article 2(6) action to maintain peace can be taken against Non-Members; that is, provided the Security Council were able to decide on action. Here we are again up against failure of unanimity.

More general consequences of this situation are that other Members are not so willing to follow the leadership of the Great Powers, and are turning away from such leadership, especially in the General Assembly, the one organ in which all Members sit and have an equal vote and where a majority can prevail. Also, it is noticeable that there is less expectation of achievement in the field of peace and security, and that attention is being turned more and more to economic development and self-determination. Other forces, of course, contribute to this trend, but the failure of unanimity, of Big Power leadership, has a large share in the responsibility.

The next large field in which I wish to inquire as to the direction in which the United Nations is moving is with regard to its character as a legal order. Of course, it is a political organization, but it is also a legal system, for it is founded upon

a treaty, it has a constitution, and it establishes legal obligations. The question is, in what direction, and how far, is it moving?

Little attention was paid at San Francisco to international law. Mr. Dulles did not look upon it with favor. The words would not be in the Charter at all but for the fight put up by small states, who, incidentally, as we shall see, are not so eager for it today. The General Assembly passed Resolution 171(II) in favor of use of law and Court; the Secretary-General emphasized that peace can be had only if states are willing to be governed by law; many delegates have made noble speeches calling for respect for law and the Charter, and then voted for, or abstained on, a resolution inconsistent with the law of the Charter; even Mr. Dulles had come round by 1954 to fear that the United Nations was guided too much by political expediency and too little by law. Nevertheless, law is till not of much importance in the United Nations today.

This situation I would like to discuss, first from the viewpoint of judicial settlement, and second as to interpretation of the Charter.

The International Court of Justice was of course not given compulsory jurisdiction over states though a majority of those at San Francisco favored it. States may, by acceptance of the "optional clause" of the Statute of the Court, accept compulsory jurisdiction if they wish; but the number of those who so wish appears to be declining. Since 1920 there have been some forty-five states which at one time or another were bound by the optional clause. Today, there are only thirty-two, and of these two are non-Members; barely half the Members of the United Nations, then, are willing to submit in advance to the jurisdiction of the Court in legal cases. A third of those who at one time favored compulsory jurisdiction no longer favor it. Furthermore, most of these acceptances were accompanied by reservations which permitted them to escape jurisdiction for various purposes; some of these would permit escape from any case, such as the damaging reservation made by the United States, followed by France, Mexico, and Pakistan. Two have recently abandoned their acceptances, Iran and Guatemala, apparently because they got called to court. Both won their cases; but it seems to have been just too much for a sovereign state to be called before a court! Perhaps I should say, for small sovereign states, because the larger ones submit without question—exception being made for the Soviet Union, which accepts no kind of jurisdiction.

After 1907, and until recently, nations had been moving toward compulsory jurisdiction and judicial settlement; now, we are moving away from it. And there have been practically no arbitration cases recently, in or out of the United Nations. Most of the contentious cases brought before the court have come, not voluntarily, but under compulsory jurisdiction. The Security Council could, under Article 36(3) of the Charter, recommend to parties to a dispute that they take it to the Court. Only once has the Council done so, in the Corfu Channel case, and in that case Albania failed to obey the decision of the Court. Similarly, any organ of the United Nations could ask an advisory opinion from the Court; the League used to do this in disputes before it. But no organ except the General Assembly has ever asked for an advisory opinion; and some of these requests simply burdened the Court with the frustration of the Assembly.

All told, the Court has had nine contentious cases (though some of these involved more than one opinion by the Court), about one a year, and it has given seven advisory opinions. The judgments of the Court were obeyed, with the exception of Albania, but it is hard to estimate the acceptance of advisory opinions. At least three were referred, though it was known in advance that the opinion given would not be respected, the two on admission to membership, and the one concerning human rights under the peace treaties in Hungary, etc. The Union of South Africa did not follow the advisory opinion concerning South West Africa. In general, the Assembly has accepted the advice given in answer to its requests.

The Court, then, has not been used very much; it does not have much compulsory jurisdiction, and few cases are willingly referred to it by states; and few of the cases which have come before it have been matters which would affect the peace of the world. In saying this, as I am sure you understand, I am not in the least criticizing the Court; it is there, ready and eager to serve, and with a good reputation. The point I am making, as throughout this whole discourse, is that Members display little interest in judicial settlement.

I turn now to interpretation of the Charter, which affords one of the most interesting studies of the development of the United Nations. There are various means of interpreting any constitution; the question which I raise here is: Has there been any interpretation of the United Nations Charter?

You are aware that the Charter contains amazing inherent conflicts: how, for example, can Article 2(7), forbidding intervention by the United Nations in the domestic affairs of a state,

be reconciled with the functions given it of promoting human rights, economic and social development, or perhaps self-determination? And you will recall also that at San Francisco all proposals for an authority to interpret the Charter were refused, with the observation that each organ would doubtless interpret its own powers and that, of course, no Member would be bound by any interpretation.

Of the various ways in which it is claimed that the Charter is interpreted, I propose to deal with three: formal vote by an organ; implication from action taken; and reference to the Court. Usage is certainly a method of interpretation, but I leave it aside because I do not know what usages are established. Perhaps not counting abstentions in the Security Council is one; but even that might possibly be set aside by a double veto.

As to the first of these methods, there have been few formal votes by organs. We made a table of some seventy cases in which the question of competence to act under the Charter was raised, not necessarily by motion. This is not the total number of times in which the question was raised, but enough on which to operate. In fourteen of these seventy cases, a vote was taken on competence itself, as differentiated from the vote on the resolution challenged. Nine of these were in Assembly committees, only three in plenary Assembly, and two in the Economic and Social Council. The three in plenary Assembly concerned domestic jurisdiction, the right to define and determine "self-governing" status, and participation of Italy in the Trusteeship Council. Of the fourteen votes taken, eight concerned Article 2(7), two related to Article 4, and two to Article 12; the two taken in the Economic and Social Council would be hard to classify under any Article of the Charter. In nine of the fourteen votes, the organ declared itself competent, in five, not competent. The two votes in the Economic and Social Council were inconsistent with each other.

It should be noted that, with regard to most of these votes, the challenged action had already been adopted by the General Assembly, perhaps several times; for example, a resolution condemning South Africa was adopted almost every year and challenged every time, but it was not until the seventh year that the General Assembly formally voted on its competence to do the things it had already done. It would have been difficult for the Assembly to admit that it had been acting illegally for seven years! It is also interesting to note that in every case in which an organ declared itself incompetent to take a proposed

action, this was an action sought by the Soviet bloc; and in two of the cases in which competence was upheld, it was through defeat of a Soviet-bloc motion of incompetence. On the other hand, every case in which competence was upheld (except in the two just mentioned) was one in which the anti-colonial majority wanted something done and had the majority to do it.

The formal votes on interpretation of the Charter have been strictly political ones; indeed, the Commission on the Racial Situation in South Africa, which has made the only study of interpretation by an organ of the United Nations, affirms that organs take the decision as to competence "from a political viewpoint." And as Staff Study No. 2 of the Senate Committee on Foreign Relations says, "Consequently, any meaning which a provision of the Charter might reasonably have, can prevail in any particular instance," i.e., there can be a different interpretation by each organ whenever desired, if there are enough votes! This, to my way of thinking, can not be called interpretation.

The second claimed method of interpretation asserts that the interpretation may be implied from the action taken. This means that whenever a delegate is faced with a proposed resolution, he considers carefully whether it is consistent with the Charter, and does not vote for the resolution unless he is quite sure that it is consistent. I rather doubt if delegates do behave in this way. Indeed, I can show from the records numerous cases in which a delegate argues that the organ is not competent to take the proposed action, and then when the vote is taken salves his conscience by abstaining, thus allowing a minority, sometimes a very small minority, to have its way. Nevertheless, the assertion is often made that the adoption of a resolution answers the question whether the organ was competent to adopt it, and delegates have expressed impatience with those "legalistic" souls who would still raise a question about it. Incidentally, I note that no one ever offers the reverse of the above proposition: that is, that if a motion is defeated, that proves the proposed action was unconstitutional; yet this seems quite as logical as to say that if a motion is adopted, that proves it is constitutional.

The third method of interpretation is by reference to the Court, which would be a quite proper way of getting an interpretation; but, as noted above, Members and organs do not like this way of doing it. There have been many suggestions that such a question be referred to the Court, and twelve motions have been made to this effect; in all but four cases, the motion

was rejected. Two of these four cases of interpretation of the Charter were the futile references with regard to admission of new Members; the other two dealt with reparations for injuries suffered in the service of the United Nations, and with the mandated territory of South West Africa.

Various reasons have been offered for this dislike of the Court. Some say that the question of interpretation, at least in some instances, is a political question, not proper for a court to handle; others say they are against "legalism." It is argued that each organ is responsible for its own affairs and should not pass its responsibility on to the Court, or that the Court is only one of the organs and not superior to any other organ. Others say that reference to the Court would mean delay, that law is harsh, and political compromise is better. Whatever the reason, there has been little judicial interpretation of the Charter.

It seems to me, then, that there have been few if any established interpretations of the Charter made. I am quite willing to say that some of the trends thus far revealed may through usage become accepted interpretations; but thus far, there has been too much inconsistency to establish interpretations. For practically every Member, it could be shown that it has voted for the domestic jurisdiction clause on one occasion and against it on another. There is no doubt that the Charter has been liberally interpreted; this I would call understatement. An example is the apparently accepted principle that an organ may do anything which is not forbidden to it in the Charter, the "reserve power" theory, illustrated by the Uniting for Peace Resolution, the asumption of jurisdiction over Non-Self-Governing Territories, etc. When you add to the "reserve power" theory the ability to interpret away the restrictions stated in the Charter, the United Nations can do almost anything it can secure enough votes for; the Charter no longer stands in the way.

I do not raise the question here whether this development is good or bad; I am simply pointing out the trends, and one of these trends is clearly that the United Nations is developing away from law and away from a constitution order. A good argument can be put forward (which does not convince me, however) that this is a justifiable development, good for the world; in any case, I am sure you will agree with me that it is a most significant development of fundamental importance to the future of the United Nations.

This development is perhaps best exemplified in the growth of supervision over the non-self-governing territories, a trend

which itself has important consequences. I feel sure that the colonial powers thought themselves well protected, and very generous, when they accepted the declaration of principles which is Chapter XI of the Charter. It gave to the United Nations no supervisory function whatever; the only mention of the United Nations was in the obligation of colonial powers to submit an annual report to the Secretary-General, a report very strictly limited as to its contents. Yet out of this slight mention there has come the most remarkable constitutional development of the organization; I can discuss it only too briefly here.

It was natural that the General Assembly should set up a committee to consider the annual reports from colonial powers; and it was not unnatural that this committee should make criticisms, ask questions, and suggest things to be done by the colonial powers. The anti-colonial majority in the Assembly was quite willing to adopt these in the form of resolutions, which called for a bit more each time. The colonial powers, at first complaisant, found themselves more and more pushed; they complained that there was no constitutional authority for such resolutions and that they were contrary to the domestic jurisdiction clause. The General Assembly then asserted gradually that it, rather than a colonial power, had the right to decide when a people had reached the stage of "self-governing," so that the colonial power would no longer have to make an annual report concerning it. Another committee was set up to study the factors of self-government and independence.

Thus a far-reaching constitutional interpretation was made, and additional machinery was set up to administer the newly assumed function; in effect, colonial peoples were to be more rapidly pushed toward independence than were the trust territories, which was certainly not the intent of the makers of the Charter.

This constitutional struggle, which has become increasingly bitter, became tied in with the cry for "self-determination," a term whose meaning was never clear and was not made clear by the Charter. This has led the United Nations into a new field, one for which no law or guiding principles have ever been developed in the past; what authority is to say and on what grounds is it to decide that a particular group of people is entitled to independence? With this goes a collateral question: how much responsibility should the United Nations assume for new states which may appear as the result of its efforts, such as Libya or Indonesia? "Self-determination" seems now to have become "United Nations determination."

All this is of much constitutional importance to the United Nations, not to mention its political significance. A majority can easily be obtained in the Assembly on any colonial question, and self-determination is applied only to colonies. A new function has been given to the United Nations and new machinery for its administration, in which more interest is shown than in the Trusteeship Council. Again, I am merely pointing out a trend, and do not consider whether the result is good or bad; but I reiterate that the result has been achieved through the strange methods of interpretation or lack of interpretation of the Charter that I have described above.

Now, I should like to add up what I have been saying, and draw two or three conclusions.

The General Assembly has become the dominant body in the United Nations, the only one of significance, and it is in a runaway mood today. Through equality of voting there is a large majority of small states, and through what is called "liberal interpretation" they can do anything for which they can get the votes, regardless of what the Charter says and regardless of what are claimed to be rights under international law, e.g., of a state over its colonies.

This is natural and understandable. Wealth and power are very unevenly divided among the sixty Members of the United Nations, most of it being held by two of them; but the voting majority can and increasingly does override those having the power. These smaller states, underdeveloped in comparison with the great states, many of them recently relieved from colonial bondage, still resentful of that status and sympathetic with those yet held in bondage, do not like the old international law which holds them down. They do not like vested interests protected by law, a law which they had no share in making. They therefore disregard that law so far as they can, and refuse judicial settlement, for a court must uphold the existing law. They prefer political action, in which they have a voting majority in the General Assembly and through which they can have their way. All this is natural and understandable, but it is also rather dangerous for the United Nations. The larger states, at first concentrated against the Soviet Union, are now beginning to fight back against the voting majority on colonial questions; power is lined up against the strong emotions and the demands for more equality and justice.

The first consequence of all this to which I draw your attention is the need for methods of making new international law, for when law is fixed and unchangeable, the result is

evasion and opposition to law, and this opposition may become violence. This is the field of peaceful change, upon which peace in the world depends. I remind you also that international law is in almost every part of it in revolutionary ferment, and that a large part of the ferment is being stirred up in, and all of it must be handled by, the United Nations—rights of individuals, self-determination, international criminal jurisdiction, jurisdiction on the high seas, etc.

It is sad to say, in view of this need, that the weakest part of international arrangements, in or out of the United Nations, is provision for international legislation. To meet the demand for new laws which stirs up so many states, we have nothing to offer but the treaty-making procedure; and the treaty was never designed to carry such a load and is quite overwhelmed by it. The Charter made no provision for new law, except in the sense of preparing it; the rule is unaffected that a state can not be bound without its own consent to a new rule of law.

In practice, the United Nations has not pushed as vigorously as did the League of Nations to secure ratifications for legislative treaties; and certainly, Members have shown no eagerness to submit themselves to new law through ratification of the treaties offered. All that is needed to confirm this statement is a glance at the chart accompany UN Doc. ST/LEG/3, "Status of Multilateral Conventions." Of thirty instruments listed under the heading of trade, two got as many as thirty ratifications; of the fourteen listed under road traffic only one had as many as sixteen ratifications. Looking at it from the viewpoint of individual states, Netherlands has the best record, sixty-eight out of eighty treaties accepted; Venezuela at the other end has accepted three, and signed two more. Fourteen states have taken action of any kind on less than ten treaties; twenty-one states have accepted less than ten. Over half the Members of the United Nations, then, have accepted less than ten of the eighty treaties (at the time I made the count). Nothing could be more important to the United Nations than providing for peaceful change through procedures for making new international law; yet there seems to be among delegates or organs of the United Nations, or for that matter among international lawyers, no recognition whatever of this need.

The next point I wish to make is this: the "liberal interpretation," or "no interpretation," of which I spoke above, and the runaway actions of the General Assembly, have been possible only because the power of the General Assembly is limited to making recommendations, which no Member is legally bound

to obey. I am not demeaning these recommendations, for they often have much weight; and if Members had been bound to obey them, it is quite probable that a number of Members would have left the United Nations by now. It would therefore seem to follow without any doubt that so long as the present majority can prevail as it has for the past few years, no amendment to the Charter will be possible which would give actual power to the General Assembly, or probably, to any other organ. If Senator Bricker and the American Bar Association could be so frightened merely by recommendations, what would happen to them if the Assembly could give legally binding orders? This, of course, creates quite a dilemma for those who would like to see better procedures for international legislation established.

It raises, further, the question of weighted representation in the General Assembly. Granted the trends of which I have been speaking, trends toward political decisions, regardless of law or Charter, by a majority of small and irresponsible states (irresponsible in the sense that they could contribute little toward the actions they wish taken, but could impose heavy responsibilities upon those who do have the strength and ability), granted this, one can feel sure that the veto will not be given up, and that the larger states will not concede any more authority to the United Nations, unless they are given a voting power corresponding to their ability to contribute and the responsibil ity which they would have to accept. It is difficult to imagine, however, that the members of this majority would give up their present equality of voting in favor of weighted representation!

The survey which I have made for you sounds pessimistic, and it is, so far as Members are concerned, but not at all so far as the United Nations as an institution is concerned. It is the Members who have produced the trends of which I have spoken. The present Charter could work far better than it has, and I say that it has done amazingly well, if Members would utilize it as it is supposed to be used. They have made it more of a political conference than the legal institution which it was set out to be by acceptance of the Charter. Indeed, no new Charter is needed, for they can now interpret the present Charter so as to do almost anything they wish to do.

To sum up, it appears that states are in no mood to give any more strength to the United Nations nor to accept any more obligations themselves; but they do seem more willing to work together for collective security and technical assistance, provided each is left free to do what he wants and as he wants to. What lies before us is an uncertain evolutionary progress

toward a consensus of opinion on which to build a stronger United Nations. There is no doubt in my mind that the goal is a strong international legal order, but law must rest upon some consensus of support from those to whom it should apply, and that consensus does not exist now.

GENERAL DISCUSSION

PROF. GRAY L. DORSEY (Washington University Law School): All three of the speeches this morning have been remarkable examples of the fruitfulness of lucid analysis. I would like to propose a problem in terms of Mr. Stein's analysis. To the extent that collective security is succeeding, and continues to succeed in cease-fire arrangements, it is interfering with an instrument that prevsiously existed for the self-determination of peoples. I am thinking of a mechanism not for peoples in trust or colonial status but one for continuing self-determination of peoples within recognized nations. At one time, if the ruler began to lose the voluntary support of his people he was in danger of military invasion from his neighbors. We are all familiar of course with the fact that time after time the English kings, on threat of French invasion, had to make concessions to the people which then became a part of their constitutional and common-law rights. This is the mechanism which, it seems to me, is impaired by the success of the United Nations in making cease-fire arrangements. Since it will no longer be allowed, and quite rightly, for any neighbors to take advantage of the internal weakness of a regime, the people who are subjects of that regime have lost the bargaining power which previously they had.

The United Nations has proposed free election as the mechanism for this situation in Korea and Vietnam. We need to find a mechanism more crude, but with more chance of being useful. I would like briefly to suggest the general direction of a possible solution to this problem.

The proposed solution involves an attempted reconciliation between UN Charter provisions for self-determination and those against interference with internal affairs. The reconciliation is this: From the beginning of our international community and modern international law there has been an implicit premise that the community of people (which is part of the concept of state) is not any working-together group but is a voluntary group which is united on terms of "belief." By "belief" I mean a rational conception of life and the universe, which has seeped into the consciousness of men until it has become not conceptualized reality but reality itself.

This would mean then, if this were so, that when organized force is exercised by a power group which calls itself a

government to maintain a structure of society which is not in accordance with the basic beliefs held by the great majority of the people against whom the force is exercised, that such should not be said by international law to be a legitimate exercise of force; and that that group and those people, all of the people against whom it is exercised, should not be taken to be the state. That government and those people should be treated as a state only to the extent that the force is applied against the people who accept the new beliefs of the minority. This would mean, as a minimum, a thing that we have always asserted in this country—the right of free emigration. I realize that this raises a great many new and complex problems, but in time of revolution there is no safe and easy way.

PROF. QUINCY WRIGHT (University of Chicago): I think Mr. Dorsey may import more moral requirements into the conception of the state than has been usual since the Peace of Westphalia. States have been treated as matters of fact rather than as matters of ethics in modern history. But I will not go into that further because I want to discuss the point Mr. Eagleton made concerning the juridical and political character of the United Nations.

It seems to me that the United Nations was designed to be more of a political agency than was the League of Nations. The Charter is drafted with very little precision. It is a difficult document to interpret consistently, as Professor Kelsen has indicated. There are obvious inconsistencies in the use of words all through it. For instance, the term "use or threat of force," appears in Article 2 with apparently the same meaning as the phrase in Article 39 "threat to the peace, breach of the peace, or act of aggression." The term "recommendation" seems sometimes to be included in the term "decision" and sometimes to be contrasted with it. The same meaning is often attached to different words, and conversely, a different meaning is often attached to the same words. The Charter is not nearly as well drafted as the League of Nations Covenant. This is notably true of the domestic jurisdiction article which can include everything or nothing in the Charter, but had a precise meaning in the Covenant.

Thus I suppose we have to accept the intention to make the United Nations a political body. The powers of the organs and the limitations upon their exercise may not be susceptible of precise legal interpretation. That may be a good thing or a bad thing, but I think it has to be admitted.

It seems to me, however, that that situation makes it all the more important that international lawyers should try to inform the public on certain precise distinctions which are inherent. I think there has been too little of that in the comments on the Charter and particularly on the terms "collective measures," "aggression," and "domestic jurisdiction." Even if these terms were intended to be interpreted politically, it seems to me that the public ought to understand something by them and not allow them to mean anything whatever. If the Charter does not provide a procedure for obtaining authoritative interpretations of these terms, it is all the more the job of the international lawyers to get together on their meaning.

I have been impressed by the recent tendency to identify the term "collective measures" in Article 1 (associated with the popular term "collective security") with the term "collective self-defense" in Article 51. I have seen some recent articles in a Department of State bulletin in which that identification is made. In the nature of things it is very difficult for an international jural community to enforce the obligations of that community upon its members, but there can be no doubt the attempt has been made by both the League of Nations and the United Nations. That attempt has been called "collective security" or "collective measures." When the jural community formed by the League of Nations undertook measures to prevent violation of the anti-war obligations of the Covenant, that was "collective security." And the term was used in contradistinction to the older term "alliance," which implied a group of states defending themselves against outside states. This important distinction between the international community acting against a member and one group of states acting against another seems to be in process of obliteration. Instead of the term "alliance" we now have the term "collective self-defense" used in Article 51; but it clearly means nothing different from the old term "alliance"—a group of states joined together to defend themselves from some outside state. If they form a jural community, the state against which they are defending themselves is not a member. Their action is self-defense, not law enforcement. I would urge that we preserve that distinction which seems to me very important. When we refer to "collective security" or "collective measures" we should mean only action under the authority of an organ of the United Nations to prevent violation of the obligations of the Charter. We should use the term "collective self-defense" to mean action by a group like NATO to defend themselves from an outside state.

To call the latter "collective security" obliterates an important distinction.

I will just say a word about "aggression." There has been a tendency to extend this term to any offensive action whatever by another state. Subversion, subversive propaganda, infiltration, and other types of objectionable action have been called "indirect aggression" or simply "forms of aggression." This seems to me unfortunate. The term "aggression" has a well-established meaning indicated in Professor Jessup's draft convention on the subject in the Harvard Research (1939). The term refers to the illegal use of armed force. Unless it is confined to that, its value is largely destroyed. The value of the term lies in that it indicates the conditions justifying "collective measures" by the United Nations or "self-defense" by states, of military character. While "subversion" and "infiltration" may be objectionable and may require appropriate action, it seems clear that military action would never be appropriate. "Aggression" should be confined to offenses where military counteraction may be appropriate.

MR. HAIM MARGALITH (New York Bar): I am in complete accord with the remark of Professor Wright that international lawyers have not made the contribution which was expected of them and which they should have made in respect to developments of plans for the United Nations. Today's speakers, too, would have better served the cause of the United Nations had they pointed out weaknesses needing remedial action, instead of concentrating on things accomplished. To be sure, Professor Eagleton did stress the fact that in the first decade of the United Nations political considerations increasingly overshadowed the importance of making the rule of law the guide for action. However, he too has found it necessary to add: "I am not stating whether it is good or bad. I am only stating facts." It seems to me that in this respect international lawyers and teachers of international law have a mission to perform. I could do no better than illustrate the point by referring to a specific instance.

It is true that in many of the problems dealt with by the United Nations the discussions and the decisions which followed were motivated by political, rather than by legal, considerations. But there were instances where such has not been the case. One such instance was the question relating to the Egyptian blockade of the Suez Canal. That question had come up before the Security Council in July, 1951. For over a month—from

July 26 to September 1—the subject was up for discussion before the Security Council. And this time the discussions and the resolutions which followed were also on a legal, rather than on a political, level. The resolution condemned the blockade as illegal and requested Egypt to terminate the same. Egypt announced immediately that it has no intention of abiding by that resolution, and in fact it never did abide by it.

Some time after the adoption of the resolution by the Security Council, a group of international lawyers, assisted by a number of law professors, took it upon themselves to conduct a thorough study of the problems involved, purely from a legal point of view. After painstaking research over a long period of time the study was made public. It concluded that the blockade was illegal on the following grounds:

(a) It was in violation of the Constantinople Convention of 1888, according to which the Suez Canal, as an international waterway, was to be open to all nations in time of peace as well as in time of war.

(b) It was in violation of the Armistice Agreement between Egypt and Israel.

(c) It was in violation of resolutions adopted by the Security Council as well as in violation of the very Charter of the United Nations.

The study ended by recommending that in the event an early settlement on the controversy was not reached and Egypt persisted in interfering with the passage of goods through the Suez Canal, appropriate steps ought to be taken by the Security Council with a view to implementing its resolution of September 1, 1951.

Article 25 of the Charter of the United Nations provides that the members of the United Nations agree to accept the decisions of the Security Council and to carry them out. To the present day this has not been done by Egypt with regard to the blockade of the Suez Canal. It is in matters of this sort that, as I stated at the outset, international lawyers and professors of international law have a mission to perform. The sooner we put our shoulders to the wheel, in the performance of this mission, the sooner will the rule of law take its rightful place in the conduct of world affairs and more particularly in the conduct of the affairs of the United Nations.

PROF. WILLIAM TUCKER DEAN (Cornell Law School): I wonder if Mr. Eagleton would like to comment on this problem. Apparently there is a consensus being reached on the requirement of some sort of inspection procedures in connection with any possible disarmament agreement. Now if this consensus on inspection procedures culminates in a treaty or agreement of some kind, so that these procedures are set in motion, will you comment on what might be the consequences in other areas of United Nations' activities of having representatives of the United Nations with permanent inspection responsibilities stationed in the various countries?

PROF. EAGLETON: Certainly I think that if they did that they would have set a precedent which might lead into various fields of enforcement.

PROF. LEO GROSS (Fletcher School): I think all three speakers came to the conclusion that somehow there is taking place or has taken place a shift in the center of gravity from the Security Council to the General Assembly. Now what is the basis for suggesting any such shift in the center of gravity? I can see very well that in terms of the expectations in 1945 there is perhaps some ground for disappointment with the work of the Security Council. But were those expectations justified in the first place, and is that disappointment justified today? And is this shift, if a shift occurred, which I personally doubt, due really to the nature of the Security Council or is it due to the kind of problems which the Security Council was called upon to deal with and which I am sure the General Assembly is in no better position to solve than is the Security Council.

We were thinking of such matters as the disarmament question. Is it really as simple as all that to expect great powers to agree to proposals in which they do not see that their national interests are safeguarded? Would it make so much difference if a resolution were adopted on the subject by the General Assembly, and disregarded in practice as is so very often the case with General Assembly resolutions? Furthermore, I think that the Charter itself is an indication that the Security Council was intended to be a functional body. Its competence was not conceived on a footing of equality with that of the General Assembly. It was limited to security functions whereas the General Assembly has part of the security function plus all the economic, social, and other functions. Obviously the General Assembly from the very beginning was given a

broader scope and I must say a more fruitful scope for promoting co-operation between the states. The Security Council was starved of all possibility for fruitful co-operation. We ought to approach this problem more in terms of what the Charter itself intended should be the respective roles, and not in terms of the expectations which were spread around at that time. And we should be more careful than we have been so far in accepting the view that there has been a diminution in prestige of the Security Council for this or that reason, and that the "balance of power" has definitely shifted in favor of the General Assembly.

PROF. WAYNE D. WILLIAMS (Denver Bar and University of Denver): I would like to suggest that one word, in addition to those mentioned by Professor Wright, has been handled very loosely, the word "constitution," which the various speakers have applied to developments in legal relationships under the United Nations. Particularly when decisions are being made in that body more and more on a political basis, and with perhaps less and less binding regard for international law, when one vote for each nation is the rule, and when (as perhaps one speaker suggested) there is a growing concept of expansion of powers or competence within the United Nations—then it is a time when we ought to keep our concept of the word "constitutional" clear, and reserve it for a different order of relationships, implying some actual change in the legal status of the component parts.

JOHN R. WILLIAMS (Lakewood, Ohio; Lecturer in World Law at Western Reserve University, School of Law): I would like to comment briefly on three points. First, Mr. Meeker indicates that the United Nations' efforts to codify human rights in UN treaty-covenants raise political difficulties. Admittedly, in the United States, special constitutional problems may arise whenever the treaty-making power is exercised. Does this justify the present U.S. policy of not encouraging the drafting of a UN covenant defining and providing measures for international enforcement of basic civil and political rights? No. The U.S. constitutional difficulties can be overcome through careful drafting of the covenant; a well-drafted covenant would not impair the rights of U.S. citizens under their state and federal constitutions and laws. UN legal safeguards for human rights are needed when and wherever the individual's rights are invaded and the individual cannot obtain relief through the normal processes of his local and national government.

Had our ancestors, in the crises of history, waited until there was a great consensus of public and governmental opinion in favor of their various proposals with little or no opposition, we would not yet have Magna Carta, the Declaration of Independence, or our Constitution.

Second, both sympathy and reason alert us when the present U.S. policy points to the urgent need for further research in discovering more accurately the number and nature of violations of human rights throughout the world. The United Nations Report on Forced Labour may well be one place to begin. It is a quasi-judicial report by the three members of the UN ad hoc commission on Forced Labour. Their formal conclusions merit study. Of equal importance are the detailed appendices to this report reprinting documentary evidence of conditions of forced labor in the areas reported.

Summarizing these two points, may we not go forward simultaneously with (1) the present United States proposals to the UN for: (a) Annual Member Nation Progress Reports on the status and advancement of respect for human rights in each reporting nation, (b) UN provision of technical assistance and exchange of human-relations experts upon request of national governments for assistance with local human rights problems, (c) UN initiated studies of the status of specific aspects of human rights on a world-wide basis; and at the same time (2) proceed with the original U.S. policy in the UN of codifying basic human rights and measures of implementation thereof in UN treaty-covenants?

My third comment concerns international legislation. To suggest that the General Assembly should be limited in its recommendations to statements of general principles and that the International Law Commission of the UN should be somewhat similarly limited, completely overlooks the validity of the majority UN findings and proposals concerning control of atomic energy. The UN has not yet been able to effect agreement among all the permanent members of the Security Council. Does the atomic energy stalemate in part result from the fact that those most directly responsible for the development of international law have not integrated into the world legal order the basic constitutional principle which we recognize to be fundamental in the local, state, and national levels of government? Traditional international law makes no practical application of the precept of our heritage that laws and fundamental policies should be based upon the consent of the people governed. The late Justice Owen J. Roberts repeatedly urged in public

statements that this principle should be applied in the field of international government and law. Application of principles of constitutional government to solving the problems of modern international organization is complicated by totalitarian dictatorships of the left and right in control of large populations and geographic areas. That additional difficulty is no reason for relinquishing efforts to apply constitutional principles at the world level; it is a challenge to our ingenuity to build the United Nations into a global federation with liberty and justice for all.

PROF. BRENDAN F. BROWN (Loyola University of the South, New Orleans, Louisiana): I should like to address myself briefly to the subject which Mr. Meeker has discussed, namely, the nature of law and the United Nations in the world community. I am somewhat disturbed by the fact that a philosophy of law has crept into the thinking of some of the nations of the free world, based upon power, which may make it very easy for them to take the next step and adopt a concept of law which would be reconcilable with that of Communist Russia. I should like to illustrate my point briefly by reference to the subject of Red China, the Tokyo Trial, and aggressive war.

You will recall that not many years ago the International Military Tribunal for the Far East tried and executed or imprisoned certain leaders of Japan for their aggression on the mainland of China. This was supposed to have been a precedent for later action. But, just a few years thereafter, namely in June of 1950, the leaders of the North Korean people attacked the Republic of Korea and two days later the Security Council of the United Nations called upon the members of the United Nations to repel this attack. In October of that year, however, the leaders of Red China entered the fray and later in February, 1951, were condemned as aggressors. Of course it was impossible to try or to convict these leaders, but the very disturbing thing was that instead of any great resentment against them, apparently they were ultimately treated as friends and equals. This is shown by the fact that many of the nations which were associated with us in the Tojo trial at Tokyo are carrying on trade with these aggressor nations. On the juridical side they recognized the government of Red China, and at the present time are endeavoring to obtain a seat in the United Nations for this government.

All this points to a very weird and contradictory type of behavior which I can diagnose only as a sort of juridical psychosis. I believe that this juridical schizophrenia is the result

of a withdrawal from the idea that international law is based upon an objective regime of principles of right and wrong. If you do not accept this conception, then it is impossible for any nation to say whether the ideals of the Communist world or the ideals of the free world are true. If you are afflicted with any doubt in this matter, then it is impossible to say what an aggressive war is. Law reduces itself down to a power concept, so that those who have the physical power may state exactly what such a war is. Therefore, we must be very careful to emphasize the need of looking at this point and of connecting it with international conduct, for we see that there is a continuing juristic fantasy in the United Nations.

In other words, here we have this world organization condemning Red China although some of its members were allies of Red China and were therefore favorable toward it in its aggression. We have also one of these members, namely Russia, with the veto power, and only its absence made it possible for the UN to take the action which was taken. The admission of Red China would only extend this fantasy. So it behooves our nation to retain its juridical sanity. It has done so thus far, after a considerable struggle between the respective proponents of the moral and power concepts of law, at least after the attack in Korea. Since that time the United States has evidenced a more sane attitude as shown by its willingness to defend Formosa, if necessary, and by its defense treaty for Southeastern Asia which was concluded in Manila last September.

PROF. JAMES O. MURDOCK (George Washington University): The discussion of legal developments in the United Nations during its first decade presents a number of interesting problems. In the first place, we should not become impatient with this young organization; it should be viewed in the perspective of legal history. It took the Romans and the civilized Mediterranean world thirteen hundred years to produce the Corpus Juris Civilis. Functioning in the shadows of the realities of a polarized world, the United Nations has done remarkably well to grow under its imperfect charter.

The significant factor is, what is the trend in the United Nations with regard to its functioning within the rule of law? If from year to year there is a notably increased disposition to conduct the United Nations' affairs according to the basic principles of justice, we should be encouraged. The organization will increasingly command the respect of mankind. On the other hand, if there is an increasing tendency to avoid the rule

of law—to use the facade of legality as a screen for power politics—this will peal the death knell of the United Nations. The peoples and nations of the world do not need an international organization to promote Machiavellian diplomacy.

How can the United Nations be brought to conduct its activities increasingly within the spirit of legality? We should not deplore the fact that legitimate political compromise takes place within the United Nations. It takes place within any well-organized nation. In the United States there are political compromises in Congress and at the White House. The significant thing is that these decisions are made within the framework of the law, and the judiciary is there to assure constitutional government. Decisions will doubtless be surcharged with politics in the international forum, but the effort must be to subject power to justice in the world community. The issue is how justice can be made an ever increasing factor, so that all decisions will be made within the framework of the law, the rule of righteous reason tested by experience.

The old Machiavellian power diplomacy attempts to achieve national ends by any means. The new democratic diplomacy requires that the conduct of international relations be carried on within the framework of the law. The supremacy of right reason is paramount in an atomic age. In this enlightened and democratic spirit the United States and other Western World representatives must take the leadership in a divided world to bring about the spirit of legality in the United Nations. This will mean that the integrity and usefulness of the United Nations will increase with each year. It will thus grow as an indispensable agency of survival and responsible government.

PROF. LOUIS B. SOHN (Harvard Law School): I would like to speak only on the main topic of today, the legality of the United Nations and the development of international law through the United Nations. It seems to me that what is really lacking is the attempt to do anything constructive about increasing the amount of law in the United Nations. We have become fascinated by the formulas of the past and as a result we either try to work within the framework of these formulas or try to do nothing.

One of these stultified formulas, for instance, is the optional clause of the Statute of the Court. Someone invented it in 1920 and for a long time it has been considered as an epitome of wisdom. But as was mentioned here today, only about half of the members of the United Nations were ready to accept it

and have done so only with very restrictive limitations. This seems to prove that such a provision is not flexible enough, that states do not want to accept jurisdiction with respect to the matters enumerated in this clause. We have to invent more clauses, dealing with other matters in a more flexible manner. For instance, we might think about the possibility of states accepting jurisdiction only with respect to a particular field of international law. We might have a new optional clause open for general acceptance which would permit states to accept jurisdiction of the Court with respect to one or more of the subject matters enumerated in the clause. One state might thus accept jurisdiction with respect to subject matters 1, 7, and 14, while another might accept 1, 14, and 25. Both will be thus bound at least with respect to matters 1 and 14.

The same method could also be applied to the other sphere of development of international law, namely, to international legislation. Mr. Meeker, I think, mentioned a very useful example of the World Health Organization and its sanitary regulations. In the old days they were made by treaties, and we had the experience that when these treaties were signed it took ten or fifteen years before they came into force with respect to a reasonable number of states. Now we have the World Health Organization which has eighty-two members, and a few years ago they adopted the International Sanitary Regulations which came into force on an agreed date with respect to fifty-eight states which made no reservations. Later on they came into force with respect to more than ten other states after the Assembly approved their reservations, and only a few states are not bound by it now. A much simpler method and a much better one. And I do not see at all any reason why we could not have a supplementary agreement giving the United Nations General Assembly power to make similar regulations in various fields of international law which do not have special political implications. I do not see why the United Nations could not be empowered, for instance, to adopt rules with respect to consular rights and privileges, its recommendations on that subject to become binding on all those states that do not object to them within a specified time limit. And we could find quite a number of other fields of international law in which that method could be applied quite easily. Again you could make a list of topics, empower the General Assembly to adopt rules on those topics, and permit each State to select in advance the topics with respect to which it would be willing to be bound by rules thus adopted. I think what we need more of in international law is

flexibility in the United Nations. I submit that we do not have enough, that we could have much more.

MR. MELVIN MARCUS (Graduate Student, University of Michigan): I should like to comment first on whether the United Nations Charter is a constitution. The United Nations Charter is an unusual document in view of the fact that it is both a multilateral treaty and an international constitutional instrument which establishes a legal order and confers legal duties and rights upon both the international political organization and upon the member states. The fact that it has been more prone to political interpretation rather than legal or juridical interpretation by the organs of the United Nations does not detract from the fact that the Charter does establish a common constitutional order.

Secondly, Mr. Meeker has mentioned the September 1, 1951 Security Council resolution on the Suez Canal blockade and its relationship to Article 25 of the Charter. Now, the decisions dealt with by Article 25 relate primarily to decisions taken under Chapter VII of the Charter. The first part of Article 39 of Chapter VII provides also for the making of recommendations, while the latter part provides for the taking of decisions. "Recommendations" of the Security Council, however, whether made under the provisions of Chapter VI or Chapter VII of the Charter must be distinguished from "decisions." Recommendations are not covered by the provisions of Article 25. United Nations members are not obliged to carry out recommendations of the Security Council; they are obliged to carry out only decisions taken under the latter part of Article 39 or the succeeding Articles of Chapter VII. There is also some question in my mind as to the nature of the recommendation and the resolution of September 1, 1951, since the Security Council failed to make clear whether it was acting under Chapter VI or Chapter VII of the Charter. The Council rarely states under just what provisions of the Charter it is acting.

Thirdly, I would like to ask Mr. Meeker why he is opposed to the development of a Security Council with really effective action even if it were possible to have one. How does he think it would be made possible, and secondly, in the long run could we have a Security Council with effective pacific settlement authority and functions if it did not have some sort of effective enforcement action and authority behind it?

MR. MEEKER: In answer to the first part of the question, I am not opposed to a Security Council which would be effective as an executive organ with enforcement powers, but I think there is a virtual impossibility of getting that kind of Security Council because of the way the world is organized into nation states and because of the objections which we can anticipate from the major powers in regard to giving up their veto. So it seems to me that it is really not a practical possibility.

Secondly, I do not believe the Council is useless. It can do many things. It has procedures for making use of rapporteurs and for setting up committees of good offices in negotiation, which can do a good deal to help parties in a dispute where that sort of assistance could make a difference.

The third point which occurs to me in this connection has to do with the character of the Security Council. By definition it is a limited body with eleven members under the Charter as it stands. Suggestions have been made for increasing the size, perhaps adding some permanent members, perhaps bringing up the total to something like fifteen. Even so, I think it is quite doubtful that you would have any fifteen that you could pick out who would be completely representative of the whole Organization in the way that an executive power or a legislative chamber is representative and able to speak for the interests of its whole constituency. That is true because the Council is chosen in such a way that its members represent their own governments and they do not really represent the whole community.

Some mention has been made that a weighted voting scheme would be very helpful in making the Assembly more realistic. I would like to throw out as a counter suggestion the thought that the Assembly as it is is rather well balanced. The voting of many of the small states is very frequently influenced by the power and influence of states which are larger in power than themselves. So I would think that the Assembly today is a more representative body than the Council and that in its actions it can very accurately reflect the basic interests involved.

Monday, June 27, 1955, Afternoon Session

THE VETO AND THE SECURITY COUNCIL

PROF. LEO GROSS* (Fletcher School): The title of my talk, "The Veto and the Security Council," is somewhat "loaded." We all know very well that in the Charter of the United Nations there is no such thing as a "veto." The voting rules for the Security Council require an affirmative vote of seven members for decisions on procedural matters; for decisions on all other matters, that is on non-procedural or substantive matters, the Charter requires an affirmative vote of seven members including the concurring votes of the permanent members. It is inaccurate and even misleading to say that the Charter confers a veto right on the permanent members. For to say this would imply what is not the case—that a permanent member is bound to vote against a non-procedural proposal in order to defeat it. According to the Charter, a proposal is lost unless it receives affirmative votes of seven members including the concurrence of the permanent members. In brief, the Charter requires concurrence and not an adverse vote, a veto, of the permanent members. This clarification is essential for the following analysis. When I use the term "veto" I shall use it as a convenient short-title or symbol for the voting rule actually laid down in the Charter.

Having identified briefly the first part of the title, allow me to identify briefly the second part. The Security Council, a principal organ of the United Nations, is primarily responsible for the maintenance of international peace and security. From a formal point of view it acts as a corporate organ of an institution endowed with international legal personality. From a substantive point of view it is a standing diplomatic conference or an instrument for multilateral diplomacy embedded in a legal framework, the Charter. This framework is fairly elastic insofar as the content of political decisions is concerned which the Security Council is authorized to make. On the other hand, this framework is remarkably rigid in certain procedural matters. The flexibility regarding substance is more than compensated by a narrowly defined voting formula which is the

*Footnotes to Leo Gross's Speech will be found at end of article.

modus operandi of the Council. Acceptance of this voting formula was one of the principal political problems in drawing up the Charter and a condition of great power participation in the Organization.

It has become fairly common with governments as well as with writers to express disappointment at the way the Security Council has functioned, and to single out the Soviet Union and its use or abuse of the "veto" as the primary cause for the less than satisfactory results achieved so far. This sort of attitude relates directly to the expectations aroused by the creation of the United Nations. No doubt these expectations were high in some quarters. It may be suggested that insofar as this country is concerned these expectations were roused to a high point by speakers from Washington, so much so that it has become rather common to note that the Charter has been "oversold." It would seem therefore that the reaction to the first ten years of the United Nations is in direct proportion to the expectations formed at the time of its formation. It is doubtful whether the United Nations has really deserved some of the bitter criticism which has been directed at it.

Personally I did not entertain any high expectations when the United Nations was founded at San Francisco ten years ago. The reason for that, I think, is very simple. I had observed very carefully the work of the League of Nations, and in a sense I looked upon the United Nations as upon a second marriage—the triumph of hope over experience. The United Nations was not created according to an entirely new conception. It was based very largely on the League pattern without really being, contrary to very widespread opinion, an improvement over the League pattern. I pointed out at the time, in a paper in the American Journal,[1] that in many of its essentials the United Nations was a codification of the experience of the League of Nations, and that it represented less rather than more than what the Covenant was intended to be. Insofar as this country was concerned, the Charter of the United Nations incorporated all the important demands for safeguarding the sovereignty of the United States which figured so prominently in the reservations of Senator Henry Cabot Lodge and the Senate debate in 1919 in connection with the question of joining the League of Nations. I think it is very useful to remind ourselves that this need for safeguarding the sovereignty of the United States was very emphatically affirmed in the hearings which preceded the consent and advice of the Senate Committee on Foreign Relations and of the Senate itself to the ratification of the United

Nations Charter. It was stated at the time by John Foster Dulles that "actually, the document before you [the Senators] charts a path which we can pursue joyfully and without fear. Under it we remain the masters of our own destiny. The Charter does not subordinate us to any supergovernment. There is no right on the part of the United Nations Organization to intervene in our domestic affairs. There can be no use of force without our consent. If the joint adventure fails, we can withdraw."[2] And Senator Vandenberg was no less emphatic when he explained to his colleagues in the Senate, prior to the vote, that "the United States retains every basic attribute of its sovereignty. We cannot be called to participate in any sort of sanctions, military or otherwise, without our own free and untrammeled consent. We cannot be taken into the World Court except at our own free option. The ultimate disposition of enemy territory which we have captured in this war is dependent solely upon our own will so far as this Charter is concerned. Our domestic questions are eliminated from the new organization's jurisdiction. Our inter-American system and the Monroe Doctrine are unimpaired in their realities. Our right of withdrawal from the new organization is absolute, and is dependent solely upon our own discretion. In a word, Mr. President," concluded Senator Vandenberg, "the flag stays on the dome of the Capitol."[3]

I suppose that the Charter was explained in similar words to the Supreme Soviets when the Supreme Soviets consented to the ratification of the United Nations Charter by the Soviet Union. In other words, what I am trying to get at is that the Charter was adopted by the two dominant powers, and presumably by the rest of the members of the United Nations, with a perfectly clear realization that it was going to be an organization of sovereign states and that all of them, and certainly the Great Powers, the permanent members of the Security Council, would remain masters of their destiny. In this I see one of the roots of the veto: That is, that it protects the national sovereignty, the right, certainly of the permanent members of the Security Council, to remain masters of their destiny.

The second root of the veto is, I think, to be found in the corporate character which the Charter confers upon this primary organ for the maintenance of peace and security. In order to make this corporate action possible, which was not possible in the League, the permanent members make sure that no United Nations action can be taken without their consent. This, I think, is a second root of the veto and, as Professor J. L.

Brierly has pointed out, "The veto is the price that the United Nations has paid in order to obtain an organ which should have power to decide and act in a corporate capacity, and it is already clear that the price has been a high one."[4]

This idea that the Security Council should be able to act in a corporate capacity is based of course upon the experience of the League, where the Council of the League did not have this capacity, where on the contrary the members derived certain obligations directly from the Covenant, and the Council could no more than co-ordinate their spontaneous action. So, in order to obtain a more perfect, a more centralized type of organization, it was necessary to surround it with certain guarantees, certain reservations that it would not be abused. And I think the requirement of unanimity among the Big Five is such a guarantee.

I would like to analyze now the voting rule for the Security Council, Article 27 of the Charter. This article lays down two or three rules. One is that each member has a single vote, one vote. The other is that matters of procedural character shall be decided by the vote of any seven members. But all other matters require the affirmative vote of seven members including the concurring votes of the permanent members. In the case of procedures for the pacific settlement of disputes, the members which are parties to the dispute are supposed to abstain from voting.

Now, the question arises, what does it mean: An Affirmative vote of seven members including the concurring votes of the permanent members of the Security Council? Four texts, the French, the Spanish, the Russian, and the Chinese texts, make it very clear that the vote of all the permanent members is required. The English version of course is quite compatible with that meaning, that the vote of all the permanent members is required: that is, that this voting rule should be read as equivalent to "all the five permanent members." However, other writers, and I think probably members of the Security Council in the Korean action, read this rule as if it were formulated "all the permanent members present and voting." I shall come back to that in a moment and see whether this interpretation is one that makes sense. In the practice of the Security Council it has come to be accepted that abstention is not a fatal defect. In other words, if you take Article 27, Paragraph 3, literally, abstention is not a fulfillment of that requirement because it is not an affirmative and concurring vote. However, the members of the Security Council and the General Assembly

itself have so far never regarded this abstention as having the effect of defeating a resolution or proposal before the Security Council. Another question which I should like to discuss a little later on is the question whether or not absence from the Security Council can be assimilated to abstention; in other words, whether absence would have the same legal effect as abstention of a permanent member.

There is one point with which I would like to begin and that is the question of the quorum of the Security Council when it is to take decisions. The Charter does not mention the quorum at all nor will you find any rules concerning the quorum in the rules of procedures of the Security Council, which are still provisional after ten years. Does this mean that there is no quorum requirement at all for the Security Council? Or does it mean that all eleven members constitute a quorum? The practice of the Security Council indicates that the Council, at least up to 1950, took the view that the quorum consists of those members whose vote is necessary for a resolution. In the Iranian case, for instance, in 1946, the Council adopted a procedural resolution in the absence of the Soviet Union.[5] In a later case, the Indonesian case, the Council in 1948 adopted a substantive, non-procedural resolution in the absence of the Ukrainian Soviet Socialist Republic, which was a non-permanent member of the Security Council.[6] In the Iranian case the British representative, Sir Alexander Cadogan, suggested that a quorum could be inferred from the voting rule which requires that any actual resolution or decision shall be carried by a certain vote:[7] a majority of any seven members for procedural decisions and a qualified majority of seven for non procedural decisions. I think that he pointed out the direction in which a search for a quorum must be made. And you will find in some international organizations certain models for this sort of approach: the Covenant itself, for instance, in Article 16, Paragraph 4, had an implied quorum requirement; and the Rio Treaty of Reciprocal Assistance of 1947 in Article 19 provides that in order to constitute a quorum it shall be necessary that the number of states represented should be at least equal to the number of votes necessary for the taking of the decision. If you apply this rule to the Security Council, it would appear that in order to take a procedural decision the presence of at least seven members is necessary, and that in order to adopt substantive, non-procedural decisions you must have the five permanent members plus at least two non-permanent members. If that is correct, then the Security Council from January, 1950

until August, 1950 lacked the proper quorum for the adoption of non-procedural decisions.

This may sound rather strange, but the Charter itself, without using the term "implied quorum," contains in at least one or two other articles an implied quorum. You will find this implied quorum in the articles dealing with amendments to the Charter of the United Nations. Rule 68 of the Rules of Procedure of the General Assembly declares that "a majority of the Members of the General Assembly shall constitute a quorum." But Articles 108 and 109, which deal with amendments and the holding of a general conference to review the Charter, require a two-thirds majority of the members of the United Nations. Here it is not the same text as in Article 18. Article 18 speaks of a majority, two-thirds majority or a simple majority, of the "members present and voting," but Article 108 and Article 109 speak of the "members of the General Assembly" or the "members of the United Nations." So, if my interpretation is correct, there is what you might call an aggravation of the voting requirement in connection with amendments to the Charter, and I think it is quite a substantial aggravation.

The point has been made by Professor McDougal that the interpretation which I propose is a literal, a textual interpretation which is not as good as his interpretation. He calls it the major-purpose interpretation or interpretation for survival.[8] It may seem a little bit naive to believe that our survival can depend upon an interpretation of the Charter. However, I would like to go a little into what results you obtain if you do adopt this major-purpose interpretation in the general context of interpretation of treaties, because after all the Charter of the United Nations is a treaty, although from a substantive point of view it is also the constitution of the United Nations.

Professor McDougal and Mr. Gardner in their argument advance several propositions which I think bear examination. One of these, of course, is untenable, and that is that prior to 1950 there was any precedent for the Security Council to have ever adopted substantive decisions in the absence of a permanent member. Reference is made to the Iranian case, but in the Iranian case no substantive decision was adopted. I think this is simply an error.[9] Another proposition is thatthe resolutions adopted by the Security Council in the Korean affair in June and July of 1950 are themselves authentic interpretations of the Charter.

I would like, however, to begin now with the first proposition, namely, that it is possible to identify absence with absten tion. The first point which I would like to make is that in the records of the Security Council there is no evidence that the Council as a corporate body, as an organ of the United Nations, equated absence with abstention. Some individual members of the Security Council did express a view to that effect, but I have not found in the records any resolution purporting to state the view of the Security Council as a corporate body. Furthermore, the record itself indicates that in the summation of the vote, the President of the Council always noted that one member of the Security Council was absent. He never said that the one absent member was a permanent member of the Security Council. On the other hand, the President in summing up the vote never said that that one member who was absent had merely abstained from voting. In other words, what you find in the records, and that is rather important, is that some members are listed as having voted for a resolution, some are listed as having voted against the resolution, some as abstaining, some as not voting, and some as not present. It is interesting that in the Indonesian case, where the Ukrainian Soviet Socialist Republic was absent from the meeting of December 24, 1948, the President did declare that the absent member, a non-permanent member, was abstaining from the vote, or would be carried, at any rate, as abstaining.[10] Professor Jessup sat for the United States on the Security Council on that occasion and maybe he will want to add something to what I have said.

Some resolutions were then adopted in June and July, 1950 by a vote which does not correspond to the voting requirement in Article 27, Paragraph 3, because one permanent member was not present, did not participate in the vote, and of course did not abstain. Now, by dint of what reasoning is a member which is not present and which is so listed in the official records, to be regarded as present and abstaining? I have construed abstention as being a tacit consent and therefore note a vitiating factor in the proceedings of the Security Council.[11] But is it possible to maintain this construction for a member which is absent but, far from abstaining, makes his dissent very clearly known to the members of the Security Council? I cannot help but agree with Professor Julius Stone in his book Legal Control of International Conflicts when he says that "the mere fact that non-concurrence is manifest in an obstructionist abstenteeism from the Council rather than an obstructionist negative vote seems immaterial."[12]

It is interesting in this connection to recall the Advisory Opinion of the International Court of Justice in the Second Admission case of March 3, 1950. In this case the Court was called upon to determine the question whether the General Assembly can make a decision to admit a State when the Security Council has transmitted no recommendation to it. It was suggested to the Court, inter alia, that the General Assembly could treat the absence of a Security Council recommendation as equivalent to an "unfavorable recommendation" upon which the Assembly could base a decision to admit a State to membership. The Court rejected this argument emphatically and held "it is impossible to admit that the General Assembly has the power to attribute to a vote of the Security Council the character of a recommendation when the Council itself considers that no such recommendation has been made."

I am not suggesting that there is a perfect analogy between the holding of the Court and the point here under consideration. I do suggest, however, that it is not possible to identify simply one thing with another, absence with abstention, and to attribute to the Soviet position a meaning which the latter expressly repudiated. Caution seems all the more necessary in view of the fact already underscored, namely, that the Security Council itself has not gone on record as making such an identification.

The second point to which I want to turn now is whether or not those recommendations or resolutions of the Council in June and July, 1950 amounted to an authentic interpretation of the Charter, in particular of the voting requirement in Article 27, Paragraph 3. That is affirmed by Professor McDougal and Dr. Gardner in their article in the Yale Law Journal when they said that these decisions, including the resolutions on Korea, taken in the absence of a permanent member "are themselves authentic interpretations of the Charter by a body authorized to make such interpretations."[13] And reference is made by the authors to the well-known statement of Committee IV/2 of the San Francisco Conference, to which Professor Eagleton referred this morning, where the Committee said it was inevitable that each organ will interpret such parts of the Charter as are applicable to its particular function and it was not necessary to include any particular principle to that effect in the Charter. However, what is omitted in the McDougal-Gardner argument is the final paragraph of that statement on interpretation, in which the Committee declared that "it is to be understood, of course, that if an interpretation made by any organ of the organization or by a committee of jurists is not generally

acceptable it will be without binding force. In such circumstances or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter. This may always be accomplished by recourse to the procedure provided for amendment."[14] Now, this is precisely the point which I was trying to make and I think this is the distinction between absence and abstention. Abstention is accepted by all the members, or at least by the members concerned, whereas the equation of absence with abstention is not generally supported by the members and in this case is actively opposed by a permanent member of the Security Council. Consequently I do not think that it is possible to regard the resolutions themselves as an authentic interpretation of the voting requirement.

Now, as to the major-purpose interpretation. It is a rather fascinating approach and I would have liked to speak at greater length on this than I can today. However, I would like to say that major-purpose interpretations of course are quite proper and in some cases they are even required by the instrument concerned. For instance, you are all familiar with the Headquarters Agreement between the United Nations and the United States of June 26, 1947. In Section 27 of this Headquarters Agreement it is said: "This Agreement shall be construed in the light of its primary purpose to enable the United Nations at its headquarters in the United States, fully and efficiently to discharge its responsibilities and fulfill its purposes."[15] Here you have a direction to the interpreter to interpret this instrument in accordance with the purposes of the United Nations.[16] Now, the major purpose, for instance, for the interpretation of the United Nations Charter may be to take collective action or collective measures, but it may also be, as I said at the very outset, to safeguard the independence and the right of every permanent member of the Security Council to be master of its destiny. There are many other international treaties which have a reference to a major purpose,[17] but in the practice of the International Court of Justice, which I accept as a guide in this matter, the major-purpose interpretation or the principle of effectiveness, as it is sometimes called, is really a principle subordinate to the principle of the interpretation based upon the actual text of the instrument. In an interesting article in the British Yearbook of International Law[18] Sir Gerald Fitzmaurice identifies the major principles of interpretation relied upon by the International Court of Justice and its predecessor. The first principle is the principle of actuality,

that is, the principle that treaties are to be interpreted primarily on the basis of their actual text. The second major principle is that of the natural meaning. And only subordinate to those two major principles is the principle called effectiveness. It is really a very risky, a very dangerous, principle, because it is a principle which tends very often to disregard the actual text itself and the intention of the parties as expressed in the treaty. I cannot accept a major-purpose interpretation which disregards the text itself. I think the text is to prevail over whatever deductions or inferences one cares to make concerning the objectives of an instrument. And I think that the Court itself in the question of the human rights provisions in the Peace Treaties with Bulgaria, Rumania, and Hungary expressed this thought very clearly when it said that the principle of interpretation "often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which... would be contrary to their letter and spirit."[19]

It seems to me, therefore, that in this case it is not possible to rely on the major-purpose interpretation in order to invalidate what I feel is a fairly clear or perhaps even a very clear text and meaning of the voting rules in the Charter. I would like to refer here again to Julius Stone who commented upon this major-purpose interpretation, saying, "It is scarcely possible to reduce the debate concerning absence to a conflict between literal interpretation and interpretation by major purpose as McDougal and Gardner seek to do. For it is not self-evident, (except wishfully speaking) whether (from the standpoint of the Great Powers) 'collective security' or preservation of their freedom of action was the 'major' purpose. The conflict is rather between literal interpretation plus one 'major purpose' and another 'major purpose' simpliciter."[20]

In order to appreciate the consequences of the major-purpose interpretation of the voting rules in the Security Council for the future, reference may be made to the following statement by McDougal and Gardner: "Nothing in this principle (of unanimity) suggests so restricted an interpretation of the voting provisions of the Charter as to make it impossible for the United Nations to take measures concerning the future of international peace and security without the complete agreement of the five major powers." It is further urged by these authors that the resolutions of June 25 and 27 "did not violate the principle of unanimity, unless that principle is thought to mean that one major power can prevent other powers from using

their forces in a course of action to which they have agreed."[21] This argument seems to disregard the theory underlying the Charter according to which it is not the Members but the Security Council which decides whether to take action. It is not the question whether one power can prevent another from taking action; the question rather is whether the Security Council can decide to take enforcement action under Article 42 or to call upon this or that minor or major power under Article 48 to take action without the concurring votes of the five permanent members. It thus appears to be inherent in the logic of the major-purpose interpretation to contend that such decisions can and perhaps indeed should be taken without the concurring votes of the permanent members and even in the face of a "veto' by one of them. The adoption of the Uniting for Peace Resolution after the votes of June/July, 1950 and the rationale behind it clearly indicate that such a far-reaching construction of the conditions for Security Council action is not countenanced by the Members of the United Nations. Moreover, if it were valid for decisions on enforcement action, would it not, a fortiori, be also valid for other decisions of the Security Council relating to the "major purpose" of the United Nations, such as the decisions to recommend admission to membership and appointment of the Secretary-General?

Now so much about the veto itself, or rather the principle of the affirmative and concurring votes in the Security Council. It is rather interesting to observe, incidentally, that the action in Korea has been subjected not merely to critique by lawyers but it has also been criticized or examined very carefully by students of politics such as Arnold Wolfers, Niemeyer, Johnson, and others.[22] It is rather interesting that they conclude from their own premises that it is dangerous in the extreme to present the action in Korea as a collective security action. Rather, they argue, it should be regarded simply as an action taken by the United States and other members of the United Nations in defense of their national interests. And it is also very interesting to find in a Staff Study of the Senate Foreign Relations Committee the following statement concerning the action in Korea: "There is no question that the military action prevented the conquest of all of Korea by an act of aggression. It is a question, however, whether the action has assisted the efforts of the organization to settle the Korean political problem which still remains unsolved. It is also a question whether the limitations on military action in Korea, adopted in part at least out of consideration for policies of participants in the United Nations

campaign, adversely affected the pursuit of our own policy."[23] Thus from a variety of approaches there is some doubt as to the wisdom or the import of the action in Korea.

One may well ask what the alternatives are in case the Security Council is prevented from functioning constitutionally, which may happen for a variety of reasons because the Charter is almost unreasonably restrictive and rigid. One alternative might be that if the Council is paralyzed by lack of a quorum the powers of the Security Council devolve upon the General Assembly. And I think it is no secret that if the Russian representative had turned up on June 25 in the Security Council the United States Government was ready to go to the General Assembly; and as a matter of fact the decision to take military action in Korea was taken ahead of the June 27 resolution, a fact which I do not wish to criticize. There was what you might call an overwhelming military necessity. One could think of still other alternatives. There is one, for instance, suggested by Professor Stone in terms of the residual powers of the member states.[24] In this view, if the Security Council is paralyzed and cannot take any action, the members may act as if they had never renounced the use of force according to their own unilateral decisions. The difficulty with this suggestion is that the members have renounced the use of force and threat of war unconditionally in Article 2, Paragraph 4.

Of course, the official alternative, as is well known, is the Uniting for Peace Resolution of 1950, which provides not for the transfer of powers but for the transfer of the subject-matter from the Security Council to the General Assembly. So far the Uniting for Peace Resolution has been rather a disappointment. It was a complete failure, I submit, insofar as the ear-marking of military forces was concerned. I do not think that any member, or at least any significant member, ear-marked any of his armed forces for the United Nations. And as to the rest, it is rather undesirable to have to rely on those blocs of votes one has to gather, and perhaps to have to enter into bargains with the holders of disposable votes in order to collect the needed majority vote in favor of a non-binding Assembly resolution. However, that may be where we stand today.

I wanted to say a few words about the so-called "double veto." The "double veto' is an aggravation of the non-existent "veto," that is, an aggravation of the principle of unanimity in the Security Council. It arises directly from the San Francisco Conference where the Four Sponsoring Powers were asked to give certain answers to certain questions. One of the questions

was: "In case a decision has to be taken as to whether a certain point is a procedural matter, is that preliminary question to be considered in itself as a procedural matter or is the veto applicable to such preliminary questions?"[25] Of course, the Four Powers, and France associated herself with them, did not answer any of the other questions specifically but they replied to this question. They said that in the opinion of the delegations the draft Charter itself contained an indication of the application of the voting procedure to the various functions of the Council. They went on to say that it would be unlikely that any doubt would arise in the future. Should, however, "such a matter arise," they continued, "the decision regarding the preliminary question as to whether or not such a matter is procedural must be taken by a vote of seven members of the Security Council including the concurring votes of the permanent members."[26] What this statement in substance says is that if there is any doubt which of the two votes applies, the simple vote of seven or the qualified vote of seven, that in itself is a non-procedural question. Thus a permanent member may raise the preliminary question whether a proposal under consideration is procedural; and by his non-concurrence in a majority vote he may force the Council to treat the proposal as a non-procedural matter. This is the first "veto." If the Council members persist and ask for a vote on the proposal, the same permanent member by his non-concurrence in a majority vote is able to prevent its adoption. This then is the "double" veto. This double veto has not been used very often in the Security Council. In fact, I went over the records very carefully and I did not find more than about half a dozen cases, and in only about three or four of those cases was there any major debate about the "double veto." It has, however, caught the imagination of delegates and people outside the United Nations and has become a major point of controversy.

What is the attitude of Security Council members with reference to this double veto? Insofar as the Council as a corporate organ is concerned, it never took a position on this question. Insofar as the non-permanent members are concerned, their position has been that it certainly is not binding on them. Of the permanent members, the Soviet Union argues that it is binding absolutely on the permanent members; France and the United Kingdom also expressed themselves in favor of the binding character of the statement; China has adopted an ambiguous position on occasion but invoked it with great force in 1950 in connection with the Formosa question. The United

States position has been somewhat flexible, I would say. I do not think this Government ever declared it was not binding but perhaps it never said clearly that it was binding. It was a statement of general attitude, said Mr. Dulles in the first committee of the General Assembly in 1947, but it was not an agreement binding in perpetuity, which of course it is not.[27] But, at any rate, we never really repudiated it, so it is probably fair to say that insofar as the five permanent members are concerned, they do regard the statement as binding in the sense that it offers a guide for the application of the double veto itself. In other words, it contains an indication as to which matters are procedural or substantive.

The double veto was used in several cases after prolonged debate, and in all cases the Soviet Union prevailed with direct or indirect support of one or more of the Great Powers, including the United States on at least one occasion. But in one case, the Formosa question, the Chinese Communists' complaint of armed invasion of Taiwan, proceedings took place in the Security Council on September 29, 1950 which were rather unusual in the annals of the Security Council, which certainly had its share of unusual meetings. In that case, where the British representative presided, the Council voted on a resolution submitted by Ecuador inviting the Central People's Government of the People's Republic of China to come to New York and to attend the meeting of the Security Council in connection with its complaint. That resolution was based upon the rules of procedures of the Security Council which provide, in Rule 39, that the Security Council may invite members of the Secretariat and other persons to supply it with information or to give them assistance. The Chinese Nationalist representative considered that a preliminary determination as to the nature of the vote was absolutely essential, and he invoked the Four Power Statement of San Francisco. The President rules this request out of order and suggested that the preliminary question be raised after the vote on the invitation itself. This had happened before; there was nothing unusual about it. The vote on the invitation was seven in favor, three against. The three votes against were cast by China, Cuba, and the United States. The President of the Council summed up the results of the vote by saying that the resolution was adopted. The Chinese representative disagreed. He claimed that because of the lack of his concurrence in the vote, the resolution had not been adopted. The discussion which followed gave an opportunity to different members to express their point of views on the double veto and Ambassador

Ernest Gross, who sat for the United States in the Security Council on that occasion, said that "The Charter of the United Nations and the Four Power Declaration of San Francisco and the precedents of the Security Council themselves seem to us solidly to support the conclusion that a motion of this kind is procedural."[28] On the same occasion he also referred to a General Assembly resolution of April 14, 1949 in which the General Assembly made several recommendations to the Council as to voting, and where the invitation to participate or to attend meetings of the Council was listed among the decisions to be governed by a procedural vote. But the Chinese representative persisted, in spite of the fact that the United States, which also objected, did not invoke the double veto because it did not consider this to be a "double veto-able" question. And then rather unusual things occurred in the Security Council. The President asked the Council to vote on the question whether the Council regards the vote taken that morning on the Ecuadorean resolution as procedural. A vote was taken accordingly, and then the President said the proposal was adopted. There were nine votes in favor, one against, and one abstention.[29] The one against, of course, was the Chinese vote. There was no proposal before the Council, really, on which to take a vote. The President had simply asked the Council to confirm the vote already taken. The Chinese representative again referred to his vote as a veto, but the President claimed that "notwithstanding the vote of our Chinese colleague, the vote which the Council took this morning on the Ecuadorian resolution is procedural."[30] Now, at this point I think the Chinese representative made a mistake. He raised a point of order and argued that the ruling of the President was ultra vires. He also proposed that the matter be referred to the International Court of Justice for an advisory opinion.[31] The President at this point considered that Mr. Tsiang was challenging his ruling, and he submitted his ruling to the vote under Rule 30 of the provisional rules of procedure, which declares that if a point of order is challenged "the President shall submit his ruling to the Security Council for immediate decision, and it shall stand unless overruled." The President submitted accordingly his ruling to the vote in the Security Council. The vote on this ruling was, I think, unique in the sense that no member really voted—none of them voted against, none in favor, and of course no one abstained. The President then interpreted this remarkable vote saying that his ruling stood.[32] The Chinese representative of course persisted in his view that this was an illegal

proceeding, but the Communist Chinese representative was invited all the same and actually attended meetings of the Security Council.

Some writers have claimed that this proceeding in the Formosa case indicates that the double veto has been effectively placed under the control of a simple majority in the Security Council. I am not sure that the conclusion is correct. I would rather, in fact, doubt that that is the correct interpretation of what happened, although I do admit that what happened was utterly confusing. In this case, as in the case of the veto itself, it is generally overlooked that the double veto and the Four Power Statement itself from which it is derived contain very substantial, very solid, advantage. It is primarily by virtue of that statement by the Four Powers in San Francisco that certain decisions of the Security Council have been considered as governed by procedural vote which without the strength of the statement might not be so considered. This applied particularly to that part of it which provides that no member of the Council can alone prevent the consideration and discussion of a dispute before the Security Council. At San Francisco the Soviet Union did not wish to accept this. The Soviets argued that consideration and discussion is the beginning of a chain of events which may lead to the application of sanctions. However, under strong pressure they agreed to waive their opposition. It is arguable that if the statement were abrogated it might not be possible to say that discussion and consideration are not subject to a qualified vote. Furthermore, certain decisions which concern the procedure in the Security Council are also governed by a procedural vote but not all of them are necessarily procedural in character. My argument here is that the statement itself really offers advantages and no drawbacks. The advantages are that it designates certain matters which are to be governed by a procedural vote without saying that they are procedural matters. Moreover, the double veto can be juridically based not upon the statement but upon the voting rule in the Charter, because Article 27, Paragraph 2, declares that while procedural matters shall be decided by a procedural vote all other questions—obviously that would include the question whether or not a matter is procedural—are to be decided by a substantive, by a qualified vote in any case.[33] It is very difficult to be precise as to when there is a case for properly applying this procedure of the double veto. Of course one can say that it is applicable only in reasonably dubious cases. The problem would be simplified if the Security Council would agree to consider the

statement as a useful guide for its own work, and if no effort were made in the future to consider such votes to be subject to interpretation by presidential rulings. Such presidential rulings could upset not merely the double veto but all the voting rules in the Security Council. If that came about they would abolish the necessary protection the members wanted to derive from the voting rules which they put into the Charter.

Footnotes to Leo Gross's Speech

1. "The Charter of the United Nations and the Lodge Reservations," 41 American Journal of International Law (1947), pp. 531-554.
2. The Charter of the United Nations, Hearings before the Committee on Foreign Relations, United States Senate, 79th Congress, 1st session, 1945, p. 641.
3. Congressional Record, 79th Congress, 1st session, July 23, 1945, No. 147, Vol. 91, p. 8089.
4. The Law of Nations, 4th ed. (1949), p. 104.
5. Repertoire of the Practice of the Security Council 1945-1951, Doc. ST/PSCA/1, 6 August 1954, pp. 175-176, Cases 190-192.
6. Security Council, Official Records (3rd year), no. 134, p. 30 ff.
7. Ibid. (1st year), no. 2, p. 251.
8. Myres S. McDougal and Richard N. Gardner, "The Veto and the Charter; An Interpretation for Survival," 60 Yale L.J. (1951), pp. 258-292.
9. Leo Gross, "Voting in the Security Council: Abstention From Voting and Absence from Meetings," 60 Yale L.J. (1951), pp. 229-235; Julius Stone, Legal Controls of International Conflict, 1954, p. 209.
10. Security Council, Official Records (3rd year), no. 134, p. 30 ff.
11. See Gross, loc. cit., p. 224 ff, 253. At the 197th meeting on August 27, 1947, the representative of the United States stated with reference to abstention: "In the opinion of the United States delegation, the Council has developed, during the past year, one practice in regard to the voting of the permanent members which appears to be of real importance. I refer to the practice of abstention by a permanent member in order to permit the will of the majority of the Council to prevail." Repertoire of the Practice of the Security Council 1946-1951, United Nations Doc. ST/PSCA/1, p. 174, Case 184 (emphasis supplied). McDougal and Gardner, loc. cit., p. 284, oppose the view that abstention is "a manifestation of consent in disguise."
12. At p. 212.
13. McDougal and Gardner, loc. cit., at p. 281.
14. UNCIO Documents, Vol. XIII, pp. 709-710.
15. Review of the United Nations Charter, A Collection of Documents, Senate Doc. 87, 83d Congress, 2d session, p. 206 (emphasis supplied; also in 61 Stat. 3416, or T.I.A.S.1676.
16. It is rather interesting, incidentally, that in authorizing the President to bring into effect this Headquarters Agreement, the Joint Resolution of the Congress of August 4, 1947 provides in Section 6 that "nothing in the agreement shall be construed as in any way diminishing, abridging, or weakening the right of the United States to safeguard its own security and completely to control the entrance of aliens into any territory of the United States other than the Headquarters district and its immediate vicinity." Public Law 357, 80th Congress, 1st session' 61 Stat. 756, 767. I am quoting this for one purpose, and that is that it made it rather dubious what the major purpose is. In other words, if an instrument directs you to interpret it in the light of a major purpose, there may be difference of opinion as to what the major purpose is.
17. See, for instance, Article 7 of the North Atlantic Treaty of April 4, 1949; Article 10 of the Rio Treaty of 1947; Article 102 of the Bogota Charter of 1948; and Article VI of the ANZUS Treaty of September 1, 1951.

18. G. G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points," 28 British Yearbook of International Law (1951), pp. 1-28, at p. 9.
19. I.C.J. Reports, p. 229 (1950).
20. Loc. cit., at p. 212, note 48.
21. Loc. cit., at p. 287.
22. Arnold Wolfers, "Collective Security and the War in Korea," 43 Yale Review (1954), pp. 481-496; Howard C. Johnson and Gerhart Niemeyer, "The Validity of an Ideal Collective Security," 8 International Organization (1954), pp. 19-35, at p. 33.
23. Pacific Settlement of Disputes in the United Nations. Staff Study No. 5. Sub-Committee on the United Nations Charter, 83d Congress, 2d session. Committee Print, October 17, 1954, p. 20.
24. Stone, loc. cit., at p. 234 ff.
25. Doc. 855, UNCIO Documents, Vol. 11, p. 699.
26. Doc. 852, UNCIO Documents, Vol. 11, p. 710.
27. Mr. Dulles' declaration was restated by Mr. Austin in 1948, Security Council, Official Records (3d year), no. 73, p. 5 f. and amplified, Id., p. 29.
28. Security Council, Official Records (5th year), no. 48, p. 12 f.
29. Security Council, Official Records (5th year), no. 49, p. 5.
30. Id.
31. Id., p. 5 f.
32. Id., p. 7 f.
33. This proposition is elaborated in my article "The Double Veto and the Four-Power Statement on Voting in the Security Council," 67 Harvard L.R. (1953), pp. 251-280, at p. 277.

INTERNATIONAL NEGOTIATIONS UNDER PARLIAMENTARY PROCEDURE

Professor Philip C. Jessup
Columbia University

June 27, 1955, Afternoon Session

I want to develop the subject about which Professor Gross has been talking, in a slightly different way from that in which he has approached it, because I should like to leave with you the impression that in this whole question of the rules of procedure in the organs of the United Nations, you have a branch of international law which actually is more enforceable and is enforced with more regularity and complete power than perhaps most of the other rules of internation law. It is a subject in which I have great interest but not complete information, a subject on which I hope to acquire some more information. I speak with some trepidation on it because two of my professors in the subject are in the audience, James Hyde and Eric Stein. Both of them know very much more about it than I do and I hope will take advantage of the opportunity to correct the mistakes I make.

It is useful in opening up the subject, and to give it a framework, to talk first a little bit about parliamentary law and, secondly, a little bit about negotiations, or diplomacy, and then see how the two things pull together.

In the book which we commonly know as Robert's Rules of Order, written by General Robert of the United States Corps of Engineers and first published in 1876, General Robert said in the preface: "The object of rules of order is to assist an assembly to accomplish the work for which it was designed in the best possible manner. It has been well said by one of the greatest of English writers on parliamentary law, 'Whether these forms be in all cases the most rational, or not, is really not of so great importance. It is much more material that there should be a rule to go by than what that rule is, that there may be a uniformity of proceeding in business not subject to the caprice of the chairman or captiousness of the members. It is very material that order, decency, and regularity be preserved in a dignified public body.'" So it is in practically all of our legislative assemblies with which we are familiar. Woodrow

Wilson in his Congressional Government paints a very vivid picture of the neophyte Congressman coming down to Washington, trying to get the floor to present his point of view and finding himself baffled at every turn by the Speaker applying the rules of the House. And Wilson goes on to give you a particular situation common enough in the House or in the Senate or in our state legislatures as an example of the way the rules operate. He says: "The Democratic majority of the House of the Forty-eighth Congress desired the immediate passage of a pension bill of rather portentous proportions, but the Republic minority disapproved of the bill with great fervor, and when it was moved by the Pension Committee late one afternoon in a thin House that the rules be suspended and an early day set for consideration of the bill, the Republicans addressed themselves to determined and persistant 'filibustering' to prevent action. First they refused to vote, leaving the Democrats without an acting quorum; then all night long they kept the House at roll-calling on dilatory and obstructive motions, the dreary dragging of time being relieved occasionally by the amusement of hearing the excuses of members who would try to slip off to bed, or by the excitement of an angry dispute between the leaders of the two parties as to the responsibility for the dead-lock. Not till the return of morning brought in the delinquents to recruit the Democratic ranks did business advance a single step."

This is the kind of thing that we read about constantly in the press and with which we are generally familiar. We must recognize it as a characteristic of all of our national and state legislative assemblies, and I wish to point out that it is equally applicable in its general aspects to the proceedings in the organs of the United Nations. Professor Gross has been dealing particularly with certain procedural aspects of the Security Council. For convenience I shall deal mainly with the General Assembly, but one could follow through the same line of thought in the other organs of the United Nations and its specialized agencies. The General Assembly is convenient for reference in terms of comparison with our legislatures because, like the national legislature in Washington, like the Senate and House, it works mainly through committees and sub-committees.

I would like to remind you of some of the aspects of the procedure in the General Assembly so that we may follow through certain points and illustrations which I would like to lay before you. You will recall that there is a General Committee composed of the officers of the Assembly, which in the first instance deals with suggestions for items to be included on the

agenda. The General Committee recommends the allocation of these items to the various committees. The items go to the committees, the committees place them on their agenda, arrange the order in which they will take them up, and then proceed to discuss them. After the committee discussion the general practice is that the committee adopts some resolution and refers it to the plenary. It is important to note in the connection that in the committee it suffices to adopt a resolution to have a simple majority, but on important questions that same resolution, on being referred to the plenary, needs a two thirds vote. So adoption of a resolution in committee does not necessarily foreshadow adoption of the same resolution when it is referred on to the plenary session for action.

You know, of course, that the Assembly, like the Security Council and other organs, has its rules of procedure. These cover, as our legislative rules cover, all of the usual matters such as the order of voting on several propositions, the question of the manner in which you take up amendments, what types of motions have precedence and priority, etc. These rules did not immediately appear as being ones that were universally acceptable. They involved some change from the rules that had been utilized in the organs of the League of Nations, and they still reflect the fact that rules of order in the ordinary parliamentary law are not uniform in all countries. For example, we are accustomed to the fact that under our procedure a motion is not debatable until it has been seconded. That rule does not apply in the parliamentary law of many other countries, and in the early phases of post war United Nations meetings there was a good deal of confusion when, for instance, an American chairman would refuse to allow debate on a motion until there had been a second or when a non-American chairman would allow debate before there had been a second. Actually the rules of procedure of the Assembly here follow the European rather than the American pattern and do not require a second. That is merely an illustration of the differences in national parliamentary procedure or law, which is reflected in the experience of the UN.

Let me mention another aspect and again refer to Woodrow Wilson's discussions in his Congressional Government where he is talking about the Congressional Record, and says, "Some people who live very far from Washington may imagine that the speeches that are spread at large in the columns of the 'Congressional Record' or which their representative sends them in pamphlet form were actually delivered in Congress, but everyone

else knows that they were not; that Congress is constantly granting leave to its members to insert in the official reports of the proceedings speeches which it never heard and does not care to hear but which it is not adverse from printing at the public expense, if it is desirable that constituents and the country at large should read them." Now this rule is not actually adopted in the United Nations—it might be well if it were! The suggestion has been made, and you may recall that in the preliminary reports of the preparations for the recent Bandung Conference it was announced that they had decided to adopt this rule to eliminate the general speeches at the Conference but to allow them to be printed subsequently. The force of habit was too strong, however, and they did not adopt it as the Conference proceeded. On the other hand, it is true, I think, that so far as the United Nations General Assembly is concerned very few people read the debates of the General Assembly. A certain larger number do see the resolutions which are adopted, but as Mr. Hyde has remarked, the resolution is like that part of the iceberg that is above water, and one does not get the full picture unless one has followed through the whole proceeding.

So much in an introductory was as to parliamentary law. Let me turn for a moment to the general question of negotiation. Negotiation in this sense may be roughly equated to diplomacy. This is a very familiar practice. We all engage in negotiation if we want to buy a second-hand car, or if we want to arrange a date or an engagement to marry, or if we want to get a job, or reorganize a corporation, or get control of a railroad, or put through a divorce, or settle an estate. On the other hand, popular ideas of diplomacy and diplomatic negotiation are less clear because many people have not had practical experience with this type of negotiation and have a somewhat distorted idea of it, drawn from fiction and Hollywood, that it is completely dominated by striped pants, dispatch cases, and mystery. Actually it is much the same process as any other negotiation. The secrecy of diplomacy is not different from the privacy of personal or business negotiations, or the confidential discussions in a jury room, or among the Justices of the Supreme Court, or those in a conference committee of the House and Senate. The novel feature of our modern, multi-nation world is the combination of diplomatic negotiation and parliamentary law which we find, for example, in the General Assembly of the United Nations, and it is to this combination that Dean Rusk has given the appropriate name of parliamentary diplomacy.

People like Sir Harold Nicholson inveigh against this development. In his very charming book (and he always writes with great skill and charm), a little one called The Evolution of Diplomatic Method, he says the "theory that diplomacy should proceed always frankly and in the public view incidentally, that theory of course was abandoned by Woodrow Wilson himself a few months after he enunciated it and so far as I know is not accepted by many people today has led to negotiations being broadcast and televised, and to all rational discussion being abandoned in favor of interminable propaganda speeches addressed, not to those with whom the delegate is supposed to be negotiating, but to his own public at home." Mr. Briggs this morning read some of the suggestions of Punch about the revision of the United Nations Charter. They had another in that collection which lampoons the same idea that Sir Harold Nicholson attacks. It concerns a proposed new Article 119, and reads as follows: "No Delegate of any Member-nation shall meet with any Delegate of any other Member-nation for any purpose whatsoever unless information as to the time and place of the meeting has first been filed with the major television and broadcasting networks of the host country."

Going back to Sir Harold Nicholson, who is describing what he calls diplomacy by insult, we read: "It would be incorrect to suppose that these meetings are intended to serve the purpose of negotiation: they are exercises in forensic propaganda and do not even purport to be experiments in diplomatic method. Such negotiation as may occur in New York is not conducted within the walls of the tall building by the East River: it is carried out elsewhere, in accordance with those principles of courtesy, confidence, and discretion which must forever remain the only principles conducive to the peaceful settlement of disputes." With due respect to a great authority on diplomacy and to a very distinguished diplomat, this, I think is a false picture, and is based, I believe, on the fact that Sir Harold knows nothing at all about what goes on in the tall building by the East River. I am not aware that he has ever been in it and I am quite sure that he has taken no part in the proceedings which go on in the United Nations General Assembly. And this is true also of certain other distinguished diplomats who have made similar adverse comments on the procedures of the General Assembly. I have in mind a person for whom I have the utmost admiration, George Kennan, and also other members of that very able group who formed the Policy Planning Staff and who have written on the subject, C. B. Marshall and Louis Halley.

But it is not true of another of their colleagues who did attend and participate in many of the activities of the United Nations General Assembly, namely, Dorothy Fosdick.

In taking this position I must remind you that I am probably biased. Nicholson quotes from Francois de Callières, a French diplomat born in 1645 whose book published in 1716 Nicholson calls "the best manual of diplomatic method ever written," and de Callières, via Nicholson, disqualifies me on two counts. "First," he says, "distrust amateurs," and I am an amateur in diplomacy. Second he says, "The training of a lawyer breeds habits and dispositions of mind which are not favorable to the practice of diplomacy," and I am a lawyer. I am reminded of the expert on industrial management who was called to go over a newsprint plant in Canada. He arrived at the little railroad station up near the mouth of the Jacques Cartier river in the middle of winter. They had a sleigh there for him and a man was putting him in the sleigh and tucking a big bearskin rug around him when the expert said, rather testily, "No, no, no. That's not the way to put it on. Put the fur inside. You get the maximum heat potential of the bear rug by having it that way." The driver complied and climbed on the box. The expert could see his shoulders shaking and could hear chuckles and said, "Well, what's so funny?" The driver said, "Oh, nothing. I was just thinking what a stupid fool that old bear was."

We must admit that there are grave disadvantages to some aspects of the United Nations debates as they are carried on, and we must admit that bad manners have been somewhat contagious. Soviet invective and vitriol have poured from the rostrum of the United Nations, from the seat of the Soviet delegation in the various committee rooms, and also from the seats of some of the satellite members. But, after all, if one attends occasional sittings of the Senate or of the House in Washington one finds somewhat similar proceedings, and if one goes to the French Assembly or to the Italian Parliament one would frequently find the proceedings interrupted by fisticuffs; actual physical force, I think, has never been used in the Assembly plenary or in any of the committee rooms of the UN. Sir Harold is more accustomed to the highly dignified House of Commons which behaves itself much better than some of its sister parliaments. In any case, time has changed and we no longer live in a world whose destiny is determined by a small group of monarchs, prime ministers, chancellors, and their ambassadors. It may be that those were the good old days, as apparently

Mr. Nicholson and Mr. Kennan believe but they are gone. For my part I think it is better to understand the world in which we live and the way it operates than to yearn nostalgically for the world of our ancestors.

Of course not all aspects of the old diplomacy are gone by any means. But the international community is organized now and it operates through organizational forms. This I am positive will continue, and the organization must operate, as General Robert said, as all organized human assemblages do, under rules, or there would be anarchy and the organization would not operate. I have not time to dwell on those extra-parliamentary negotiations which do go on in the United Nations, not only in the tall building by the East River but throughout the city in the offices of the various permanent delegations to the United Nations. The fact is that negotiations do continuously go on there, both inside and outside the building.

I would like to move you on, however, to the time that a meeting of the General Assembly convenes, when this process of negotiation becomes intensified again both inside and outside the building as the delegates gather, and particularly under the present habit when the foreign ministers are apt to come for an early part of the session and there is an intense diplomatic activity. There are lunches and dinners and numerous cocktail parties at which a great deal of diplomatic business is done. Some people seem to think that this represents a very unfortunate kind of activity that people should talk over cocktails, and perhaps it is true that there are whispers and whiskey on every lip, but an official goes out if he mixes bourbon and blunders or vodka and volubility.

Once the General Assembly has actually opened, parliamentary diplomacy is at work and parliamentary law begins to control the operation. One may note at the outset the parliamentary device which has now become rather standardized, of meeting the problem of Chinese representation commonly by introducing at once in a plenary session a resolution to adjourn consideration of any proposals on Chinese representation for the present time. This, being a motion to adjourn discussion of a subject, takes precedence over other motions and can be immediately put to a vote and as a procedural motion carried by a simple majority. On the other hand, if such a motion were coupled with substantive questions, the presiding officer might very well rule that it had lost its status as a procedural motion and had therefore lost its priority and, depending upon the nature of the substantive matters included, might rule that it requires a two-thirds vote.

One then proceeds to the elections, and primarily to the election of the President of the Assembly. Here one runs into the problem of pre-commitments, and finds close analogies to the proceedings of the national party conventions of the Republican and Democrat parties. You may have seen in the New York Times about a week ago a story indicating that the Chilean canadidate for the presidency of the next General Assembly was building up a great bloc of votes. It even told just how many had agreed to vote for him and how many said they probably would vote for him. This is a common device. It tends to build up the bandwagon psychology and to carry a candidate to victory. It is an important thing because this office of President of the General Assembly is an office which carries real power. Let me just remind you of one case to illustrate this power, which shows the effectiveness with which the rules of parliamentary law in an international organization are enforced. It was the Assembly of 1949. General Romulo of the Philippines was the President of the Assembly, obviously a man representing a state which in terms of power politics is small and weak. He announced at the opening of the general debate that a delegate would be required to keep to the subject which they were discussing, and that if a delegate strayed from that to engage in pure invective attacking other delegations, he would rule him out of order. Mr. Vishinsky, as the delegate of the Soviet Union, began one of his customary diatribes. Romulo rapped his gavel, interrupted him, and reminded him that he had made this ruling and that the delegate was out of order in what he was saying. Vishinsky looked at him coldly while he made these remarks, and then turned back and continued to read his speech, whereupon Romulo pounded with his gavel vigorously enough to drown out Vishinsky and shouted into the microphone, "I hereby, as President of the Assembly, instruct the translating services to stop the translation of the delegate's address and I order the electricians to turn off the loudspeaker." Mr. Vishinsky tried to continue; there was no translation, there was no amplification, he was inaudible to the audience, and after a few feeble attempts he picked up his papers and left the rostrum. Later, Romulo further said that he would have installed at the President's rostrum a switch so that the President himself could on occasion automatically shut off the translating and loudspeaking services.

There have been numerous other occasions on which the President of the Assembly has exercised that kind of authority in the enforcement of the rules, and Professor Gross has given

us a good example of the power of the Presiding Officer of the Security Council when Sir Gladwyn Jebb's ruling on the question of the invitation to the Chinese prevailed, and the result was that the Chinese Communists were actually invited. This is the interesting thing, if one wants to follow through in terms of the application of parliamentary law, namely, the situations in which the application of the rule and the enforcement of the rule actually determine the outcome of the matter at issue. I want in a moment to give you a few examples of this.

Another example of the application of a parliamentary rule and, in this case, a novel device at the time, which Mr. Stein referred to this morning, arose in the debate on Morocco in the Assembly in 1951 at which I believe it was the Canadian Delegate in the General Committee who moved that consideration of the question of placing the Morocco item on the agenda be postponed for the time being. This being carried in the General Committee and so reported to the plenary, it was carried by the necessary procedural majority, somewhat akin to the formula utilized in the Chinese representation case. But the real application of parliamentary diplomacy comes as matters get into committee for debate, and the examples that I am going to give are mainly from the First Committee, the Political Committee, with one or two also from the ad hoc Political Committee and from the Fourth Committee.

First, let me say that the diplomatic or negotiating side of the matter comes at the planning stage before the debate opens. It is frequently true that the United States delegation, for instance, may feel it disadvantageous for the United States to appear as the sponsor of a resolution on a particular subject, or it may feel that it is disadvantageous for the United States alone to propose a resolution. The United States then may consult with various other delegations and get one, two, or as many as ten or fifteen to join them in presenting a resolution. Or the suggestion may be made to a friendly delegation, or delegations, to draft a resultion and put it in so that the United States will not appear as a moving party. This is all very important in terms of the psychology of the meeting, which is developed in part through the presentation and the sponsorship of the resolutions. Here it is vital to recall a distinction between the UN General Assembly and the Congress. In the Congress, if you were fighting a bill through and you passed it by one vote, it is still passed and the bill becomes law. If, on the other hand, in the General Assembly you are sponsoring some such proposal as the identification of the Chinese Communists as aggressors

in Korea, and you get that through by one vote, you have failed miserably. You must show an overwhelming majority in carrying your point, in order to identify the opinion of the General Assembly as being on your side.

To go back to the committees, first you get a vote on the order of the items, and here there is an attempt on the part of various delegations to secure a favored position for their resolutions. It is a common experience that the last item on the agenda will get less attention because it is usually reached near the end when people are anxious to wind up and go home, and some hope that it might be buried in the last-minute rush.

Now, let us look at one or two situations and the way the parliamentary rules have been applied in dealing with the issue. Take the Cyprus case in the Assembly in 1954. Clearly what the Greek delegation wanted in bringing up this ussue was to get some indication from the Assembly of sympathy with their position, namely, that Cyprus should be freed from British rule and allowed to unite with Greece. Clearly the British wanted exactly the opposite. They would have liked to keep it off the agenda; if they could not keep it off the agenda, they would have preferred no resolution or the most innocuous resolution possible. The Greeks put in a noble kind of resolution to satisfy their aspirations, and the New Zealand delegation, backing up, naturally, the U.K., introduced a resolution which in effect provided that the General Assembly would decide to take no action on this matter. It was then moved that the New Zealand resolution should be taken up first, ahead of the Greek resolution—a change in the order in which they had been filed—and this could be done by simple majority of the committee deciding to take up the second resolution first. The Greek delegate immediately got to his feet and asked the Chairman to rule that the New Zealand resolution was in effect a motion to reconsider because, he said, "we have decided that we are going to take up the Cyprus question and New Zealand is asking us to reverse that and not to take it up. Therefore, the adoption of the New Zealand resoltuion under the rules requires a two-thirds vote." This requirement is true of a motion to reconsider. There was a good deal of argument on this. The Chairman eventually adopted what seemed to me an intelligent and rather clever solution. He said, "If we voted on the New Zealand resolution immediately without any debate, it would indeed be a motion to reconsider and would require a two-thirds vote. But if we debate the New Zealand resolution, we will then carry out the earlier decision we have made, which is to take up the Cyprus

question, and then when you put the New Zealand resolution it requires a simple majority." And that ruling not being challenged, prevailed, and the New Zealand resolution was passed after the debate had occurred.

Take another type of situation, also in 1954, the Chinese Piracy Case. You will remember that was a Societ item on the agendy, complaining of the violation of the freedom of navigation in the area of the China Seas. A Polish vessel had been intercepted by the Chinese Nationalists, and all of these heinous acts were attributed by the Soviets to the United States. The Soviets put in a typical resolution denouncing the United States and the Chinese Nationalists for piracy and so on. They did not make much progress with that. They obviously were not gathering votes, and one of the Soviet bloc stimulated the delegate from Syria to intorudce a separate resultion which left out all of the invective and just talked in general terms about the freedom of the seas, deplorying any interference with this freedom. The Soviet bloc switched its support to the Syrian resolution. Thereupon the United States joined with Cuba and the Philippines in putting in a new resolution referring the whole question to the International Law Commission, which was discussing the regime of the high seas, to study what the rules were about what could be done on the high seas. Here you have to relatively innocous and balanced resolutions: one talked rather generally about freedom of the seas, one referred it to the International Law Commission. Whichever one was put up first would attract a good many votes because there was nothing particularly bad about either one of them. Therefore, the United States, I assume, suggested to the Belgian representative that he move to take up the U.S. resolution, or the joint resolution of the U.S., Cuba, and the Philippines, first. This was done, the motion was passed to change the order, and the tripartite resolution having come up first was adopted.

There are many instances in the Palestine case. I do not have time to go into all of them, but let me mention a few of them to suggest the same type of situation and the way in which parliamentary law controls. You will remember that the Palestine situation came to a head in the spring of 1947 when the British Government announced the termination of the mandate and asked for a special session of the General Assembly to consider the future of Palestine. The Arab position was that they wanted the Assembly to terminate the mandate or to declare it terminated and to declare also the independence of Palestine. The Committees were appointed and at the regular

session that fall the argument turned largely on the proposal for partition into an Arab state and a Jewish state with a special regime for Jerusalem; the feeling was very tense on this. Finally the Iranian delegate, supporting the Arab point of view, put in what he intended to be a motion for adjournment because they felt that if they came to a substantive vote, the vote would probably be in favor of partition, which they wanted to avoid. But the Iranian motion was not skillfully conceived, and, in concluding included within the motion to adjourn several substantive proposals about committees of study. The Chairman therefore ruled that this was not a motion to adjourn, did not have priority, but merely took its place after the other resolutions, and the Arab attempt to forestall the vote on the principal resolution failed.

A rather more normal development occurred in the second special session in May of 1948. There the situation was that the British announced that they were getting out at 6 o'clock in the evening, and it seemed very desirable that the UN should take some action before that deadline occurred so there would be no interregnum. The Arabs and the Soviet bloc were conducting a filibuster. They preferred not to have action taken because they did not think the action would be what they desired. The meeting, which began at Lake Success in the committee, went on from 10 o'clock in the morning until about 3 in the afternoon, at which time it became apparent that if the filibuster was not stopped there was no chance on getting action before the deadline that afternoon. So the United States decided the closure rule should be invoked. Under the closure rule, the chair must recognize two speakers against closure after which it shall be immediately put to the vote. But it was clear that if the United States had merely moved closure, one of the Arab delegates and, let us say, the Polish delegate could have said, "We want to speak against closure," and each one could have spoken for three hours, therefore continuing the filibuster beyond the deadline. So a member of the United States delegation explained the situation to the delegates of Cuba, Thailand, and Iran, who were sympathetic to the purpose. It worked out in this way: the Cuban delegate moved closure, and immediately the delegates of Thailand and Iran put up their hands; the Chairman knew they were going to put up their hands and recognized them as the two people who were going to speak against closure. The Delegate from Thailand said he thought that if the delegates would just stick to the business a little more closely they could get through with it, so he would vote against closure. Then the

delegate from Iran, in a rather amusing speech, said that they had been sitting there since 10 o'clock and they were all hungry. If they all sent out for sandwiches and coffee, everybody would have their mouths full and they would not talk so much. Anyway, they could limit the length of speeches and that would do, so he was against closure. Each one of these speeches took about 30 seconds. The Chair then ruled that two people had spoken against, put the motion to a vote, and it was carried. The meeting rose and we got on to the plenary still within the deadline.

There are very interesting, but somewhat more lengthy and involved situations in the Palestine case from 1948 on to 1952, which I will not take the time to go into. I would just like to mention one other case which was touched on this morning by Mr. Eagleton, and that is the Puerto Rico case involving the question of the power of the Assembly to decide when a non-sefl-governing territory has become self-governing. The United States in 1953 gave notice that Puerto Rico was now self-governing, having adopted its own constitution and having become a commonwealth associated with the United States. The anti-colonial powers had meanwhile been conducting a fight to establish the power of the Assembly to decide the question whether a country had become self-governing, and not to leave it to the administering state. In the Fourth Committee, where this matter was discussed, a group of states sponsored a seven-power draft resolution which recited the facts and approved the position of the United States and said Puerto Rico has become self-governing. Whereupon Burma, Guatemala, Honduras, Indonesia, and Mexico introduced an amendment to insert in the preamble of the resolution the following clause: "Bearing in mind the competence of the General Assembly to decide whether a non-self-governing territory has or has not attained a full measure of self-government as referred to in Chapter 11 of the Charter. . . ." This of course created a terrific dilemma for the United States and its friends. The amendment was adopted. It is just like a rider put on an appropriations bill in the House, when you want to get in some special thing and you know that they cannot veto the whole bill, so you stick it in by a rider. The United States either had to oppose a resolution that Puerto Rico was now self-governing or they had to accept the idea that the Assembly had this power to decide; and the same dilemma confronted a number of the other states, with the interesting result that in the committee the United States voted to abstain. The vote against the resolution included the administering

countries such as Australia, Belgium, Canada, New Zealand, and South Africa, who objected of course to the amendment that had gotten into the preamble; and on the other hand included Burma, Guatemala, India, Indonesia, Iraq, Mexico, Yugoslavia, and the Soviet bloc because they objected to the declaration that Puerto Rico was now self-governing. The resolution was then carried with this rare mixture of votes, but by less than two third. Under previous practice in the Assembly these questions about non-self-governing territories in the plenary had been treated as important questions requiring a two-thirds vote. There were other resolutions coming up from the Fourth Committee, and when the report of that Committee reached the plenary the Mexican delegate got up and made a long, long speech. He said there was no justification for treating these Fourth Committee questions as questions of special importance requiring a two-thirds vote and they should be carried by a simple majority vote. He talked so long that delegates began to lose interest, but he carried a proposal that these questions should be adopted by a simple majority. The first thing that came up was the Factors Resolution, which Mr. Eagleton referred to, which laid out various factors that were to determine whether a state was self-governing. That was passed. There were a couple of minor resolutions that were similarly passed. Then came among others the Puerto Rico Resolution. At this point the administering states seemed rather suddenly to realize that now the Puerto Rico Resolution with the preamble reciting the power of the Assembly to decide these things might get through by a simple majority. They objected that the previous motion of Mexico had applied only to the Factors Resolution and not to the Puerto Rico Resolution. This was argued back and forth with the President of the Assembly under considerable doubt as to how to rule, but finally ruling after further vote from the floor that the Puerto Rico Resolution should be carried by a simple majority. Again the state were in their same dilemma. The United States here decided it was better to take the substantive part in favor of Puerto Rico even if they had to swallow the preamble, and they voted in favor of it; but you still got, in abstentions and in opposition, a queer mixture of the colonial powers and the Soviet bloc opposing the resolution for directly opposite ideas. This same dilemma arose in 1954 in the Greenland case, where the same issue was presented with regard to Denmark and Greenland.

The double veto cases that Mr. Gross mentioned are further illustrations of this whole problem of the application of

parliamentary law. This is not, in my opinion, merely parliamentary shenanigans. These people in the Assembly are not Nicholson's amateurs. They are professionals—professional diplomats and becoming professional parliamentarians in the international organization sense. They recognize perfectly what is going on. They recognize the skill which is necessary to operate under these rules of procedure, and they have in mind what the ultimate objectives are and how these objectives may be obtained or defeated by a proper application of the rules of procedure. It is not surprising that these have not yet been perfected and that the method has not yet been perfected. We must bear in mind that the British Parliament, which is somewhat of a model in its application of parliamentary law, has developed over centures, and our own Congress has developed over generations, whereas the General Assembly of the United Nations, even though it draws somewhat on the experience of the League, has just completed its first decade.

Here I would go back just to remind you that in this whole process there is very much more of a kind of camaraderie different from that to which Sir Harold Nicholson refers, but very real in the sense that as the Assembly opens you find here a group of men who have been accustomed to work together. They may be enemies or friends from a political point of view; they are at least acquaintances and colleagues. They know each other. They know the methods of operation. They understand what the problems are. There may be public vilification for the record and there may be private accommodation of the actual ends in view. And the disunity which may appear in detail may merely conceal from the public gaze some unity on the generalities which count more in the long run. There certainly is, it seems to me, an application of law to a procedure of negotiation among governments. It is, as I have suggested, law which can be authoritatively applied by the presiding officer, which can be enforced, against which there is no veto (although a ruling of the chair may be overruled by a majority vote). So that you have a system, and a developing system, of a different kind of law in the international scene, which I think is very important to an understanding of the whole procedure and method of the United Nations.

GENERAL DISCUSSION

PROF. QUINCY WRIGHT (University of Chicago): I want to comment on two points made by Mr. Gross. As I understood Mr. Gross, he thought that the absence of the Soviet Union from the votes on the Korean matter in the Security Council made the resolution invalid. It seems to me that there is even stronger ground for saying that absence is not a veto than for saying that abstention is not a veto, on the general principle that rights do not arise from wrongs. Jur ex injuria non oritur. The Soviet Union in absenting itself from the Security Council violated a positive obligation in the Charter. Article 24 provides that the Security Council has a first responsibility for acting to maintain international peace and security; and Article 28 says that the Security Council shall be so organized as to make it possible to act continuously, and that members are under an obligation to maintain a representative on the spot. Nothing prevented the Soviet Union from carrying out its obligations. It seems to me absurd, then, to say that by violating a very specific obligation a state can frustrate the activities of the Security Council in carrying out its primary responsibilities. So, I think the Korean resolution was valid and that the Soviet Union was violating an obligation by being absent from the Council.

I suppose one could make a better argument against the validity of the resolution on the grounds that China was not represented. If one takes the position that the Secretary-General took, and that Great Britain took, and that Professor Lauterpacht has argued for, that a general de facto government is entitled to recognition and can alone represent the state, then the Communist government was entitled to represent China in the Security Council. It could be argued that China was not represented and that its failure was not its own fault. I do not think, however, that this is a sound argument. I would take the position that it belongs to the Security Council to decide which of two contending governments should represent a state. The Security Council had decided for the Nationalist Government of China.

The other point I want to make concerns Mr. Gross's position, if I understood him correctly, that the Five Power statement made at San Francisco was binding in regard to the distinction between procedural and substantive questions. It seems to me that one cannot give greater weight to that Five

Power statement than what is called travaux préparatoires. To be regarded as a binding interpretation of the Charter, it should have been appended as a formal reservation to the ratification of the Charter. I do not believe that statements made by a small number of the parties to the United Nations Charter can be regarded as any more than travaux preparatoires; such material has interpretative value but is not authoritative. The phraseology of Article 27 suggests that there is a juridical distinction between procedural questions and substantive questions. One would suppose that the logical way to decide this would be to ask for an advisory opinion of the International Court of Justice on whether a particular issue is procedural or not. That has never been done. If it is not decided that way, I should suppose that the proper procedure would be a ruling by the Chairman which can be overruled, I should say, by a simple majority vote. It seems to me that sustaining or overruling the Chairman is a procedural question. The main point I want to make is that this statement made by the Five Powers at San Francisco is not a formally binding interpretation of the Charter.

MR. JAMES N. HYDE (New York Bar): Just another word about the double veto. I have listened with the greatest admiration and respect to Professor Gross's discussion this afternoon of a very important and technical question. And as I listened to what Professor Quincy Wright said, it became obvious that the difference between him and Professor Gross may be phrased thus: what binding effect, if any, is to be given to a statement made in San Francisco sponsored by what became the five permanent members of the Security Council? As one makes up his mind on this question I think it may be important to examine one other source of evidence to which neither Professor Gross nor Professor Wright referred, and that is the careful analysis of the problems of the veto which took place in the "Little Assembly," the Interim Committee of the General Assembly. This analysis was later embodied in a resolution of the General Assembly in 1949. This resolution, as a practical matter, really embodied the tests, the decisions, and the substance of the San Francisco statement. As a matter of practical politics, that was a good thing from the point of view of the United States, at any rate, because one could then reason in terms of an Assembly resolution rather than in terms of a statement of the five Great Powers to which the smaller states were not parties, and which for that reason they very much dislike to have cited in the Security Council.

In any case in which the United States or the United Kingdom or certain other members of the Security Council ask themselves whether a case has arisen where they think they should prevent a double veto, by which I mean whether they should prevent a permanent member from saying "I decide that this is not a procedural question," there are several points considered. When the United States approaches that problem I think you can assume that the United States representatives look very carefully at the General Assembly resolution which I have mentioned. You can assume that they look very carefully at the political consequences of preventing a double veto in two respects: in respect whether the decision they take might cause another permanent member to leave the Security Council; or in respect whether the decision they take might cause a nibbling away of the veto as an institution; because the United States might want to use the veto in connection with a possible future order of the Council which could involve American troops.

PROF. LEO GROSS: Quincy Wright gave an interesting presentation. His first point about absence and abstention shows a patent inconsistency and contradiction: what you do is take Article 24, Paragraph 1, and Article 28, Paragraph 1, and you look at them, and their meaning is perfectly obvious and clear—they mean what they do not say. On the other hand if you look at Article 27, Paragraph 3, you claim it does not mean what it says; it does not mean that it requires the affirmative and concurring vote of the five permanent members. I cannot see on what ground one can perfectly clearly see the meaning of one paragraph in the Charter and yet say that another article has not the meaning which it is intended to have.

Actually, what does Article 24, Paragraph 1, say? It says very little about the participation of the members of the Security Council. Article 28, Paragraph 1, says that the Council should be constituted so as to be able to function continuously. It does not establish a duty to be there. It establishes a duty to be in New York, which is the headquarters of the United Nations, but not necessarily to be present always whenever anybody calls a meeting of the Security Council.

Furthermore, the resolution to which Mr. Hyde referred also calls upon the permanent members to consult before meetings of the Security Council where the veto might be raised or something of that nature might happen. It seems to me that if there was ever any occasion to try to use this procedure it was the night of June 24-25, 1950 when it might have been possible

to find out what the position of the Soviet Union was at that particular point. Furthermore, I think that the principle Mr. Hyde suggests is undesirable and possibly dangerous in its consequences if it advocates a sort of tit for tat—we determine that you violated one article and we determine to violate another. Who is right and who is wrong in such a situation?

The International Court of Justice had occasion to go into that question in connection with provisions on human rights in the Peace Treaty with Hungary, Bulgaria, and Rumania. The International Court of Justice explicitly found that these three states had violated the peace treaties by refusing to appoint an arbitrator to the commission of three. The United States used that statement by the Court in order to ask the Court whether it was proper for the Secretary-General to appoint the third arbitrator, so that a commission of two would adjudicate the question. The Court said that although Hungary, Bulgaria, and Rumania violated their obligation in not appointing their respective arbitrators and thereby incurred international responsibility, this would not make it possible for the Court to declare that a commission of two would be the commission of three members provided for in the peace treaties. The Court held that the breach of the treaty obligation cannot be remedied by creating a commission which is not the kind of commission contemplated by the treaties.[1] Mutatis mutandis this observation is applicable to the composition of the Security Council.

MR. MELVIN MARCUS (Graduate Student, University of Michigan): One of the difficulties with Mr. Gross's position is that he begins with a strictly literal interpretation of Article 27, Paragraph 3, and then draws from it a position on abstention by saying that when a permanent member of the Security Council abstains from voting, that member is giving expression to a tacit consent. He then connects the requirement that there must be a concurring vote of all the permanent members on a substantive question to the fact that when a permanent member abstains it is tacitly consenting to the adoption of the resolution in question.

Mr. Gross then holds that since abstention is tacit consent, absence of a permanent member cannot be assimilated to abstention because willful absence is a deliberate attempt to defeat the adoption of any substantive resolution voted upon by the

1. I.C.J. Reports, p. 221 ff. (1950).

Council during his absence; absence is clearly not an expression of a tacit consent. If one checks the Official Records of the Security Council, however, he finds that when the representative of a permanent member who has abstained or is about to abstain on a resolution explains his position, he most often does not say or imply in any sense at all that he is tacitly consenting to its adoption—in fact, he is often quite opposed to the resolution before the Security Council, but he refuses to accept the political responsibility for vetoing the matter and, therefore, he takes the only way out; i.e., to abstain. Thus the argument that the assimilation of absence to abstention is impossible because one is equivalent to a negative vote and the other to an affirmative vote is not supported by the facts.

Several speakers have alluded to the case in which the Ukrainian S.S.R.'s representative was unable to leave New York in time to arrive in Paris where the Council was already meeting. When the Council was about to vote on an important draft resolution, one of the representatives asked the President, "Is an absent member counted as having abstained?" The President replied, "It seems to me that he must be counted as having abstained. I do not see how we could act otherwise." After some discussion, the Council agreed to the President's ruling, and the Ukrainian S.S.R. was listed in the record of the vote as having abstained. Neither the Soviet representative nor any of the other permanent members made any comment. It was accepted that a member who was absent could be considered as abstaining.[1]

When the Soviet representative left the Security Council on January 13, 1950 he did not take the position that his action would estop the Security Council from acting on substantive or any other matters. He merely stated that since the Red Chinese were not present as members of the Security Council, anything the latter would adopt would be illegal and void. The Russians did not take the position that their own absence had any effect whatsoever on the validity of Security Council resolutions or actions until after the original Korean Resolutions were adopted some six months later during the summer of 1950.[2]

1. Cf. Security Council, 3rd yr., No. 134, 392nd meeting; December 24, 1948, pp. 30 ff.
2. Cf. Official Records, 5th yr., No. 3, 461st meeting; January 13, 1950, Doc. S/PV. 461, pp. 9-10.

MAUNG HLA AUNG (Burmese graduate student at Harvard Law School): I would like to direct a question to both Professor Gross and Professor Jessup with regard to the specific question of the representation of China in the United Nations. As far as I know, there has been only one precedent, the representation of Ethiopia in the League of Nations. It is common knowledge that in the question of representation of China the United Nations has been governed mainly by political considerations. What I wish to ask is, apart from these political considerations, what would be the legal view of the question from the point of view of procedure both of the Security Council and the General Assembly?

PROF. JESSUP: If I understand correctly, you ask what kind of vote would be necessary in the Security Council and in the General Assembly if the issue of the seating of the Chinese Communist delegation came up. On the position in the Security Council, my own view is one which the United States espoused some time ago, namely, that the question of passing upon the credentials would be a procedural matter and the veto would not be applicable to it. This was of course a question of interpretation of the rules and I understand the current interpretation may be to the contrary. It seems to me that the previous interpretation, that this passing on credentials was procedural and could be adopted by a simple majority, was a sound position. Similarly in the General Assembly the Credentials Committee report could be adopted by a simple majority. It is, of course, quite possible, if the veto is held to apply in the Security Council, that the General Assembly might decide to seat the representatives of Peiping and the Security Council might continue to seat the representative of the Chinese nationalists on Formosa, and that you would have different representation in the different bodies. It is quite clear that there is no hierarchy of decision there and that the decision of the General Assembly would not control the Security Council and vice versa. It is probable that if such a decision were reached in the General Assembly to seat the representatives from Peiping that that decision would be followed in the other organs aside from the Security Council, and in the specialized agencies, but if the veto were recognized we still might have different representation in the Security Council.

PROF. CLYDE EAGLETON (New York University): Professor Jessup's talk did raise a question in my mind for those

of us who are teaching international law and who are occasionally called upon to train people for the Foreign Service. It seems to me that we shall have to consider including teaching about the United Nations, not merely its organization but the procedure of the United Nations, use of documents, and all sorts of things like that.

PROF. JESSUP. I would just suggest that from a teaching point of view the mere fact that a certain skill is important to a man in the Government service after his appointment does not mean that we necessarily cover it in his curriculum. While this may be of vital importance, it may not necessarily come into the curriculum.

PROF. WRIGHT: I am willing to concede to Mr. Gross that if a member of the Security Council is temporarily absent for a good reason—such as to answer the telephone—the Council could not shove through a resolution and consider his absence as not a veto. But I think that kind of a situation is very different from the kind of situation where there is due notice given and it is clear that a permanent member of the Security Council is absent because he wants to frustrate the action of the Security Council. The latter was clearly the situation when the Korean resolution was passed.

I would like to comment on the analogy of the opinion of the Court in the case of Rumania, Bulgaria, and Hungary. In that case the peace treaties provided for an arbitral procedure to be implemented by ad hoc appointment of arbitrators. The Court said that even though the three states had violated the treaties by failing to appoint arbitrators, nevertheless the tribunal could not function. It was clearly intended that the tribunal should be composed of arbitrators appointed by the drafting states. The Court said they had no authority to compel the delinquent states to make the appointments, even though the tribunal could not act without appointees of both sides. I think that is a very different situation from the situation of a continuing body like the Security Council, so organized as to function continuously.

THE UNITED NATIONS AFTER A DECADE

Hon. Ernest A. Gross
of the New York Bar
Former Legal Adviser Dept. of State,
Assistant Secretary of State, and Deputy Representative
of U.S. to the Security Council

Surveying the field of the United Nations can, like any other field of surveying, be helped a little bit by triangulation, and I suggest there are three principal angles which should be explored or measured in evaluating the role and function of the United Nations. I will speak very generally and briefly by way of introduction, with apologies for being perhaps too superficial. The first angle of measurement is the United States, or perhaps if you want to over-generalize, the free world angle. The second is that of the Soviet or Communist world. The third is that of the United Nations, not "one world," so much as "whole world." Diplomacy is the means for seeking peace and well-being for one's own country; that is axiomatic. The question is more specifically, what kind of peace and what conditions of well-being? I should like to take each of these angles for a very brief measurement.

So far as the United States objectives are concerned, briefly and most generally, we wish to promote the general welfare through co-operative effort, to create conditions in which individual freedoms flourish, and to remain loyal to a tradition of morality and ethics. Lapses are frequent, but they are viewed as departures from a norm. Our diplomacy works toward the kind of peace and stability which advances these objectives, or, to put it in international terms, a peace based on "collective security," which is simply a synonym for co-operative action.

Soviet objectives, our second angle of measurement, are of course designed to further their national interest, just as ours are intended to serve the United States. However, in many basic respects, one might say in most basic respects, Soviet methods are the opposite of ours. They seek to promote the general welfare through dictated effort. They subject the will of the individual to that of the state, the "will" of the latter being arbitrarily defined. And they view morality and ethics as a flexible means of achieving a predetermined goal.

The third angle of measurement is the United Nations' objectives. It has often been pointed out that the United Nations Charter broadly defines the objectives of a free society. It is therefore largely a projection of our own concepts into the international community. However, since its membership fortunately, if not happily, includes conflicting viewpoints which are facts of international life, the methods of the United Nations must seek to narrow the gaps without at the same time betraying its objectives. This is the dilemma of United Nations diplomacy. There is no escape from its challenge or its complexity.

May I now consider the impact of the dilemma which I have just described? Most Americans believe that the principal obstacles in the way of a just peace and conditions of stability are created by Communist foreign policy. This is not implying that our conduct of foreign affairs leaves nothing to be desired. We tend, for example, to assume truculent postures and work from inside lines of self-righteousness. Nevertheless, the fact is that many of our faults of omission and commission are the effect, rather than the cause, of tensions. I include in this category the many unrealistic aspects of our relations with Communist China.

A primary cause of tension, and hence a seed of war, is to be found in the closed-world concept of the Communist system. Our will toward freely-achieved unity is shown by the very name we give our country, the United States. The closed-world system is symbolized, on the other hand, by the divided states—Germany, Korea, Indochina, all of them victims of the Iron Curtain. It is the closed-world concept which accounts as well for the deadlock on other major issues of war and peace. Now, without taking our eyes off the pressing requirements of the hungry millions, a high priority must be given to bring about through peaceful pressures a shift of Soviet policy away from its present closed-world focus. International organizations can serve valuable roles in helping to bring about a modification in Soviet foreign policy in this respect. The problem I pose for myself this evening is how we can effectively use these forums to that end, in tandem with our bilateral diplomatic efforts.

May I first turn to an analysis of some of the characteristics of the United Nations forum. In a study by the Woodrow Wilson Foundation called United States Foreign Policy, George Kennan makes several comments which may serve as a point of departure for this section of my analysis. He disparages what he describes as "the importance attached in United Nations

circles, American and foreign, to the United Nations as an institution rather than just a forum of diplomacy." With obvious concern, lest these United Nations circles seek to run away from home, Kennan warns, "The United Nations under any realistic appraisal is in fact still the instrument of national policy. It is not an institution in itself at this stage in its development." And then to drive the lesson home Kennan concludes, "The single most important check to multilateral diplomacy is the recourse to bilateral diplomacy."

With all respect to a good friend and a universally admired scholar, these quoted bits seem to me to reflect an ignorance of the workings both of the United States Mission and of the United Nations itself. Whether it is called an institution or, as Kennan prefers to say, "just a forum" is a matter of indifference. The two terms are not mutually exclusive. What Kennan clearly intends to stress is the UN as a meeting place, rather than an agency for integrated effort. What is damaging, however, is his misconception that the United Nations was ever thought by any responsible American delegate to be something other than an instrument of enlightened national policy. It is this false premise which leads to the error of thinking of bilateral diplomacy as a "check" on multilateral diplomacy. The fact is that both these types of diplomacy must be used in skillful reciprocity. Neither can claim a higher virtue and both are indispensable. I would venture to say that the United Nations is a modern way of carrying on old-fashioned diplomacy. It is, of course, not the only way.

This leads me to consider some special characteristics of this forum. First, a feeling of sharing a common responsibility marks the attitude of colleagues in a multilateral forum to an extent rarely present in bilateral processes. This feeling contributes to that sense of the United Nations as an institution, which seems to truble Kennan and some other distant observers. Incidentally, this is true of regional organizations as well. I have known in my service with the United States Mission numerous Foreign Service officers, skilled and experienced in the methods of bilateral diplomacy, who almost invariably within a few weeks or months of beginning service with the Mission developed this sense which I have just described. Membership on a council, on an assembly, or on a committee facilitates frankness of personal discussion. The sharing of functions common to one organization provides a certain degree of insulation from usual diplomatic sensitivities. I myself learned this almost within hours after joining the United States Mission in 1949 when

I was precipitated headfirst into private and delicate negotiations then going on in the highly inflamed Kashmir dispute. I felt at the time that I was able to discuss so frankly and personally, within a few hours of arriving on the scene, with high officials of the contending parties, matters of such high sensitivity only because I was doing so in a forum in which my Canadian, French, and British colleagues were present to share the load. I think any of us, Phil Jessup, or Jim Hyde, who was one of the most valued members of the Mission, and others in this audience, could verify what I have just said. And note please that in such cases, bilateral discussions were also taking place, co-ordinated and paced withours. Far from acting as a "check" on multilateral diplomacy, the bilateral negotiations often welcomed the larger forum as a decidedly more convenient and beneficial procedure in many difficult cases.

The second special characteristic of the multilateral forum, at least as I witnessed it, is based upon the importance of observation and reporting as a diplomatic responsibility. The larger forum furnishes an admirable opportunity, if properly used, to study the several national viewpoints, not only in themselves but also when they are viewed in conjunction or in conflict with each other. I have frequently recalled the numerous caucuses of the Latin American group held at the United Nations when it was discussing matters of common interest. The observations one was able to form concerning the interplay of viewpoint, as well as of personality, among the Latin American delegates seated around the table behind closed doors provided, I am sure, a degree of analysis, of information, and reporting, which would be difficult indeed to have duplicated from twenty separate Latin American capitols. I recall with equal vividness the beginnings of the Asian-African group during the Korean days in 1950 when, I believe, the characteristics and potential growth and development of that group was misread, perhaps it is fair to say, largely because of the biases of those familiar solely and exclusively with bilateral phenomena of diplomacy.

The third characteristic is that the multilateral forum provides a setting in which skillful handling can influence relationships between others, as well as with others. In this respect many of the characteristics resemble those of domestic politics. The bandwagon tendency is always latent, and the swaying of tides can be studied and sometimes managed. May I cite one or two cases from my own experience. In 1948 in the Paris Assembly, we were anxious to get through the Assembly a ceiling upon the United States contribution to the United Nations

budget. It is hard to exaggerate the degree of emotional opposition manifest at the beginning of the session to what many members thought was an attempt on our part to avoid our fair share of the contribution. I venture to say that if it had not been for a calculated tactic of developing a bandwagon psychology in our direction, we might not have gotten a simple majority. As a matter of fact we did get a unanimous vote, all except for the abstentions of the Soviet bloc. The same thing (as it happened during that same Assembly) was true of the Genocide Concention. We made a special effort to obtain a unanimous vote and were successful in doing so. The session did not start out that way, by any means.

Now, I should like to discuss briefly types of United Nations procedures which I believe illustrate the characteristics of the forum I have been describing.

Perhaps the most common fallacy about the United Nations is that the bulk of its operations takes place in public. One hears even well-informed persons characterize United Nations activity in terms of "diplomacy by conference" or "diplomacy in a goldfish bowl." United Nations diplomacy involves both private and public activities, and the private activities comprise perhaps 90% to 95% of the total effort expended in the forum. This is true of both the principal types of behind-the-scenes activity: secret or private negotiation and private mediation, conciliation, or the like. In each of these, the role of the Secretary-General is of increasing importance. I believe that within a short time this will become widely recognized and even perhaps publicly endorsed and stimulated by our own Government. The normal functions of public or open activity may be summarized as follows:

(1) Fact-finding and reporting.

(2) Open efforts at mediation. These almost invariably are designed to lead the parties to the conference table behind closed doors.

(3) Open negotiation. It is perhaps better to describe this as "debate" rather than "negotiation," since it is primarily designed to generate public understanding and public pressures. A good example is the public activity of the Disarmament Commission.

(4) Supervisory functions. These may be to supervise a truce, as in Palestine or Korea, or to carry out UN recommendations, as in the case of

Libya and Eritrea where UN administrators helped prepare the way for self-government.

(5) Activities in the economic and social fields, where publicly-organized and executed programs are the rule rather than the exception.

The issue of disarmament involves most if not all of these public and private functions which I have just described. In view of this fact, and because of its crucial importance, I should like to analyze the problem of disarmament and the key role which the United Nations must play in its handling.

The question is often asked whether the Soviets want war. This is the wrong question. Like anyone else, the Soviet leaders would prefer to gain their objectives without war. The real question is, what are their objectives? Are these objectives likely to lead to war? Disarmament is a good testing point, because the atomic arms race itself is a reactor which breeds war. I doubt that the Soviet motive is to create conditions most favorable for a sneak atomic attack, although naturally we guard against this to the extent practicable. It is more probable that they wish to effect a maximum reduction of the arms burden, with a minimum degree of trespass beyond the Iron Curtain. As between their fear of our violating an unpoliced pledge not to use atomic weapons and their fear of yielding any of their sealed-in sovereignty, it is the latter fear which has tended to shape their policy. For us, the risk of aggression had, up to now at least, out-weighed the resistance which any sovereignty, including our own, offers to encroachment. The difference is, at least in part, due to the fact that within a police state sovereignty is congealed by the requirements of power control, whereas in an open society the concept of sovereignty is more fluid and therefore more easily pooled.

All the while, however, the new discoveries have increased the hazards of atomic warfare. The new technology makes even more impractical what has come to be called in the folklore of disarmament "foolproof inspection." The result of the increasing hazards of atomic warfare and the impracticability of foolproof inspection is a growing pressure upon us to search for less rigid concepts of control and inspection. The same pressures work on the Soviet side to induce a relaxation of the closed-world abhorrence to all penetration. The resultant equation can be formulated something like this: the more closed the Soviet system, the more rigid must be the controls, and vice versa. It is not at all unlikely, and indeed I would

venture to say it is probable, that neither we nor the Soviets ment policy." In any event, no one will deny the decisive importance of making a wise choice of international procedures in which these issues can be most effectively negotiated.

Before turning specifically to a consideration of the role of the United Nations in this respect, may I mention what I would call the three aspects of disarmament: weapons disarmament, strategic disarmament, and economic disarmament. These three are interrelated although seldom described in this way. "Weapons disarmament," or more accurately, reduction of arms and armed forces and elimination of certain weapons, is commonly regarded as the most important aspect. There is no doubt that it is crucial, but it is related to the other aspects. "Strategic disarmament" involves the means of delivery of weapons and of movement of material, of men, and of information. An example of strategic disarmament is of course the Soviet demand that we evacuate overseas bases. To a large extent the dismantling of key bases would involve dismantling the free-world coalition. The prime value of the regional arrangements, particularly NATO, is to be found in the infrastructure, even more than in the supra-structure. The third aspect, "economic disarmament," is not as fashionable a phrase now as it was during the abortive postwar attempt to limit German productive capacity. There is little doubt, however, that the Soviet desire to neutralize Germany is due in some measure, at least, to her desire to sterilize the Ruhr. Industrial capacity along with resources of men and material underlies the whole question of the use of national power. The Soviet Government combined these three aspects in their May 10, 1955 London proposals. I do not mean to express agreement with these proposals. In the first place, they are extremely difficult to understand in their over-generalized form. But they are realistic if only in the sense that they combine these three ingredients or components of the problem of disarmament. Incidentally, the Soviets have also shown their realization that the United Nations is the most practicable forum for dealing with this problem. This is the principal significance of their belated and rather startling concession that the United Nations is, after all, a forum in which German questions can be discussed!

All the foregoing factors lead me to attempt to define the disarmament objective in the following terms: an enforceable agreement on the balanced reduction of national power, as well

as on the limits within which that power will be used. These are both indispensable elements of the definition. It reflects the experience of the League of Nations, as distilled by Madariaga in 1929 in Disarmament, which still makes interesting reading. As so defined, disarmament is seen as a dynamic and a changing process rather than as a program which can ever be achieved or "completed." It is of the essence that the effort to deal with this process be a continuing and a general one. To that end it must be tackled, it seems to me, in a continuing and general forum that is the United Nations.

I should like to disucss briefly the relationship between the United Nations and other forums, such as regional organizations. In the quest for collective security, the regional arrangement plays a role which I believe is directly proportionate to the extent to which it is endowed with machinery. NATO has motors and is self-propelled. In my judgment SEATO is the glider type, pretty much held up by currents of warm air. There is a constant interplay between the Churchillian concept of a federation of regional organizations and the Rooseveltian (or perhaps more accurately the Cordell Hull) approach of an integrated world body. The former concept quite naturally gravitates toward Locarnos, meetings at the Summit, and similar eclectic procedures. This takes me back to the beginning of this survey, that is, a triangulation of objectives.

In the light of our objectives, those of the Soviet Union, and those of the United Nations, I have attempted to define them, what is to be expected from meetings of the Chiefs of State at the Summit, alternating, if I may say so, with Foreign Ministers' meetings in the attic? I believe their usefulness is to be gauged largely by the extent, if any, to which they tend to bring about a change in Soviet policy—specifically, to the extent to which they lead to at least a partial or gradual opening of the closed world. A confrontation of leaders, which in any event is demanded by public opinion, may work a limited personal magic, although there is room to doubt this. The Communists may wish to have dramatic sounding boards to announce so-called concessions, usually pre-determined. But neither of these tactical ends provides a worthy motive in itself for high-level meetings. When the substance of diplomacy becomes sticky—I cite again disarmament as a testing point—the highest premium must be placed upon the procedures of diplomacy. A major effort should be in the direction of buttressing what we already have and, if you please, cashing in on pledges already obtained.

An effective method of doing this would be to insist in all our forums of diplomacy upon the overriding sanctity of the United Nations security guarantees. In a normal society it is commonly regarded as a duty rather than as a virtue to carry out one's pledge. Tension is undoubtedly relaxed when a pickpocket takes his hand out of your pocket. This may provide a suitable occasion for rejoicing, but not necessarily for passing out good-conduct medals. Among its other dangers, an obdurate course of international conduct tempts the victims to keep buying back the same horse in the hope that sooner or later their title will be recognized. One of the standard ways of holding out bait is to offer new pledges without ever making quite clear what happened to the old ones. For some years the Soviet delegations in the United Nations have stressed the importance they attach first to a so called "Five Power Peace Pact," and more recently to obtaining confirmation of their postwar gains through a European Non-Aggression Pact. Whether or not this is an intentional plan to debase the value of the United Nations security guarantee is quite beside the point. The fact is that it would have exactly this effect.

Locarno was worse than useless. The reason it lasted only eleven years was precisely the reason why it was concluded in the first place: the lack of will on the part of the members of the League of Nations to give weight to the security pledges of the Covenant. For the same reason it is of the utmost importance that high-level meetings should dramatize our insistence that existing forums, and in particular the United Nations, the major one to which both we and the Soviet belong, must be faithfully employed.

Moreover, it should be made clear that the faithful employment of this forum requires that at least Germany, Japan, and Italy be added to it. High on the agenda of meetings of the Chiefs of State should be placed the question of the Soviet abuse of the veto on United Nations membership questions. It seems to me that this is a much more fitting forum in which to press for Soviet action and to inform public opinion with regard to this important problem than would be a general conference to review the Charter. We missed an excellent chance in the Austrian Peace Treaty to break the log jam on membership. The Soviets were, after all, let off the hook without even being asked to pledge their support to the Austrian application for membership. There was, it is true, placed in the Preamble of the Austrian Peace Treaty the boilerplate language of the earlier violated satellite treaties. But there was no Soviet commitment to vote for Austrian admission.

As one looks ahead, we may safely say that we will not have peace without the United Nations, and it is very difficult to see how the United Nations can effectively work for peace if its security guarantee is debased, if its membership is artificially and arbitrarily restricted, and if issues such as disarmament and the other major issues of war and peace, deadlocked, as I have said, largely because of the Soviet closed-world concept, are not constantly and patiently explored, dramatized in that forum. Public opinion must be constantly mobilized in support of practical and honest positions. Public opinion grows like a stalactite. I think, in a word, that the United Nations has a future something along these lines. If the United Nations does not have a future it is doubtful whether we do, either!

QUESTION: Recently there has been much talk in the press about "peaceful coexistence." In that respect Arnold Toynbee, the historian philosopher, writing in the New York Times Magazine Section recently has said that the alternative to peaceful coexistence is not the happy elimination of Soviet Russia with us the surviving jubilant victor, but an atomic war which will see us all destroyed. I would like to hear Mr. Gross's comments on this.

The other question I would like to ask is this. Recently President Eisenhower has appointed Harold Stassen as Secretary of Disarmament. I would like to know whether the work of Mr. Stassen is independent of or in conjunction with the work of the United Nations.

MR. GROSS: With regard to the first question, I was reading a Yugoslav publication—in English, I hasten to add—a few days ago in which one of the writers from the Yugoslav Information Service discussed this question of peaceful coexistence (this was after the conference in Belgrade of the Soviet leaders with Tito, and after Tito had agreed with Bulganin and with Chou En Lai that coexistence was quite the thing). This writer defined coexistence as "loyal compliance with the principles of the United Nations Charter." I accept that definition and I think that is as good a test as any. If I seem to be paraphrasing a similar definition of coexistence by our Secretary of State in his speech at San Francisco, it is by coincidence. It is the words of this Yugoslav writer that came into my mind first. The problem is to give content and meaning to the phrase. That is precisely what the problem must remain. It is easy enough to say "either coexistence or no existence," but I think we have

learned to distrust slogans. The problem is to give the phrase meaning, content, and reality; the United Nations Charter provides the framework.

With regard to the question about Stassen's responsibility, I believe that Stassen's appointment was suggested by the Secretary of State, and that his task of co-ordinating the presently diversified positions of the key departments of our Government will undoubtedly be reflected to the world when he speaks for the United States delegation to the Disarmament Commission.

QUESTION: I want to ask Mr. Gross if he can spell out a little more specifically what steps he believes now might be taken to give new credit and virtue and standing to the collective security guarantees in the United Nations Charter.

MR. GROSS: Our leaders talk insistently about the importance of the moral basis of our leadership in the world and the forging of a moral unity. It is fair to say that the first step to be taken is to dramatize and to insist in all available forums upon not merely the validity of the UN security guarantee, but also its sanctity. Aggression must be regarded as transgression, as Madariaga once said. This is a good way of describing what is usually referred to as the moral basis of the collective security system. The aggressor is a transgressor. And the fact that the UN security pledge, the no-aggression pledge, is coupled with other elements of a moral concept and a sense of world community adds to the sanctity of that pledge. The antithesis of that, the pathetic reaching for new pacts, new guarantees, new pledges, is on a different road altogether. With regard to practical matters, I would not disagree for a moment with my old friend, Mr. Gilbert Montague's, comments in his introductory remarks, that the skill of debating is an important attribute indeed and I can only apologize for having been a lawyer while I was also trying to debate! But the point I would want to make here is that the quick answer is appealing and one can gain certain virtue by virtuosity. The debater's answer is good for domestic consumption and for world attention. But the 90 or 95% of private, non-goldfish-bowl activity in the UN forum, the constant attempt to create a climate of responsibility, of good will, and of confidence is, in the last analysis—I say it as an old, broken-down bureaucrat, Mr. Chairman—the highest service the UN forum can really perform in terms of strengthening our relationship with other nations.

QUESTION: I wondered if I understood Mr. Gross correctly to say that we major powers no longer have particular policies with respect to disarmament and atomic energy control. That is, if we could consider a situation where there was complete agreement upon the United Nations majority proposals for atomic control as they were specified about 1950, would the United States now back away from that?

MR. GROSS: The impression one has is that the "foolproof" formula is obsolete, that the new techniques have made 100% Baruch-type inspection a thing of the past. Perhaps that creates Stassen's primary responsibility. Also, I think the Secretary of State is the "Secretary of Peace," and that Secretary Stassen is secretary in charge of helping Mr. Dulles to find a new formula for disarmament. Moreover, the pressures of the new weapons have heightened a sense of urgency which leads one to the conclusion that the great problem of statesmanship in the United States and the Soviets is whether the two curves on the chart can be brought to some crossing-point. I refer to the line represented by pressures on the Soviet to relax the Iron Curtain system because of fears of hydrogen war, and the line depicting pressures upon us to relax our control formula because of the same fears.

QUESTION: Do I correctly gather from your remarks and implication that in working in the Summit meeting with Russia on their veto exercise, that the United States now would be willing, or should be willing, to do away with the veto, to accept the two-thirds vote as enough or something like that in the operations of the Security Council?

MR. GROSS: My comments were about the membership question. With regard to the veto, we had announced earlier that we would not use the veto in connection with the membership question. We have lost a little bit of, shall we say, abstract virtue in that regard because of the more recent announcement that we would if necessary veto the seating of Communist China in the United Nations. That, incidentally, is a viewpoint I have found it difficult to understand because, if it were a vetoable question, the Nationalist China representative could veto his own replacement and our own vote would there not be decisive.

With regard to the problem of veto in other aspects, so far as I know, the only recommendation that has been made by the

Administration is the elimination of the veto on pacific settlement. It has been repeatedly proclaimed that we would not favor elimination or modification of the veto with regard to enforcement measures. With respect to the pacific settlement questions, the problem is not one which has any acute urgency. It is not an issue of war and peace as between the Soviet system and the free world. Many people believe it would be a nice and a useful amendment. But it would not be a decisively important one because the principal cuases of tension can not be traced to the Soviet abuse of the veto in pacific settlement issues. I do not recall any case in the first ten years of the United Nations in which the Soviet has cast a veto in the pacific settlement field, perhaps once or twice in ten years. It certainly has not been very basic to the success or failure of the security system.

QUESTION: I wonder if you would undertake to comment briefly with respect to the function and success of some of the auxilliary agencies of the United Nations. I have in mind, of course, UNESCO, the International Labor Office and the like.

MR. GROSS: The specialized agencies have been startlingly successful. I should like to point out, however, that although I have always pictured them and will picture them as integral parts of the United Nations system, one of the most unfortunate aspects of the structure is that—as Cabot Lodge described it in testifying before the Senate Sub-Committee—they are for all practical purposes independent of the United Nations. To the public at large they are certainly regarded as UN agencies and I always make it a point to describe them in that way. But there is room for improvement in terms of co-ordination of effort. There is a great deal of efficiency and economy of operation which common budgets, common overhead, and pooling of resources could effectuate. There is entirely too much vested interest in each, or perhaps I should say, in many of the organizations. It is a problem which should be met head-on by a Congress which is properly jealous of the way in which the taxpayers' money is spent. In that respect the agencies leave room for improvement. With regard to their specific accomplishments, they are of course really jewels in the crown of the UN system, but I do wish that UNESCO would shine a little more brightly at times. UNESCO could profit a great deal by a closer co ordination and integration, administratively and functionally, in the general pool of efforts of the United Nations. I

do not believe that a Charter Review Conference should be called for the purpose of looking into that question. The United States, as the principal contributor to all of them could exercise a very salutary influence, and above all, the recruiting of good personnel could be immeasurably enhanced by a pooling of recruitment effort and a tenure based upon working for one organization instead of working in a side pocket.

LIMITATIONS ON WHAT THE UNITED NATIONS CAN DO SUCCESSFULLY

RESTRICTIVE BUSINESS PRACTICES AS AN APPROPRIATE SUBJECT FOR UNITED NATIONS ACTION

Sigmund Timberg, Esq.,*
of the District of Columbia Bar,
former Secretary of United Nations ad hoc Committee
on Restrictive Business Practices

The U.N. and Foreign Background of Anti-Cartel Action

June 28, 1955, Morning Session

In March, 1948 this government after two years of negotiations and three full scale international conferences[1] persuaded the representatives of some fifty-three other nations to sign the Havana Charter for an all-inclusive International Trade Organization. The Charter contained a chapter devoted to the prevention and control of restrictive business practices affecting international trade. The Charter was thereafter abandoned because it became apparent that Congress, perturbed primarily by chapters other than the one relating to restrictive business practices, was not going to approve that instrument. As late as 1950 a large number of businessmen and business organizations, and some farm and labor groups, favored U.S. ratification of the entire Charter.[2] The organizations opposed to ratification of the Charter largely focused their objections on the portions of the Charter dealing with intergovernmental commodity agreements,[3] foreign investment, and full employment.[4]

In the fall of 1951 this government resumed its anti-cartel initiative within a less ambitious frame work. It introduced a resolution in the Economic and Social Council to establish an intergovernmental committee to make recommendations to the Council solely for the prevention and control of restrictive business practices in international trade.[5] That resolution, introduced at a time when Congress was, through the Benton amendment, asking the Economic Cooperation Administration to intensify its anti-cartel activity in foreign countries,[6] passed by a vote of 13 to 3. The three negative votes were those of the

*Footnotes to Sigmund Timberg's Speech will be found at end of article.

Soviet bloc, which took the position that the resolution was only a hypocritical façade designed to cloak this country's efforts to increase the power and share of U.S. monopolies in international trade.[7]

Pursuant to this resolution an able intergovernmental committee composed of ten countries[8] toiled diligently for over a year. That committee reviewed the relevant substantive articles of Chapter V of the Havana Charter and found them with minor modifications and rearrangements, acceptable. The committee also added a series of procedural and organizational articles, the main purpose of which was to insure independence, impartiality, and specialized knowledge on the part of the secretariat of the agency, and yet take account of the practical fact that vital trading and economic interests of governments and enterprises were involved.

The Draft International Agreement we are reviewing today is the work of this committee.[9] About five weeks ago the United States announced that this Draft Agreement would not be practicable or effective in accomplishing the elimination of restrictive business practices in international trade because the various national policies, legislation, and enforcement procedures in this field were not sufficiently comparable.[10] Even though the shift of the United States from its original position had doubtless been sensed for perhaps two years since the change of the administration, seven countries still indicated a general endorsement of the substance of the Draft Agreement.[11]

Thus twice within eight years the United States has led a formidable march up the hill only to beat a retreat and leave its foreign associates stranded at the summit of achievement. International upward marches of this character are not, as any initiate knows, glorious cavalry charges. They combine some of the worst features of Hannibal's elephants crossing the Alps with those of Sisyphus' classical struggle with the stone that kept on rolling backwards. The issue posed by this negative outcome, however, is not one of disappointed expectations and of wasted years of negotiations, drafting and discussion by instructed and re-instructed delegations and their respective Foreign Offices. No amount of energy and resource expenditure or of emotional involvement should permit the perpetuation of a mistake, if one was in fact made in embarking on the project in the first place.

The issue rather is this: whether by this and similar debacles in the international arena this country has not been frittering away a position of economic and moral leadership that is

essential to the maintenance of the free world as we would like to see it. A related issue is whether this country's retreat on the international front may not serve to retard the recent trend in the legislation of many countries directed against restrictionist industrial policies. The encouragement of that anti-cartel and anti-restrictionist legislative trend still remains a guiding principle of this country's foreign economic policy.[12]

Congress, when it adopted by bipartisan vote the Benton, Moody, and Thye amendments to the Mutual Security legislation, endorsed the proposition that restrictive practices in economies of our free world allies so lowered national levels of productivity as to impair the economic and military potential of those countries and thereby endanger our own security. Equally well recognized has been the fact that business restrictions caused inflation, under-consumption, and lowered standards of living, and that these conditions provide a fertile feeding ground for anti-American and anti-capitalist propaganda.[13] On the international scale, cartel and restrictionist practices diminish and distort the amount and channels of trade, the balance of international payments, the maintenance of full employment, and the economic development of countries.[14] The Randall Commission on Foreign Economic Policy concluded, in one of its few unanimous conclusions, that the existence of restrictive business practices "will limit the willingness of United States businessmen to invest abroad and will reduce the benefits of investment abroad to the economies of the host country."[15]

Sparked largely by this country's initiative, promising legislation relating to the control of restrictive business practices has been adopted in the United Kingdom, Sweden, Norway, Denmark, Ireland, and the European Coal and Steel Community, and has been under active consideration in Belgium, France, The Netherlands, South Africa, Finland, West Germany, and Israel.[16] English, Swedish, German, French, and other officials and experts, largely at the encouragement of the Economic Cooperation Administration, have studied at first hand the functioning of the U.S. antitrust laws.[17] Many published books and reports, both by governments and private individuals, have added to the growing understanding of the cartel problem abroad.[18]

In the less than two years since January 1, 1953, some twenty countries and the European Coal and Steel Community have reported to the United Nations noteworthy developments

in the field of restrictive business practices.[19] The forces of inertia and restrictionism, however, remain strong in all those countries. The mere passage of legislation is no guarantee of its effective enforcement. A world-wide public opinion in favor of a more competitive economic outlook (as opposed to support by perceptive government officials, businessmen, and economists) is still in the making. Accordingly we must take heed lest the withdrawal of U.S. support from any international project in this area be interpreted as evidence of a general slackening of our own enthusiasm for the competitive way of life and furnish grist for the anti-U.S. propaganda mills.

Are Restrictive Business Practices a Unique International Problem?

If this conference results in giving us any general clues as to the basis for effective United Nations action in the economic arena, it will be time abundantly well spent. I am happy and honored, therefore, that you have invited me to explore this problem with you. I do not in any way represent the views of the United Nations, but shall, as the Secretary of the United Nations committee that wrestled with the problem, try to give you some of the background and rationale of the provisions of the Draft Agreement.

The problem we are considering has a twofold aspect. First, is there anything about the nature of restrictive business practices that makes them more recalcitrant to international handling than tariff and other trade barriers, monetary and exchange restrictions, and impediments to economic development? These other fields are both technical and bristling with controversy and national apprehensions, yet international organs for their control in the interest of the world community are currently operative. Second, assuming the desirability of international action, what substantive, procedural, and organizational form should such action take?

Strictly speaking, only the first question is relevant to the announced topic of this session. However, the bulk of the current discussion concerning international control of restrictive practices relates to the substantive and administrative features of a single proposal in the field, that of the United Nations Committee on Restrictive Business Practices. In focusing my own discussion on this document—and I am under clear instructions from Bill Bishop to present clear-cut issues rather than to

minimize them—may I make one minor suggestion: when members of Congress have objections to a bill which has been fully considered by a committee and reported out, they do not mechanically cast their vote in blanket opposition to the bill, but propose amendments and substitutes which reflect their own concepts of what is desirable and appropriate. This kind of constructive approach has thus far been lacking in the bulk of the private comments in the field, but I know that it is well within the critical competence of this group.

Main Outlines of United Nations Committee Draft Agreement

Turning now to the Draft Agreement, a brief sketch of its main substantive contents will help us to review its virtues and defects.

1. The Draft Agreement deals with restrictive business practices which it defines as "'business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control" (Art. 1, par. 1). Restrictive business practices are not only defined but are listed; the Agreement specifically enumerates exclusion from markets, dividing markets, price fixing, price discrimination, limitations of production, and specific types of patent, trademark, and copyright abuse (Art. 1, par. 3).

2. The Draft Agreement and the international agency which is to administer it are instruments of international co-operation. They are not instruments of international sovereignty. The proposed agency is not given any judicial, legislative, or other sovereign powers. It is almost entirely concerned with the international trade in products, in which area it is to achieve its purposes by procedures of study, consultation, and investigation.

3. Very little, if any, criticism has been leveled, at least by the U.S. critics, against the consultation procedure provided for in Art. 2 of the Draft Agreement, or the provision for study of general or specific topics embodied in Art. 4, or the limited procedures applicable to "services" contained in Art. 8, or the obvious arrangements involving co-operation with and among governments, intergovernmental bodies, and agencies (Arts. 6 and 9).[20]

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4. The controversial function of the international agency is the procedure for the investigation of complaints of

restrictive business practices. The administrative steps involved in this procedure are outlined in Art. 3 of the Draft Agreement; the general policies underlying the application of the investigation procedure are set forth in Art. 1; and the specific obligations undertaken by Member countries (this last is quite crucial in the evaluation of the Agreement) are contained in Art. 5 and in Art. 1, par. 1.

5. The proposed international agency has jurisdiction to investigate restrictive business practices, regardless of whether they are engaged in by private or public commercial enterprises, with two minor qualifications that I consider truly trivial.

6. The proposed agency may investigate restrictive business practices only if the enterprise or enterprises engaging in them "possess effective control of trade among a number of countries in one or more products" (Art. 1, par. 2(c)); and if a written complaint is lodged by a government containing substantial information as to the nature of the restrictive business practices which are complained of and the reason for alleging that those restrictive business practices "have harmful effects on the expansion of production or trade," in the light of the general objectives of the agreement.

7. The end result of the agency's investigation of a particular complaint is the issuance of a report. That report examines, analyzes, and sets out the information received, decides whether the complained-of practice has had, has, or is about to have harmful effects within the meaning of the Draft Agreement and makes recommendations in appropriate cases to governments as to remedial measures (Art. 3, pars. 6, 7, and 8; Art. 15, pars. 4, 5, and 6; Art. 16; Art. 17).[21]

8. The report of the agency has no direct sanction except the informal one of publicity. However, the governments adhering to the Draft Agreement are obligated to supply the information needed by the agency (Art. 5, pars. 1, 2, and 3). They are further obligated to take appropriate action to implement the remedial measures recommended to them by the agency (Art. 5, pars. 4 and 5), and to keep the agency posted on their compliance (Art. 5, par. 5).

These are the main substantive outlines of the Draft Agreement. Further details, and the procedural and organizational provisions of the Draft Agreement, will become clearer in the course of the subsequent discussion.

"Harmful Effects" - A "Rule of Reason" for Foreign Trade

Before getting into that discussion, I should like to place the Draft Agreement in the context of what appear to me some basic and compelling political considerations.

The drafting of any acceptable multilateral convention, particularly one that concerns vital national interests and somewhat controversial economic policies, is, in the broadest and ultimate sense of the term, a political achievement. Politics is the art of the possible, not of the ideal. It was clearly not possible for the Draft Agreement to internationalize Senator Sherman's competitive dream of 1890, enriched by sixty-five years of reverent judicial interpretation in the United States. Even within the relatively homogeneous experience and legal climate of our country, different judges of the same court emerge with discrepant, but nonetheless dogmatic, versions of that dream.[22] In fact, at times American foreign trade circles, if I read correctly what they have been saying, have looked on the competitive dream as something of a business nightmare. No amount of competent consulting by well-paid legal therapeutists has been able to eliminate an aura of neurotic uncertainty and schizophrenia caused by the necessary imprecision of the American antitrust laws.

In the Draft Agreement, the United States made a basic concession to other countries which do not bring to the problem of restrictive business practices this country's detailed experience and passionate concern, and our strong political predisposition against monopoly and private trade restraint. Certain restrictive business practices, such as price fixing, which in the United States are traditionally regarded as illegal per se, are, under the Agreement, to be evaluated in terms of their "harmful effects" on the expansion of production and trade, viewed in the light of certain broad objectives.[23]

This opens the door for more detailed factual and economic examination of the effect of the complained-of restriction on the public interest than would be permitted in a U.S. court proceeding. It does not involve as much scrutiny of such matters as has been called for by antitrust critics in this country who have favored expansive notions of "workable competition" and of the rule of reason that governs the application of the Sherman Act.[24] The Draft Agreement, therefore, involves a departure from accepted Sherman Act doctrine, but it represents the maximum commitment against restrictive business practices that could have been obtained from other countries.

The issue, however, is not whether the Draft Convention will raise the legislation of other countries to the pinnacle of our presumed antitrust perfection. It is whether it will substantially assist in effectuating the control of international cartels and in generating in other countries national policies with respect to the prevention and control of restrictive business practices that will galvanize the needlessly low and static economic and political potential of the Free World.

Concessions to National Sovereignty

Except for this notion of "harmful effects," the main features of the Draft Agreement, in my mind, reflect either the general contours of restrictive business practices as they are customarily viewed in this country; or norms of impartial, orderly, and intelligent administration phrased in the conventional terminology of the administrative process; or the necessity of preserving the domestic jurisdiction of governments adhering to the Draft Agreement—a need which is politically more imperative for the United States perhaps than for other countries. It is this last factor, that of deference to national sovereignty and the domestic jurisdiction of states, that has resulted in giving the international agency contemplated by the Agreement the role of an instrumentality of international cooperation, rather than of an organ with sovereign, judicial, or executive powers. The functioning of the Draft Agreement depends, as in the case of all international treaties, on the parties living up to their commitments to co-operate.

Paragraph 1 of Article 1 of the Draft Agreement contains an unqualified obligation on the part of governments to "take appropriate measures and...cooperate with other Members and the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control," whenever such practices have the prescribed harmful effects.

Paragraph 2 of Article 5 requires each government to "make adequate arrangements for presenting complaints, conducting investigations, and preparing information and reports requested by the Organization." Paragraph 3 of the same article requires governments to "furnish to the Organization, as promptly and as fully as possible, such information as is requested by the Organization for its consideration and

investigation of complaints and for its conduct of studies under this Agreement."

The obligation of governments to give information to the international agency is qualified by only two provisos:

> 1. A government may withhold information which it "considers is not essential to the Organization in conducting an adequate investigation and which, if disclosed, would substantially damage the legitimate business interests of a commercial enterprise" (Art. 5, par. 3).
>
> 2. A government is not required "to furnish any information the disclosure of which it considers contrary to its essential security interests" (Art. 5, par. 8).

Under paragraph 1 of Article 5, a member government is obligated to "take all possible measures by legislation or otherwise, in accordance with its constitution or system of law and economic organization, to ensure, within its jurisdiction, that private and public commercial enterprises do not engage in" restrictive business practices which have harmful effects, and to "assist the Organization in preventing these practices." Under paragraph 5 of the same article, governments are obliged to "report fully any action taken, independently or in concert with other Members, to comply with the requests and carry out the recommendations of the Organization."

To secure Congressional approval of any international modus operandi in this field, it was necessary to assure, as the Draft Agreement does, that the Sherman Act would neither be modified in its letter nor abated in its enforcement.[25] It was also prerequisite that restrictive business practices be investigated and remedies applied to condemnable practices in such a way as to safeguard the constitutional and legal rights of U.S. enterprises. To accomplish the latter purpose, a signatory government is given the discretion, in implementing the international organization's recommendation, to proceed "in accordance with its constitution or system of law and economic organization." Given the natural concern that our country has for the constitutional and legal procedures that make antitrust enforcement both effective and fair, this is a perfectly normal and reasonable reservation.[26] Doubtless other governments feel the same way about their legal systems as we do. For example, the constitutional order of Sweden may permit it to enforce by royal decree, and that of the United Kingdom may authorize it to impose by an order of the Board of Trade based on a report to Parliament, a remedy which in this country might

call for the institution of a court or Federal Trade Commission proceeding.

Obviously, if the functions of obtaining evidence or correcting pernicious restrictive practices must in the last analysis be entrusted to national governments, they cannot be entrusted to an international agency. It is therefore idle to complain that the international agency has no subpoena power and "nebulous" enforcement sanctions. Nor need it be a matter for concern that the tangible outcome of the agency's activity is only an advisory report, analyzing the facts and recommending remedial measures, provided the Draft Agreement contains some assurance that the analysis will be heeded and the remedial recommendations complied with. Those assurances are to be found, first, in the rather extended series of obligations of governments under the Agreement to co-operate in the work of the agency, and, second, in the sanction of publicity that will be given the agency's findings and conclusions.

In summary, the ultimate question for decision is whether the Agreement provides a workable amalgam of national activity in the investigation of restrictive business practices and the application of remedial measures and of international activity in analyzing the economic situation and making recommendations for remedial action. Will the amalgam result in an improved approach to the problem of restrictive business practices in international trade?

In ascertaining the existence and the degree of that improved approach, the following caveats seem to me appropriate: First, national efforts to counteract the activities of international cartels and combines are largely ineffective because of territorial limitations. Hence, not taking international action against restrictive business practices in international trade is tantamount to abandoning the prospect of action against most such practices.[27] Second, the Draft Agreement must be appraised as an organic whole. I do not believe that it can do anything more than embody general principles of action. It should not be viewed as a series of particularistic prescriptions. It cannot be phrased with the precision of a conveyance or contract of sale. Third, it is logically inconsistent to criticize the Draft Agreement for having no teeth, and at the same time to charge it lacks protections for individuals and governments that would be relevant only if it had teeth.[28]

Coverage of the Draft Agreement

Having roughly presented the main outlines of the Draft Agreement, I shall now sketch in a few details, concerning points where there has been considerable confusion.

The Agreement's definition and enumeration of restrictive business practices seems to cover adequately the main areas to which this country's enforcement of the Sherman Act in international trade has in the past been directed. We have built up in this country tomes of decisional jurisprudence and commentary on the basis of the simple expression "restraint of trade." The international agency's jurisdiction extends only to practices engaged in by enterprises which "possess effective control of trade among a number of states in one or more products" (Art. 1, par. 2(c)). This insures that no international body will be concerned with business restrictions of purely national scope. As a jurisdictional guidepost, it is a much more precise standard than that of the Sherman Act, requiring that the trade and commerce restrained be "among the several states and with foreign nations." Experts in constitutional law will recall all the difficulties that there were in determining the content of this concept, and the changes in the application of the Sherman Act that have taken place even within the last ten years.[29]

The two purely procedural differences between the treatment of public and private enterprises are insubstantial and seem well justified by the practicalities of the situation.[30] Let us assume that the General Services Administration was involved in an alleged restrictive practice in the importation of some critical material from a foreign country. First, a complaining government would have to bring its complaint in its own behalf, and not merely in behalf of its nationals. Second, the complaining government would have to take the matter up in the first instance on an informal basis with the U.S. Government, which controls the General Services Administration, so as to exhaust the possibilities of rectifying the situation expeditiously and without fanfare. In cases involving complaints against private enterprises, governments may (but are not required to) resort to such informal consultations. Once informal consultations are over, a complaint against a public enterprise is handled exactly as is one against a private enterprise.

There are excluded, from the scope of the investigatory procedure which lies at the heart of the U.N. proposals,

restrictive practices which are "specifically required" by governments. The rationale of this provision is that practices which are "specifically required" by a government cease to be the voluntary action of the enterprises involved and become acts of state, which are removed from the sphere of antitrust enforcement activity. For example, in this country, if an airline or shipping company is required by the Civil Aeronautics Authority or the Maritime Commission to engage in a restrictive practice, it cannot be charged with an antitrust violation.

The Draft Agreement has very carefully circumscribed this exemption. First, it does not extend to practices that are tolerated, encouraged, permitted, or even authorized by foreign governments; clear legal evidence of an express government requirement, in the form of a law, order, or decree, is necessary. Second, the exemption is limited to a restrictive practice that is specifically required "in all countries in which it is found to exist"; thus, a practice required by the Mexican, but not by the United States, Government could be investigated under the Agreement.[31] Third, even where an investigation is discontinued, the Agreement provides for bringing the matter to the attention of the governments and intergovernmental bodies concerned, along with relevant observations.

Mandatory (as opposed to permissive) cartels are currently the exception and not the rule. Foreign governments may tolerate and sometimes encourage cartel practices, but they rarely compel them. In short, the exemption of governmentally required practices from the Agreement will probably prove to be a quite limited one.

The foregoing misapprehensions as to the impact of the Draft Agreement on public commercial enterprises and on restrictive practices required by governments have given rise to a feeling that the Draft Agreement creates a gap between governments with highly developed systems of antitrust enforcement such as ours and governments with inadequate antitrust policies, bearing more heavily on the former than on the latter. This seems to me to misconceive the situation. As I see it, the commercial enterprises of this country remain subject to the strict regime of the Sherman Act, regardless of the ultimate fate of the Draft Agreement. They are already at a discriminatory disadvantage with respect to the enterprises of other countries, and the Draft Agreement would not increase the gap. The impact of the Draft Agreement can only be to raise the levels of antitrust enforcement abroad, and thereby to close this discriminatory gap.

Administration of the Draft Agreement

There has been some concern, and I think it is a legitimate concern, at the prospect that the Agreement may create a forum for bringing vexatious, unfounded, and politically inspired complaints against American business.

Practically every country represented on the ad hoc Committee conceived of itself primarily in the role of a prospective defendant in an antitrust complaint. The industrial countries worried not only about complaints from the underdeveloped countries; they were worried about the roster of cases that the United States might have to bring against them. To deal rationally with this fear, one has to take a look at the administrative and organizational provisions of the Agreement. These presuppose an adequately staffed executive secretariat, who would examine complaints, screen out those which did not have an adequate basis, request supplemental information where it was needed, and see to it that the minimum jurisdictional prerequisites of the Draft Agreement were met. The executive secretary then advises the political organ of the agency whether the complaint satisfies the conditions laid down in the Draft Agreement. The investigation then proceeds only if the Representative Body, the political organ, does not disagree with the advice of the executive secretary. There is thus a double check on the bringing of inappropriate complaints, first at the level of an independent secretariat and then at a more political level, by a body of national representatives.

The Committee also realized that the reports of the agency, the end products of its investigations, would command respect and acceptance only to the extent that they were carefully, objectively, and impartially prepared by a competent and experienced staff, on the basis of fair procedures. The preparation of the reports (which are based on facts supplied by governments) was made the special responsibility of an advisory staff of independent experts, selected for "their competence, integrity, open-mindedness, and impartiality as individuals." Provision was also made for affording the involved enterprises and governments a "reasonable opportunity to be heard." Furthermore, it is reasonable to assume that the international agency will, of its own volition, adopt further rules protecting commercial enterprises, the activities of which it is examining.

These procedures seem to me to minimize the contingency that anti-capitalistic countries would be able to give publicity to groundless complaints against the enterprise of the United

States and other large trading countries. In exploiting the existence of monopolies and cartels in non-Communist countries, Communist publications, such as have appeared in France and in Italy, have not waited on the establishment of U.N. restrictive business practices machinery. They can easily turn to their own devices information which is readily available in the Wall Street Journal, New York Times, Court and Federal Trade Commission decisions, public records, and scholarly volumes.

Already there has been created in the minds of European and Asiatic democratic elements the insidious notion that this country supports a system of aggressive monopoly capitalism which is completely lacking in social conscience. This notion cannot be counteracted by sweeping the problem under the carpet or by relaxing our efforts to remedy the strains and stresses of our free enterprise system. It can only be met by demonstrating that antitrust serves as the conscience of our social and economic system, and that that conscience is a vigilant one.

The last administrative problem that I will discuss is the fear that the international agency will be controlled by the underdeveloped countries with all sorts of axes to grind. It is true that seven countries control 65% of international trade, and that none of the remaining fifty-four for which statistics exist account for more than 3%. However, I should like to point out that six highly industrialized countries, five of which were in the bracket of the seven top trading countries of the world, were represented on the ad hoc Committee: The United Kingdom, the United States, France, Canada, Belgium, Sweden. It seems hardly plausible that the representatives of these countries would have acquiesced in an agreement setting up an agency controlled by the less highly developed countries with a smaller stake in international trade.

Conceivably the provisions against such domination of the agency are not airtight, and additional safeguards might be spelled out in future negotiations, but the safeguards currently in the Draft Agreement are worth noting:

1. The Draft Agreement does not come into effect unless the major trading powers are satisfied with it.

2. The Agreement provides for an executive secretary and for an advisory staff, whose function it will be to guide the work of the agency along responsible and reasonable lines.

3. The system of reviews, checks, and balances that has been established in connection with the investigation procedure of the agency supplies additional assurances that the work of the agency will be objective and competent.

4. The Committee's proposals provide for a representative body consisting of representatives of the adhering governments. The influence of the major trading powers—and this is true of all existing international organizations, especially those concerned with economic matters—far outweighs the single vote they cast. Moreover, it was contemplated that the bulk of the work of the agency would be done not by a large and unwieldy Representative Body, but by a more tightly organized Executive Board. In the composition of this Executive Board due weight must be given to countries of chief economic importance in international trade.

5. The co operation of governments is essential to the success of the Draft Agreement, and it will not be forthcoming if the Agreement works unreasonably or arbitrarily.

Does the Draft Agreement Lower U.S. Antitrust Standards?

Now I should like to deal with a fundamental objection of principle, the one that was advanced by the U.S. Government as the sole reason for its withdrawal from the support of the convention. It relates, as I have pointed out, not to the Draft Convention itself, but to the deficiencies of national legislation in this field. For the United States "The basic problem is not the wording of the proposed Agreement or differences in economic or legal phraseology among countries. It is rather that a sufficient degree of agreement on fundamentals does not now exist."[32] The existence of wide disparities in present-day national policies and measures concerning restrictive business practices is indisputable. It was recognized by the ad hoc Committee, and it is evidenced by the 1953 secretariat report on governmental measures in the field.[33]

It is well, however, that we should avoid too complacent notions of ourselves as dwelling on a high plateau of competitive perfection while the rest of the world resides in the sunless valleys of restrictionism and cartelization. A proper perspective would show us that U.S. legislation has seriously curbed the play of competitive forces with respect to the important international "services" of shipping, air travel and transport, marine insurance, and telecommunications. This is rather important. One delegation at one time indicated that a restrictive business practices convention limited to "products" and not embracing international services was of no use to it.[34] And Belgium has also regretted the omission of services from the scope of the ad hoc Committee's proposals.[35]

As regards the international trade in products, this country has the Webb-Pomerene Export Associations which, whatever one thinks of their economic justification, are basically, technically speaking, selling cartels. The U.S. Government's involvement in the importation of critical and strategic materials from abroad, the exportation of U.S. agricultural products, and the antitrust exemptions provided for in the Defense Production, Act,[36] has introduced additional anti-competitive rigidities in the various markets involved. In addition to this wide range of governmental immunizations from, and interference with, competitive markets, approximately forty international cartel cases have been instituted by the Antitrust Division since the end of World War II. This would appear to be more than a surface indication of the prevalence of anti-competitive practices even in unregulated industries.

On the other side of the coin, as was noted by the U.S. delegation to ECOSOC, there has been encouraging and continuing progress in many countries in the development of legislation and administrative techniques for dealing with restrictive business practices. At this time, the Attorney General's National Committee to Study the Antitrust Laws has bravely come out with a majority recommendation for the repeal of resale-price maintenance legislation, a recommendation which I think it is doubtful that Congress will adopt as yet. Sweden, Canada, and to some extent France have already outlawed this practice.[37] Patent suppression in this country can only be attacked by the cumbersome process of bringing an antitrust suit involving the abused patents; practically all the other countries of the world have in their patent statutes direct sanction against that type of abuse. The reports that have been issued for the past half-dozen years by the United Kingdom Monopolies and Restrictive Business Practices Commission, established in 1948, compare favorably with those put out by the Federal Trade Commission.[38] Sweden, which already required the registration of restrictive business practices, has established a Freedom of Commerce Board which has already succeeded in eliminating many restrictive agreements. The push of the European Coal and Steel Community is in the direction of establishing a free market covering the coal and steel industries of six countries and of fighting against cartel agreements that restrict competition within that market.[39] Legislative developments in other countries have been noted.[40]

Nevertheless, habits of cartelization and business restrictionism have been ingrained in the industrial fabric of many

countries for close to a century.[40A] It is for this reason that the Draft Agreement has been limited to restrictive business practices that have harmful effects on the expansion of production and trade. However—and this I think is the critical point of analysis—once a country ratifies the Draft Agreement, the relevant measure of divergence of its antitrust standards from those of the United States is no longer its pre-existing national legislation, but the standards required by the Agreement. Hence, the United States' standards must be measured not, as has been argued, against the currently non-existent or inferior standards of some fifty or sixty different governments, but against the single minimum antitrust standard of the Draft Agreement. The problem becomes one of determining whether the gap between the two standards is so broad as to make the Draft Agreement unproductive of good results.

As stated earlier, signatories of the Draft Convention are obligated to adopt investigative measures that will enable them to supply the agency with the information needed to enable the agency to make intelligent recommendations. They must make adequate provision for putting the agency's remedial recommendations into operation. They undertake to keep the international agency posted on their compliance with the agency's recommendations.

The foregoing, and the adoption of a raised and uniform standard of harmful effects represents a substantial improvement over the status quo. Even if the improvement is not as substantial as one would like, what is the alternative?

Need for International Co-operation

National legislation has not thus far met either the public need of this country for effective antitrust enforcement in the international arena or the aspiration of U.S. foreign traders for more equitable treatment. I have developed elsewhere the general economic, administrative, and legal reasons why economic activities which are internationally integrated cannot be effectively regulated by a legal system which has attained only nationwide integration.[41]

The reasons for this failure are similar to those which explain why the numerous state antitrust laws prior to 1890 could not cope with nationwide and regional monopolies and trade restraints.

Recent cases in the international cartel field have illustrated the legal and factual infirmities of national judicial and

administrative organizations in coping with the action of international cartels. Frequently our own judicial organs are not able to obtain jurisdiction over persons and enterprises domiciled in foreign countries.[42] Even when such jurisdiction is ultimately secured, this is at considerable expense, delay and ruffling of national feelings.[43] National enforcement agencies are frequently unable to obtain needed evidence concerning transactions of parties located abroad. Efforts to obtain such information by judicial process arouse resentment.[44] For example, the Province of Ontario not so long ago made it a felony to send any corporate records out of Canada at the request of any foreign legislative, judicial, or administrative organ.[45]

Assuming that these barriers are overcome, a final and frequently insurmountable obstacle remains, i.e., what relief can you get? The only method of enforcing extraterritorial remedial process is through the comity which foreign countries will extend to American antitrust judgments, and that comity is not likely to be extended in countries whose antitrust public policy differs from that of the United States or which have no knowledge of what the controversy is about, or in situations where vested foreign property interests are involved.[46] Thus, restrictive business practices in international trade cannot be counteracted by national action alone.

A word should be said about the plight of the U.S. foreign trader, who has complained that the antitrust policy in this country does not take proper account of the economic and legal realities of foreign trade and of the fact that he is subjected abroad, both by legislation and business custom, to standards of commercial behavior and pressures that are at variance with the competitive norms fostered by the Sherman Act. They have asked for reasonable and flexible antitrust standards in foreign trade which will take account of the many ways in which that trade differs from domestic commerce, and have called for the application of more uniform standards.[47]

Thus, the United States Government is confronted with a "no man's land," one where its antitrust policy against international restrictive business practices cannot be effectively vindicated. The U.S. businessman engaged in foreign trade is caught "between the jaws" of stringent U.S. antitrust requirements, and counter-vailing foreign pressures and customs of a restrictionist character. In such a case the question to consider is whether both public and private interests might not well be the gainers from the establishment of an international forum which would permit all relevant economic facts and legal

considerations to be objectively analyzed in the framework of an approved minimum standard of antitrust performance. It is in this light that the Draft Convention proposed by the ad hoc Committee on Restrictive Business Practices should be viewed.

Footnotes to Sigmund Timberg's Speech

1. London, Oct. 15-Nov. 26, 1946; Geneva, April 10-Aug. 22, 1947; Havana, Nov. 21, 1947-March 24, 1948. This is exclusive of extensive preparatory work at the national and diplomatic levels. See Wilcox, A Charter for World Trade (Macmillan, 1949), pp. 37-50.
2. These business organizations included the Committee for Economic Development, U.S. Junior Chamber of Commerce, National Council of American Importers, Inc., National Planning Association, and the Committee for an International Trade Organization. See Hearings before the House Committee on Foreign Affairs, 81st Cong., 2nd Sess., on H.J. Res. 236, April 19-May 12, 1950, pp. 114-17, 133, 135-6, 393, 445, 466.
3. Thus, the representative of the National Association of Manufacturers said, concerning the restrictive business practices and intergovernmental commodity agreement chapters of the Havana Charter:

   "...they contain a mild—a very mild—indictment of private cartels, while opening the gates widely to intergovernmental ones." Ibid., p. 564.

   In a similar vein, the U.S. Chamber of Commerce said:

   "The aim of limiting the harmful effects of private international cartels appears to be won, but it is a Pyrrhic victory...[because] ...it appears that intergovernmental commodity agreements are exempted from the provisions against private cartels." Ibid., p. 419.
4. For a general review, see William Diebold, Jr., "The End of the ITO," Essays in International Finance, No. 16, Princeton University, October, 1952.
5. Economic and Social Council Resolution, 375 (XIII), of September 13, 1951.
6. Public Law No. 165, 82nd Cong., 1st Sess., c. 479, No. 5-6 (1951). In 1952 Congress, through the so-called Moody amendment, appropriated funds to carry out the Benton amendment. In 1953 Congress adopted the Thye amendment, which reads:

   "The Congress recognizes the vital role of free enterprise in achieving rising levels of production and standards of living essential to the economic progress and defensive strength of the free world. Accordingly, it is declared to be the policy of the United States to encourage the efforts of other free nations to increase the flow of international trade, to foster private initiative and competition, to discourage monopolistic practices. ..." (Public Law No. 118, 83rd Cong., 1st Sess., c. 195, § 710 (1953).

7. Summary Records, 547th Meeting of the Economic and Social Council, Sept. 12, 1951, pp. 621-5, 628-30; 548th Meeting, Sept. 12, 1951, pp. 635-6; 549th Meeting, Sept. 13, 1951, p. 643.
8. Belgium, Canada, France, India, Mexico, Pakistan, Sweden, United Kingdom, United States, and Uruguay.
9. See Report of the ad hoc Committee on Restrictive Business Practices to the Economic and Social Council (E/2380), Official Records, Sixteenth Session, Supplement No. 11, March 30, 1953. The draft articles of agreement appears on pp. 12-18 of this document; the text of the

1951 resolution (see footnote 5) on p. 12. The draft articles follow the present paper in this volume.

10. Comment submitted pursuant to Economic and Social Council Resolution 487 (XVI) of July 31, 1953, E/2612/Add. 2, April 4, 1955, pp. 4-5; Summary Records, 856th Meeting of Council, May 25, 1955, pp. 6-7.
11. Sweden, E/2612, May 28, 1954; Belgium, E/2612, May 28, 1954; Norway, E/2612/Add. 2, April 4, 1955, pp. 3-4; Federal Republic of Germany, E/2612/Add. 3, April 15, 1955, pp. 3-5; Turkey, Summary Records, 855th Meeting, May 26, 1955, pp. 5-7; Yugoslavia, ibid., pp. 10-13; India, Summary Records, 856th Meeting, May 25, 1955, p. 4. Norway, Germany, Turkey, Yugoslavia, and India favored administration of the agreement within the general framework of the General Agreement on Tariffs and Trade (GATT). Compare also the statement of the Netherlands delegation in Summary Records, 855th Meeting, pp. 7-8.
12. "The elimination of harmful restraints on international trade and the furthering of the development of free competitive enterprise continue to be basic objectives of this country's economic policy. ...emphasis should be given...to the more fundamental need of further developing effective national programmes to deal with restrictive business practices. ..." Comment of U.S. Government, footnote 10, above.
13. See the Congressional debate on the three bills referred to in footnote 6, above, e.g., 98 Congress. Record 6123 et seq. (Sen. Moody), 6126 et seq. (Sen. Benton), 6129 et seq. (Sen. Douglas), 7765 et seq. (Secretary Dulles, F.O.A. Director Stassen, Sen. McClellan and Sen. Smith (N.J.)) (1952-53).
14. See Statement of Swedish Delegation, Sixteenth Session, Economic and Social Council, 742nd Meeting, July 30, 1953, p. 245. At the May, 1955, session of the Council, the delegations of Argentina, Yugoslavia, Egypt, Ecuador, and the Dominican Republic indicated a strong interest in the effect of restrictive business practices on economic development.
15. Report of the (Randall) Committee on Foreign Economic Policy, Jan. 28, 1954, p. 18.
16. See the U.N. secretariat reports on:
    (a) Analysis of Governmental Measures Relating to Restrictive Business Practices (E/2379), Official Records: Sixteenth Session, Supplement No. 11A (April 29, 1953);
    (b) Texts of National Legislation and Other Governmental Measures Relating to Restrictive Business Practices (E/2379/Add. 2), ibid., Supplement No. 11B (March 13, 1953);
    (c) Report on Current Legal Developments in the Field of Restrictive Business Practices (E/2671), Official Records: Nineteenth Session, Supplement No. 3 (December, 1954).
17. Thus in 1951 French Premier Pleven sent a 14-man mission under the chairmanship of Madame Germaine Poinso-Chapuis, Vice President of the National Assembly, to this country to study the workings of the American antitrust laws. The reports of two members of a recent German mission to the United States will be found in Kamberg, "Wirtschaftliche Massnahmen und Erfahrungen," Bundesanzeiger, No. 6, January 11, 1955; Meyer-Cording, "Zur heutigen Situation im Antitrustrecht," Bundesanzeiger, No. 193, October 7, 1954.
18. An annex to the U.N. secretariat report cited in footnote 16(a) summarizes the official documentation on cartels then available in 17 countries (see pp. 46-9). The more comprehensive official studies on economic aspects of restrictive business practices include:

(a) Canada: "Canada and International Cartels," Report of the Commissioner, Combines Investigation Act, Government Printer, Ottawa, October 1945;
(b) France: "Ententes et Monopoles dans le Monde," La Documentation francaise: Notes et Etudes documentaires. Covering France; Germany; the United Kingdom and the British Commonwealth; the Benelux countries; Switzerland, Liechtenstein and Austria; Latin America; the Scandinavian countries; Japan and Italy. Direction de la Documentation de la Presidence du Conseil, Paris;
(c) Sweden: "Konkurrensbegransning," avgivet av Nyetableringssakkunniga, vols. 1 and 2, Statens Offentliga Utredningar 1951; 27 and 28, Kandelsdepartementet, Stockholm, 1951;
(d) Union of South Africa: "Regulation of Monopolistic Conditions," Board of Trade and Industries Report No. 327, Government Printer, Pretoria, 1951.

A partial list of private publications in the antitrust field includes:

(a) Del Marmol, Charley, "La reglementation juridique des ententes industrielles," Revue de Droit International et de Droit Compare (Special Number, 1950), pp. 125 et seq.;
(b) Del Marmol, Charley, Les Ententes Industrielles en Droit Compare (Bruxelles 1950);
(c) Einaudi, Luigi (President of Italian Republic), "Economy of Competition and Historical Capitalism," 1 Scienza Nuova 7-34 (1954);
(d) Evely, Richard, Monopoly: Good and Bad, Victor Gollancz, Ltd. (1954);
(e) Ender, Walter & Conrad Landau, Kommentar Zum Kartellgesetz, Verlag Eugen Ketterl, (1952);
(f) Friedmann, Wolfgang, "Monopoly, Reasonableness and Public Interest in the Canadian Anti-Combines Law," 23 Canadian Bar Review 133 (1955);
(g) Gide, Pierre, "La Projet Francais de Loi Anti-trust et les Experiences Étrangères" (Recueil Sirey 1953);
(h) Krawielicki, Robert, Das Monopolverbot in Schuman-Plan, J.C.B. Mohr (Paul Siebech) Tubingen (1952);
(i) Mendes-France, Pierre (former French Premier) and Gabriel Ardant, Economics and Action, Columbia-UNESCO (1954);
(j) Neumeyer, Fredrik, Monopol Kontroll i USA, Stockholm (1951);
(k) Neumeyer, Fredrik, "Swedish Cartel and Monopoly Control Legislation," 3 Amer. J. of Comp. Law 563 (1954);
(l) Thorelli, Hans B., The Federal Antitrust Policy - Origination of an American Tradition, Stockholm (1954); also Johns Hopkins Press. (An exhaustive 650-page study of the legal, administrative, political, economic, and social origins of antitrust policy, up to the year 1903);
(m) Monopoly and Competition and Their Regulation (E.H. Chamberlain, ed.) (Containing papers delivered at the Tailloires Conference of the International Economic Association, covering developments in many countries).

Two foreign periodicals, Wirtschaft und Wettbewerb and Cartel, are devoted exclusively to antitrust problems.

19. See Footnote 16(c).
20. In fact, Prof. Carlston concludes, with respect to the ad hoc Committee's proposals:

> "At this initial state of control, use should be made of the procedures of study, negotiation and national legislation rather than those of adjudication or quasi-adjudication." "Antitrust Policy Abroad," 49 Northwestern Univ. Law Rev. 713, 732 (1955).

For the author, the economic analysis and reporting provided for by the draft agreement cannot properly be described as "adjudication or quasi-adjudication." As Mr. Domke has pointed out, "the concluding article of the Draft-Convention expressly states that the term 'decision' by the organs of the Organization, on harmful effects of such practices, 'does not determine the obligations of Members, but means only that the Organization reaches a conclusion.' " The United Nations Draft Convention on Restrictive Business Practices, 4 International & Comp. Law Quar. 129, 134 (1955).

21. See also paragraph 52 of the Ad Hoc Committee's report, supra, footnote 9.
22. As witness the majority, concurring, and minority opinions in Timken Roller Bearing Co. v. U.S., 341 U.S. 593 (1951), and the majority and dissenting opinions in Georgia v. Pennsylvania R. R. Co., 324 U.S. 439 (1945); U.S. v. Line Material Co., 333 U.S. 287 (1948); U.S. v. Columbia Steel Co., 334 U.S. 495 (1948); and Standard Oil Co. (California) v. U.S., 337 U.S. 293 (1949).
23. The general objectives of the draft agreement are:
    (a) The reduction of governmental and private barriers to trade and the promotion of access, on equitable terms, to markets, products and productive facilities;
    (b) The encouragement of economic development, particularly in under-developed areas;
    (c) A balanced and expanding world economy, through greater and more efficient production, increased income, greater consumption, and the elimination of discrimination in international trade;
    (d) Mutual understanding and co-operation in the solution of international trade problems.

    These objectives appear to be consistent with both U.S. antitrust and foreign economic policy. On the whole, they should make it easier rather than more difficult to prove that international cartel restrictions have the "harmful effects" contemplated by the draft agreement.
24. See, e.g., the elaborate factual findings on "effective competition" which it was proposed courts should be required to make in all antitrust cases in Blackwell Smith, "Effective Competition: Hypothesis for Modernizing the Antitrust Laws," 26 N.Y. Univ. L. Rev. 405 (1951). This proposal at one time had the endorsement of Prof. Oppenheim and of the Business Advisory Council of the Secretary of Commerce.
25. Article 7 of the draft agreement specifically provides that:

> "No act or omission to act on the part of the Organization shall preclude any member [government] from enforcing any national statute or decree directed towards preventing monopoly or restraint of trade."

26. The provision has been regarded by some critics of the draft agreement as an escape hatch which would excuse countries without developed antitrust legislation from complying with the substantive obligations of the draft agreement. On this interpretation are premised the further objections that the draft agreement will be unenforceable against countries with presently nonexistent or lax antitrust standards, and that the agreement will have a discriminatorily heavy impact on American business. See Kopper, "The International Regulation of Cartels—Current Proposals," 40 Va. L. Rev. 1003, 1016, 1018; Report of Committee on International Restrictive Business Practices, Antitrust Section, American Bar Association, January 1955; Foreign Commerce Department, U.S. Chamber of Commerce, "International Control of Restrictive Business Practices,' p. 8; Carlston, footnote 20 above, at p. 729. This author's view is rather that the provision reserves to national governments the procedural option to carry out their substantive treaty commitments in accordance with their over-all constitutional and legal systems.
27. "Business firms, in the absence of international law on the subject, have been able to develop and administer their own private systems of international law and regulations. This development has aided in carrying the results of industrial integration and combination far beyond the boundaries of individual states and makes it difficult for any one country, particularly one largely dependent upon trade with others, to devise effective measures to deal with them." Canada and International Cartels, Report of Commissioner, Combines Investigation Act (1945), p. 65.
28. This sounds like a truism. However, the report of the International Restrictive Business Practices Committee, footnote 27 above, first complains of the lack of machinery for an impartial "adjudication" on a record, and of the lack of basic safeguards provided for in the first ten amendments to the Constitution. It then criticizes the draft agreement for conferring on the organization "only a most nebulous authority for enforcement."
29. Thus, in 1895, a nationwide Sugar Trust, with refineries in many states, was held not to be within the jurisdiction of the Sherman Act (U.S. v. E. C. Knight Co., 156 U.S. 1); in 1948 three processors of beet sugar, whose operations were confined solely to the State of California, were held subject to the Act (Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219). Since Paul v. Virginia, 8 Wall. 168 (U.S. 1868), the nation was generally held that insurance was constitutionally immune from federal regulation; in 1944 insurance was held subject to the Sherman Act (U.S. v. South-Eastern Underwriters Assn., 322 U.S. 533 (1944). The decisions in these cases, and such other "interstate commerce" cases as Cooley v. Board of Wardens, 12 How. 299 (U.S. 1851); The Passenger Cases, 7 How. 283 (U.S. 1849); Lottery Cases, 188 U.S. 321 (1903); Carter v. Carter Coal Co., 398 U.S. 338 (1936); Sunshine Anthracite Co. v. Adkins, 310 U.S. 38 (1939); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); South Carolina Highway Dept. v. Barnwell, 303 U.S. 177 (1938); Opp Cotton Mills v. Administrator, 312 U.S. 126, 657 (1941), represent as tortuous a path of judicial exegesis as is to be found anywhere in American law.
30. Prof. Carlston, an adverse critic of the draft agreement, is on sound ground when he says:

> "The fact that the practice is engaged in by a public (as distinguished from a private) commercial enterprise does not affect the jurisdiction of the Organization. . . ." Footnote 20 above, at p. 726.

Similarly, the adverse Report of the Foreign Commerce Department of the U.S. Chamber, footnote 27 above, makes no mention of any such discrimination. Yet this alleged but non-existent discrimination is sharply stressed by other critics: Kopper, footnote 26, above; Report of International Restrictive Business Practices Committee, footnote 27, above; statement by Gilbert A. Montague in the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), at p. 106.

31. Under American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), such a case would probably be thrown out of a U.S. antitrust court. Cf. also Parker v. Brown, 317 U.S. 341 (1943) (California raisin price stabilization program held no violation of the Sherman Act).
32. U.S. comment, footnote 10, above.
33. See the Ad Hoc Committee's Letter of Transmittal, footnote 16(b), above.
34. At the Preparatory Committee (for the Havana Charter), India, Cuba, Chile, and Brazil felt that services should be included in Chapter V. Brown, The United States and the Restoration of World Trade (Brookings, 1950), pp. 130-31.
35. See its statement in E/2612, May 28, 1954.
36. Defense Production Act of 1950, 50 U.S.C.A. § 2158.
37. Sweden, footnote 16(b) above, p. 191; Canada, footnote 16(b), above, pp. 50-51; France, footnote 16(c), above, pp. 12, 15-16. Three Canadian reports on this subject merit mention: Report of the Committee to Study Combines Legislation (MacQuarrie Report), Ottawa, March 8, 1952; Restrictive Trade Practices Commission, Report on an Inquiry Into Loss-Leader Selling, Ottawa, March 28, 1955; Material Collected by Director of Investigation and Research in connection with an inquiry into Loss-Leader Selling, Ottawa, 1954.
38. International & cartel students will be particularly interested in the reports on Matches and Match-Making Machinery (1953), Imported Timber (1953), and Semi-Manufactures of Copper and Copper-Based Alloys (1955). The Commission has recently issued a general report on Collective Discrimination (1955) which is concerned with exclusive dealing, collective boycotts and other disciminatory trade practices.
39. See "Toward Free Competition in Europe," Bulletin from the European Community for Coal and Steel, April, 1955, No. 6.
40. See footnote 16, above. For a summary review, see Timberg, "Restrictive Business Practices,' 2 Am. J. of Comp. Law 445 (1953).

40A. "While the constitutional texts and statutory provision of many other countries [than the United States and Canada] show on their face a similar hostility against monopolies, these have no history of practical enforcement." Timberg, supra, fn. 40, at p. 465.

41. "International Combines versus National Sovereigns," 95 Univ. of Penna. L. Rev. 575 (1947).
42. E.g., U.S. v. Asbestos Corp., Ltd., 34 F. 2d 182 (S.D.N.Y. 1929); U.S. v. De Beers Consolidated Mines, Ltd., 1948-49 Trade Cases, Par. 62, 248 (S.D.N.Y. 1948).
43. As witness the protests of N. V. Phillips Eindhoven and the Netherlands Government in the General Electric Lamp case, 82 F. Supp. 753 (D.N.J. 1949). All of General Electric's German, English, and other

foreign cartel associates, with the exception of Phillips, were immune from suit; Phillips had established a factory in the United States during World War II. The selective enforcement of the Sherman Act against foreign businesses that happen to get "caught within the jurisdiction' satisfies neither the U.S. defendants, nor the hapless foreign defendant, nor the antitrust enforcement authorities. See also U.S. v. Aluminum Company of America, 20 F. Supp. 13 (S.D.N.Y. 1937).

44. As witness the protests of various foreign governments in the currently pending Oil Cartel case. See also Hansard, "U.S. Antitrust Process Beyond Our Borders," Section on Antitrust Law, N.Y. State Bar Assn. Symposium (1954).
45. Business Records Protection Act, Chapter 44, Revised Statutes, 1950, Vol. I, pp. 409-10.
46. See British Nylon Spinners v. Imperial Chemical Industries, [1952] 2. All E. R. 780 (C.A.), [1953] 1 Ch. 19, where the British court refused to give effect to patent relief decreed by the Federal District Court in U.S. v. Imperial Chemical Industries, 105 F. Supp. 215 (S.D.N.Y. 1952); and the discussion of foreign trade and international law problems in Hansard, footnote 45 above; Haight, "International Law and Extraterritorial Application of the Antitrust Laws," 63 Yale L.J. 639 (1954); Whitney, "Sources of Conflict Between International Law and the Antitrust Laws,' 63 Yale L.J. 655 (1954); Carlston, "Antitrust Policy Abroad," 49 Northwestern Univ. L. Rev. 569, 573, 35 seq. (1955); Timberg, "Antitrust and Foreign Trade," 48 Northwestern Univ. L. Rev. 411 (1953).
47. See Lockwood & Schmeisser, "Restrictive Practices in International Trade," 11 Law & Contemp. Probs. 663 (1946); Hale and Hale, "Monopoly Abroad," 31 Texas L. Rev. 493 (1953).

DRAFT ARTICLES OF AGREEMENT PROPOSED BY THE AD HOC COMMITTEE ON RESTRICTIVE BUSINESS PRACTICES, UNITED NATIONS, MARCH 30, 1953

[ECOSOC Official Records, 16th Session, Supplement No. 11, p. 12]

Draft articles of agreement

PREAMBLE

For the purpose of realizing the aims set forth in the Charter of the United Nations, particularly the attainment of the higher standards of living, full employment and conditions of economic and social progress and development, envisaged in Article 55 of that Charter;

Recognizing the need for co-ordinated national and international action to attain the following objectives:

1. To promote the reduction of barriers to trade, governmental and private, and to promote on equitable terms access to markets, products, and productive facilities;

2. To encourage economic development, industrial and agricultural, particularly in under-developed areas;

3. To contribute to a balanced and expanding world economy through greater and more efficient production, increased income and greater consumption, and the elimination of discriminatory treatment in international trade;

4. To promote mutual understanding and co-operation in the solution of problems arising in the field of international trade in all its aspects;

Recognizing further that national and international action in the field of restrictive business practices can contribute substantially to the attainment of such over-all objectives;

Accordingly the parties to this Agreement agree as follows:

ARTICLE 1

General policy towards restrictive business practices

1. Each Member shall take appropriate measures and shall co-operate with other Members and the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expension of production or trade, in the light of the objectives set forth in the Preamble to this Agreement.

2. In order that the Organization may decide in a particular instance whether a practice has or is about to have the effect indicated in paragraph 1, the Members agree, without limiting paragraph 1, that complaints regarding any of the practices listed in paragraph 3 shall be subject to investigation in ac cordance with the procedure regarding complaints provided for in articles 3 and 5, whenever

(a) Such a complaint is presented to the Organization, and

(b) The practice is engaged in, or made effective, by one or more private or public commercial enterprises or by any combination, agreement or other arrangement between any such enterprises, and

(c) Such commercial enterprises, individually or collec tively, possess effective control of trade among a number of countries in one or more products.

3. The practices referred to in paragraph 2 are the fol lowing:

(a) Fixing prices, terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product;

(b) Excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocat ing customers, or fixing sales quotas or purchase quotas;

(c) Discriminating against particular enterprises;

(d) Limiting production or fixing production quotas;

(e) Preventing by agreement or coercion the development or application of technology or invention whether patended or

unpatented, or withholding the application of such technology with the result of monopolizing an industrial or commercial field;

(f) Extending the use of rights under patents, trade marks or copyrights granted by any Member to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions of production, use, or sale which are likewise not the subjects of such grants;

(g) Any similar practices which the Organization may declare, by a majority of two-thirds of the Members present and voting, to be restrictive business practices.

ARTICLE 2

Consultation procedure

Any affected Member which considers that in any particular instance a practice exists (whether engaged in by private or public commercial enterprises) which has or is about to have the effect indicated in paragraph 1 of article 1 may consult other Members directly or request the Organization to arrange for consultation with particular Members with a view to reaching mutually satisfactory conclusions. If requested by the Member and if it considers such action to be justified, the Organization shall arrange for and assist in such consultation. Action under this article shall be without prejudice to the procedure provided for in article 3.

ARTICLE 3

Investigation procedure

1. In accordance with paragraphs 2 and 3 of article 1, any affected Member on its own behalf or any Member on behalf of any affected person, enterprise or organization within that Member's jurisdiction, may present a written complaint to the Organization that in any particular instance a practice exists (whether engaged in by private or public commercial enterprises) which has or is about to have the effect indicated in paragraph 1 of article 1; provided that in the case of complaints against a public commercial enterprise acting independently of any other enterprise, such complaints may be presented only by a Member on its own behalf and only after the Member has resorted to the procedure of article 2.

unpatented, or withholding the application of such technology with the result of monopolizing an industrial or commercial field;

(f) Extending the use of rights under patents, trade marks or copyrights granted by any Member to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions of production, use, or sale which are likewise not the subjects of such grants;

(g) Any similar practices which the Organization may declare, by a majority of two-thirds of the Members present and voting, to be restrictive business practices.

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2. The Organization shall prescribe the minimum information to be included in complaints under this article. This information shall give substantial indication of the nature of the practices and the reasons for alleging the effects indicated in paragraph 1 of article 1.

3. The Organization shall consider each complaint presented in accordance with paragraph 1. If the Organization deems it appropriate, it shall request Members concerned to furnish supplementary information, for example, information from commercial enterprises within their jurisdiction. After reviewing the relevant information, the Organization shall decide whether an investigation is justified.

4. If the Organization is satisfied that the practice in question has been specifically required by governmental measures existing prior to the complaint, no further investigation under the provisions of this Article shall be undertaken; provided, however, that any practice found to exist in more than one country may be further investigated in the discretion of the Organization if such practice is not so specifically required in all countries in which it is found to exist. The Organization may, however, bring to the attention of Members or of any appropriate intergovernmental body or agency, with such observations as it may desire to make, aspects of governmental measures that specifically required restrictive business practices, or aspects of practices thus required, which may have the effect indicated in paragraph 1 of article 1.

5. If the Organization decides that an investigation is justified, it shall inform all Members of the complaint, request any Member to furnish such additional information relevant to the complaint as the Organization may deem necessary, and shall subsequently afford any Member, and any person, enterprise or organization on whose behalf the complaint has been made, as well as the commercial enterprises alleged to have engaged in the practice complained of, reasonable opportunity to be heard.

6. The Organization shall review all information available and decide whether the conditions specified in paragraphs 2 and 3 of article 1 are present and, if so, whether the practice in question has had, has or is about to have the effect indicated in paragraph 1 of that article.

7. The Organization shall inform all Members of its decision and the reasons therefor.

8. If the Organization decides that in any particular case the conditions specified in paragraphs 2 and 3 of article 1 are present and that the practice in question has had, has or is about to have the effect indicated in paragraph 1 of that article, it shall request each Member concerned to take very possible remedial action, and may also recommend to the Members concerned remedial measures to be carried out in accordance with their respective laws and procedures.

9. The Organization may request any Member concerned to report fully on the remedial action it has taken in any particular case.

10. As soon as possible after its proceedings in respect of any complaint under this article have been provisionally or finally closed, the Organization shall prepare and publish a report showing fully the decisions reached, the reasons therefor and any measures recommended to the Members concerned. The Organization shall not, if a Member so requests, disclose confidential information furnished by that Member, which if disclosed would substantially damage the legitimate business interests of a commercial enterprise.

11. The Organization shall report to all Members and make public the remedial action which has been taken by the Members concerned in any particular case.

ARTICLE 4

Studies relating to restrictive business practices

1. The Organization is authorized:

(a) To conduct and publish the results of studies, either on its own initiative or at the request of any Member or of any organ of the United Nations or of any other intergovernmental body or agency, relating to

(i) general aspects of restrictive business practices affecting international trade;

(ii) conventions, laws and procedures concerning, for example, incorporation, company registration, investments, securities, prices, markets, fair trade practices, trade marks, copyrights, patents and the exchange and development of technology in so far as they are relevant to restrictive business practices affecting international trade; and

(iii) the registration of restrictive business agreements and other arrangements affecting international trade; and

(b) To request information from Members in connection with such studies.

2. The Organization is authorized:

(a) To make recommendations to Members concerning such conventions, laws and procedures as are relevant to their obligations under this Agreement; and

(b) To arrange for conferences of Members to discuss any matters relating to restrictive business practices affecting international trade.

ARTICLE 5

Obligations of Members

1. Each Member shall take all possible measures by legislation or otherwise, in accordance with its constitution or system of law and economic organization, to ensure, within its jurisdiction, that private and public commercial enterprises do not engage in practices which are as specified in paragraphs 2 and 3 of article 1 and have the effect indicated in paragraph 1 of that article, and it shall assist the Organization in preventing these practices.

2. Each Member shall make adequate arrangements for presenting complaints, conducting investigations and preparing information and reports requested by the Organization.

3. Each Member shall furnish to the Organization, as promptly and as fully as possible, such information as is requested by the Organization for its consideration and investigation of complaints and for its conduct of studies under this Agreement; provided that any Member, on notification to the Organization, may withhold information which the Member considers is not essential to the Organization in conducting an adequate investigation and which, if disclosed, would substantially damage the legitimate business interests of a commercial enterprise. In notifying the Organization that it is withholding information pursuant to this clause, the Member shall indicate the general character of the information withheld and the reason why it considers it not essential.

4. Each Member shall take full acount of each request, decision and recommendation of the Organization under article 3 and, in accordance with its constitution or system of law and economic organization, take in the particular case the action it considers appropriate having regard to its obligations under this Agreement.

5. Each Member shall report fully any action taken, independently or in concert with other Members, to comply with the requests and carry out the recommendations of the Organization and, when no action has been taken, inform the Organization of the reasons therefor and discuss the matter further with the Organization if it so requests.

6. Each Member shall, at the request of the Organization, take part in consultations and conferences, provided for in this Agreement with a view to reaching mutually satisfactory conclusions.

7. Each Member shall inform the Organization of the results of consultations and conferences provided for in this Agreement in which such Member has participated.

8. Nothing in this Agreement shall be construed to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests.

ARTICLE 6

Co-operative remedial arrangements

1. Members may co-operate with each other for the purpose of making more effective within their respective jurisdictions any remedial measures taken in furtherance of the objectives of this Agreement and consistent with their obligations under other provisions of this Agreement.

2. Members shall keep the Organization informed of any decision to participate in any such co-operative action and of any measures taken.

ARTICLE 7

Domestic measures against restrictive business practices

No act or omission to act on the part of the Organization shall preclude any Member from enforcing any national statute

or decree directed towards preventing monopoly or restraint of trade.

ARTICLE 8

Special procedures in respect of services

1. The Members recognize that certain services, such as transportation, telecommunications, insurance and the commercial services of banks, are substantial elements of international trade and that any restrictive business practices by enterprises engaged in these activities in international trade may have harmful effects similar to those indicated in paragraph 1 of article 1. Such practices, when (a) they are engaged in or made effective by one or more private or public commercial enterprises or by any combination, agreement or other arrangement between any such enterprises and (b) such commercial enterprises individually or collectively possess effective control of trade in one or more services among a number of countries, shall be dealt with in accordance with the following paragraphs of this article.

2. If any Member considers that there exist restrictive business practices in relation to a service referred to in paragraph 1 which have or are about to have harmful effects similar to those indicated in paragraph 1, and that its interests are thereby adversely affected, the Member may submit a written statement explaining the situation to the Member or Members whose private or public enterprises are engaged in the services in question. The Member or Members concerned shall give sympathetic consideration to the statement and to such proposals as may be made and shall afford adequate opportunities for consultation, with a view to effecting a satisfactory adjustment.

3. If no adjustment can be effected in accordance with the provisions of paragraph 2, and if the matter is referred to the Organization, it shall be transferred to the intergovernmental body or agency, if one exists, empowered to deal with that type of problem with such observations as the Organization may wish to make. If no such intergovernmental body or agency exists, and if Members so request, the Organization may make recommendations for, and promote international agreement on, measures designed to remedy the particular situation so far as it comes within the scope of this Agreement. For the purpose

of framing such recommendations, the Organization may make such arrangements as it deems appropriate to obtain information from Members and, subject to the proviso of paragraph 3 of article 5 and to paragraph 8 of article 5, Members shall co-operate with the Organization accordingly, provided that due regard is had to their legal and constitutional systems.

ARTICLE 9

Other procedures

1. Where measures taken by a Member or an intergovernmental body or agency, or business practices required or approved by any such measure, relate to the work of the Organization, the Organization may bring the effect of these measures or practices on its work to the attention of the Member or intergovernmental body or agency, respectively, with such observations as it may desire to make.

2. The Organization shall make arrangements with other intergovernmental bodies or agencies to provide for effective co-operation with respect to restrictive business practices and the avoidance of unnecessary duplication of activities in connexion therewith. The Organization may for this purpose consult with such bodies or agencies, arrange for joint committees and reciprocal representation at meetings, and establish such other working relationships as may be appropriate.

3. For the purposes of this article, the words "intergovernmental bodies or agencies" shall be deemed to include entities which have responsibility in the field of restrictive business practices and which possess sovereign powers through a delegation of sovereignty by two or more States.

4. The Organization may make suitable arrangements for consultation and co-operation with non-governmental organizations concerned with matters within the scope of this Agreement.

ARTICLE 10

The Representative Body

1. The Representative Body shall consist of all Members of the agency. Each Member shall have one representative in the Representative Body and may appoint alternates and advisers to its representative.

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ARTICLE 10

The Representative Body

1. The Representative Body shall consist of all Members of the agency. Each Member shall have one representative in the Representative Body and may appoint alternates and advisers to its representative.

2. Each Member shall have one vote in the Representative Body.

3. Except as otherwise provided in this Agreement, decisions of the Representative Body shall be taken by a majority of the Members present and voting.

4. The Representative Body shall meet in regular sessions at intervals determined by it and in such special sessions as shall be convoked by the executive secretary upon request by the Executive Board or by one-third of the Members of the Representative Body.

5. The Representative Body shall establish its rules of procedure, and shall elect its chairman and other officers.

6. The powers and duties attributed to the agency by this Agreement and the final authority to determine the policies of the agency shall be vested in the Representative Body.

ARTICLE 11

Executive Board

1. There shall be an Executive Board.

2. Except in so far as the Representative Body may decide to reserve to itself specific functions or duties and the powers appropriate thereto, the Executive Board shall carry out the functions and duties of the Representative Body and exercise its powers; provided that the Executive Board may refer any question relating to the carrying out of such functions or duties to the Representative Body or may request the Representative Body to assume any such function or duty.

3. The size, composition and voting procedures of the Executive Board shall be determined by the Representative Body.

4. The members of the Executive Board shall be selected by the Representative Body.

5. In selecting the members of the Executive Board, the Representative Body shall have regard to the objectives of including Members from the different types of economies and degrees of economic development to be found among Members of the agency, from the broad geographical areas to which the Members belong, and from countries of chief economic importance, for which last criterion particular regard shall be paid to Members' shares in international trade.

6. In accord with policies and procedures established by the Representative Body, Members of the agency which are not members of the Executive Board may take part in the work of the Board when matters of direct concern to them are under consideration.

ARTICLE 12

Executive secretary

The chief administrative officer of the agency shall be the executive secretary.

ARTICLE 13

Advisory staff

1. The chief advisory officer of the agency shall be the director of the advisory staff. He shall be appointed by the Representative Body and be subject to its general supervision.

2. In accordance with any rules laid down by the Representative Body, the director shall select the advisory staff and any necessary consultants to it.

3. Members of the advisory staff shall be selected in the light of the following considerations:

(a) Knowledge and experience of the working and problems of different types of economy shall be available so as to secure, so far as possible, a proper balance of advice;

(b) Due regard shall be had to the desirability of drawing staff from different geographical areas;

(c) The paramount considerations in the selection of candidates shall be their competence, integrity, open-mindedness and impartiality as individuals.

4. The advisory staff shall exercise its functions in complete independence, in the general interest of all Members, and shall neither solicit nor accept instructions from any government.

ARTICLE 14

Functions of the executive secretary

Pursuant to policies and rules prescribed by the Representative Body, the executive secretary shall perform the following functions:

(a) Arranging for and assisting in consultations pursuant to the provisions of article 2;

(b) Examining complaints, checking that the minimum information prescribed in accordance with paragraph 2 or article 3 has been supplied, and, where appropriate, requesting Members to furnish supplementary information pursuant to the provisions of paragraph 3 of article 3;

(c) Preparing and transmitting to the Representative Body advice in the form of proposals as to (i) whether investigations are justified pursuant to the last sentence of paragraph 3 of article 3, and (ii) whether any designated sequence is appropriate for them in the programme of investigatory work; provided that, if no Member has within . . . days submitted observations on any such proposals to the Representative Body, the proposals shall be regarded as adopted as the decision of the Representative Body;

(d) Informing Members and requesting information pursuant to paragraph 5 of article 3, article 4 and paragraph 3 of article 8. In requesting information pursuant to this subsection the executive secretary shall consult the director of the advisory staff with reference to the types of information required;

(e) Making administrative arrangements for the advisory staff; provided, however, that the selection of members of the advisory staff shall be carried out in accordance with paragraphs 2 and 3 of article 13. It shall at all times be the duty of the executive secretary to facilitate the work of the advisory staff.

ARTICLE 15

Functions of the advisory staff

1. Pursuant to policies and rules prescribed by the Representative Body, the advisory staff shall (a) perform the functions

set out in the following paragraphs of this article and (b) advise the Representative Body, subject to any limitations established by that Body.

2. After the executive secretary has collected information relating to a complaint in pursuance of the relevant provisions of article 3, and has transmitted it to the director of the advisory staff, the director shall arrange for the analysis of the information and for the preparation of a report by the advisory staff.

3. The director of the advisory staff shall arrange for opportunities to be given in accordance with paragraph 5 of article 3, for any Member or any person, enterprise or organization on whose behalf the complaint has been made, or any commercial enterprise alleged to have engaged in the practice complained of, to be heard by the advisory staff; provided, however, that the Representative Body in its discretion may afford opportunities for such persons to be heard by it after it has received the report of the advisory staff.

4. The report of the advisory staff shall set out the facts established by the information aforesaid, together with such analysis of their effects and significance in relation to the objectives of the Agreement as may assist the Representative Body in carrying out the duties laid on it by the Agreement.

5. When, in accordance with paragraph 3 of article 8, the Representative Body shall have arranged for the collection of information from Members, all such information collected by the executive secretary shall be transmitted to the director of the advisory staff who shall arrange for its analysis and for the preparation of a report in accordance with paragraph 4 of this article.

6. Reports by the advisory staff shall be submitted to the Representative Body.

7. In response to any request transmitted by the executive secretary, the director of the advisory staff shall arrange for the conduct by the advisory staff of such studies as the Representative Body may decide upon pursuant to the provisions of article 4 and within terms of reference prescribed by it, and for the preparation of reports of such studies for consideration by the Representative Body.

8. It shall be the duty of the director of the advisory staff to give such advice and assistance as may be requested by the executive secretary in carrying out his functions and duties under article 14.

ARTICLE 16

Action of the Representative Body on complaints

1. The Representative Body, in carrying out the duties laid on it by this Agreement, shall take full acount of reports of the advisory staff.

2. At its discretion the Representative Body may refer reports back to the advisory staff with a request for any material in such report to be clarified or amplified or to be re-examined in the light of any observations transmitted by the Representative Body to the advisory staff.

ARTICLE 17

Content of reports

The Representative Body shall include in any report, prepared in accordance with paragraph 10 of article 3, the report of the advisory staff as submitted to it after any reference back in accordance with paragraph 2 of article 16.

ARTICLE 18

Entry into force

1. The government of each State accepting the Agreement shall deposit an instrument of acceptance with . . . , who will inform all governments that have deposited such instruments of the date of deposit of such instrument of acceptance and of the day on which the Agreement enters into force. After the entry into force of the Agreement, each instrument of acceptance so deposited shall take effect on the sixtieth day following the day on which it is deposited.

2. The Agreement shall enter into force on the sixtieth day following the day on which either of the following conditions is fulfilled:

(a) The number of governments which have deposted instruments of acceptance shall reach twenty or more and shall

cover 65 per cent or more of the total value of world imports and exports, as set forth in appendix A;

(b) The number of governments which have deposited instruments of acceptance shall have reached twenty or more and shall cover 65 per cent or more of the total value of world imports and exports as set forth in appendix A, and shall include six countries which individually have 3 per cent or more of such total value.

Governments which wish to deposit instruments of acceptance applicable only to sub-paragraph (b) of this paragraph may so elect.

3. If this Agreement shall not have entered into force by ..., the... shall invite those governments which have deposited instruments of acceptance to enter into consultation to determine whether and on what conditions they desire to bring this Agreement into force.

ARTICLE 19

Amendment, withdrawal and termination

1. Any amendment to this Agreement which does not alter the obligations of Members shall become effective upon approval by the Representative Body by a two-thirds majority of its Members.

2. Any amendment which alters the obligation of Members shall, after receiving the approval of the Representative Body by a two-thirds majority of its Members, become effective for the Members accepting the amendment upon the... day after two-thirds of the Members have given notification of their acceptance, and thereafter for each remaining Member upon acceptance by it.

3. In determining whether a proposed amendment shall be considered under paragraph 1 or paragraph 2 above, it shall require a two-thirds majority of the Members present and voting of the Representative Body to establish that a proposed amendment does not alter the obligations of Members and therefore should be considered under paragraph 1. Amendments which are not so established shall be regarded as altering the obligations of Members and shall be dealt with in accordance with paragraph 2.

4. Any Member may withdraw from the agency at any time after . . . from the day of the entry into force of this Agreement. A withdrawal shall become effective upon the expiration of six months from the day on which written notice of such withdrawal is received by the executive secretary.

5. This Agreement may be terminated at any time by agreement of three-fourths of the Members.

ARTICLE 20

Interpretation and definition

For the purpose of this Agreement:

(a) The term "business practice" shall not be so construed as to include an individual contract between two parties as seller and buyer, lessor and lessee, or principal and agent, provided that such contract is not used to restrain competition, limit access to markets or foster monopolistic control;

(b) The term "public commercial enterprises" means

(i) agencies of governments in so far as they are engaged in trade and

(ii) trading enterprises mainly or wholly owned by public authority, provided the Member concerned declares that for the purposes of this Agreement it has effective control over or assumes responsibility for the enterprises;

(c) The term "private commercial enterprise" means all commercial enterprises other than public commercial enterprises;

(d) The terms "decide" and "decision" as used in articles 1, 3 (except in paragraphs 3 and 5) and 5 do not determine the obligations of Members, but mean only that the Organization reaches a conclusion.

INTERPRETATIVE NOTE TO ARTICLE 8

The provisions of this article shall not apply to matters relating to shipping services which are subject to the Convention of the Intergovernmental Maritime Consultative Organization.

THE PROPOSED UN PROGRAM ON RESTRICTIVE BUSINESS PRACTICES

Gilbert H. Montague,*of the New York Bar

I

Limitations on what the UN can do successfully frequently raise problems in the drafting of international conventions in the economic, social, and human rights fields.[1]

One problem of special concern to the United States is the fact that international conventions or proposed conventions often deal with matters primarily within the jurisdiction of the forty-eight States of our federal union. Secretary Dulles has made clear that our Government will not sign or ratify a treaty that has the effect of imposing domestic reforms in the economic and social fields in this country and that for this reason the United States will not become a party to the Draft Covenants on Human Rights and to the Convention on Political Rights of Women. Similar problems arise for other Member Nations in the UN, such as Australia and Canada, which are also Federal States.

Another and broader problem in this field is the difficulty of concluding satisfactory treaties where there is no real agreement among UN Member Nations. This as I shall soon explain is the defect which just recently in May 1955 prompted the Economic and Social Council to resolve without a dissenting vote to postpone for an indefinite period any action upon the proposed UN Program on restrictive business practices, unless and until the Secretary-General shall suggest further consideration of the matter at a later Session of the Council. Another example is the Draft Convention on Freedom of Information, which has been under consideration in various UN bodies for a number of years, and which is currently being discussed in the Economic and Social Council. In this case, there is a wide range of interpretation of the whole concept of freedom of information, with the United States at one extreme and the Soviet Union at the other. Our Government has long taken the position

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that a convention under present circumstances would restrict rather than promote freedom of information.

These and other inherent difficulties are preventing the United States from approving UN proposals such as the Genocide Convention, the Bill of Rights Covenant, the Commission on International Commodity Trade, the Special UN Fund for Economic Development ("SUNFED"), and various conventions proposed by the International Labor Organization. A related problem is the attempt on occasion to conclude an international instrument of some kind in fields where non-governmental organizations should more appropriately assume responsibility. For some time the General Assembly considered the development of an international code of ethics for use of information personnel. United States Delegations repeatedly argued against the desirability of doing so. It was the view of our Government that the development of a code of ethics was not an appropriate subject for the General Assembly, and that this was a subject for information personnel to develop for itself. There was, however, considerable sentiment at several Sessions of the General Assembly favoring the convening of an international conference by the UN to draft a text of such an international code of ethics. Information enterprises and national and international associations consulted did not in general favor such UN action. At its 1954 Session the General Assembly finally agreed with the United States that the UN should not convene such a conference.

II

Limitations on what the UN can do successfully are well illustrated by the recently proposed UN Program on restrictive business practices, on which the Economic and Social Council in May 1955 resolved without a dissenting vote to postpone any action for an indefinite period, unless and until the Secretary-General shall suggest further consideration of the matter at a later Session of the Council.[2] The prime purpose of this Program was to stimulate all Member Nations participating in the Program to adopt more drastic, comprehensive, and vigilant laws and procedures against restrictive business practices. This purpose was wholly thwarted, however, by the remedial procedure prescribed by the Program.

The utmost diversity prevails among nations regarding their laws and procedures against restrictive business practices.[3] Any participating Member Nation, however, even though

it has few or no laws and procedures against restrictive business practices within its own jurisdiction, could have invoked against any other Member Nation the remedial procedure provided in the Program proposed to the Economic and Social Council in the Report of its Ad Hoc Committee; and the remedial procedure could require such other Member Nation to take action regarding any restrictive business practice within its jurisdiction, to the full extent of its laws and procedures.

Note here the two catches in the remedial procedure, and the two advantages which the remedial procedure gave to the Member Nation that has few or no laws and procedures against restrictive business practices. A Member Nation that has few or no laws and procedures against restrictive business practices could invoke the remedial procedure against any other Member Nation that has drastic, comprehensive, and vigilant laws and procedures, and the remedial procedure could require such other Member Nation to take action regarding any business practice within its jurisdiction to the full extent of such other Member Nation's drastic, comprehensive, and vigilant laws and procedures. But when the Member Nation that has drastic, comprehensive, and vigilant laws and procedures turns about, and tries to reverse the situation, and invokes the remedial procedure against the Member Nation which has few or no laws and procedures, the remedial procedure could not require the Member Nation that has few or no laws and procedures to take any action beyond the extent of its laws and procedures, which is practically nil.

To a Member Nation that has few or no laws and procedures against restrictive business practices, therefore, the UN Program offered no inducement to adopt any drastic, comprehensive, and vigilant laws and procedures, for it already had the same right that every Member Nation had to invoke the remedial procedure, and that right being already complete could not be increased, while the exemption that it enjoys as a Member Nation that has few or no laws and procedures would be diminished by exactly the extent to which such Member Nation changed its course and adopted drastic, comprehensive, and vigilant laws and procedures against restrictive business practices.

Thus the remedial procedure completely thwarted the purpose of the proposed UN Program. The United States had the most drastic, comprehensive and vigilant laws in the world against restrictive business practices.[4] All other Member Nations have less drastic, comprehensive and vigilant laws, and

some have only rudimentary, nominal, and non enforced laws, and some have none at all.[5] It staggers the imagination to conceive the extent to which other Member Nations, especially those having only rudimentary, nominal, and non-enforced laws, could exploit the remedial procedure of the UN Program against the United States and the United States nationals.[6]

The trade of the United States and United States nationals is carried on wholly through what the UN Program called "private commercial enterprises." The trade of many other Member Nations and their nationals is carried on by governmental monopolies and nationalized businesses which the proposed UN Program called "public commercial enterprises." The remedial procedure of the UN Program gave many more favors to "public commercial enterprises" than it gave to "private commercial enterprises." The remedial procedure in the UN Program was fundamentally discriminatory against the United States and United States nationals and in favor of the governmental monopolies and the nationalized businesses of every other Member Nation.

III

Every nation, as has been stated, differs from every other nation regarding the text and the interpretation of its laws and procedures regarding restrictive business practices.[7] So deeply rooted are these differences in every nation's economy, jurisprudence, and national life that every nation, as a prime essential of its sovereignty, tenaciously holds and stalwartly maintains all the peculiarities of its own laws and procedures on this subject.[8] It is a prime requirement of the comity of nations, therefore, that all nations shall respect one another's differences in their laws and procedures regarding restrictive business practices.[9]

Since the proposed UN Program could not possibly hope to set up an agreed single standard of laws and procedures on restrictive business practices, it was plain that the furthest that the Program could go was to require that every participating Member Nation should take action against any restrictive business practice within its jurisdiction only to the full extent of such Member Nation's own laws and procedures. It was also plain that as each nation is an independent sovereign, all decisions under the Program would have to be arrived at on a one-nation-one-vote basis, and all decisions so arrived at would have to be final and unappealable. This is exactly what

the Program provided. Any such Program inevitably would be non-judicial, political, partisan, and heavily discriminatory and weighted against the United States and United States nationals.[10]

Each of these inevitable defects was greatly aggravated, however, because the Program went further, and on the pretense of attaining a semblance of unity, on a subject in which the widest differences are inescapable, the Program picked up from loose generalizations scattered throughout the Preamble and Articles of the UN Charter a melange of "objectives," and wrote these into the Program as criteria for deciding what business practices would be held to be restrictive under the Program; under the Program these decisions would have had to be arrived at on a one-nation-one-vote basis, and all decisions so arrived at would have to be final and unappealable. How hopelessly loose, indefinite, and vague were the criteria for deciding what business practices would be held to be restrictive under the Program can be shown by quoting from the Program.

IV

Any Member Nation participating in the Program could file a complaint against the United States simply charging that a United States national is engaged in a business practice which such Member Nation alleges is harmful in that it hinders or retards one or more of such Member Nation's nationals in attaining any of the following "objectives," viz.:

"reduction of barriers to trade"
"access to markets"
"access to . . . products"
"access to . . . productive facilities"
"economic development, industrial . . . , particularly in underdeveloped areas"
"economic development, . . . agricultural, particularly in underdeveloped areas"
"greater . . . production"
"more efficient production"
"increased income"
"greater consumption"
"the elimination of discriminatory treatment in international trade"
"a balanced . . . world economy"
"[n] . . . expanding world economy"

"mutual understanding . . . in the solution of problems arising in the field of international trade in all its aspects"
"mutual . . . co-operation in the solution of problems arising in the field of international trade in all its aspects" (See Ad Hoc Com. Rep., Draft Articles of Agreement, Preamble)
"expansion of production"
"expansion of . . . trade" (See Ibid., Art. 1, par. 1, see also Ad Hoc Com. Rep., par. 16)
"employment" (See Ad Hoc Com. Rep., par. 15)
"higher standards of living"
"full employment'
"conditions of economic . . . progress"
"conditions of economic . . . development"
"conditions of . . . social progress"
"conditions of . . . social . . . development" (See Ad Hoc Com. Rep., par. 16)

Conversely, in the case of a complaint against any Member Nation other than the United States, each of these "objectives" would afford to such Member Nation and its nationals, a complete escape for any business practice which the organization administering the Program might decide was a practice that was conducive to that particular "objective." The reason why the United States and its nationals are the only Member Nation and nationals that cannot avail themselves of this escape is because the Program obligates all United States nationals to comply with all United States antitrust laws and procedures (see Chapter II above); and numerous decisions of the Supreme Court of the United States have established that no "objective" of this character can be a defense against any of the United States antitrust laws. The provisions of the Program with respect to these "objectives" are grammatically loose and obscure, but the interpretations placed on them throughout this address are amply supported by the interpretations of these provisions contained in the Report of the Ad Hoc Committee.

Since the organization that would administer the Program would be the Representative Body comprising all the Member Nations participating in the Program, or an Executive Board elected by the Representative Body, the Representative Body or the Executive Board would make all decisions as to whether the United States national is or is not engaged in a restrictive business practice forbidden by the Program, and as to how the provisions of the Program shall be interpreted and enforced.

Since their decisions would be unappealable and final and binding upon the United States and United States nationals, it follows that the UN Program would mean only what the Representative Body or the Executive Board decided it meant regardless of any express language to the contrary in the Program; for the United States would have only one vote in the Executive Board (if the United States were elected to the Executive Board by the Representative Body) as against all the other Member Nations comprising the Executive Board, and the United States would have only one vote in the Representative Body, as against the seventy-five votes of the other Member Nations which may participate in the UN Program. It is easy to see, therefore, how readily a complaint against the United States, charging that a United States national is engaging in a restrictive business practice as defined by the proposed UN Program, could be exploited against the United States and United States nationals.11

V

All nations, even those having undeveloped economies, try in their respective governments to insure that all questions regarding business transactions and practices shall be decided by an adjudicating procedure that in theory at least shall be judicial, impartial, non-partisan, and non-political. This universal pattern of adjudicating procedure for deciding questions arising from business transactions and practices is rejected in the adjudicating procedure of the proposed UN Program. The persons who will represent their respective Member Nations in the Representative Body and its Executive Board will in most if not all instances be the same persons who will represent their respective Member Nations in the UN General Assembly. The same partisan, political, and non-judicial viewpoint that justifiably characterizes the attitude of such persons as representatives of their respective Member Nations in the UN General Assembly cannot fail to characterize their attitude as the representatives of their respective Member Nations in the Representative Body and the Executive Board in deciding complaints under the proposed program. How very differently the UN proceeds when it wishes to insure a judicial, impartial, non-partisan and non-political adjudicating tribunal is shown by the strict requirements prescribed by the provisions of the UN Charter regarding its principal judicial organ, which is the International Court of Justice (see Statute of the International Court of Justice, Arts. 1, 3, 4, 6, 16, 17, 20, 31).

The pattern of the adjudicating procedure in the proposed UN Program can be pictured by the following example. Under present United States laws the final adjudicating authority regarding all cases charging a violation of the antitrust laws is the Supreme Court of the United States, which can review decisions of the United States Courts of Appeals, the United States District Courts, and the Federal Trade Commission, all of which are in all respects subject to all the constitutional safeguards in the Constitution of the United States. Imagine now that the Constitution of the United States is abolished, and that the Supreme Court of the United States, the United States Courts of Appeals, the United States District Courts, and the Federal Trade Commission are also abolished. Imagine also that all powers and duties of all branches of the United States Government, legislative, executive, and judicial, are all vested in a Representative Body, comprising forty-eight representatives, one from each of the forty-eight States of the United States, each of whom is selected to be the partisan, political, and non-judicial spokesman for the State he represents. This Representative Body will have final authority to determine all cases charging a violation of the antitrust laws, all decisions of the Representative Body shall be final and unappealable and binding upon everybody. Therefore, all laws shall mean only what the Representative Body decides they mean, regardless of any express language to the contrary in those laws. Then there will be an Executive Board, comprising say eighteen representatives, each of whom is a partisan, political, and non-judicial spokesman selected by the forty-eight partisan, political, and non-judicial representatives in the Representative Body for the express "objectives" of being the spokesman for one of the "different types of economies and degrees of economic development" and "broad geographical areas" of the forty-eight States of the United States. Imagine also that all powers and duties of the Representative Body, to the extent that the Representative Body does not reserve them to itself, may be exercised by an Executive Board.

This pictures the pattern of the adjudicating procedure of the proposed UN Program regarding restrictive business practices.[12]

VI

This partisan, political, and non-judicial adjudicating procedure, and this unappealable, final, and binding character of all the decisions adopted by the one-nation-one-vote procedure of

the Representative Body that comprises all the Member Nations participating in the Program, and this one-nation-one-vote procedure of the Executive Board elected by the Representative Body, are not corrected by providing that "an adequately staffed executive secretariat . . . would examine complaints, screen out those which did not have an adequate basis," and that "the preparation of the reports" on the complaints would be "the special responsibility of an advisory staff of independent experts, selected for their competence, integrity, open-mindedness and impartiality as individuals." All these assurances regarding "competence, integrity, openmindedness and impartiality" are nullified by the provisions of the Proposed UN Program which vest "final authority" in the Representative Body and the Executive Board to overrule any action by the secretariat or any report of the Advisory Staff (Ad Hoc Com. Rep., Draft Articles of Agreement, Arts. 10 and 11), and which expressly require the Advisory Staff in all its "functions" to conform strictly "to policies and rules prescribed by the Representative Body" and "to any limitations established by that Body" (Ibid. Art. 15).

The Advisory Staff would be helpless, therefore, to "exercise its functions in complete independence," and would always be a vassal of the Representative Body and the Executive Board. A vassal and helpless Advisory Staff, which can always be overruled by the Representative Body and the Executive Board, and is always governed by these masters, cannot possibly infuse any judicial, impartial, non-partisan, and non-political character into the Representative Body and the Executive Board, which inevitably will be partisan, political, non-judicial, and heavily weighted against the United States and United States nationals.

VII

Can it be that there are ulterior purposes behind the vast, multi-national, bureaucratic apparatus proposed in this UN Program? Throughout the Program, the terms "decide" and "decision" are used to describe the action which the organization administering the Program would take in respect of complaints under the Program. But in the very last sentence of the very last Article in the Draft Articles of Agreement proposed by the Program, it is stated that "the terms 'decide' and 'decision' as used in Articles 1, 3 (except in paragraphs 3 and 5), and 5 do not determine the obligations of Members, but mean

only that the Organization reaches a conclusion." (Ad Hoc Com. Rep., Draft Articles of Agreement, Art. 20, par. (d))

The inevitable consequences of using these terms "decide" and "decision" would be three-fold, viz.:

(1) It would enable the organization administering the Program to publicize its "decisions" throughout the world as "decisions" that were "decided" by a duly authorized organization of UN, thus stigmatizing throughout the world the Member Nation and its nationals complained of, as having been "decided" to be guilty of restrictive business practices by a "decision" of a duly authorized organization of UN.

(2) This world-wide calumny and stigma resulting from publicizing these "decisions" would affront every Member Nation whose laws and procedures regarding restrictive business practices do not conform to the "decision" of the organization administering the Program, and would violate the comity of nations, and the respect that every nation owes to every other nation as regards its own laws and procedures regarding all business practices that are within its own jurisdiction.

(3) This affront would be all the more outrageous because every Member Nation participating in the Program does so in reliance upon the representation expressly stated in the Program that the Program obligates no Member Nation to go beyond its own laws and procedures to prevent restrictive business practices within its own jurisdiction, see Chapters II and III above.

VIII

The argument that "economic activities which are internationally integrated cannot be effectively regulated by a legal system which has attained only nationwide integration" is conclusively answered by scores of successful and effective decrees which the Attorney General has obtained in prosecutions under the Sherman Act against scores of "internationally integrated" cartels. (Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955, Washington, D.C., 105-106.) The argument that the proposed UN Program would break down the foreign legal barriers which in a very small percentage of cases may have presented occasional difficulties in Sherman Act prosecutions of "internationally integrated" cartels is conclusively refuted by the express language of the proposed UN Program, which obligates no participating Member Nation to go beyond its own existing laws and

procedures to prevent restrictive business practices within its own jurisdiction (Ad Hoc Com. Rep., Draft Articles of Agreement, Art 5, par. 1; Ibid., Art 3, par. 8; Ibid., Art. 5, par. 4; Ibid., Art. 8, par. 3; see also Ad Hoc Com. Rep. par. 16), (see Chapters II and III above).

It is notewothy that during the many months while the proposed UN Program was being considered by the Attorney General's National Committee to Study the Antitrust Laws, before that Committee finally dropped this item from its agenda, neither the Attorney General nor any official in the Antitrust Division of the Department of Justice suggested to the Attorney General's National Committee that the proposed UN Program would be necessary or useful in coping with "internationally integrated" cartels. (Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955, Washington, D. C., pp. 105-106.) Still more extraordinary are the following arguments that have been advanced in support of the proposed UN Program:

> "The U.S. businessmen engaged in foreign trade is caught 'between the jaws' of stringent U.S. antitrust requirements, and counter-vailing foreign pressures and customs of a restrictionist character. In such a case the question to consider is whether both public and private interests might not well be the gainers from the establishment of an international forum which would permit all relevant economic facts and legal considerations to be objectively analyzed, in the framework of an approved minimum standard of antitrust performance. It is in this light that the Draft Convention proposed by the Ad Hoc Committee on Restrictive Business Practices should be viewed."

Nothing in the proposed UN Program can possibly save "the U.S. businessman engaged in foreign trade" from "the jaws of stringent U.S. antitrust requirements," see Chapters II - VII above. The Draft Articles of Agreement in the Ad Hoc Committee Report expressly provide that each Member Nation shall deal with restrictive business practices within its jurisdication only "in accordance with its constitution or system of law and economic organization" (Draft Articles of Agreement, Art. 5, par. 1; see also Ibid., Art. 3, par. 8 "in accordance with their respective laws and procedures," also Ibid., Art. 5, par. 4 "in accordance with its constitution or system of law and economic organization," also Ibid., Art. 8, par. 3 "provided

that due regard is had to their legal and constitutional systems," see also Ad Hoc Com. Rep., par. 16). If the "stringent U.S. antitrust requirements" do not "permit all relevant economic facts and legal considerations to be objectively analyzed" (see Chapter IV above), what possible avail can it be to "the U.S. businessman engaged in foreign trade" that "all relevant economic facts and legal considerations [can] be objectively analyzed" in the additional, collateral, and superimposed procedure of the vast, multi-national, bureaucratic apparatus that is built into the proposed UN Program? "The U.S. businessman engaged in foreign trade" is certainly doomed to painful disappointment, if he is induced to view the proposed UN Program in "this light" in which its sponsors have presented it.

IX

This proposed UN Program regarding restrictive business practices was officially disapproved by the United States Representative to the UN in his official statement addressed to the Secretary-General in March, 1955 as follows:[13]

> "The United States Government has given careful and extensive consideration to the proposals of the Ad Hoc Committee on Restrictive Business Practices.
>
> In doing so, it has evaluated the Committee's proposals in the light of whether they would be effective in eliminating restrictive business practices which interfere with international trade.
>
> It has noted the substantial differences which presently exist in national policies and practices in this field and it has been drawn to the conclusion that these differences are of such magnitude that the proposed international agreement would be neither satisfactory nor effective in accomplishing this purpose.
>
> In order to recommend action against cartel practices, the proposed international body would be required not only to find that such practices exist but that they have harmful effects on production or trade in the light of very general criteria.
>
> This latter determination would be extremely difficult for a body of governmental representatives to make in the light of the substantial divergences in approach previously referred to, and, in the

opinion of the United States Government, would likely result in the condoning of restrictive practices or in no agreement by the international body on the disposition of complaints brought before it.

In addition, since action under the proposed agreement would be primarily a matter of enforcement procedures under national laws, the present stage of development of national legislation offers little hope that recommendations of the international body could be effectively carried out.

While encouraged by the progress which has been made in recent years in this field, the United States does not feel that the point has been reached at which a broad international arrangement of the type proposed by the Committee could be successfully implemented.

The elimination of harmful restraints on international trade and the furthering of the development of free competitive enterprise continue to be basic objectives of this country's economic policy. In the present circumstances, however, the endeavour to effectuate a plan of international co-operation along the lines envisaged by the current proposals might well prejudice rather than promote the attainment of these objectives.

It is therefore the opinion of the United States Government that present emphasis should be given not to international organizational machinery but rather to the more fundamental need of further developing effective national programmes to deal with restrictive business practices, and of achieving a greater degree of comparability in the policies and practices of all nations in their approach to the subject."

During the debate of the Economic and Social Council on this proposed UN Program in the May 1955 Session of the Council the United States position was further elucidated by the United States Representative to the Council as follows:[14]

"The success of an undertaking of this kind depends fundamentally upon the extent to which we are all guided by a common economic philosophy. Similarly, that common economic philosophy must be

implemented by comparable legislation and enforcement.

During recent years commendable progress has been made by a number of nations in developing effective programs in this field.

However, it is the opinion of my Government that the essential degree of comparability in national approach, legislation and enforcement procedures has not at the present time been achieved.

Indeed, the diversity which exists in national practice is clearly reflected in the report prepared by the Secretariat in 1953.

Under the present circumstances my Government believes that to attempt to formulate and carry out a plan of international co-operation along the lines envisaged by the current proposals might well prejudice rather than promote the attainment of the desired objectives.

In this connection I should like to refer specifically to one of the fundamental difficulties presented by the suggested Agreement under consideration.

The basic purpose of the Agreement as set forth in Article 1 would be that measures should be taken to prevent restrictive business practices affecting international trade 'which restrain competition, limit access to markets, or further monopolistic control whenever such practices have harmful effects on the expansion of production and trade.' Hence the test would be not whether a practice restricts competition. Rather the standard would be whether the restriction of competition is harmful. Moreover, the draft Agreement does not provide adequate guidance as to the criteria for determining whether restrictive business practices are harmful or not.

My Government believes that a great deal of basic difficulty lies hidden in this word 'harmful'. There is no consensus among nations at the present time as to its interpretation and meaning. So far as we can see, the test of harmfulness contained in the proposals of the Committee could range as a matter of interpretation all the way from an approximation of the United States viewpoint to a general acceptance of restraints on competition as beneficial to

trade. Given the wide differences of views among countries, it is therefore uncertain what would or could be done under this agreement. It is obvious that there would be uncertainty and misunderstanding. I am emphasizing this point because I want to make it clear that the basic problem is not the wording of the proposed agreement or differences in economic and legal phraseology among countries. It is rather that a sufficient degree of agreement on fundamentals does not now exist.

As time goes on we sincerely hope there will be progress in this field. Indeed, the modern industrial world is still in its infancy. Recognition of the scope of restrictive business practices and the study of their implications is comparatively recent. The establishment of governmental programs to deal with them is relatively new. Few countries have had much experience with such programs to curb restrictive practices, and many nations have not yet made a beginning. Nevertheless, a great deal of progress has been made during the past decade. This progress is encouraging—and it is continuing. Many countries are now engaged in considering their domestic policies, and in developing leglislation and administrative technique for dealing with problems of this kind. From this progress, which inevitably draws on the exchange of ideas among countries, it seems reasonable to expect that we shall gradually achieve a more common approach to this problem.

In the meantime, the United States, though not supporting a proposal for an international organization as recommended by the Committee, will continue to cooperate with other governments in dealing with restrictive business practices. With growing awareness of the problem, much can be done through normal diplomatic channels and through technical assistance.

In conclusion the United States does not believe that a proposal of the nature set forth in the report of the Ad Hoc Committee should be adopted."

X

These official statements by the United States Representative to UN and the United States Representative to the Economic and Social Council, which show so clearly some of the limitations on what UN can do successfully, are well reflected in the resolution which the Council adopted on May 26, 1955 without a dissenting vote, in which the Council "taking into account the fact that international action in this field would not be effective without sufficient support by Member Nations" postponed for an indefinite period any action on the proposed UN Program on restrictive business practices, unless and until the Secretary-General should suggest further consideration of the matter at a later Session of the Council. The resolution states:[15]

"The Economic and Social Council,

"Having considered the reports prepared by the Secretary-General and the Ad Hoc Committee on Restrictive Business Practices, and the comments transmitted by Governments, specialized agencies, inter-governmental organizations and non-governmental organizations pursuant to Council resolutions 375 (XIII) and 487 (XVI),

"Noting with satisfaction that these reports indicate that a number of Governments have undertaken new measures, or strengthened existing measures, to prevent or control restrictive business practices or their harmful effects; and that there is a growing awareness of the fact that, even though the precise form or effect of restrictive business practices differs throughout the world, these practices may have harmful effects upon economic development, employment and international trade,

"Recognizing that national action and international co-operation are needed in order to deal effectively with restrictive business practices affecting international trade, but taking into account the fact that international action in this field would not be effective without sufficient support by Member States,

"1. Reaffirms its continuing concern with the existence in international trade of restrictive business practices which have harmful effects on the attainment of higher standards of living, full employment

and conditions of economic and social progress and development;

"2. Urges Governments to continue the examination of restrictive business practices with a view to the adoption of laws, measures and policies which will counteract such effects;

"3. Recommends to Member States to continue to communicate to the Secretary-General information concerning laws, measures and policies adopted by them in respect to such restrictive business practices;

"4. Requests the Secretary-General:

"(a) To circulate to Member States any further information received from Governments;

"(b) To circulate to Member States the views of appropriate intergovernmental bodies and agencies in respect of this question;

"(c) To assist in making such arrangements - at the request of interested Governments - as may be appropriate to enable them to avail themselves of any opportunities to share the experience gained in countries having an established body of law and practices in this field;

"(d) To suggest further consideration of the matter at a later session of the Council; and for this purpose, to continue to summarize information concerning restrictive practices in international trade and to prepare a bibliography on the nature of restrictive business practices and of their effect on economic development, employment and international trade."[16]

XI

Is it fair to say that the UN Program proposed by the Ad Hoc Committee on restrictive business practices was rejected because the Truman Administration was succeeded in 1953 by the Eisenhower Administration? It will be hard to convince the country that the Eisenhower Administration is disloyal to UN, and that it favors restrictive business practices in international

trade. Is it not fairer to face up to the following facts: Every nation, as has been stated, differs from every other nation regarding the text and interpretation of its laws and procedures regarding restrictive business practices (see Chapters II - III and VII - VIII above, and Footnotes 2 - 10 following this article). This is plainly apparent from the laws and court decisions of the United States and foreign nations and compiled in the Ad Hoc Committee Report and the 427 pp. accompaniments prepared by the Committee's Secretary (see Footnote 2 following this article). The fact was emphasized by the United States Representative to the Economic and Social Council in the May 1955 session of the Council (see Chapter IX above). This fact is so uncontradicted and irrefutable that it is wholly unrealistic for the Ad Hoc Committee and the sponsors of the proposed UN Program to indulge in misleading statements and exaggerations regarding the degree in which the American concept of competition and antitrust enforcement is being accepted by other nations (see comments by the United States Representative to UN and the United States Representative to the Economic and Social Council in Chapter IX above).

Many times throughout 1953-1955 this proposed UN Program has been earnestly and hopefully studied by many well-qualified businessmen and lawyers, who have regretfully been forced to the conclusion that they must register their disapproval; and their disapproval has now been emphatically endorsed by a long succession of business and legal organizations, including the National Foreign Trade Council, the American Bar Association, the Chamber of Commerce of the United States, and the International Chamber of Commerce (see Footnote 18). The reasons why this proposed UN Program was rejected were stated by the United States Representative to UN in March, 1955 (see Chapter IX above), and by the United States Representative to the Economic and Social Council in May 1955 (see Chapter IX above), and were stated in the Resolution adopted without a dissenting vote by the Economic and Social Council on May 26, 1955 (see Chapter X above). These reasons were not trival (see Chapter I - X above). Many times throughout 1953-1955 the reasons were publicly stated, without refutation from any member of the Ad Hoc Committee Report (see Footnote 18 in footnotes following this article).

Whenever a plan can be proposed that will be truly practicable for correcting restrictive business practices in international trade there will be no lack of American support for it.

Many times in recent years the State Department has shown the way to a highly practicable plan for correcting restrictive business practices in international trade by the short and simple method of inserting a brief and appropriate paragraph in a succession of bilateral treaties (see Footnote 14). The preliminary steps that must first be taken before any multi-national plan can become practicable have already been outlined at length by the United States Representative to UN and the United States Representative to the Economic and Social Council, and were reiterated in the Resolution adopted without a dissenting vote by the Economic and Social Council on May 26, 1955 (see Chapters IX and X above).

Instead of impugning the motives of these responsible officials in the UN and in the United States Delegation, is it not better to implement the constructive and common sense suggestions which these officials have outlined? Instead of sulking because these officials have rejected the multi-national proposed UN Program as being impracticable, is it not better to make progress in the direction now being followed by the United States State Department? Is it not better to support wholeheartedly the highly practicable plan of correcting restrictive business practices in international trade by the short and simple method of inserting a brief and appropriate paragraph in a succession of bilateral treaties (see Footnote 14 in Footnotes following this article)?

FOOTNOTES

1. Unlike the Federal and State Constitutions in the United States, the UN Charter is lacking in unequivocal provisions defining what cannot be done under it. Throughout the UN Charter, its "aims," "principles," and "purposes" are stated in such broad and sweeping generalizations (see for example the Preamble and Art. 1 and Art. 55) that they afford little if any guidance on this point. Art. 2 of UN Charter provides that excepting enforcement measures under Chapter VII, "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter. ..." (emphasis supplied). But this has not deterred the UN Commission on the Racial Situation in the Union of South Africa from stating in its recent Report A/2505, 13 October 1953; "A general study of the provisions relating to the purposes and principles of the Charter and the powers and limitations of principal organs of the United Nations in carrying them out leaves no room for doubt that, under the Charter, the Assembly is empowered to undertake any investigations and make any recommendations to Member States that it deems desirable concerning the application and enforcement of the purposes and principles of the Charter. ..." As the provisions of the UN Charter are so indefinite in defining the limitations on what can be done under it, it seems elementary prudence for the UN to avoid attempting to do what it cannot do successfully.
2. Report of the Ad Hoc Committee on Restrictive Business Practices to the Economic and Social Council (62 pp. typewritten and mimeographed), E/2380, E/AC.37/3, 30 March 1953. Accompanying the Ad Hoc Committee report were the following 427 pp. accompaniments, which were prepared by Sigmund Timberg, Secretary of the Ad Hoc Committee, viz.: Analysis of Governmental Measures Relating to Restrictive Business Practices (135 pp. typewritten and mimeographed), E/2379, E/AC. 37/2, 30 March 1953; and Annex A—List of Documentation on Restrictive Business Practices Received from Governments (10 pp. typewritten and mimeographed), E/2379 Add. 1, E/AC. 37/2 Add. 1, 2 April 1953; and Annex B—Four Case Histories of Restrictive Business Practices (taken from official documents) (48 pp. typewritten and mimeographed), comprising electric lamps, titanium pigments, aluminum, and metal products, E/2379 Add. 1, E/AC. 37/2 Add. 1, 2 April 1953; and Annex C—Text of National Legislation and Other Governmental Measures Relating to Restrictive Business Practices, Supplement No. 11B (234 pp. closely printed), E/2379 Add. 2, E/AC. 37/2 Add. 2. The members of the Ad Hoc Committee on Restrictive Business Practices were Belgium, Canada, France, India, Mexico, Pakistan, Sweden, United Kingdom, United States, and Uruguay. The resolution creating the Ad Hoc Committee, E/Resolution 375 (XIII), was adopted September 13, 1951, at the 13th Session of the Economic and Social Council. The members of the Economic and Social Council then were Belgium, Canada, Chile, China, Czechoslovakia, France, India, Iran, Mexico, Pakistan, Peru, Phillippines, Poland, Sweden, Union of Soviet Socialist Republics, United Kingdom, United States, and Uruguay. The resolution E/Resolution (XVI)/23 adopted July 31, 1953 at the 16th Session of the Economic and Social

Council deferred taking a vote on the above-mentioned Report of the Ad Hoc Committee on Restrictive Business Practices until 1955. By resolution E/Resolution (XIX)/14 adopted May 26, 1955 without a dissenting vote at the Council's 19th Session the Council "taking into account the fact that international action in this field would not be effective without sufficient support by Member States" postponed for an indefinite period any action on the above mentioned Report of the Ad Hoc Committee on Restrictive Business Practices for an indefinite period, unless and until the Secretary-General should suggest further consideration of the matter at a later Session of the Council.

3. See Footnote 2 above.
4. See Footnote 5 below and documents cited in Footnote 2 above.
5. "Foreign Legislation Concerning Monopoly and Cartel Practices" (1952), Report of the State Department to the Subcommittee on Monopoly of the Senate Committee on Small Business, pp. 1-252 and documents cited in Footnote 2 above.
6. In June 1955 the UN comprised 60 member nations. Of these, the United States and 5 other member nations each had trade over 3% of the world total, and the remaining 54 member nations in the UN each had trade under 3% of the world total. In June 1955, therefore, the voting strength—or voting weakness—in the UN of the United States and the 5 other member nations each having trade over 3% of the world total was 6-54. These figures are compiled from Annex A, the Share in World Trade of Individual Countries, pp. 1-9, in the Report of the Ad Hoc Committee on Restrictive Business Practices to the Economic and Social Council (62 pp. typewritten and mimeographed), E/2380, E/AC. 37/3, 30 March 1953 (see Footnote 2 above). On Dec. 14, 1955, however, this 6-54 voting position of the United States and the 5 other member nations each having trade over 3% of this world total was radically reduced to 6-70 voting strength—or voting weakness—because the UN General Assembly on Dec. 14, 1955 elected to membership 16 new UN member nations each having trade under 3% of the world total. Next day the New York Times (Dec. 15, 1955) reported in its news columns:

> "United Nations, N.Y., Dec. 14—Increase of the United Nations membership will bring a revolution in voting patterns within the organization. With four members of the Soviet bloc admitted the number of Communist votes will be almost doubled. With the others in the sixteen-nation package deal admitted the nations more or less neutral in the East-West conflict will increase to a quarter of the total membership. The voice of Asia, a whisper when the United Nations was founded, will be louder than that of any other continent.
>
> "The new line-up will bring a sharp acceleration in the rise to importance in world affairs of countries, once great, that fell behind the rest of the world in recent centuries. With that rise has gone a diminishing influence of the nations that were the first to industrialize, and a shift in the chief objective of the United Nations—away from being primarily an instrument of collective security to becoming an instrument for political, social and economic advancement.

"Term 'Bloc' is Unpopular

"The delegates at the United Nations do not like to talk in terms of 'blocs'—like representatives in any body they prefer to let it appear that their positions are determined only by the particular interest of those they represent. Nevertheless there are wide communities of interest between certain nations that are significant in determining voting alignments in this world body. And most of these areas of common interest have taken organizational form outside the United Nations.

"The five Communist countries, for example, are closely tied together not alone by their respective Communist parties, but also by an intricate system of military alliances and economic agreements. Forty-one of the strongly non-Communist, or at least anti-Soviet Union countries, are similarly linked together. And each major area has been formalized in such groupings as the council of Europe, the North Atlantic Treaty Organization, the Organization of American States, the Middle East Treaty Organization and the Southeast Asia Collective Defense Treaty. The neutralist nations found their expression through the Bandung Conference in Indonesia last spring—described by India's Prime Minister Jawaharlal Nehru as 'essentially an experiment in co-existence.' It tied together seventeen United Nations members—nine in Asia, two Negro states in Africa and six Arab states that also are linked through the Arab League. Despite its neutralist tenor it was attended by six countries with defense ties to the West.

"Outside this system there are only a few maverick nations. The Union of South Africa has only the slimmest of ties to Britain through the Commonwealth. Israel and Sweden, leaning in sentiment to the non-Communist bloc, have found it politically more expedient to remain aloof. Among the sixteen new members three fall into this uneasy category. Austria and Finland are bound by the peace treaties of World War II to international neutrality. Ireland, like South Africa, would be out of place on either side. Four of the new members will join the Communist bloc—Albania, Hungary, Rumania and Bulgaria. This means that in the days ahead the Soviet Union can count on nine votes even should the rest of the organization be aligned against it—a much better showing in the eyes of the world than the old minority of five. The anti-Soviet bloc, on the other hand, will be strengthened by three new members that have defense agreements with the West—Italy, Portugal and Spain.

"Gain is Seen For Asians

"But the greatest harvest will be reaped by the members of the Bandung Conference. Six of the sixteen new members were among its participants—Jordan, Libya, Ceylon, Nepal, Cambodia and Laos. Jordan and Libya will also help increase the weight of Arab League opinion on Middle East matters. The divisions at the United Nations are not strictly

concerned with power-politics, however. Increasingly the important issues are those involving colonialism, economic development and social services. For these are issues in which the Asian and African nations, and the countries of Latin America are deeply interested and can count on Communist support. On these issues the United States and European countries that administer nonself-governing territories can muster a hard-core minority of only twelve. At best they can count on the support of only four of the new members—Portugal, Spain, Austria and Italy. All the other twelve will join with and reinforce the heavy majority that has in recent years brought about the transformation of the United Nations.''

New York Times (Dec. 15, 1955). Events in UN from 1946 to 1955 which made these consequences inevitable are reviewed and analyzed in several other articles in New York Times (Dec. 11, 15, and 25, 1955).

7. See Footnote 5 above.
8. Clair Wilcox: A Charter for World Trade (1949, Macmillan), pp. 105-112; also Footnote 4, above, and Footnote 9, below.
9. Lauritzen v. Larsen, 345 U.S. 571 (1953), 575-593.
10. See Footnote 6, above. How inevitably the proposed Program would be nonjudicial, political, partisan, and heavily discriminatory and weighted against the United States and United States nationals has many times been shown in debates of the Economic and Social Council and in the Economic and Financial Committee (Second Committee) of the UN General Assembly. The so-called anti-capitalistic bloc in UN, led by the Soviet Union and its satellites, systematically assails the United States, and charges that its antitrust prosecutions and agitation against cartels are the smoke-screen by which the United States hopes to divert attention away from what the Communistic bloc claims are the United States' own self-confessed and conclusively-proved monopolistic economy, and its own imperialistic ambition to dominate the economy of other nations. See in the Economic and Social Council, 547th Meeting, Sept. 12, 1951, Mr. Nosek (Czechoslovakia), pp. 621-625, and Mr. Birecki (Poland), pp. 628-630; 548th Meeting, Sept. 12, 1951, Mr. Arkadiev (Soviet Union), pp. 635-636; 549th Meeting, Sept. 13, 1951, Mr. Saksin (Soviet Union), p. 643; 742nd Meeting, July 30, 1953, Mr. Blusztajn (Poland), pp. 242-243; 744th Meeting, July 31, 1953, Mr. Morozov (Soviet Union), pp. 259-260. See in the Economic and Financial Committee (Second Committee) of the General Assembly of the United Nations, 246th Meeting, Dec. 20, 1952, Mr. Arkadyev (Soviet Union), pp. 330-331; 267th Meeting, Oct. 28, 1953, Mr. Nosek (Czechoslovakia), pp. 113-114; 281st Meeting, Nov. 30, 1953, Mr. Birecki (Poland), pp. 185-186, and Mr. Nosek (Czechoslovakia), pp. 186-188. How continuously successful this anti-capitalistic bloc is, in marshalling against the United States large majorities in UN on any issue in which envy and hatred of the United States and its economy can be exploited in UN debates, was again shown on Nov. 29, 1955, when only 11 other UN member nations supported the United States in a fruitless effort to amend a resolution which would sanction every UN member nation in expropriating on its own terms concessions of natural resources now operated by United States nationals in any UN member nation. See news article in New York Times (Nov. 30, 1955).

11. See Footnotes 5 and 6.
12. Since the furthest that the proposed UN Program could go was to require that every participating Member Nation should take action against any restrictive business practice within its jurisdiction only to the full extent of such Member Nation's own laws and procedures, see Chapter II in the text of this address, it is odd that nowhere in the Report of the Ad Hoc Committee or any of its voluminous accompaniments (see Footnote 2 above), which the Ad Hoc Committee submitted in support of the vast, multi-national, bureaucratic apparatus of its proposed Program, was there any reference to the easy way by which the State Department of the United States has many times achieved this simple purpose, by negotiating, and inserting in an ordinary treaty of friendship, commerce, and navigation a simple single paragraph in substantially the following form: "The two parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises, may have harmful effects upon commerce between their respective territories. Accordingly, each party agrees upon the request of the other party to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects." See for example the United States Treaties of Friendship, Commerce and Navigation with Israel, Italy, Denmark, Greece and Japan referred to in "Treaties of Friendship, Commerce and Navigation", Executive Report No. 5, pp. 6-7, Senate Committee on Foreign Relations, July 17, 1953, 83rd Cong., 1st Sess.
13. Official statement addressed by the United States Representative to UN to the Secretary-General, who, by Resolution 487 (XVI) adopted July 31, 1953 by the Economic and Social Council was requested to transmit to Member Nations "for examination and comment, the report of the Ad Hoc Committee on Restrictive Business Practices and the Secretariat's analysis of governmental measures relating to restrictive practices, prepared by the Secretary-General in accordance with Council resolution 375 (XIII)" (see Footnote 2).
14. United States Mission to UN: Press Release No. 2161, May 23, 1955.
15. Resolution on Restrictive Business Practices adopted by the Economic and Social Council, item 12, 19th Session, 26 May 1955, E/Resolution (XIX)/14.
16. Comments favoring, and comments and action opposing the UN Program proposed by the Ad Hoc Committee on Restrictive Business Practices were collected by a Committee of the American Branch of the International Law Association, and were cited in the submittal by the spokesman of that Association to the Non-Governmental Organizations Committee of the Economic and Social Council at its 19th Session on May 16, 1955. From this and other sources the following compilation has been prepared:

(1) Comments Favoring the Proposed UN Program

Corwin D. Edwards, "Regulation of Monopolistic Cartelization," 14 Ohio St. L.J. 252 (1953); and Sigmund Timberg, "Restrictive Business Practices," 2 Am. J. Comp. L. 445 (1953). Mr. Edwards was the United States Representative in the Ad Hoc Committee throughout its

existence in 1951-1953; Sigmund Timberg became the Committee's full-time Secretary several months after the Committee was created, collaborated with the Committee throughout the preparation of the Ad Hoc Committee Report, and prepared the voluminous accompaniments of the Report (see Footnote 2 above).

(2) Comments and Action Opposing the Proposed UN Program

Kopper, "The International Regulation of Cartels - Current Proposals," 40 Virginia L.R. 1005 (1954); Carlston, "Antitrust Policy Abroad," 49 Northwestern U. L. Review 569, 725-733 (1954-55); and Domke, "The United Nations Draft Convention on Restrictive Business Practices," 4 International and Comparative L. Quarterly 129 (1955); Statement Opposing the Ad Hoc Committee Report on Restrictive Business Practices, adopted by the National Foreign Trade Council, May 25, 1953; Report Opposing the Ad Hoc Committee Report on Restrictive Business Practices, adopted by a Subcommittee of the Committee on Antitrust Problems in International Trade in the Section of Antitrust Law of the American Bar Association, July 1953; Report Opposing the Ad Hoc Committee Report on Restrictive Business Practices, adopted by the Committee on International Trade Regulation and Impact of Antitrust Laws on Foreign Trade in the Section of International and Comparative Law of the American Bar Association, August 6, 1953; Report Opposing the Ad Hoc Committee Report on Restrictive Business Practices, adopted by the Committee on International Restrictive Business Practices in the Section of Antitrust Law of the American Bar Association, January, 1955; Resolution Opposing the Ad Hoc Committee Report on Restrictive Business Practices, adopted by the House of Delegates of the American Bar Association, February 21, 1955; Report Opposing the Ad Hoc Committee Report on Restrictive Business Practices, adopted by the Foreign Commerce Department Committee of the Chamber of Commerce of the United States on International Control of Restrictive Business Practices, January 1955; Policy Declaration Opposing the Ad Hoc Committee Report on Restrictive Business Practices, adopted by the Chamber of Commerce of the United States at its Annual Meeting May 2-4, 1955; Statement Opposing the Ad Hoc Committee Report on Restrictive Business Practices, issued by the Law Department of the National Association of Manufacturers, March 3, 1955; Statement Opposing the Ad Hoc Committee Report on Restrictive Business Practices, submitted to the UN Secretary-General by the Chamber of Commerce of the United States, E/2612, Add. 2, 4 April 1955; Statement Opposing the Ad Hoc Committee Report on Restrictive Business Practices, submitted to the UN Secretary-General by the International Chamber of Commerce, E/2612/Add. 2, 4 April 1955; Statement Opposing the Ad Hoc Committee Report on Restrictive Business Practices, submitted to the UN Secretary-General by the National Association of Manufacturers, E/C.2/429, 25 April 1955.

(3) Some Conclusions

In the foregoing May 16, 1955 submittal to the Non-Governmental Organizations Committee of the Economic and Social Council by the Committee of the American Branch of the International Law Association, the spokesman for that Association noted that the Report of the

Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955, pp. 98-108, showed that a majority of the Attorney General's National Committee felt that the proposed UN Program regarding restrictive business practices lay outside the scope of the Attorney General's National Committee. Continuing, this May 16, 1955 submittal in behalf of the International Law Association stated: "The reports which the UN Secretariat has published during the past six months in response to the request of the Economic and Social Council seem to substantiate the fact that there is still very little agreement as to how the international community should approach the problem of restrictive business practices. . . . It is true that there are many similarities between the laws of Canada and the United States on restrictive business practices but beyond that there is little similarity. Even though the United States and the United Kingdom have common law backgrounds, it is obvious that there has not been a substantial amount of agreement between the two nations as to the nature of restrictive business practices or on how to deal with them either internally or in the international sphere. . . . The comments received by the UN Secretary General from Governments, Specialized Agencies, Intergovernmental Organizations, and Non-Governmental Organizations as of May 1, 1954 do not reflect as yet any substantial amount of detailed analysis of the legal aspects and workability of the UN proposals. Furthermore, it is notable that only eight governments submitted any comments at all. As might be expected, the limited number of comments on such a complicated program varied considerably. It is clear, however, that there still exist wide differences of opinion on how the problem of international restrictive business practices should be approached. This is even more clearly indicated in the 'Report on Current Legal Developments in the Field of Restrictive Business Practices' recently published by the Secretariat of the UN." In conclusion this May 16, 1955 submittal stated: "The proposed plan of the Ad Hoc Committee raises the fundamental question whether it is wise to attempt to establish international machinery to handle restrictive business practices where there is so little evident basic agreement. Before asking the United Nations to undertake sweeping action in the field of restrictive business practices, it is essential that there be greater accord among the family of nations on the national level on economic and legal approaches to the problem."

Footnotes to Rebuttal Statement

1. See fns. 2, 3 and 4 of main statement.
2. See Report of the Attorney General's National Committee to study the Antitrust Laws, pp. 98 et seq.
3. See Hearings before House Judiciary Antitrust Subcommittee, 84th Cong., 1st sess., Part I, Serial No. 3, pp. 187 et seq., 199 et seq.
4. See fn. 2 Rebuttal Statement footnotes above. A majority of the Attorney General's National Committee decided that the Draft Agreement was not within the Committee's jurisdiction, a procedural point which need not concern us. A substantial minority supported Prof. Rostow's favorable views on the Draft Agreement.
5. See, e.g., statement by Lawrence Apsey, Senate Judiciary Antitrust and Monopoly Subcommittee Hearings, 84th Cong., 1st sess., Sept 13, 1955.
6. E/2380, Official Records: Sixteenth Session, Supplement No. 11, 30 March 1953.
7. See p. above.
8. Thorsten v. Kallijarvi, Acting Deputy Under Secretary of State for Economic Affairs, has stated that the State Department "believes that our policy of free competition contributes to the respect with which American industry is held in the world. Our antitrust laws and policy are evidence to other countries that our aim is not to exploit but to compete, openly and fairly, to bring more and better goods and services to others at more reasonable prices. It is in this spirit that we reach out to the market places of the world. Of course, there will always be those who will slander our country and our industry with charges of 'colonial exploitation,' 'economic imperialism,' and the usual string of expletives; but our policy of free competition is one of the most effective answers we have to such charges." Senate Judiciary Antitrust and Monopoly Subcommittee Hearings, 84th Cong., 1st sess., Sept. 15, 1955.
9. Thorelli, The Federal Antitrust Policy (Stockholm; also Johns Hopkins Press, 1954).
10. U.S. v. E. C. Knight Co., 156 U.S. 1 (1895).

COMMENTS

PROF. KENNETH S. CARLSTON (University of Illinois Law School):

1. Let us approach this problem from a factual basis, that is, let us take a few cases raising the issue of international restrictive business practices or trade barriers, which you will see have certain resemblances to concrete situations today that are not wholly purely coincidental, and then proceed to see what conclusions we can develop therefrom:

Case I. State A is a small country, surrounded by powerful neighbors, which has developed as one of its sources of national power a manufacturing industry involving a high degree of technical skill and the use of precision manufacturing equipment. The industry is composed of a few firms who buy their materials and sell their products throughout the world. Their sales policies in each foreign country are jointly coordinated in the light of the conditions, competitive and otherwise prevailing there.

Case II. States B, C, D, and E contain deposits of a certain mineral necessary in any industrial society and hence sold throughout the world. Several corporations organized in and with their management offices in State B carry on the extraction of this mineral in all four states. The mines in State E are marginal producers but are important in the economy of that state. Under threat of governmental expropriation, State E compels the corporations to establish a world market price which will permit the continued operation of its mines.

Case III. State F, because of its geographical conditions, including climate, is the principal source of a certain commodity sold in world markets. It finds its national welfare promoted by controlling production of the private producers and thereby establishing a non-competitive price. The purchasers of the commodity in other states are perforce constrained to accept this price.

Case IV. State G is the situs of the manufacture of a certain product which by virtue of mass production methods and technology can be manufactured more cheaply therein than in any other country. It is sold throughout the world. State H

wishes to establish its own production of this product for reasons of national defense and accordingly establishes numerical import quotas to the injury of the trade of State G.

Case V. States I, J, K, L, M, and N are producers of coal and steel. They wish to create by agreement a common market among them for coal and steel. The problem of marginal production in State I was hitherto met by certain restrictive practices adopted by common agreement among the principal producers in the several states, pursuant to legislation in State I. The several states now wish to limit the sources of production to the more efficient producers so as to expand the volume of sales in the common market through lower prices.

2. In each of the first four cases above the practices adopted were a product of the following conditions, among others:

(a) The practice would not have been adopted in the particular state unless its people were (i) indifferent to the consequences of this particular foreign economic policy, or (ii) were actively supporting it, or (iii) were opposed to it, but their opposition was overcome by the use of force by the policy makers of the state. Stated otherwise, those officials whose decisions either created or permitted the practice in question did so because the structure of power in their particular state allowed such a decision to be made, and the decision was felt by those who made it to be in the interest of the ascendant or dominant group interests within the state. In this setting, the decision is classified and treated as a decision made in the national interest.

(b) Our existing structure of international law permits this unilateral assumption of power by one state, even though its foreign commerce could not exist without the participation of the other states with which its commerce is conducted; because our fundamental legal hypothesis is that each state is supreme within its own territory and hence may legislate with respect to matters within its territorial jurisdiction and may judicially regulate international transactions pursuant to the relevant principles of private international law. As Justice Holmes put it, this assertion of territorial legal supremacy or jurisdiction rests on physical power. The command of physical power by the sovereign within its territory is sanctified or conceptualized in the legal right of sovereign jurisdiction.

(c) The only countervailing theory or principle which may be brought to bear by other states affected by such unilateral determination of policy to control the consequences of such policy is that, since the foreign conduct, even though legal within the foreign jurisdiction, has an impact within and affects the interests of the forum, the foreign conduct may be legislatively regulated by the forum. Since laws must be uniform, any such extraterritorial legislative regulations adopted by the forum will apply indifferently to aliens and nationals alike. The regulations will on the whole tend to be ineffective in meeting the problem, first, for the reason that the prohibited conduct takes place outside the jurisdiction and hence outside the sphere of effective power, and, second, because the persons against whom sanctions or punishment can be applied will depend upon the fortuitous circumstance of whether they can be found within the jurisdiction of the forum. To the extent the regulation of extraterritorial conduct is effective, it will subject the persons engaged in the trade simultaneously to two systems of law. It will be recalled that this last result was the basis of Judge Moore's criticism of the theory of extraterritorial jurisdiction in the case of the S. S. "Lotus" before the Permanent Court of International Justice.

3. The solution of the problem raised in the fifth case will still be based on the national interest of each state, but there is now a common interest among the several states concerned in the establishment of a common regional market and the obtaining of the benefits thereof. This common interest ranks higher in priority than even the interest of the state in which the marginal producers are located. The common interest therefore leads to a common decision or agreement upon orderly ways of retiring the marginal producers and upon procedures for the elimination of restrictive trade practices which would impair the benefits to be derived from the common market.

4. There is a general problem of restrictive business practices in the international sphere, but this general problem embraces a miscellany of particular problems, each of which is a product of its particular conditions. Each must be approached in the light of the particular conditions which brought the practice into being. Until those conditions are changed, most of the problems will remain unsoluble.

5. The proposed United Nations arrangements for dealing with this problem do not recognize its essential nature and do not provide the appropriate machinery for dealing with it. They conceive the problem to be one regulated in an atmosphere of law, when there has not yet developed a consensus upon the relevant legal principles, and when there is as yet no underlying substratum of social structure, goals, and action directed toward reaching those goals in which common legal principles could develop. In other words, until there is among the states concerned a general interest in the goal of elimination of restrictive business practices, and until the pursuit by them of foreign and internal economic policies towards reaching that goal will be thought to promote their national interests, there is not likely to develop a common law against restrictive practices. The vague rules set forth in the present United Nations proposals are a consequence of this fact. Moreover, trade barriers must be eliminated, for trade barriers and restrictive practices are all a part of a common pattern.

To deal with the problem of international restrictive practices, the United Nations' proposals envisage no independent, impartial body for the purpose of decision making. Instead they propose a political body, that is, a body composed of representatives of all the states concerned, in which the political rather than the judicial process will inevitably take place.

The decisions of this body are, moreover, binding only to the extent that the law of each participating state permits them to be. Hence they cannot effectively control the conduct of those states which will have created the problem. Only those states, such as the United States, which have already adopted laws prohibiting restrictive practices will be effectively under the control of the international body. To put it otherwise, the law-abiding state is under international control, the lawbreaker is not.

6. Until such time as we can persuade the several states to adopt a workable set of rules, and impartial, independent judicial machinery for their application and enforcement, we can and should do these things in the international sphere:

First, we can work towards eliminating those underlying conditions which have created the problem of restrictive practices. The elimination of trade barriers, including tariffs, the creation of wider and expanding markets, the extension of financial assistance in eliminating marginal production, the

recognition of the principle that international trade should be served by the efficient producer, the further continuance of provision of funds for the development of new local industries and the promotion of foreign trade, these are some of the steps which we might well take. This will require international social and political engineering of the highest order, imaginative and creative.

Second, we should support research by scholars within the university community in studies of particular industries or segments of foreign trade so that we may know the facts of the problems before us. The publication of these facts might well lead to a much greater demand by the citizens of states pursuing restrictive practices for their elimination when they realize how much these practices are costing them as consumers. This in turn might well aid in the solution of particular problems through diplomatic negotiations. The publication of such studies would, moreover, enable us to reach informed judgments as to how we should proceed.

Third, some decision should be reached by the international community as to how it should deal with state trading and governmentally sanctioned or directed restrictive business practices which, under the United Nations proposals, escape regulation. A one-sided system of regulation is manifestly unfair as well as one which imposes competitive handicaps upon those subject to such regulation.

SAMUEL K. C. KOPPER (Arabian American Oil Company): Both Messrs. Timberg and Montague deserve our thanks for so clearly stating the issues in this highly complicated subject of the international regulation of restrictive business practices. You have heard Professor Carlston's able comments on the problem, during which he demonstrated by the case method the extreme difficulty and, indeed, the impossibility of handling these problems in the international sphere of the proposed UN plan. I propose to comment on what has been said in a somewhat more general manner.

In his opening remarks Mr. Montague referred not only to the proposed UN plan, but also to other matters which the United Nations has attempted to handle. Mr. Montague has referred to the problem raised by the fact that many of the proposed international conventions deal with matters which are primarily within the jurisdiction of the forty-eight states of our federal union. This is indeed a real problem which we as lawyers in the United States should attempt to face more positively.

From the point of view of the United States' moral and political leadership in the world, we stand to lose heavily in certain instances unless we recover fully from a serious attack of anti-conventionitis which has been paralyzing our activities in the United Nations and in the Economic and Social Council. I have recently seen and heard our representative on that council say that the United States could not go along with the preparation of a new anti-slavery convention. Is this not an extraordinary commentary on the policy of a nation which went through a bitter war for four long years in which slavery was a basic issue?

Mr. Montague has pointed out some very basic difficulties in participation by the United States in the field of human rights, a field in which we should be leading, rather than trailing behind. It is my impression, however, that the United States' objections to such programs as SUNFED (Special United Nations Fund for Economic Development) and the Commission on International Commodity Trade stem from other policy reasons and do not necessarily arise from any basic limitation on what the United Nations can do successfully. The value of Mr. Montague's opening remarks is that it calls to our attention the practical necessity of the United States Government carefully observing the proposed UN programs sufficiently in advance so that our policy may be effective.

The articles of the United Nations Charter regarding the powers of the organization with respect to the economic and social field appear general, broad, and indeed vague. This is understandable. It is difficult to be too precise when we are dealing with the hopes of mankind with respect to the future social and economic well-being of the world. It is possible, however, to be precise when we come to specific programs and proposals arising in the UN. Much good can come from a thorough review of the activities of the many organs and agencies of the UN operating in the economic and social field. Much duplication and freewheeling might be eliminated to the benefit of all members of the United Nations.

The specific program which we are considering at present, the UN proposals on restrictive business practices, is the type of program which does not, in my judgment, lend itself readily to UN action. Mr. Timberg has eloquently stated the desirability of eliminating cartel practices which restrict the fields of activity in which American business can operate. I think we can all agree that this is a desirable objective. It seems to me, however, that there is a basic error in attempting to solve

a problem so basically substantive by the establishment of procedural machinery whose terms of reference are in reality vague and whose powers are loosely defined.

The discussion thus far this morning has brought out several very fundamental points. There is still little or no agreement in the international community as to the nature of restrictive business practices or as to how they should be dealt with, if at all, by the United Nations as a whole.

Secondly, there is a remarkable paucity of interest in most nations about restrictive business practices.

Thirdly, the plan proposed by the UN Ad Hoc Committee does suffer from substantial defects in a number of articles, defects which unfortunately cannot be remedied. I might pause here to interject that it seems to me the valued efforts of the UN Ad Hoc Committee over a period of a year and a half in which they held some seventy-seven meetings clearly indicate the great difficulty of reaching a common denominator, a basic defect which only will be remedied over the years by a greater agreement, not only from the legal point of view but more basically from the economic and social philosophies of the sixty-odd members of the United Nations.

Fourthly, there is a great diversity of economic and legislative philosophies in the family of nations on the matter of how to regulate restrictive business practices. It is true that in many members of the United Nations there exist constitutional and legislative provisions regarding restrictive business practices. It is equally true, however, that in most of these nations there does not exist a great deal of judicial interpretation or indications of actual enforcement of those provisions.

Finally, it would seem to me that here we are confronted with something which is not necessarily a constitutional limitation on the powers of the United Nations in view of the problem, but a matter in which it would be doing the United Nations a positive disservice to ask it to undertake sweeping action in the field of restrictive business practice until there is greater accord among the family of nations on the national level.

Now what do we do about that? I think it would be highly desirable that in the immediate future nations with an interest in doing something about the field of restrictive business practices should increasingly utilize the bilateral method of approach. We have witnessed during the past several years something of a tendency on the part of certain other nations to revert back to the cartel method of doing business. For the time being, the

best hope for action in the international field is bilateral, trilateral, or multilateral agreements amongst nations who have common problems, common economic philosophies. This was evident during the recent discussions of the Economic and Social Council in New York. It would apply particularly to the countries of Western Europe.

Secondly, it seems to me that during the period of years to come much could be done by the individual members of the United Nations to study this problem. I have been a member of some of these committees of the American Bar Association and the United States Chamber of Commerce as well as the one of which I was chairman, the American Branch of the International Law Association. Our studies have led me to believe that our dismay stems in part from the fact that in spite of the real desire of many lawyers to do something about this proble, the Ad Hoc Committee's plan, even though it was the best plan, fell so far short of anything that was workable. This is a problem which cannot be solved overnight by the institution of a plan which really has so little common agreement.

REBUTTAL

by Sigmund Timberg*

MR. SIGMUND TIMBERG: I belong to the rather old-fashioned school which, on issues of analysis, says that "One man with God is a majority." Therefore, it may be a little bit beyond the point to make too much issue of the fact that this Draft Convention was originally approved by the Committee for Economic Development, the National Planning Association, foreign trade organizations, foreign traders, and others.[1] This convention has also had the approval of a distinguished alumnus of this university and member of the Attorney General's National Committee, Wendell Berge,[2] who has had some acquaintance with the administration of the antitrust laws. Congressman Reuss,[3] Dean Rostow of Yale Law School,[4] and others have taken a different view from Mr. Montague.[5]

I would like to read just a few sentences from still another commentator who says as follows: "American business will find considerable cause for encouragement in the proposals regarding restrictive trade practices affecting foreign and international trade which are contained in the proposals for consideration by an International Conference on Trade and Employment signed on December 6, by representatives of the Governments of the United States and Britain." Then follows a short summary of what the proposals were at that time and a conclusion which reads as follows: "Here at long last is a multilateral, international approach to which the governments of the United States and Great Britain are already committed, and which [it] is hoped will receive the assent of all the other nations who are members of the United Nations Organization by which a world policy may be established regarding foreign and international trade.

"This will be good news to American businessmen, who have long wearied of the uncertainties and the conflicts that in recent years have grown to intolerable proportions, because of the widely varying national policies in this field." These statements are part of an address before a Symposium on Trusts and Cartels that was held at the Harvard Law School

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*Footnotes will be found at end of article.

Forum in 1946, and it is the statement of Mr. Montague. I do not bring this statement up for any other reason than to suggest that perhaps there is still a basis of discussion somewhere in these proposals and something might still emerge of value. I respect every man's right to analyze and consider a problem and change his mind with respect to basic considerations. I intend to do the same myself in the light of new information that may develop.

As a UN consultant to the May 1955 meeting of the Economic and Social Council, I collaborated with the U.S. and other delegations to the United Nations in the deliberations leading up to the resolution applauded by Mr. Montague. I can therefore say that my position is in accord with the policy expressed in that resolution. That resolution notes with satisfaction, if you will turn to page ten of Mr. Montague's convenient document, that the reports of the Secretariat (which I can assure you are read very carefully) "indicate that a number of Governments have undertaken new measures, or strengthened existing measures, to prevent and control restrictive business practices or their harmful effects; and that there is a growing awareness of the fact that, even though the precise form or effect of restrictive business practices differs throughout the world, these practices may have harmful effects on economic development, employment and international trade." As has been pointed out, this resolution was passed unanimously after four days of extensive consideration, in which every word was weighed by the delegations; and I think it amounts to a statement of both UN and U.S. position that the situation has improved and has not deteriorated.

The second relevant phase of this resolution is that the United Nations and the U.S. recognize "that national action and international co-operation are needed in order to deal effectively with restrictive business practices affecting international trade." I do not know of any method that will lead to increased international co-operation that is more effective than the method which you, Dean Stason and Bill Bishop, have used, of bringing viewpoints together to see what there is of value in the past that supplies a guide for the future.

To get to just one or two of the substantive points on which I think there can be clarification, I wish to point out something that in the burden of trying to present the whole picture I had neglected to say, which is that the administrative and organizational provisions of this Draft Convention do not have the same degree of finality that attaches to the more substantive

provisions. Paragraph 43 of the Ad Hoc Committee's report puts the situation clearly when it says that the committee feels "that whatever is of value in these proposals lies in the fact that they have emerged from full discussions by representatives of ten countries of varied problems and interests. It is not to be expected that any country would regard these proposals as entirely satisfactory, but they indicate lines on which it may be possible to resolve different national conceptions."[6]

The composition of the United Nations committee entitles its conclusions to some respect. On it was not only Corwin Edwards, Chief Economist of the Federal Trade Commission, but the top man in the Canadian Combines Investigation Administration. The committee was chaired by Professor Svennilson of Sweden, who is a leading economist and advisor to Swedish industries, and the author of a learned book on Growth and Stagnation in the European Economy, financed by the Rockefeller Foundation. The representatives of Belgium and France were of the highest ranks of their civil service, "inspectors-general of finance." The British and other governments were represented by their Commercial Counselors, leading officials of the Board of Trade, and the like.

It seems most illogical to suppose that a committee consisting of the representatives of six industrial nations and containing no representatives of the Soviet bloc would have created a propaganda springboard for the Communists. I have already outlined the administrative safeguards in the agreement that would insure against such a contingency.[7] Moreover, if we are to win the world's esteem and friendship, it is not because we hold ourselves out as plaster saints who maintain our civil and economic liberties in a flawlessly perfect condition, but because it is recognized that we aspire genuinely, in a human and not necessarily infallible way, to universally accepted ideals of economic and human freedom. Public, judicial, or administrative procedures whereby we remedy, and on appropriate occasions chastise, departures from those ideals only serve to underscore the importance which we attach to those ideals.[8]

To me it has been a revelation to discover how much was understood of our antitrust problems by people abroad, such as two of the people who worked on this problem in the course of the United Nations delibrations, a Swede named Thorelli and a Britisher named Neale, who have either put out or are in the course of putting out books on the American antitrust laws that I can conscientiously recommend to every man in this room.[9]

I agree that there is a great problem presented by the existence of a politically constituted representative body, by way of protecting the interests of major trading countries. It may be that there ought to be, at the start, a multilateral convention involving, let us say, the seven major trading powers. Any approach which is going to prevail in this field is going to have to take into account the essentially political nature of antitrust and antitrust enforcement, even in this country. Therefore, the ultimate ideal—the type of thinking that was envisaged in the United Nations report—is that of a Federal Trade Commission report, which is prepared by a staff of competent people who look up the facts and present a draft to a politically appointed, politically responsible commission, which then gives that report a final and a conscientious appraisal.

Both on the international scene and on the national scene, I continue to be surprised by the extent to which political representatives, be they on a national commission or an international agency, are guided by objective staff work and by objective considerations. I know how little a secretary of any international group is permitted to do in the United Nations; his entire activity is under the specific control of the group members. Any yet there have been produced secretariat reports that represent good contributions to the understanding of the problem and the beginning steps for effective action. It is a problem that we have not licked completely in this country and certainly have not licked on the international stage, but it is within the area of faith and trial rather than that of outright rejection.

One final comment, I suggest that if anyone would like to see what some of this national legislation is, it is available in the reports of the United Nations, as Mr. Montague has pointed out. It is available with very little commentary; the last two UN progress reports consist of no commentary at all by the Secretariat. In any event, legislative provisions speak for themselves. I would invite everyone, for example, to take a look at the United Kingdom Monopolies and Restrictive Practices Act, enacted only in 1948 after a century and a half of interregnum in the application of the restraint of trade doctrine of England, and to take a look at some of the excellent publications which that commission has turned out.

This represents only a beginning, but some students of antitrust law who are old enough to know remind me that the U.S. Government failed in six cases before it finally won its first antitrust victory when the Sherman Act was first passed.

In 1895 it was decided that sugar manufacture was not even subject to handling under the commerce clause, and a sugar trust was not within the jurisdiction of the Sherman Act.[10]

We make progress from small beginnings. We need not be satisfied only to remake the world. Despite the discouraging statement made by the U.S. delegation, you should know that there were countries, such as Sweden, France, Norway, Belgium, India, and Turkey which were prepared to take positive action on the UN Committee's report.

GENERAL DISCUSSION

PROF. E. ERNEST GOLDSTEIN (University of Texas Law School): Leaving aside for the moment the issue of whether or not the procedural passages and the mechanisms set up in the Draft Convention are good or bad or indifferent, I would suggest that it seems that something has been left out in terms of a form of interim organization to replace the Ad Hoc Committee. I suggest this on the basis of U.S. experience in Europe, on both a multilateral and bilateral basis, with the problem of restrictive practices. The commercial treaties, although they speak piously of restrictive practices and the mutual aid bilaterals, have not actually been effective in the field of restrictive practices. On the other hand, we have seen a multilateral and a bilateral approach that has been effective from the U.S. point of view although requiring the expenditure of a bit of money. Congress, by the Moody Amendment, appropriated $100,000,000 to handle restrictive practices in Europe and as a result there are fourteen operative bilaterals including one for the creation of the European Productivity Agency. I would ascribe some of Mr. Kopper's optimism, as to European public opinion being interested in restrictive practices, to the activities encouraged by bilateral agreements under the Moody Amendment and the EPA.

Therefore, it would seem that if we are not going to have the suggested Convention, and if we are agreed that some activity is necessary in this field, some organizational set-up either under U.S. auspices or under UN auspices, then to promote constructive public relations attitude in restrictive business practices would certainly serve a useful purpose and might reconcile some of the difficulties that bother some of the critics of the proposals.

DEAN MIRIAM THERESA ROONEY (Seton Hall Law School): This discussion, it seems to me, marks a beginning of one of the most important studies that must be made and faced before we can reach any real conclusions on the relationship of trade policy to political policy. The problem is well focused here by the different views of these two speakers, as well as by the remarks that have been made by the commentators.

As a people we speak in favor of free enterprise and against monopoly. We speak in favor of small business. We

are rather strong in our support of the Sherman Act, and of breaking down trusts in practically every field. We are opposed to the cartelization of the world. We have done a great deal to break up these economic empires by bringing under political control the enemy assets that have been built up in foreign trade. And yet, when we come to handling individual problems of our own, we more or less tend to patronize monopolies. We talk one way and act another, and it seems to me that the divergence in practice is underlined by Congress itself in making a distinction between domestic and foreign policy. To put it another way, the Sherman Act is very carefully observed in the letter and the spirit in this country by the activities of the Anti-Trust Division and by the general policies of Congress—until we come to the sphere of foreign trade. There a distinction has been made with respect to Webb-Pomerene corporations, and with some of the Latin-American corporations. Indeed there have appeared at times some indications of a willingness on the part of Congress to go along with tax inducements to Americans investing abroad. In view of the very great divergence of opinion which exists in this country about monopoly—and it comes in all fields (basically that was the argument Saturday with respect to the fisheries), it comes up in communications (the monopoly of the air waves versus free competition), and it comes up in state trading,—we have got to make up our minds whether we are going to support monopoly or whether we are going to try to encourage all over the world some strengthening of smaller units of free enterprise. If we determine upon the latter, then we shall have to make up our minds what we are going to do about tax inducements to the big corporations upon which most of our foreign investment depends. If we want foreign investment, if we want markets all over the world, then we have to give some consideration to whether we are going to expand or contract on the matter of price-fixing and on dividing up the markets. Until we do that, I do not see any hope for an immediate solution by a United Nations draft convention. It seems to me that the most hopeful thing that can come out of such a project are the studies which must have been made in this Ad Hoc Committee and in the various other undertakings the UN has started; and that these must be explained and analyzed carefully in our schools to bring out the probable effects of the proposed measures in their workings on the business enterprises upon which, ultimately, our employment and our interests in this country depend.

REVIEW AND REVISION OF THE UNITED NATIONS CHARTER

CHARTER REVISION - THE REALISTIC VIEW

Tuesday afternoon, June 28, 1955

PROF. LOUIS B. SOHN (Harvard Law School): Ten years ago the leading statesmen of the world signed the Charter of the United Nations, promising "to save succeeding generations from the scourge of war, which twice in one lifetime has brought untold sorrow to mankind." To that end they agreed to unite the strength of all peace-loving nations to maintain international peace and security and "to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace." During the campaign for the ratification of the Charter, the peoples of the world were assured that at long last an answer had been found to the great question - how can we prevent war? Mankind's chance for peace would finally come, if only we ratified the Charter.

Even before the Charter came into force, however, an atomic bomb was dropped on Hiroshima and a new age dawned upon us. Was the Charter strong enough to cope with the requirements of the new age, or was it, like most instruments ending the wars of the past, only sufficient to provide an answer to problems of the kind which led to the war which had just ended? One of the chief draftsmen of the Charter, Secretary of State Dulles, has expressed the view that "had the delegates at San Francisco known we were entering the age of atomic warfare, they would have seen to it that the Charter dealt more positively with the problems thus raised."

I do not propose to speculate what they would have done if they had known of the new danger just around the corner. But it seems quite proper to discuss what we should be doing about it right now. The easiest way out is, of course, to accept the counsel of despair and to say: "It is too late and nothing can be done; let us like ostriches bury our heads in the sand." But such a defeatist attitude is certainly not realistic. Mankind has always accepted the challenge of new vistas, and out of each new experience a new and better life for all has come. The present threat to the survival of our civilization constitutes

just such an opportunity for bringing about a better world, in which people will no longer live in fear of total annihilation.

But a world free from fear will not arrive by itself, it has to be planned for, it has to be prepared for. Some of us have tried to do it; others, while not willing to take part in this endeavor themselves, have at least encouraged us in our labors; but there is also a group which finds it necessary to criticize our efforts as unrealistic and politically unwise. Before I go any further, I would like to dispose of some of the arguments of these pessimists who oppose our efforts to strengthen the United Nations through Charter amendment.

They say, for instance, that if we do not watch out the United Nations will be destroyed, or that we will lose our present Charter, while the new one will never come into force. They seem to forget quite conveniently that until the amended Charter comes into force the powers of the United Nations under the old Charter will continue without any diminution. Several attempts were made to amend the Covenant of the League of Nations, but the League of Nations continued to function despite the non-ratification of those amendments.

The next argument of our opponents is that the Charter might be more weakened than strengthened during the process of revision. The answer to this is simple: If the Government of the United States should feel that any amendments are undesirable, it can prevent their coming into force by refusing to ratify them.

Another argument is that no amendments are possible because the Soviet Union will reject them. Of course, it is impossible to predict what the Soviet Union will do in any particular instance. But we certainly know that the Soviet Union can change her attitude on any given question quite easily, and very often does. We all remember the Soviet boycott of the allegedly illegal Trusteeship Council and the sudden appearance of the Soviet delegate in that Council, without any explanation whatever. Similarly, during the Korean crisis the Soviet Union on a very flimsy pretext rejoined the Security Council despite its allegedly unconstitutional composition. Only last year the Soviet Union became a member of the ILO and of UNESCO after many years of violent opposition. I venture to predict that if we can come up with a proposal which is as fair and equitable as we can make it, and if a vast majority of the nations of the world accepts it as the fulfilment of the hopes of all of us, the Soviet Union will find it impossible to reject it. Furthermore, this argument about the danger of Soviet obstruction is not only

of doubtful validity as far as its merits are concerned, but also amounts to supporting the current Soviet opposition to Charter revision. It seems to suggest that we should join the Soviet Union in an unholy alliance against the small powers which want amendments. Many valuable proposals were lost at San Francisco because of our working hand-in-hand with the Soviet Union. We have regretted it ever since, and that tragic performance certainly does not warrant a revival.

In a similar vein, it has been suggested that if we support Charter amendment we might offend the Soviet Union and thus enlarge the gulf between us. A review of the main events of the last ten years will easily refute this argument. Whenever we have had the courage to do something we felt strongly about regardless of possible Soviet objections we have ordinarily succeeded in obtaining the desired result; witness the Truman plan for aid to Greece and Turkey, the Marshall Plan, NATO, West Germany and Austria. Here also, if we have enough courage, the Soviet Union might have to take the pill and might even discover that it likes the taste of this particular medicine.

While I do not think that it is really necessary to worry about the comfort of our opponents, I am more inclined to worry about possible difficulties with our friends. We cannot sell them short just to obtain our own bargain; we must defend their interests as much as our own. This does not mean, however, that they should not make any sacrifices for the common good and that all the concessions should be made by us only. It seems to me that the time has arrived for all the nations of the Atlantic Community to have not only a military alliance but also a more complete pooling of their political and economic assets. If one of them should be obliged to make a sacrifice at the bargaining table in order to obtain an agreement desired by all, other members of the Atlantic Community must be prepared to compensate the losing nation in some other field of great importance to it. For instance, a loss of a colony by a nation might be compensated by really substantial economic aid and a considerable lowering of tariffs for goods produced by that nation, or a lowering of immigration barriers to its citizens. We must avoid unilateral sacrifices, we must share the burdens more equally.

We are also told that it is dangerous to raise extravagant hopes in the public mind, and that if the Review Conference does not succeed in obtaining substantial amendments in the Charter the United Nations will lose its popular support. It seems to me that extravagant hopes were really raised in 1945

and that despite many disappointments the general public remained more devoted to the United Nations than the very statesmen who sold it to the public under false pretenses. It is really amazing how popular the United Nations still is and how strongly the belief is held that the future of the world lies in the hands of a stronger United Nations, well-equipped to do the job for which it was created. As long as we strive in that direction, we will have the public on our side. Only if we should abandon the common ideal, if we should refuse to make a real effort to fulfill our promises, might the public desert us. It is more likely, however, that the public even in those circumstances will remain faithful to the United Nations, and that it will vent its wrath on the timid statesmen, and on us, for having betrayed our principal mission.

The next question is, I suppose, the question of timing. We are told that the general political climate is not ripe for a reasonable approach to United Nations problems, that other problems must be solved first, and that we must first achieve a preponderance of power, or, alternatively, that we must wait until the Communist world and the West are perfectly balanced. We cannot wait, however, for the ideal moment, the ideal climate. No one can know at any given point in history whether this is the last chance for peace, or whether better chances loom in the not too distant future. Only after the event can historians allege that an opportunity to prevent a war was missed at a particular point; most of them disagree on the exact moment of opportunity, and even more on the event which would have led to the correct turn at the crossroads leading to peace and war. I submit that we might not find a better time for doing the right thing than in the next few years. Several basic disputes between us and the Communist powers have either already reached a solution or are on the way to an early settlement. While there are likely to be many ups and downs, the general trend is positive rather than negative. We can negotiate from strength at this moment, and it is doubtful whether a few years hence this will be still true. It might not be possible for us to keep our armaments on as high a level as today if Russians continue to be sweetly reasonable. Russian truculence and their ability to commit the worst possible blunder at the worst possible time were the main building blocks of Western unity. Many of our alliances would melt quickly if the sun of Russian friendliness should continue to shine. Looking at the grimmer side of the picture, we have to take into account the fact that in ten, if not five, years the Soviet bloc not only will

reach relative parity in nuclear weapons needed to destroy the foundations of the opponent's power, but also will have a sufficient number of long-range airplanes and guided missiles to deliver a crippling blow without any difficulty whatsoever. Do we have to wait for that dreadful moment, hoping that then a miracle of some sort will occur to rescue us from the predicament brought about by our own stupidity? Or shall we start doing something about it now, when there is still time, when we have leaders trusted by all, when we can still negotiate from strength? It seems to me that there is only one answer to this question, and that there is hope that our government will give that answer when the time comes.

The final argument is that it is not in the interest of the United States to have a stronger United Nations, that we must retain our freedom of action, and that in case of a crisis we can count only on our strength and we cannot surrender it to the United Nations. It is true that at this moment the future of the world depends on the strength of the United States, but it is equally true that we are not omnipotent. We are used to solving our own problems in our own way, and as long as these problems were purely internal ones the American nation was able to achieve one miracle after another. But our international experiences have been more frustrating. We gave up the job entirely in 1920, we were unwilling to help the League effectively against the fascist aggressors in the 1930's, and we were forced into the war in 1941 only through a direct attack. We hoped that after a short emergency period following the war our international task would be finished and we would be able to focus our attention on domestic problems. It did not happen, and we found it necessary to take over the leadership of the West with all the concomitant responsibilities and frustrations. We do not really enjoy it; we are surprised at the complications of the task, the ingratitude of those for whose benefit we are slaving, and at the unreasonableness of the Soviet Union; we are deeply hurt by the accusations that we are not doing our job well, that we are not listening to the advice of other, more experienced nations, and that the mess we are in is largely due to our own unreasonable attitude.

We have discovered that the outside world is more difficult to govern that our domestic front, that the problems of the world cannot be solved by our unilateral decisions, that we are not strong enough to do everything single-handedly. We can no longer go it alone; we know that if we tried to isolate ourselves from the rest of the world, we would open the rest of the world

to Communist expansion, and that in the end we would have to surrender to the combined might of the other continents.

We realize woefully that we no longer have complete freedom of action; not only do we find it necessary to depend on the co-operation of our friends, but also our most desired ambition—to live in peace—is constantly at the mercy of other countries. It is true that we do not like the idea of limiting our power of doing what we please when we please. But we like even less the freedom of the Russians and the Communist Chinese to do what they please when they please. Ideally, we would like a situation in which we could limit the freedom of the Russians without limiting our own; we have to accept the fact, however, that international relations can be conducted successfully only on a basis of reciprocity. If we want to limit the ability of the Soviet Union to start a war against us we must agree also to limitations on our ability to wage war. The more we want to restrict the Russians, the more we have to restrict ourselves. And there is no better way to restrict the Russians than a stronger United Nations, able to impose the necessary restrictions equally on all of us. It seems to me, therefore, that the best interests of the United States will be served most adequately by a United Nations strong enough to check the Russian ambition to dominate the world. The only thing we will have to give up is something we do not want in the first place, namely, our own chance to impose our rule on other nations of the world.

Assuming that we want a United Nations strong enough to prevent future wars and thus fulfilling the promise of the original Charter, we have to define in more concrete terms what we mean by a stronger United Nations. Those who have studied the matter agree that there are three interconnected problems which must be solved not separately but simultaneously, namely, collective security, disarmament, and pacific settlement of disputes. Without collective security, disarmament is not possible, as nobody can renounce his armaments unless he can count on adequate protection by the community against possible violators of the law. Conversely, collective security is not possible without disarmament, as we can put at the disposal of the community only limited forces which cannot be expected to provide sufficient protection against the gigantic might of the big powers. Only if states are disarmed can we have an international police force strong enough to cope with aggression anywhere in the world. Finally, we cannot deprive the nations of the means of solving their disputes by force without providing

at the same time adequate methods for the pacific settlement of all disputes which threaten friendly relations between states.

This idea is, of course, not new. In the 1920's a group of Americans led by James T. Shotwell and David Hunter Miller suggested to the League of Nations this combined approach, and it led to one of the most ambitious attempts to solve this problem, the Geneva Protocol of 1924. It depended, however, on a future solution of the disarmament question, and the effort was never completed. The history of the world might have been different if the Protocol had come into force.

We are faced with a similar problem, and the basic element of a solution is that we cannot tinker with one problem only, but must be ready to tackle all three simultaneously. While theoretically this could be done apart from any Charter Review Conference and while many solutions could be put into effect without Charter amendment, the Review Conference presents an opportunity to deal with the matter in an orderly fashion. And once an agreement is reached among all the nations of the world on the needed measures there should not be any more difficulty in embodying them in the Charter itself rather than in a series of separate instruments.

All the past discussions on disarmament show quite clearly that mere reduction of armaments does not present a solution, and that disputes about quotas and the comparative value of various armaments cannot be solved in any generally satisfactory manner. If large national forces are retained, the international peace force will also have to be dangerously strong, and it may be expected that after a short truce period the armaments race will start again. In my work with Mr. Grenville Clark we have come to the conclusion that only complete disarmament of all national military and para-military forces will solve this problem. Of course, disarmament of this type cannot be accomplished at one fell swoop. We propose a ten-year period during which a ten percent reduction in all national forces and armaments, conventional and atomic, would be made each year under careful international supervision. Simultaneously, adequate international controls would come into effect over the production and utilization of nuclear materials. With the growth of peaceful uses of these materials, it does not seem possible to advocate any longer United Nations ownership of all the facilities which produce and utilize them. Instead, we propose United Nations custody of all materials not actually in use, and participation by United Nations personnel in the management and operation of all the facilities which

produce or utilize dangerous amounts of nuclear materials. While principal controls would be limited to declared facilities, sufficient power must be given to United Nations Inspectors to inspect any places in which illegal activities might be conducted. Guarantees must be provided, of course, against abuses and in certain cases a warrant from an international court would be required.

Over the same ten-year period during which disarmament would be gradually effected, an internatinal peace force would be built up, by ten percent each year, until it would reach its authorized strength of some 500,000 persons. Such force would act only on orders of the General Assembly or of the Security Council, and would be subject to various controls designed to ensure its independent, international character, and to prevent its domination by any nation or group of nations.

The revised Charter must also provide more effective methods for dealing with international disputes. For instance, the General Assembly and the Security Council may be authorized to make a preliminary investigation of each dispute, and if they should determine that the dispute is of so serious a character as to endanger international peace they may further be empowered to direct the parties to submit their case to the International Court of Justice, and the Court would have compulsory jurisdiction over any dispute thus submitted. If the Assembly or the Council should decide that a particular dispute cannot be settled by a decision of the legal questions involved in it, it may send the dispute instead to an international equity tribunal authorized to take into consideration other factors besides the legal ones. Such a tribunal may be given at the outset only the power to make recommendatins, except where the parties have previously accepted its jurisdiction as compulsory, but after a period of time its jurisdiction may be made obligatory by a special vote of the General Assembly.

If all these changes are made in the powers of the organs of the United Nations, changes will also be necessary in their structure and voting procedure. There are many proposals for weighting the votes in the General Assembly, for having the members of the General Assembly responsible to their peoples rather than to their governments, for making the Security Council in turn responsible to the General Assembly and functioning as the Assembly's executive organ, and for improving the financial situation of the United Nations. There are also various proposals for enlarging the powers of the United Nations in other fields, e.g., with respect to economically underdeveloped

areas and the non-self-governing territories. Enough has been said, however, to indicate the vast scope of the proposed changes. How can all this be done?

I submit that the American people are willing to accept many of these changes without strong opposition, and that the rest will be accepted if the matter is properly explained to them. If our President should reach the decision that the enlightened interest of the United States requires a stronger United Nations, built on the principles which I have outlined, he will be pleasantly surprised at the vast support he will receive for such a plan. It is doubtful whether any considerable minority of the Senate will dare to oppose a plan supported strongly and unequivocally by the President and the people of the United States. In the past such opposition has always melted whenever the pressure was strong enough. The votes for the original Charter of the United Nations, for the acceptance of the jurisdiction of the International Court of Justice and for the North Atlantic Treaty, all dealing with new obligations never accepted before, have all been practically unanimous.

If we can prepare an agreement solving honestly the basic problems of today in a spirit of generosity and understanding, other nations will accept our leadership with gratitude and for the first time in modern days we shall achieve on the international scene a success comparable to those successes which we accept as a matter of fact whenever we tackle our domestic problems. Time is getting short for such a successful venture, but the opportunity still beckons. Our client, humanity, is waiting impatiently for our helping hand. When a future historian writes up the history of our days I hope he will be able to note that we have accepted the challenge and have thus ensured the survival of the human race. Let us not invoke the failures of the past as an excuse for lethargy. In the last ten years we have learned how to split the atom; I am sure before the next ten years are over we will also learn how to keep the world together.

TENTATIVE TOPICS FOR BRIEF DISCUSSION

Prepared by Louis B. Sohn, Harvard Law School

1. What factors should be considered by the Government of the United States in reaching the decision whether or not to support a Charter Review Conference?

2. If a Conference is held, should the chief emphasis be on disarmament or on other questions? For instance, Ambassador Lodge would like the Conference to deal principally with veto on membership. Is such a limited approach more desirable?

3. If the Government of the United States should follow the suggestions of Chancellor Adenauer and present a bold new program of disarmament, can this topic be considered apart from other subjects, or are there any questions so closely connected with the question of disarmament as to require simultaneous consideration?

4. Should any changes be made (a) in the structure of the United Nations, (b) in the voting procedures of the Security Council, and (c) in the voting procedures of the General Assembly?

5. Should international lawyers concern themselves with all these questions, or should they concentrate their efforts on problems of special interest to lawyers, such as pacific settlement of disputes and codification of international law? Can we expect more rapid progress in these fields apart from any developments in areas of greater political significance?

6. Should the United States be prepared to defend the status quo in the economic and colonial fields or should it try to seize the initiative by proposing to strengthen the powers of the United Nations in these fields?

REVIEW AND REVISION OF THE UNITED NATIONS CHARTER

by James N. Hyde., Esq.,
of the New York Bar,
formerly of the U.S. Mission to the United Nations

1. Introduction

As the final speaker on the Institute's program dealing with the United Nations I scarcely hope to add to the insights and scholarship of which we have all had the benefit. Therefore I would like to discuss with you some differing approaches to the questions of the review and revision of the Charter.

2. Background

The Charter of the United Nations is at the same time the constitution of the organization and a multilateral treaty. An agreement of this sort whether it be between governments or private individuals is intended to operate for a long, if indeterminate, period. We all know that such agreements should contain, within their terms, procedures for taking into account changes and the possibility of amendments. Otherwise, the continuing effectiveness of the agreement may be questioned by applying the classical doctrine of changed circumstances. It is therefore understandable and important that the United Nations Charter contain within its terms provisions for making changes in operations under it.

In the first place, there is the specific language of Article 108, which I will call the "ordinary procedure." It provides that the Charter can be amended when a proposal has been adopted by a vote of two-thirds of the members of the General Assembly, and then ratified by two-thirds of the Member States of the United Nations, including all the permanent members of the Security Council. I can recall at least one instance in which a Member State has suggested an amendment under this Article.

Secondly, there is the procedure for the summoning of the general conference for the purpose of reviewing the Charter at a date and place to be fixed by a two-thirds—and I would

underline two-thirds—vote of the Assembly and any seven members of the Security Council. This is provided in the first paragraph of Article 109 of the Charter. John Foster Dulles, in his book War Or Peace, which he wrote as a private citizen in 1950, recommended such a general conference to "modernize the United Nations in the light of its five years' experience, and to review broadly its basic objectives" (p. 208).

In the third place, there is the possibility of amending the Charter on the basis of proposals which might emerge from a review conference called by action of the Tenth Annual Session of the General Assembly. The agenda of the Tenth Session of the General Assembly, which meets in September of this year, will, pursuant to this provision, contain the proposal to call such a conference. If a majority vote of the members of the General Assembly and any seven members of the Security Council so decide, such a review conference shall be held. Thus, in the tenth year of the United Nations it is only necessary to have a majority of members of the Assembly vote in favor of such a conference, although in previous years it would have required a two-thirds vote of such members, concurred in each instance by any seven members of the Security Council.

There has been some discussion inside and outside government circles about whether the two-thirds majority needed to summon a Charter Review conference in the first ten years of the UN will be necessary in the future. In other words, from here on out it is argued that a simple majority in the Assembly will be sufficient.

In each of the procedures which I have mentioned one ends up with the necessity that any amendment, although it may originate in different ways, shall take effect only when ratified by two-thirds of the members of the United Nations, including all the members of the Security Council. That means that any amendment can be vetoed, and from whatever point of departure one sets out that is the legal and political fact that stands between any proposal and its adoption. There may be differences among scholars about whether I have correctly interpreted the ratification procedure of an amendment coming from a general review conference called by the Tenth Session of the Assembly. I feel certain, however, that the United States, the United Kingdom, and France would stand on the proposition that all amendments to the Charter are subject to the veto.

Thus, the fact that the Assembly will discuss the holding of a Charter Review conference in less than three months at once raises the question of whether such a conference is now a

bargain because of the fact that it can be obtained by a majority vote in the Assembly instead of a two-thirds vote. Again there are those who would argue that at any time after the Tenth Session the majority vote would prevail when the two-thirds voting formula comes to an end next September. I shall not delay you by debating that point.

A fourth method of making changes in the Charter would be the radical device of starting all over again and drafting an entirely new Charter in the way that sentiment in the free world would like to have it, thereby settling the membership question and doing away with the veto in the area of peaceful settlement of disputes. Such proposals are heard from time to time, and one of the most important statements of the principle was made by a former President of the Assembly, Dr. Jose Arce of Argentina, who suggested that a review conference might be held in which it would be decided that the new Charter it drafted would become effective upon the deposit of ratifications by two-thirds of the signatory states "to avoid the veto." (New York Times, May 16, 1955) I sense no enthusiasm for such a proposal by any of the permanent members of the Security Council.

Finally there is the method of evolutionary development of the Charter without the amendment of its language or the essential need for a general conference to consider its operations as a whole. The Charter has that flexibility which has permitted it during the first ten years of the United Nations to conform to changed conditions. Thus, there are many ways in which it has developed and operated differently from what was anticipated at San Francisco. Hans Morgenthau speaks of the "old Charter" as drafted at San Francisco and the "new Charter" as it exists even today.

These, then, are some of the possibilities. Attention focuses now on the possibility of a review conference and amendments which might or might not emerge from it. The United States gave a strong impetus to a move in the direction of holding such a conference when Secretary Dulles told the American Bar Association in August 1953 that the United States would vote in favor of holding a conference. Since then he has testified before the Senate Subcommittee that in spite of the then Soviet opposition to the holding of such a conference he felt that in all probability there would be a review conference and that the United States expected to favor holding it. He added that he would not take it as a foregone conclusion that any nation would, because it held the veto, be able arbitrarily to

impose changes or to veto changes. Secretary Dulles stated in January of 1954, however, that the Administration had not taken a firm position about specific Charter amendments because it wanted to advance its own studies, ascertain the views of American citizenry, the Congress, and the views of other nations. Since the original statement of position, some two years in advance, about what the United States would do, the views of American citizenry have been formulated at an impressive rate. The Senate Subcommittee has held hearings up and down the land. Its staff has prepared a series of impressive studies on substantive and procedural issues. The Brookings Institution has just published the first of its six volumes; the Carnegie Endowment has in preparation the studies of attitudes toward the United Nations in fifty-three countries including the United States. The American Assembly of Columbia University, after a three-day conference last summer, reached the conclusion stated on behalf of most of its participants that the United States attitude should be developed in the light of conditions which obtain when the question of a Charter Review conference arises in the Assembly. If the majority of members support the calling of such a conference, then the United States should not actively oppose it. (The American Assembly, The U.S. Stake in the U.N., 1954, p. 132.)

The fact that the General Assembly will be debating this question and the fact that the United States Government has indicated this measure of support for the holding of a conference have led to these extensive considerations. It is the reason why we are here today. It is a good thing that so many people have been giving some thought to the problems of operating in the United Nations and how its procedures might be improved. I know that at least several foreign offices have been considering the Charter article by article so that at least they will have a position on how, if at all, the Charter might be altered if a practical means presents itself.

3. Substantive Issues

Some of you may remember the Peterkin Papers in which a family got into numerous difficulties with the everyday mechanics of life. Solomon-John decided that he wanted to write a book, and after endless difficulties in obtaining pen and paper, he sat down to consider what he wanted to say, and then he found he had no ideas at all.

Unlike Solomon-John a great many of you and many others have been thinking and working on the substantive problems of international organization. Speaking generally, the sorts of things that have been under consideration can be classified as long range and basic questions on the one hand, and negotiating and operating questions on the other. By long range questions I mean studies which proceed on the premise that one puts aside the current political situation as it exists this year or next year, and then examines some of the factors that make it possible for men to live together and some of the factors which lead men to engage in hostilities with each other. The work of Van Wagenen at Princeton is one example of what I mean. The project there is a study of how groups of men attain the status of security communities, and this involves a fresh examination of what the behavioral sciences can contribute to political science.

Charles Cheney Hyde, who spent more than one summer teaching at the University of Michigan felt the need for fresh thinking about international organization and its role in preserving peace. In an article published in 1950, which contained his matured and considered views, he addressed himself to this problem. Let me quote two paragraphs of his conclusions. He said, in part:

> "Here, the inexorable price of peace, soaring to new heights through the presence of the atomic bomb, and that of the hydrogen bomb, puts to society the hard question whether it is really willing to pay what is now exacted. Thus far it has not been willing to do so. The intriguing task is to learn how society may attain the requisite worthwhileness of peace and by learning that in payment of the necessary price therefor is to be found an inestimable reward that is fully compensatory for what is exacted.
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> "The price has been stated above. It is this: The surrender of all military armament and what appertains to it, by every possessor, to a new and fresh entity such as the United Nations. If the coming of the atom bomb has vastly increased the necessary sacrifice, it has also inspired the conviction that it must be made, and that it can be made."*

*C. C. Hyde, "Bombs, Super Bombs and the Cost of Peace," 29 Texas Law Review 143, at pp. 210-211 (Dec. 1950).

You have heard today from a distinguished scholar, Professor Louis Sohn, who has devoted much time to an entirely independent long-range study, the concept of world government with universal disarmament, enforceable by a strongly armed United Nations military force. Mr. Grenville Clark has indicated his view that these proposals might reach the negotiating stage before 1970.

Looking now to the short-range and negotiating problems, these are the responsibilities of government officials, practitioners as they might be called, and those concerned with day to day operations of international organization and business. We have here some most experienced practitioners such as Messrs. Gross and Jessup. A major premise in their work inside government must be the political situation as it exists now and in what diplomats call the "foreseeable future," usually defined as five years. Practitioners have the responsibility for the security of the interests which they represent; that would be the security of the United States in the case of government officials. They must weigh carefully in terms of national policy the tactical measures and steps which those dealing with broader questions would consider of less interest or importance.

Some two years ago I was asked to analyze some of the current work in the progress of both groups and give my opinion about which field is the more important. I cam to the conclusion that both approaches are necessary and valid. But I also felt that it is in part the responsibility of scholars, and in part the responsibility of government officials, never to lose sight of the present day realities when considering the method by which a conclusion, generalized from the behavioral sciences, might be embodied into current, operative foreign policy. It does not follow that though we desperately need the solution to a problem, therefore such a solution must exist. Thus, I am interested and impressed with the work of Mr. Grenville Clark and Professor Louis Sohn. I would be most hesitant to see their proposals the subject of public debate with other governments in an international conference. It seems to me that we would run great risks of building up hope and then causing despair among segments of public opinion who would see what appeared to be another solution vanish. You will recall the story, now almost a cliché of political science, of Fleury's admonition to the Abbé Saint Pierre. Fleury, after reading Saint Pierre's Project of Perpetual Peace said to the Abbé: "You have forgotten an essential article, that of dispatching

missionaries to touch the hearts of princes and to persuade them to enter into your views." That is the problem for the negotiators who often need the prodding and the stimulation of creative thinking. It is understandable that those who work on the long-range problems may often feel that the practitioners are physicians coping with disease by using aspirin when antibiotics are available. There is, then, the need for hard work by both groups and for consultation between them.

4. International Organization and the United Nations

Now I come to international organization in general and the United Nations in particular.

During the commemorative ceremonies at San Francisco, there was much emphasis on the UN as an institution, entitled to support as such. There seems to be some danger in this emphasis and in repeated references of dedication to the United Nations, because the institution aspect of the UN is simply one approach to it. This approach leads one to make value judgments and set up balance sheets measuring successes and failures. President Eisenhower himself warned about this in his speech at San Francisco when he said that while there have been successes and failures in attempts to solve international difficulties, without the United Nations the failures would still have been written into history as such. One should not overlook, however, the important things that the UN as an agency or instrumentality of the international community can do. One need go no further than to recall the important mediatory efforts in Palestine of the three B's—Bernadotte, Bunche, and Burns.

But look at the United Nations from another point of view. It represents, through the Charter, the principles of conduct about which so much has been said at San Francisco. These are principles to which the Soviet Union, even in its propaganda campaigns about bacteriological warfare and in support of Chinese Communist intervention in Korea, has felt it necessary to do lip service. Some feel that such Soviet double-talk has destroyed the meaning of Charter principles and made them largely a language of mythology. It seems to me that they are full of meaning and importance to the free world and that the moral attitudes which they express are important sources of national strength and power. Certainly that is strongly the view of the United States Government, and Ambassador Henry Cabot Lodge has emphasized over and over again the function of the UN as a "loudspeaker."

Finally, the UN is a continuing international conference. It presents a great advantage for the foreign ministers and other officials of Member States to be able to meet around a table and on neutral ground with no one foreign minister having invited the others. It thus has presented an international clearing house for diplomatic business. Here it is that the new techniques of multilateral diplomacy, described by Messrs. Gross and Jessup, have been so brilliantly practiced by them both.

This combination of an organization-entity, a body of principles, and the conference table, is the image which occurs to me when I think about what the United Nations is.

Although United States officials have often referred to the UN as a cornerstone of American foreign policy and have said that our government is dedicated to Charter principles, when one gets to specifics it seems that our government, like other governments, considers the United Nations as one possible intrumentality of foreign policy, one alternative way of handling an international problem. There may be the alternative of direct negotiation or reference to a regional organization, to mention two alternatives (in government there are often three or more alternatives). Ambassador Jessup analyzed this approach when in presenting the case of the Berlin blockade in the Security Council he said:

> "The real question is far more fundamental. The real question is whether in the present situation the only existing general international machinery for the preservation of peace can be used to remove a threat to the peace, or whether, as the government of the Soviet Union contends, the world must be thrown back upon the unorganized international community with all that implied." (Security Council, 361st meeting)

Thus the national interest in our case, as in the case of other states, and I use this term in its broadest sense, is the basis on which the UN procedures may be invoked.

5. Review and Revision

Look at the world as it is today. There is a certain lessening of surface tensions between East and West. One must be sure of his position in calling it more than surface. Look

then at the United Nations as providing at least in one of its aspects an instrumentality for the foreign policy of its members. Are there practical means of strengthening United Nations procedures in ways to which the five permanent members of the Security Council would agree, and to which in the case of the United States the Senate would give its advice and consent?

We here can probably agree that it would be well to have a Charter with no veto possible on membership applicatins, and with a Security Council unfrustrated in the pacific settlement field by the probability or threat of a veto. These proposals as stated in the Vandenberg Resolution reflected the sense of the Senate in 1948. It does not follow, however, that because the United States would like to see these amendments, they are obtainable. If the Soviet Union has vetoed the Italian membership application on five separate occasions, it scarcely seems likely that it would agree to abandon its right of veto over membership applications generally.

The complex of problems presented by membership and the politically related issue of Chinese representation has resulted in an organization divided on the Chinese question. The exclusion of such states as Italy, Japan, and West Germany means that there are empty seats at the conference table. We support the Government of the Republic of China as the representative of China. Some of our allies feel that China is partially represented. As a result there are issues being discussed and decisions being made at international conferences outside of the United Nations' system with the U.S. not present or not fully represented. One can look to Bandung in April of 1955 and Geneva in July of 1954 as two examples. These facts reflect the inability of the United Nations to supply certain conference facilities for which states have therefore had to look elsewhere.

As to the problem of Communist China, we will not forget our long friendship with the Nationalist government or the costs in American blood of the Communist aggression in Korea. There were indications at Bandung that Chou En-Lai recognized that he could not seek a role in the United Nations by presenting the point of a bayonet and a refusal to make concessions. I touch on this issue here because it seems to me that it is the first one on which a Charter review conference would hang up. Certainly the Western world has a degree of interest in having such important states as Japan, Italy, and West Germany members of the United Nations.

The membership stalemate has come about over a period of years because the Soviet Union has felt that without the affirmative votes of the United States, the United Kingdom, and France in the Security Council it is not possible to get the necessary seven votes for a favorable recommendation of such states as Hungary, Bulgaria, and Roumania. It is that fact which has led to a series of Soviet proposals for deals or horse trades. The last state to be admitted to the United Nations, Indonesia, sensed the political climate surrounding its own application and brought it forward under circumstances it felt propitious. As you will remember, the Soviet Union abstained on the vote in the Security Council. On the other hand there were instances in which the Italian and Japanese applications were submitted at a time near the holding of an election in their respective countries. Thus, membership has become a political problem between East and West, and the most likely prospect is the admission of one applicant here and one there rather than any over-all or blanket agreement not to use the veto.

One of the great disappointments to some has been the collective security function of the United Nations. Instead of developing through legally binding orders by the Security Council, collective security developed through the implementation of recommendations, as in the case of the North Korean aggression. Some feel that this job should be left to regional organizations. It is well to remember, however, that we have in the "old Charter" the constitutional machinery of Article 43 which could be used in a radically different political situation. We also have the important and costly experience of Korea on which the "Uniting for Peace" resolution has built. It is well to remember, also, the Members States of the United Nations who look to it in the quest for their own security and who are not themselves members of any regional organization. Reviewing and amending the Charter in this area would not strengthen either ourselves or the organization.

Ernest Gross has discussed with you here domestic jurisdiction which is often seen as one specific of the great issue of colonialism. Clyde Eagleton has told you of how decisions are made by political organs for political reasons rather than as determinations of questions of law. Here again I see no likelihood of strengthening the procedures of the United Nations and the organization itself by attempting to codify, and to get general agreement and ratification of such codification of the relationship between Article 10 and Article 2, paragraph 7. Insofar as the veto is concerned, it is now a truism to say that it is

a sympton of the relation between East and West rather than a cause of tension.

There are some ways in which operations in the United Nations could be rendered smoother and more effective from a procedural point of view, which would involve no full dress review or amendments of the Charter. There was a special Assembly Committee on Procedure in 1949 which brought about measures that have saved a great deal of time by limiting plenary debate on issues discussed in the main committees. There has been mounting criticism of the atmosphere in economic, trusteeship, and legal committees as representing groups of delegates who from year to year apply their own individual approach and often without any very detailed instructions. To meet this problem it might be possible to amend the Assembly rules and do away with the present committee structure, simply having committees A, B, C, D, and E. The business of the Assembly would then be divided with some political, some economic, and some trusteeship issues in each committee. There would not then be the concentration or atmosphere of each committee separate and distinct from another.

As another example, the Assembly might well continue its study of how it can be useful in the pacific settlement field. There are delicate unresolved questions about the right of access to the UN of members of regional organizations, especially in the case of the Organization of American States. Also, there is a panel of mediators to which the United States appointments have expired. There should be new appointments. On the economic side, the technical assistance activities of the United Nations are well worth more support than the funds which the United States has been able to contribute to them.

6. Conclusion

Does our government have something substantive to say at a full dress review conference, looking in the direction of specific amendments? So far as the long-term proposals are concerned, such as those contained in the Clark-Sohn plan, would it not be well to sound out our free world allies either before or after consulting the Senate about the necessary amendments to the constitution, before debating the issue of world government in a United Nations Conference? There seems to me danger that American public opinion will split into a neo-isolationist group on the one hand and a group disillusioned in hopes for a new Utopia on the other if world

government is debated at a review conference. The Conference can not make decisions for the United States on the Soviet Union. So far as the current negotiating situation is concerned I see little prospect of tangible results that would justify the risk and expense of a general review conference which would not likely produce proposals for revision which the United States would support.

The need for flexibility of approach to international organization is important at a time like this. It is the period in the football game when after a series of muddy line plays we must be willing to attempt a few passes and expect others to attempt them. Although it does not seem likely that the Soviet Union as a minority member of the United Nations would ratify an amendment abolishing the veto on membership applications, it is at least possible that they would accept some individual states as they did Indonesia in 1949. I have seen the Soviet Representatives during the long quest for a Secretary-General suddenly pick up the name of Hammarskjold after weeks of stalemate. It is this sort of ad hoc agreement on specific questions that seems to me the most reasonable possibility.

In his penetrating article in the current issue of International Organization, Lawrence Finkelstein has observed as a matter of practical politics and votes that it is by no means clear that the necessary majority for a Charter review conference will be forthcoming next September "if the United States should, for example, merely cast its vote affirmatively without actually attempting to enlist support." He concludes that the issue will rest squarely on the United States. 1956 is an election year. That is the earliest time a conference might be held. It is also apparent that there are grave disadvantages in negotiating with our friends in public on issues on which they and we are not entirely agreed.

Perhaps these ideas were not distant from Ambassador Lodge's mind when he told the Senate Subcommittee last month that in his personal opinion, while he favored the holding of a Charter review conference,

> "Before such a charter review conference is held, we, in this country, must develop a national position on the changes we favor; there must be time for other countries to do the same; there should then be time for us and our allies to develop an agreed position; and finally, there must be time to build up a big wave of world opinion in support of our proposed changes." (Review of the United Nations

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Charter, Hearings before a Subcommittee of the Committee on Foreign Relations, U.S. Senate, 84th Congress, 1st session, p. 1968.)

The United States is not in that position now. Applying the test to substantive changes which we and our allies can reasonably expect to obtain, I wonder whether the United States has much more to say at a review conference than Solomon-John in the Peterkin Papers? Perhaps next fall the United States will accept the diplomatically phrased formula of Secretary-General Hammarskjold that the General Assembly decide in favor of a Charter review conference "leaving open for the time being the question of when the conference for that purpose should be held."

From the point of view of groups such as this Institute, I repeat that it is well that we have been stirred up to think and write and speak about these questions. This would probably not have occurred but for the third paragraph of Article 109 of the Charter, and Secretary Dulles' interest in having the American citizenry rethink the problems of international organization. After all, as states use the United Nations as an instrumentality, and as precedents are created and adjustments made, these states will find they have been reviewing the Charter all along, right from the days of San Francisco in 1945, just as the Bourgeois Gentilhomme finally discovered that he had been talking prose all his life.

GENERAL DISCUSSION

June 28, 1955, Afternoon Session

JOHN R. WILLIAMS (Lakewood, Ohio; Western Reserve University, Law School): I would like to take exception to Mr. Hyde's suggestion that long-range proposals for building a world federal constitution as a Charter for a more effective United Nations are only to be considered within the closed ranks of a corps of intellectual elite. That "elite approach" is the exact antithesis of the foundation upon which our government is built. Our government is founded upon the premise that the issues of foreign policy are just as much a vital concern to the citizens of the United States as the tariff and income tax. Let me assure you that in Ohio, and I am sure it is equally true throughout the rest of the United States, the man on the street is thinking of the issue of world federation. With sufficient study and effort by expert and layman alike, the principles of constitutional government can be applied on a world scale to eliminate war and maintain a world legal order which would ensure liberty and justice for everyone.

It is not impossible to institute a popularly elected UN policy-making body in which a large proportion of the members would be directly responsible to the people and would be chosen, to the extent possible at the present time throughout the free world, in free and fair elections. This is not only an American point of view. At the recent Bandung Conference, Sir John Kotelawala of Ceylon (according to Keesing's Contemporary Archives, Vol X, p. 14181 B) "in his opening statement observed . . . that the United Nations should be reconstructed so that it could be an effective instrument for peace . . . and a fully representative organ of the peoples of the world . . ." The goal of United Nations Constitutional Federation may not be easily reached, nor attained in 1955, 1956, or whenever the first UN Charter Review Conference is called.

Laymen throughout the free world need more than ever the help and counsel flowing from your learning, scholarship, and technical skill in international law, to meet the present crisis in world affairs. It is respectfully submitted that the obstacles to a free world community may be overcome through co-operative efforts among international jurists, laymen, practicing lawyers, and experts in comparative constitutional law and

governments. In the light of the needs of modern, international organization a re-examination should be made of the constitutional principles upon which our own government is based and upon which the other constitutions of the free world are based. Then every avenue of legal action should be explored to achieve as rapidly as possible the implementation of the best of these principles into any revisions of the UN Charter and into the day-to-day growth of the United Nations.

PROF. JAY MURPHY (University of Alabama Law School): I have a similar comment on Mr. Hyde's point. Mr. Hyde says that he would be most hesitant to see Professor Sohn's and Clark's proposals the subject of public debate, and the reason given was that this would run risks of creating feelings of despair among the people. This is an over-simplification, but I wonder if there is a possibility of a misunderstanding of Mr. Hyde's statement. Whether despair would exist would be a question of fact, and I do not think any of us really know that fact, nor, second, whether despair would be bad if it did result from such debate. This is a question that we might ask ourselves. Indeed, we are living in quite despairing times and people should feel great despair since this is reality. It is possible that the ultimate implication behind Mr. Hyde's fear may be that communication on a subject on which people differ basically is dangerous. This principle, we will recognize, is against the free spirit of inquiry which is fundamental to democracy. I was frightened just a little bit by the implication of non-discussion and non-communication concerning very fundamental ideas relating to the organization of man into new patterns to meet, among others, the phenomenon of the atom.

MR. HYDE: I can think of no subject more important for every man, woman, and child in the United States to think about, and to work at separately and in groups than the problems to which Professor Sohn has directed our attention. The point that I was making as a practitioner was that American public opinion, American groups, American commerce, the American executive, must understand and have the broadest base for reaching a conclusion on a problem that is so incredibly difficult.

Let me recall that my subject was "Charter Review and Revision," and speaking as one who had been a practitioner I think that the ultimate aims about which Professor Sohn is concerned might be prejudiced if instructed representatives of the

United States Government, in an international conference, had to discuss them with instructed representatives of other governments without the broadest understanding and base in this country. These are problems that involve life and death for ourselves and our children, and problems which for our military establishment involve the responsibility to try and protect us.

MR. WILLARD N. HOGAN (New Paltz, New York): Professor Sohn suggested that a Charter Review Conference, with a possibility of Charter revision or amendment, would be an excellent way to get before the world the possibility of strengthening the United Nations and of achieving some results in the field of disarmament. I would like to suggest that these basic objectives might be better accomplished if they were disassociated as much as possible from the idea of a Charter amendment, and this for two reasons. One is that the problem of strengthening the United Nations is not primarily a problem of the text of the Charter, but of tensions that exist between nations of the world and of the policies of the major powers. Therefore, Charter revision is not something that is necessary in order to achieve these primary objectives. In the second place, if we agree that Charter revision or amendment is subject to the veto under the present arrangements, this would seem to me to be the most difficult, rather than the easiest, way to accomplish these objectives which have been suggested and in which we are all interested.

I would also like to make a brief comment on the Arce letter to the New York Times, which Mr. Hyde mentioned. I wrote a brief reply to the Arce letter which also was published in the New York Times. A day or two later I received in the mail a detailed statement about his position from Mr. Arce, and it amounted pretty much to this. The argument was based on the contention that the United Nations was created in January 1942, and that the Charter which was drafted at the San Francisco Conference in 1945 was only one structure or one procedure which has been set up by this current United Nations which continues to exist and which can adopt any other Charter it wants to. Mr. Arce also stated that of course in the amending of the laws or articles of the present Charter, which might be suggested by the two-thirds vote of the Charter Review Conference called under Article 109, it would have to be ratified by the signatory states and which would be binding only on the states which would ratify such a change in the amending

procedure. Therefore it is pretty difficult for me to see how this really amounts to an improvement over Article 109 as it now stands in the Charter.

PROF. BRENDAN BROWN. (Loyola University of the South): I should like to ask Professor Sohn if he would be so good as to comment a little further as to the chief criterion of juridical strength when he speaks about the strengthening of the United Nations. In other words, is it just a matter of strengthening the United Nations by an army of 500,000? Is it a question of strengthening the authority of the United Nations? Just what are we strengthening here?

PROF. SOHN: When I talk about strengthening the United Nations I talk in two terms. First, I mean strengthening the authority of the United Nations to do what can be done for the peace of the world under the Charter. Second, I mean strengthening the means which the United Nations has at its disposal to do it. Of course, in the world of sovereign states, the kind we have at this point, the United Nations has to rely on state honor and on the hope that states will do what they ought to do. We have seen in the past that reliance on the states' sense of duty is sometimes justified, as in the Korean case; but sometimes it might not be sufficient. It certainly would not be sufficient in the case of an atomic war. The United Nations needs additional powers to cope with this problem. I believe that if something has to be done, one can find a way to do it. We do not have to be entirely pessimistic about it, to believe that nothing can be done and the whole catastrophe will fall upon us. I do not believe either that we have to wait forever or even that we have to wait until 1970 to do it. We reached one crisis a year ago when the hydrogen bomb came up. A few years hence—maybe three years, as some experts say, maybe five years, maybe ten—intercontinental ballistic missiles are going to come out, and at that point we are going to have another attempt in this country to do something about the matter. Perhaps at that time it may be already too late and maybe the Armageddon will come whether we like it or not, but as long as we have time we ought to do something about it. I do not see that anything better can be done about it than for the United States Government to come with an enlightened, general, basic policy on the subject. Maybe Mr. Stassen is trying to think it through. Perhaps Mr. Stassen can find a way without amending the Charter. If he can do it, so much the better. I am not insisting on the revision of the

Charter and I do not think it is absolutely necessary. I believe that it would be a convenient way to do it, but not a necessary way to do it. On the other hand, you have to remember that the whole business is not worth the candle if it is done unilaterally by a group of states, however large. It has to be done by the consent of everybody and it has to be done with the final consent of the Soviet Union whether given at the Charter Review Conference or given at the conference agreeing with the disarmaments treaty or at some later date when everybody else ratifies it first. Once you get the Soviet consent it would not matter by which method you have obtained it. You would not be confronted any more with the veto problem. Having gotten its consent anyway, you could amend the Charter as well as any other document at that time.

But the basic problem to me is that stated a moment ago by Mr. Hyde: that the people in the United States should understand the issue, should have the knowledge necessary to decide whether they are willing to pay the price. Mr. Ernest Gross stated it very nicely last night. There is the curve of what we want and the curve is going in one direction, and there is a curve of what the Russians want going in the other direction. The big question of our time is if they are going to meet someday and if we both are going to agree that we want peace more than we want some other things, without surrendering at the same time our freedom and our liberty. Of course the easiest way to get peace is to surrender to the Russians. They would not like anything better than that and that would be probably the easiest way. As Hitler always said the peace of the world could be achieved best by Germany dominating the whole world. The United States is not used to the idea of dominating the world. The only idea we can contemplate for the government of the world is to have some kind of federated structure. It is probably not going to be a federation of the type of the United States or even the one proposed for Europe; it would be something in between what we call international organization and international federation. It seems to me that the ingenuity of lawyers and political scientists has to be directed to finding an intermediary institution strong enough to do the job—to answer the question with which I started—and at the same time not so strong that it would become by itself some Frankenstein of which we would be frightened.

PROF. JAMES O. MURDOCK (George Washington Law School): In this thoughtful discussion of the review of the Charter there have emerged conflicting points of view that

remind me of one of the early debates in the League of Nations at Geneva. Lord Robert Cecil, who was something of an idealist, argued that the League should go forward audaciously. His colleague, Lord Balfour, who saw the problems of the moment with great clarity, urged that the League should proceed very cautiously. When the British delegation finished talking, the delegate from Haiti, who had quite a sense of humor, said that it was not clear whether the British delegation wished the League to be audaciously cautious or cautiously audacious.

Do we have to accept these alternatives? Mr. Hyde has pointed out the difference between long-range projects—the strategy of world peace—and short-range projects—the immediate tactics. These concepts do not necessarily conflict. They are or should be made complementary.

There are three general patterns of world organization. One is international law supplementing balance of power politics. This is about what we have today. Another pattern is the simple-minded one—world empire. There are certain states that have this in mind. They do not hesitate to let their long-range plans be known. They declare them in manifestos. There is another possible pattern of world organization—a federation of nations. This does not necessarily mean our type of federation, but some sort of federation where there is a union of equal states, with power delegated from the people to a federal government of limited powers. There are many people in the world who do not know what a federal union of states means. I have a very dear colleague—most of you know him, Edgar Turlington—who has been out in Eritrea for a couple of years trying to work out between Ethiopia and Eritrea the basic concepts of federation, a novel idea in that part of the world. Either you rule or you are ruled is the concept that prevails in many parts of the world. The idea of a free people and equal states working together is something that is more abstruse.

It is suggested that as leaders of free thought and the free world we formulate a long-range policy that is worthy of our heritage. Let it be known what our grand strategy is by propagating it and working for it openly. The present difficulty is that our leaders of thought and our political leaders have not had the vision or the courage to crystallize a long-range policy. They have been too preoccupied with small bickerings of the moment and possibly re-election to determine the long-range course of the ship of state. But the Western World cries for a grand strategy that will stir the hearts of men and raise their hopes in every land. Once the strategic objective is clearly

defined, day-to-day diplomatic decisions and tactics are readily shaped and developed to achieve by degrees the dominant objective. Thus long-range objectives and immediate tactics will be rationally co-ordinated.

PROF. CLYDE EAGLETON (New York University): I do not want to pass by this list of topics that Mr. Sohn gave us to consider. I thought I might answer them briefly and get the discussion started. I am going to leave the first for the last, though. As for the second and third, I can not see the connection that they have with the Charter Review Conference, unless you are thinking of putting into the Charter a requirement that no state shall be allowed to have any arms or something like that; if that were so I would say that it is utterly hopeless and no use considering at a Charter Review Conference.

The fourth question, should any changes be made in the structure of the United Nations? I should like to see one, at any rate. I would like to see a provision by which the permanent members of the Security Council could be changed, as was possible under the League of Nations. Again, I do not see much use in raising that question; it could hardly be done. As to voting procedures, either in the Council or in the General Assembly, that can be done without amendment to the Charter. All you have to do is get the agreement of the Five Powers and you can change the voting procedure in the Security Council; as far as the General Assembly is concerned they can make their own rules of procedure.

The fifth one, should international lawyers concern themselves with all these questions, or should they concentrate all their efforts on problems of special interest to lawyers such as pacific settlement of disputes and codification of international law? It seems to me that you cannot separate them. One depends on the other, and if a lawyer tries to concentrate on, say, pacific settlement, he only gets tangled up in a lot of other questions as well, like voting procedure, and is therefore forced to consider pretty nearly everything.

The sixth one, should the United States be prepared to defend the status quo in the economic and colonial fields? Why is that a question for Charter amendment? It sounds like a question of national policy, as to what policy should be followed. I should think rather that if you are talking in terms of amendment of the Charter you would ask how we can set up the rules and procedures of the United Nations in such a way that the community of nations can answer this question, rather than the

United States answer it, which might bring in such matters as weighted representation or getting a fair share of responsibility assigned, and so on.

The first question is the decision whether or not to support a Charter Review Conference. I have always felt that the Charter Review Conference would be held, that the demand for it could not be refused, but I have also wondered what could be done there. I have a great deal of sympathy with the Clark-Sohn proposals and with what Mr. Williams said, but I have to think of them in terms of long-range objectives; and with regard to the present situation, we can do a great many things without amendment of the Charter. Yesterday in a non-cynical but pessimistic mood I suggested that you did need an amendment to the Charter because under present methods of interpretation they can do anything they want to anyhow. Of course that does not reach out to giving orders. You would have to amend the Charter if you were going to strengthen the General Assembly so that it could give orders, but that you will not get, so it is not worth consideration.

On the other hand, there are a great many things that can be done under the Charter today without amendment. You can get compulsory jurisdiction for the International Court of Justice simply by accepting the optional clause without reservations; you could get rid of the veto, or you could modify the use of the veto simply by agreement of the powers. You can set up an international police force. There is nothing in the Charter to prevent that, if you just got the Assembly to agree to put up the money and everything else that would have to be done in order to get it. Domestic jurisdiction—I do not see how that can be amended. I have puzzled over that a great deal myself and I do not see any way of amending the text so that it would be a satisfactory change in the Charter. I treat that as a matter that would have to be worked out gradually. The point that I am getting at is, as I said yesterday, that you do not have a consensus of opinion sufficiently strong to strengthen the United Nations. If you had that consensus you could accomplish a great many things right now without amending the Charter. And if you do not have enough consensus to get compulsory jurisdiction for the Court by the use of the optional clause, then you cannot hope to get it by amendment.

And so, in general, I have the impression that it would be much better for us to continue working on some of the specific problems in the hope of getting agreement on this one and that one, and gradually building up your consensus until you can

strengthen the United Nations by amendment; but you will not get it by review and revision of the Charter now. So, as a final suggestion—I believe this has not been made here—it seems to me that it might be a useful thing for the General Assembly to vote to have a Review Conference sometime in the future, and then to set up a Preparatory Committee which would study for as many years as were necessary. The Committee could say when the time was ready for a Review Conference, could suggest the methods to be followed, and could consult with governments to see how far they were ready to agree. This would be a better procedure than just plowing right into the Review Conference.

MR. ERNEST A. GROSS (New York Bar): I have two questions of fact to address to Dr. Sohn. As I understood Louis Sohn, he asked rhetorically whether we should join the Soviet Union in an unholy alliance against the small powers who want Charter amendment. That raises a question of fact, and I would like to ask what evidence there is that the small powers want Charter amendment, and which small powers want Charter amendment, and what amendments to the Charter do they want? In the recently concluded Commemorative Session in San Francisco there were many opportunities to discuss this question in the statements made by the representatives of the Member States. It was raised remarkably few times in the course of the debate. The few statements made with respect to it rather indicated that the small powers were not at all anxious for a Charter Review Conference. In one rather surprising case, that of India, the delegate formally stated that his government did not favor a Charter Review Conference.

The second question of fact I want to ask is whether it is historically correct to say that "the United Nations was sold to the public by statesmen under false pretenses in 1945." I have had occasion myself to examine the newspaper and editorial and Congressional files at the time, and at least on the basis of my own inspection I found that there was a remarkable degree of conservatism shown by the witnesses before the Senate Committee on Foreign Relations and by the editorial writers and the non-governmental organizations, including the church groups. There was an almost universal warning, voiced also by Mr. Dulles himself, as well as by others who testified and wrote on the subject, that this was just the beginning, that there was nothing here but an instrumentality or mechanism, the success or failure of which would depend entirely upon the will

strengthen the United Nations by amendment; but you will not get it by review and revision of the Charter now. So, as a final suggestion—I believe this has not been made here—it seems to me that it might be a useful thing for the General Assembly to vote to have a Review Conference sometime in the future, and then to set up a Preparatory Committee which would study for as many years as were necessary. The Committee could say when the time was ready for a Review Conference, could suggest the methods to be followed, and could consult with governments to see how far they were ready to agree. This would be a better procedure than just plowing right into the Review Conference.

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with which the problems ahead were approached. It is true that in 1945 there was a general anticipation of victory, a flush of warm feeling toward the Soviet Union brought about by the remarkable wartime coalition. This created a degree of enthusiasm for world effort and world organization. But to say that this effort was sold to the public by statesmen under false pretenses leaves a misleading impression, and I question the basis for the statement.

PROF. SOHN: As to the first question—about the position of the small powers—I relied mostly on the record of the debate in the General Assembly when they were debating the question two years ago. At that time most of the small powers wanted a Charter Review Conference according to my counting, but they were unsure whether they were going to get anywhere unless the Big Powers were going to support it. So far as the present meeting at San Francisco is concerned, as far as I can tell, some of them had instructions not to deal with such a controversial question. On the other hand, if you look at the record of the San Francisco Conference you find that practically every delegate said that the time had arrived for the Big Powers to do something conclusive and permament about the question of disarmament. On the last day, for instance, the delegate from Belgium made a very strong statement that unless something would be done in the near future on the question of disarmament the small powers were going to try to push the Big Powers to do something. My contention has always been that the only reason for holding the Charter Review Conference is to do something big and constructive. I agree entirely with what Mr. Ernest Gross said last night, that it is no use having the Charter Review Conference for dealing only with the question of membership or even the question of the veto on pacific settlement of disputes. It might be very nice to have some improvement in this area, but probably a Conference would raise quite a lot of other questions as well. This connects with something that Mr. Eagleton has said about the colonial powers. I think one reason why we do not like the idea of the Charter Review Conference limited to a few matters is that one of the matters, which we ourselves would not put on the agenda but which other nations might, would be the question of strengthening the Charter provisions relating to colonial territories, and our colonial friends would run into a tremendous difficulty. This is one of the things that makes us wary of a Charter Review Conference. To this the answer is, it seems to me, that

if you put something as big as total disarmament into the hopper, people would be less insistent on the other questions and would want the Big Powers to tackle that first before they tackled anything else.

Coming to your second question—about the spirit of 1945—here is something very characteristic in the affairs of the United States. We sell things entirely differently to the general public than we do to the Senate. Mr. Leo Gross yesterday has shown very nicely how the Charter was sold to the Senate on the ground that it did not really involve any commitment by the United States. On the other hand, if this were advertised to the public, I do not think you would have gotten any support at all from the public for the Charter. We had the same difficulty a few years later about NATO, when different statements were made by us to our allies about what NATO means, what our obligation under NATO means, while at the same time we were trying to persuade the Senate that it was nothing really dangerous and that it did not involve any actual commitments. This is a kind of governmental schizophrenia which has afflicted our Government for some time. Indeed it was quite clear, to me at least, in 1945 that this was something that was happening. The Charter was sold on very conservative grounds both to the Senate and to the professional people who knew something about it, and it was sold on entirely different grounds to the general public. Maybe I have been reading it wrong, but this has been always my impression and some other people who studied international problems seem to have come to similar conclusions.

PROF. JAY MURPHY (University of Alabama Law School): I would like to make one comment on Mr. Gross's second question to Professor Sohn. The question as to how the UN was sold to the public raises the problem of what is the public, and Professor Sohn has indicated that there are classes of public. There is one other point. I have the feeling that Mr. Gross's question assumes a sophistication which just does not exist on the part of what I consider to be the general public, the general masses, concerning precisely what the UN would be. This point is clear, that the UN was (and is) perhaps a symbol to the public to solve our international problems, as the Constitution of the United States is a general symbol of freedom to the public; and yet we know there are tremendous disparities between the symbol and the reality. Likewise the Declaration of Independence is a great symbol of freedom and liberty to the

public, and the Magna Carta continues to be one. I have the feeling that this is the meaning of Professor Sohn's statement concerning selling the UN to the public. I do not think that there was any nefariousness on the part of the sellers of the UN to the public at all. A symbol making public reaction was perhaps an innate or inherent characteristic of the situation which was being dealt with at the time.

PROF. LEO GROSS (Fletcher School): I want to add a few remarks to what has been said by Louis Sohn and Jay Murphy on the "selling" of the Charter. If you look up the report of Secretary of State Stettinius to the President and the hearings on the Charter in the Senate, you will find there some selling points. For instance, that the Charter is a much better instrument than the Covenant of the League of Nations. There was a constant comparison going on, on a superficial level, between the Charter and the Covenant. I referred to it yesterday in a very small way. You will find on the veto itself statements that it is much better than the voting rule in the League: In the League every power had a veto; now on the Security Council, on the other hand, only the Big Five have the veto; this is consequently a much better arrangement. In the General Assembly nobody has the veto, everything is decided by a two-thirds majority vote or by a simple majority. Throughout the presentation you will find many such little things which indicate that those who drafted the Charter wanted to put the very best interpretation on what they had achieved, but actually they had not achieved very much. Some of you may recall that between Dumbarton Oaks and the San Francisco Conference and again after the San Francisco Conference, the Department of State sent out a number of officials to explain to the people first the Dumbarton Oaks proposals and later the United Nations Charter. How these speakers were selected I have no idea, but I attended some meetings myself in Boston, and the tenor was that the United Nations is a much better thing than was the League of Nations. It seems to me that there is a point in what Louis Sohn said, although as he also pointed out there is a certain ambivalence about it. To make it easier for the Senate to accept the Charter, the commitments were played down to the vanishing point, and in explaining the United Nations to the people it was claimed that we had achieved a tremendous success at San Francisco and produced something very much better than the League of Nations.

PROF. PHILIP C. JESSUP (Columbia University): One word on what Leo Gross has just said. It seems to me that the question which Ernest Gross raised was a challenge to the implication in Louis Sohn's statement that there was some kind of trickery or falsification in the presentation of the UN issues to the American public in 1945. I think Mr. Sohn answered that. But Professor Leo Gross suggests that it was deceitful for someone in 1945, in the great enthusiasm of the operations in San Francisco—rescuing the whole idea of international organization out of defeat, bringing the Russians in and actually getting some kind of an organization going, getting some kind of a charter agreed on—to say the Charter was better than the Covenant. It may be a sign of stupidity, but it was not, it seems to me, any evidence of deceit. A lot of people who were working at San Francisco thought that a great thing had been accomplished. They thought in the first flush of success that it was better than the League of Nations, and in the drafting of the report to the President I can bear testimony that a very conscientious effort was made at drafting a record which would stand up as reflecting an accurate interpretation of the Charter. Perhaps they were all wrong, but the sincerity of those who made statements at the time should not necessarily be challenged because in hindsight we may dispute them.

JOHN R. WILLIAMS (Lakewood, Ohio; Western Reserve University School of Law): Concerning the problem of disarmament, I do not believe it is essential to world security that there be complete elimination of all weapons on the national level. The real objective is to assure that on all levels of government—local, state, national, and world—armaments be effectively subjected to constitutional authority. We are not afraid in the United States of the fact that people in Tennessee may be able to make an atomic bomb and that Michigan, Ohio, and Indiana can not do so. We are not worried about that because there is a carefully developed, effective system of constitution checks and balances imposing legislative, administrative, police, and judicial power to control how all persons within the U.S. shall behave with respect to the use of all weapons and other dangerous instruments, including nuclear energy. If a similar system of checks and balances were applied in a constitutional, federal government of the United Nations, it would not make any difference to us whether or not the United Kingdom or any other country whose people upheld constitutional government had ten times as many hydrogen

bombs as the United States. Even conceding the desirability of establishing some equitable balance of armaments among the permanent members of the Security Council, certainly, further research in the field of how armaments (weapons of all kinds including firearms) are controlled in the various state governments and on all levels of government throughout the United States—as well as in other countries throughout the world—should not be neglected. Such research efforts may well reveal a vast reservoir of practical techniques for regulating and controlling armaments, at least some of which could be applied to the problem of armament regulation, licensing, and control by the United Nations in the world community.

MR. MELVIN MARCUS (Graduate Student, University of Michigan): I should like to make a final comment. It seems to me that no nation or society can live or work outside the frame of reference which is provided by the history and conditions of the time in which it finds itself. The overriding frame of reference, the hard reality of the time in which we now live is the tremendous conflict between the two Super-Powers, the United States and the Soviet Union.

Just as many of the defects in the United Nations Charter are due primarily to the conflict of interest and policy between the U.S. and the U.S.S.R. at San Francisco, so I think the primary difficulty in providing for a new or revised or amended Charter will also arise out of the difficulties due to the differences of opinion and ideas between the United States and the Soviet Union.

Our primary task today is one of negotiating with the Soviet Union and educating our own people and our democratic leadership. What we must do is somehow or other to convince both the leadership and people of this country, and at least the leadership of the Soviet Union, that it is to the vital national interest of both to develop some sort of compromise and understanding whereby we can live with each other. While we are discussing the problem of amending or revising the Charter and developing international law here, our leaders are preparing to open negotiations with the Russians at Geneva. I am most concerned with the comments in the press and in Congress which are part of an attempt to mortgage the freedom and flexibility of negotiation even before the Conference begins and which can only foreclose any possible hope of success.

As a student, it seems to me that you gentlemen here, who are the outstanding scholars and leaders in the field of

international legal studies, must concern yourself with this problem of educating our people and leadership so that the opportunity for building a new frame of reference for our time through negotiation will not be lost. Only when this new frame of reference is constructed will we be able to make more constructive and effective use of the United Nations Charter as it stand either through a process of development and interpretation as outlined by Mr. Eagleton or through a development of the Charter along the lines of the drastic reforms as Mr. Sohn has suggested.