

# INTERNATIONAL LAW AND THE WORLD COMMUNITY

## THE MEANING OF WORDS, THE NATURE OF THINGS, AND THE FACE OF THE INTERNATIONAL ORDER

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### I. INTRODUCTION: DEFINITION AND MEANING

Endemic among you there is, I know, either skepticism about the claims of international law to reflect a legal order or annoyance at both the restraints you feel that international law imposes on you and the protections it seems, from your perspective, to give to wrongdoing states. Today I am going to try to dissolve that skepticism and to demonstrate that, although you may feel international law's restraints to be irksome, they can also limit your adversary, your competitor, so that he too can be brought to feel their discipline. Much, indeed, of what arouses your skepticism or engages your impatience may not so often be the restraints of law as chosen policies of self-restraint or of permissiveness to others. International law may not, in all cases, require the kind of conduct which engages your cynicism. But first we need to clear up a few preliminary matters; for example, what we mean by such terms as "law" and "international law."

Many people ask, when they look at the international order and see that there are none of the regular institutions of a domestic legal order, no legislature, no executive with law-enforcement authority, and no system of courts with

compulsory jurisdiction: "How can international law be law at all?" Now this brings me to my first point. Only too often people confuse a significant discussion about the nature of things, or the nature of law, as in this case, with a trivial argument about the meaning of words. Let me illustrate this.

Most people's concept of law, even today, is based on an authoritarian model which can be stated in general terms as a general command issued by a sovereign authority owning no political superior, enforced by the authority of a system of courts, and administered by an executive authority. This is one generally accepted definition of the word "law." But it is a very narrow, restricted view of the law, and it leaves out of account very many kinds of law, even very many kinds of domestic law. On the other hand, its wide acceptance stems from the English Utilitarians of a century and a half ago, especially Jeremy Bentham and John Austin, and their extensive program of domestic legislative reform. One consequence of this positivist, utilitarian definition of law was that international law came to be characterized as "positive morality." This illustrates my point. Stipulate a narrow definition of the word "law," and international law is excluded. On the other hand, if you stipulate a

broader definition of law, international law will be included. This reminds me about all the controversy which has been plaguing the world of literature for about a hundred years: "Did William Shakespeare really write those plays he is credited with?" One answer is: "If he did not, then somebody else called William Shakespeare did."

If anyone says to me, "I stipulate a definition of law which will exclude international law. Therefore international law is not law," I will say, "Well, your second sentence, your conclusion, is unnecessary; it was already inherent in your premise. If you stipulate that kind of a definition of law, that is your business. And I do not wish to argue over trivialities. But I would like to point out that you are probably wrong in your concept of what law is." This last is not a trivial point. It is something we should think about—what the nature of law is, what its uses are, how we may best employ it, and how, indeed, it can be utilized to the advantage of the Navy, of the United States, of the world community, rather than treat it as a counter in a parlor game with words.

## II. A LEGAL SYSTEM AT WORK— SOME "STILL" PICTURES

I will start my discussion of this topic of finding some common models or pictures of a legal system with the idea that most of us find international law a difficult concept to grasp, or a difficult thing to think about, because our everyday ordinary way of thinking about law is the product of common experiences—these produce the models we have in our heads. For example, a common model of the legal system at work is the picture of a traffic policeman booking us for making a left-hand turn out of a right-hand lane. Now we know there is a rule, we know there is a person in authority, and we know we have done the wrong thing. And this is an easy and simple approach to giving us

a model or picture of what law is. Behind the policeman is the State Legislature which authorized the writing (or indeed may have written itself as is the case in some states) the Rules of the Road, including the strict requirement about not making left-hand turns out of right-hand lanes. The policeman himself is appointed under laws written by the State Legislature, and ultimately his appointment has to be valid, as the legal provision our citizen has offended has to be valid, under the Constitution of the State and that of the United States. There is thus a legal system which bears down on us, possessing the powerful and vast machinery of a sovereign state, complete with legislature, authoritative executive, and, finally, courts with compulsory jurisdiction. (If you make a left-hand turn out of a right-hand lane you will probably find yourself in one of the very minor courts of a great hierarchy of judicial institutions.) In addition to showing our motoring citizen as feeling very sorry for himself while the officer writes out the ticket and says, "You shouldn't have done that, sir," or words to that effect, there is a vast background which the legal order provides to this trivial legal event. Insofar as this incident has legal significance, it involves the whole domestic legal order and is governed by it. In this way we all see the secure order of great richness in commands or, better, prescriptions, rules, institutions, and validly appointed legal authorities which keep our complex society functioning with the minimum of friction and waste. Then we look to international law and we see none or, at best very little of this institutional richness and depth of legal rules, institutions, experience, authority, and power.

I have gone into some detail with this picture, this common model of the legal order, since many of us and our fellow citizens carry it in their heads as their belief that it constitutes a "hard-core" example of the legal system at work—

the citizen in his automobile and the traffic policeman on his motorcycle. This is also in that area of law which most people regard as the paradigm of the legal order—the enforcement of the criminal law. Let us now go a little further. Do you think that in many cases when the U.S. Government, for example, may have to deal with organized crime in the United States, the law enforcement situation is so simple? It seems to me that some research worker could probably uncover an enormous and intricate system of negotiation, concession, surrender, giving ground, claiming ground, and so on, in many of the major cases which the Federal Government or a State government brings against a major representative of organized crime, in order to conduct the case ultimately to the conviction and punishment of the accused. It seems that when we observe governments prosecuting major underworld figures we are already a long way from the clear-cut law-enforcement situation of the policeman and the motorcar driver or the policeman and the petty criminal. Let us go another step further.

Outside the realm of criminal law—and you will notice that I have kept my pictures, so far, in the realms of criminal law—we find that there are many more diverse ways in which the law operates than we are apt to expect inside the area of criminal law. We find that the legal system appears, mainly, to provide the citizen with the procedures, with the means, of doing the sort of things he wants to do. The Law of Real Property is not only a law which tells trespassers to keep off your property or be prosecuted; it is also a law, a body of very intricate law, that tells you how you can enjoy what you have and, if you have the right kind of interest, the many ways in which you can transmit that interest or the fruits of it to other people; what it can be worth to you in a money sense—given the state of the

market—and how you can enjoy it to its best advantage. This is not telling you not to do something. There is here nothing like an equivalent of disobeying a prohibition—for example, making a left-hand turn out of a right-hand lane or even of belonging to a powerful syndicate of criminals running illegal “business ventures.” This area of law tells you what you can do with your own so as to effectuate the maximum of enjoyment to yourself and with maximum advantage to your neighbors.

Again, when a civilian writes a will there are certain rules that he must fulfill; for example, he must have his signature attested to by a certain number of witnesses (the actual number depending on state law); also he must follow certain other basic procedures. It would, therefore, be wrong to say that the law relating to the writing of wills consists of commands given by a legislature and enforced by sanctions—by the threat of prosecution and punishment. After all, what is the sanction if someone writes a will and fails to have it testified to by the right number of witnesses? The will may be invalid, but the citizen will not be punished by any decision to invalidate his will. After all, he is dead! In this kind of a situation, it seems silly to call nullification a sanction, a threat of punishment.

The system, the laws we have on writing wills, are what we may call facultative or facilitating rules. So are all the rules which tell us, and institutions which tell us, how to do what we want to do in the best way for ourselves and our fellow citizens.

Thus we see that law—even law within these United States—is something far more pervasive, far less clear-cut, than a prohibition, an offense, a policeman, and a lower court. We need to give it a far wider definition. Now the interesting thing is once we move away from the idea that the legislature, executive, and courts with compulsory jurisdiction are essential to the existence of

a legal system, almost any other definition of law includes international law. If, for example, we are prepared to say that a legal system consists of a process of authoritative decisionmaking, in which basic values become reflected in social action by means of the decisional process and through the agency of the authoritative decisionmakers (including courts, but not restricted to them), then we find that international law fits into that definition quite well. Again, if we add thereto the concept of law as a system of facilitative means of social interaction and communication which contains prohibitions only where interaction extends beyond what is permissible in a mutually viable system, then, here too, we find that international law quite clearly fits within our definition. Also, if we state that it is a most important means of directing participants' efforts for the realization of common values, then, again, international law fits in with such a definition of law. Now, I have stressed the problem of definitions because I really want to underline the distinction between the trivial point of arguing about the meaning of words and the important point which calls for an investigation of the nature of things. I must also point out that the definitions of law which I have just indicated seem far closer to the nature of law than the more traditional one which emphasizes power and enforcement at the expense of interaction and direction. I will close this section of my presentation by pointing out to you that international law provides prohibitions which states, like individuals, take into account when calculating the chances of success a given policy may have. In addition, and more significantly perhaps, it exists as a system of decisionmaking, of process, and of communication. Assuming a knowledge of international law is like assuming a knowledge of language. You can cue your friends and your rivals as to your intentions and then indicate to

them those of their options which are acceptable to you—and those which are unacceptable. Your game plans, incidentally, should include the choice of your adversaries' selecting unacceptable options. These, again, should be clearly discernible through the language of international law.

### III. THE NATURE OF INTERNATIONAL LAW— RESPONSES TO SOME CRITICISMS

#### A. The Problem of State Sovereignty

There is a more sophisticated variant of the skeptics' position which we have just discussed, namely that international law cannot be "law properly so called" since it is not issued by a sovereign commander, is not supported by sanctions, and is not administered by courts with compulsory jurisdiction. That more sophisticated variation takes up the concept of sovereignty from a new point of view. It argues, not on the footing of international law's failure to indicate its own sovereign, but rather, that since it is an order of sovereign nations, it cannot for that reason also be a legal order. More briefly, this argument holds that national sovereignty is inconsistent with international law. The inarticulate premise of such an argument is that if a legal system is itself the child of sovereign authority it cannot, at the same time, incorporate many sovereigns. The restricted definition of law itself, which I outlined earlier, comes up again. It is translated into this new inverted perspective of sovereignty and the international order.

But what do we mean when we talk of national sovereignty? From the point of view of international law, the sovereignty of a state is not an extralegal or metalegal concept. Rather, it is a basic concept of international law and is defined by it. Sovereignty is the term used to describe the competence which the international law ascribes to states.

We tend, perhaps, to think of sovereignty in absolute terms. Yet no state is sovereign in the world today in the same sense that the Roman Empire was sovereign in the Mediterranean Basin, in, say, A.D. 100. The difference between then and now is that although every contemporary state is said to be sovereign, each one must recognize and act in terms of the sovereignty of all the others. For all sovereign states act and interact in the common arena of international relations wherein international law facilitates their peaceable interactions and is formulated to limit, where it cannot prevent, states' hostile or violent interactions. International law thus may be seen, at one and the same time, as according and ascribing to states their sovereign authority as the form of competence they enjoy in the international arena and placing the necessary limits on that competence in order to limit, and to humanize, collisions in its mutual and interacting exercise. In contrast with the contemporary world where more than 120 states interact in the same area of action, the sovereign situation of the Roman Empire existed simply because there were no other states interacting with it to limit its sovereignty. By contrast with the example from the Roman world, the contemporary states' interaction calls for the ascription of competences to states. We denominate these competences "sovereignty," which becomes a legally defined and a relative concept. Admittedly, that definition is in extremely wide terms; but there are limits to it. There are limits to it set by treaties and by customary law. Examples of the customary law limitation on state sovereignty are states' universal recognition of the immunity of foreign sovereigns, their diplomats, and their warships in receiving states' ports. At such points as these, and even on the territory of the United States, our legal sovereign power stops short. It meets the opposing and countervailing sov-

eign competence of a foreign country. Thus, while it is so latitudinarily defined as, possibly, to weaken and undermine the orderliness of the international legal order, the concept of state sovereignty does not contradict that order. It cannot do so, because it is, itself, a derivative of that order.

## B. The Problem of Commitment

Tied in with the problems which the looseness of the international order presents is a criticism which looks, at first blush, like a restatement of the argument we have just disposed of when that is freed of its conceptualist impediment labeled "sovereignty." This attack on international law, however, in reality comes from a very different group of theorists. Those who argue that national sovereignty is inconsistent with international law, and is a logical denial of it, are concerned about international law's failure to develop into a highly integrated and formalized system of authority. The critics whose position we are now going to review, on the other hand, argue against international law's validity on pragmatic grounds. They argue that because, as it is clear on any view of the way states behave toward each other, no state has an overriding and absolute commitment to the vindication of international law at all costs, international law either does not exist in international reality or, at most, does not reflect a meaningful legal order. I suggest to you that such a thesis is completely beside the point. It is, furthermore, not only based on a cynical, Machiavellian view of the law, it is also based on a misconception of the relation of law and morals and of the morality of obedience to law. Everyone in this room has a sticking point where he would not have an overriding and absolute commitment to the vindication of the domestic law of the United States or of the State of Rhode Island. There may be situations where the law may

call upon a citizen to do things that go against his basic moral ideas and which he will withdraw from doing. Thus, once we really start to look at the criticisms involving the issue of commitment which frequently are sagely adduced to deny the existence of international law—including those by such eminent men as Dean Acheson, George Kennan, and Professor Morgenthau—we find that their positions turn on mistaken notions about either the meaning of law or about the expectations people might appropriately entertain of international law itself. Moreover, they do not, perhaps, think sufficiently comparatively in order to evaluate how people, in general, react to certain legal rules which might be imposed before they look at theorists' and states' adverse reactions to specific rules or doctrines of international law.

The cynical position we have just reviewed is, of course, made all the more plausible when we remember that there is an issue many legal philosophers overlook when discussing the way in which legal systems work. The truism is this: there is no legal rule for applying a legal rule. Whenever any legal rule is applied, it is applied by a human being who is applying (a) his knowledge of law; (b) his evaluation and characterization of the facts; (c) his ideas of the relevance of the law he knows to the facts before him; (d) the theory and morality of law he entertains; and (e) the policy goals of the law he holds to be relevant to the case. Now I am coming to one of the points I need to emphasize this morning. You all carry around with you your own moralities of law and your own theories of law. You are all legal philosophers, and you apply your philosophies whenever you face a legal problem or make a legal decision. Your problem may well be that, although you operate from philosophical premises about the nature and morality of law when you apply a rule or discuss the meaning of law, those premises are

mainly below the threshold of your articulate thought. But, whether fully articulated and at the forefront of your minds, or operating as inarticulate premises or unconscious prejudices, they exist and they guide your knowledge and your thinking about law in general and your application of law, whether that is to enforce the discipline of a ship, or to identify the relevance of article 2, paragraph 4, of the Charter of the United Nations to a specific situation or decision you may have to make.

### C. The Problem of Obligation

This leads me, then, to the third point in our discussion of the meaning and function of international law. At least as significant a question about international law as the question, "Is international law really law?" is the question: "Is international law really binding?" This then leads on to the next question: "And, if so, what is the nature of international law's obligatoriness?" Many critics of international law again show their policeman hangup when we come to this issue. They point to the unsatisfactory means of enforcing international law. Owing to the deadlock of the United Nations Security Council, the only sanction is by the use of force by states. In this context, however, we may tend to underestimate the legal significance of joint action by collective self-defense. This, after all, was the earliest form of law enforcement in domestic legal systems and identified in early Anglo-American law as the "hue and cry." Be that as it may, it is still unfortunately true that the general hue and cry reflected in the United Nations General Assembly's Uniting for Peace Resolution has long been losing whatever effectiveness it may once have had. Again, resort to reprisals by individual states, once a significant sanction, is ceasing to be effective for a myriad of reasons, not the least important of which, perhaps, are such prohibitions as

those to be found in article 2, paragraph 4 of the United Nations Charter which tells us that: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

But to say that because it cannot be enforced, an obligation does not exist, is nonsense. Clearly there are binding obligations in international law which states could only flout with full knowledge of the illegality of their conduct. We should note two well-known facts here. First, while states may act knowingly in breach of international law from time to time, their breaches are generally, indeed standardly, the result of decisions to take calculated risks. That is, states tend to take calculated risks regarding how severe or painful other states' condemnatory reactions will be. Second, no matter how frequently one state may breach its international obligations, it is always indignant at breaches by other states. Hence it is clear that states review both their own and other countries' policies and conduct in the light of a widespread presumption that international law not only exists, but also will be obeyed and followed. Why should this be so? It is clearly because each state anticipates that its own long-term advantage lies more with the compliance of other states with international law than attempting to survive in an international order where international law has no authority and creates no expectations. Such an order would either be one of chaos, where each state is entitled to deny all claims by others not supported by sufficient strength to enforce them, one where there is no law but that of the jungle and where no right can be maintained except that of holding as much as can be physically mastered, or, alternatively, be one governed by the totalitarian authority of a single world

empire. (For we may note, parenthetically, that even a world federal system would still need to include much, if not most, of the present order for many years to come, and so should not be viewed as a valid alternative to the present order as much as one possible development of it.)

Neither chaos on the one hand nor subordination in a world empire on the other has much appeal to most states, hence their acceptance of the present order in its broad outline and their indignation at breaches of international law by their fellow subjects of the system. Often, indeed, states brazenness when charged with breaches of their own obligations appears to reflect their acknowledgment of their duties and their guilt at their evasions. They seem, only too frequently, to remind us of the self-indulgent Roman poet's confession, *videor meliora proboque, deteriora sequor*—I see the better and more honorable course of conduct as I follow the worse.

New states are currently accepting the international legal system as an order, while calling for specific changes to those of the specific rules and doctrines which they consider irksome or anachronistic. This is evidenced by their rejection of the Communists' traditional rejection of international law. It is also reflected at the present time, interestingly enough, in Russia's willingness (together with her satellites, as distinguished from China and hers) to cooperate within the system, to abide by an increasing (if uncertain) number of the existing customary rules of international law in the name of "peaceful coexistence" and to prefer the chicanery of a shabby diplomat over the tactics of an outraged revolutionary.

This review of states' conduct as standardly reflecting a general acceptance of the international legal order as a system should not blind us to the fact that most of the new states are dissatisfied with, and many question the

validity of, some of the rules we have inherited from the past as part of customary international law. But the rejection of some traditional rules by some of the new states as irrelevant to the present international order and the questioning of others by many should not be confused with a total rejection of the system. Rather, it is a demand for peaceful legal change to reflect the enormous social change in international society which has gone on over the last two decades. My message in this part of my lecture simply boils down to this: We can, and should clearly distinguish between demands for changing the rules, doctrines, and institutions of international law from demands for the overthrow of the present international legal system. The former note is loudly and sometimes dissonantly struck, the latter is hardly struck at all; except sometimes in the rhetoric of an angry politician speaking, usually, either for home consumption only or in a spirit of malicious gamesmanship.

#### D. Some Friends of International Law and What They Have Wrought

One of the greatest disservices that has been performed to international law by its supporters is the overstatement of the case for international law by the Great Optimists. In our culture we have a long tradition of being suspicious of politics, politicians, and "the political"—namely the making of political issues out of issues which could be left to economics, jurisprudence, sociology, or any other science or pseudoscience. We have, since the 17th century, since the English Revolution, the French Revolution, the American Revolution, had a basic philosophical value, namely that science and scientific man should replace politics and that ultimate scoundrel, political man. This, of course, was the metaphysical basis for justifying the transfer of much activity, especially economic activity, from the public to

the private sector. Its corollary has been the proliferation of models of man as an object of science, "economic man," the "reasonable man" of the law, and "sociological profiles," to name but a few of the models of "scientific man." The model of scientific man may have originally developed as a metaphysical foundation for the privatization of social action. Today, paradoxically, it, and the traditional hostility to "the political," is leading to the proliferation of bureaucracies as the most "scientific" means of directing predictable conduct. This phenomenon is as noticeable in the international arena as it is elsewhere, and little thought has been given to either the basic justifications of such a proliferation (except, possibly, the political one of recruiting the leadership of the developing world in favor of international organizations by demonstrating their attractions!) or to viable alternatives.

Any philosophy which can offer a program for eliminating the unpredictable, temporizing, and covinous qualities of political action and substitute the predictable conduct of "scientific man" in place of it, offers a very attractive dream. Particularly, from the point of view of this lecture, the rise of the science of jurisprudence and of the reasonable man, or *bonus paterfamilias*, gives us a means of replacing politics by codes, constitutions, and treaties. The precision of jurisprudence and of legal logic could then, so the advocates of mechanistic jurisprudence and mechanistic man aver, be called to replace the imprecision of human life and the discretions of myriads of interacting individuals pursuing, in the public arena, their private goals. As I pointed out earlier, this is an old habit in our culture. Let us remember that at the height of the Terror of the French Revolution, France's extremely distinguished "blueprint writer," Abbé Siéyès, believed that all he had to do was to draw up a better Constitution for



France, and all that terror, all that bloodshed, all those executions would stop. He quite forgot that people tend to kill other people for reasons which are more compelling than the message of some words on paper, no matter how eloquently, rationally, or elaborately these may be formulated. Optimistically drawing up better documents, constitutions, treaties is, in a nutshell, what some lawyers think they mean when they refer to that vaguely menacing ideal of "social engineering." (Others, including myself, mean something quite different, namely the improvement and addition of precepts, institutions, and procedures which facilitate intercourse, communications, respect, and participation; we do not desire to engineer society, only to engineer for society like real engineers do with hardware.) Transferred to the international sphere, the dream of the social engineers has proliferated, because many people believe that the international legal order, above all, requires special engineering. They say that we can make peace permanent and secure if we draw up a better treaty; that if we appeal to the reason in men to see that this treaty is in the best interests of us all, everyone will agree with it, and perpetual peace will result. Now there are many people in this country and abroad who believe this fervently. And I have every sympathy with them. I only wish, first, that they were right; and second, that they did not arouse so much skepticism in the hearts of those who would otherwise be merely lukewarm toward international law. There is, unfortunately, a spillover of the skepticism these idealists generate toward the drawing of their more way-out blueprints which sometimes seems to threaten to engulf international law in general.

The professional optimists have done international law a major disservice by overstating the case for it. For them, almost every international problem becomes resolvable by a legal formula.

Now this, patently, is not true. Lawyers operate on the assumption that all disputes can be formulated clearly and be made the objects of litigation, arbitration, or negotiation on the footing of legal dialectic. Politicians, especially those opposed to this legalistic approach, seek to avoid putting their claims into legal, concrete, and binding form. They prefer to view disputes as tests of nerve and strength and so avoid making their demands rationally explicit. This is sometimes also true of the domestic sphere, especially in business relations. (It may be of interest to suggest that much of the problem the courts face with regard to enforcing the duty of good faith bargaining in labor-management disputes tends to be related to the need to force parties to negotiate on the footing of concrete claims and counterclaims, rather than on the raw basis of nerve and strength.)

The limits of what is appropriately a legal decision are all around us, even in private life. For example, your attorney, whom you wish to instruct to draw up your will, may advise you as to how you should draw up a trust for your children, but he is not going to tell you how to make a detailed distribution of your estate. He may advise you as to what sort of claims should be responded to when you draw your will. He may, in addition, offer advice, in general terms, about whom you should consider appropriate targets of your posthumous bounty. And, in discussing some possible basic family claims, he advises you because he is as much a trusted and knowledgeable friend as he is your lawyer, although his experience as a lawyer may render his advice all the more worth heeding in this extra-professional context as well. But this is because he is a man experienced not only in the writing of wills, but in the way people make posthumous distribution of their wealth amongst their family and friends. In a strictly professional sense he should, as a lawyer, accept your instructions and

should only tell you or warn you about a distribution which you propose to make which may be so unfair or inequitable to members of your family that it might be open to attack, in some jurisdictions at least, after your death. Where he gives you further advice he is not solving your problems, he is helping you make nonlegal decisions on how you could best use the facilities the law offers you. Incidentally, this excursus about the interaction of choices and law when it comes to making a will provides an example of the way society provides us with the means of doing what we want or need to do through law.

We have already seen how international law is facilitative and functional. We now note that it does not prescribe the goals of human action (the goals, for example, of human respect, participation, and dignity and freedom), although it may be formulated in terms of such goals. These goals may be expressed by lawyers and be incorporated in legal documents; but they remain above and beyond the law, and the law provides one of many means of achieving them. For the ultimate demands we make on life and on society are not legal demands. And it is a mistake to try and substitute the needs of life by the criteria of the law.

#### IV. INTERNATIONAL SOCIETY AND LEGAL CHANGE

We are told that in the "Third World"—the world of the developing countries—the charge is laid against international law that it is simply a form of neoimperialism. Only too often, however, this rhetoric is an attempt to forestall us in indicating to some of the emerging or developing countries what their legal obligations are. This is a piece of gamesmanship we would do well not to heed. On the other hand, these countries are also telling us that they have a demand for legal change. This is something to which we should listen

most carefully. But, because we have not been clear-cut in our thinking only too often, our responses to gamesmen's charges have been as conciliatory as those to the people who are making serious claims for legal change. Our own confusion about international law has encouraged others to assert the non-existence, or the disuetude, of many legal rights which have a lively claim for contemporary respect, recognition, and vindication. It is as if, being careless about its own most valuable legal protection, namely law itself, the United States were encouraging others to be more careless about this country's rights than they would normally be. But this is an aside. We must turn back to our main problem in this part of my lecture, namely, that of legal change in international law.

If, for the sake of an easy and familiar model in its general outline at least, we look at the domestic law of the United States for an example, we see the functioning legislatures as well as the courts and the executives. Now we know the function of a legislature is to keep law in tune with society, or at least we are told this is the function of the legislature. In contrast with this situation, there is no legislature or any similar institution in the international legal order which can be called upon to bring about timely legal change. But this does not necessarily mean that international law is a body of archaic and antiquated rules which can only be found in the doctrines, writings, and practices of 17th century Western Europe which have remained unchanged ever since. Despite its lack of the usual accouterments of legal reform through legislation and despite the fact that the possession of a legislative organ would possibly help international law to be both more elegant and contemporary, international law does change. It can, at times, change with surprising speed. States can change their legal rights and obligations by entering into treaties, and

more and more international law is being expressed in multilateral conventions. States may also enter into regional agreements and bilateral treaties. As far as those treaties are concerned, states may also alter and redefine their legal relations amongst themselves very considerably. Again, a trend in bilateral treaties may start a new development in general customary international law. For example, one of the most significant factors of the *Alabama Claims Arbitration* was not that this was one of the very early arbitrations to which sovereign states resorted, despite the very high and hostile feelings which ran on each side, but also because it was significant in the development of the rules of neutrality. This arbitration was called to decide a dispute between the United States and Great Britain after the defeat of the Southern Confederacy. The United States asserted that Great Britain had allowed the *Alabama* and the *Georgia* and their warlike equipment, to be built and supplied by British yards contrary to the latter's duties as a neutral.

The parties met in head-on dispute over the question of law since, at that time, doubts still existed as to the duties of a neutral state regarding the supply of war vessels to a belligerent. But, by the Treaty of Washington of 1871, the parties agreed to the famous "Three Rules" which have since then come to be regarded as substantially reflecting the customary international law duties of neutrals and, with some changes, have been formulated in article 8 of the Hague Convention No. 13 of 1907. They provide, in effect, that a neutral state must use "due diligence" to prevent:

(1) the fitting out, arming, adapting, or equipping of a vessel in its jurisdiction which it has reason to believe is intended to cruise or otherwise engage in hostile acts against a government with which it is at peace;

(2) the departure of such a vessel,

once it has been fitted out, armed, equipped, adapted or built, from its jurisdiction; and

(3) violation of these duties within its ports, roadsteads, and waters.

Thus, in addition to their utility as defining, or redefining, the obligations of the parties and to expressing agreement between states on a contractual footing by setting an example for future conduct, bilateral as well as multilateral treaties can start new developments in customary international law. Secondly, legal change comes about by what is regarded as a second source of law (as prescribed in article 38 of the Statute of the International Court of Justice), namely by custom. Old customs can be dispensed with. Long before the challenges of the modern age, for example, the idea that a state could acquire territory simply by discovering it had disappeared well before the end of the 19th century as a result of the technological and population changes of that century. In previous centuries, when explorations had been conducted in leaky wooden hulks, propelled only by sails or oars, an adventurer was able to acquire territory for his sovereign simply by an act of discovery. In the 19th century, with the introduction of iron- and steel-hulled steamships, we find that to recognize this as a basis of title becomes no longer feasible. There would have been too many title-conferring "discoveries"! Something much more came to be required before international law could recognize the acquisition of territory—so occupation came to be developed as a replacement of discovery as a legal concept which could validly provide states with original titles to masterless lands. Occupation called for more activity than discovery did, namely a real "taking" of and exercise of control over the territory in question before it could be said to belong to the claimant. Thus we have here an early example of technological and demographic change effecting a

change in customary law. Today, of course, customary law seems almost to be withering before the rapidity of technological and demographic change. But this can be overstated. While some aspects are withering, others, interestingly enough, are acquiring a new vigor and are requiring a new restatement.

## V. THE CRISIS OF INTERNATIONAL LAW

My last observation is not intended to palliate the fact that international law is in a state of crisis today. This has many causes and more symptoms. Without any notion of ordering these in a list of importance, I would like briefly to indicate them as follows: the technological revolution; the population explosion; the decolonization policies of the former European empires (Western European empires, not the Eastern European ones) and the proliferation of new "developing" states; the rise of single-party states as the norm of the developing world instead of the democratic two-party or multiparty politics which had been hoped for and optimistically predicted at the time of the independence of more new countries; and, finally, revolutionary communism. But, as I indicated earlier, these factors have not led to a widespread, root-and-branch denial of international law, but only to disputes as to the meaning, scope, and content of specific rules, to claims for legal change, and to an acceleration of social change. This last, the factor of acceleration, places international law under increasing stress on account of the paucity of its institutions geared towards responding to the needs of accelerated legal change.

On the other side of the coin we find there is a great and very important proliferation of universal and regional agencies. The central organization in international law is the United Nations; but there are many more international

agencies than just this one. And these are becoming of increasing importance. There are regional agencies such as the Organization of American States and collective self-defense arrangements like the North Atlantic Treaty Organization. There are important universal agencies such as the Universal Postal Union and the International Telecommunication Union. These, I must emphasize, exist as institutions of international law. Although you may not realize it, they affect your daily lives. The fact that you can have rapid and cheaply mailed letters from anywhere in the world to the United States, the fact that you can send telegrams anywhere in the world from the United States or receive television news items by satellite are due to these and other important international organizations.

Lastly, there is the peace-enforcing function of regional organizations. I will just give you, as my time is running out, one example. The Cuban Missile Crisis in 1962, and the defensive quarantine which was imposed in response thereto were achieved through the procedures and processes of the Organization of American states. The U.S. Navy could act as it did only through the intelligent utilization of the United Nations Charter and the Rio de Janeiro Pact. Our trump card was the agreement of the Organization of American States that the Soviet missiles in Cuba were a threat to this hemisphere. We may hope that it is through the regional and universal organs of peace and progress that desirable legal change can be brought about in a timely way and that they will increasingly carry the burden which has come to be too heavy for customary international law and traditionally drafted treaties to bear alone.

It is for this reason that it is now possible to discern an emerging quasi-competence on the part of international organizations, and especially the United Nations, to indicate, by their practice and by their formulations of generally

held basic values and programs of legal change, emerging doctrines and precepts. These enjoy, in international law, at least the equivalent of the "directive principles" of the Indian and Irish constitutions. In some cases, furthermore, they may have a more direct "self-

executing" effect. They may offer a new source of law responsive to both the interests calling for change and those promoting the values of stability and continuity. To do so they must, however, reflect a general, if not a universal, consensus.

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