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

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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.