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THE UNITED STATES OF AMERICA AND INTERNATIONAL PUBLIC LAW, 1900-1976

COVEY T. OLIVER*

In September 1976 the Institute of Legal Research of the National University of Mexico and the Mexican National Institute of Penal Sciences held a wide-ranging colloquium on the evolution of comparative public law in the first three-quarters of the twentieth century. The colloquium took place only after years of preparation and with generous financial help from foundations, the Mexican Government, and the cultural services of other countries. It drew participants from scholarly and public affairs from all over the world, including the socialist states and made a serious contribution to legal science. Two of the functions that it performed are particularly important. First, it focused attention on comparative public law, which is not often dealt with outside the penal field.¹ Second, it took stock of progress, and the lack thereof, in planetary legal science at a time that will perhaps be viewed as more significant than the mere dawning of the year 2000.

Primarily as a result of the counsel and influence of Mexico's outstanding international legal publicist, Dr. Cesar Sepulveda, the subject of international public law was included in the discussion. Dean Sepulveda showed his mastery of both reality and science when he conceived of presentations focusing on certain national and

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1. I complained of this in my second Hague lectures: Oliver, *The Enforcement of Treaties by a Federal State*, in *RECUEIL DES COURS* 333, 338 (I 1974).

regional influences on international law.² By serendipity or by conscious design on the part of the Dean who, along with many of his countrymen, understands the United States, admires its achievements, and tolerates its faults, a "bicentennial effect"³ resulted, insofar as this presentation was concerned. This article is offered in the belief that it might be useful to both American and foreign readers either to become informed, or be reformed, of the influence the United States has had on the development of world order and the rule of law during its first century of outstanding global power and responsibility. It is not the product of a professional legal historian, nor is it precisely about the legal history of America's relationship to international public law. But, mindful of the fact that knowledge of the institutional past tends to blur and to diminish as the observer moves away from the phenomenon in time,⁴ this synthesis is offered. It comes from one whose span, so far, is about a decade short of the period covered and whose cultural conditioning makes unconscious ethnocentrism a major vice⁵ to be stoutly resisted in American legal scholarship, especially in international public law.

2. Latin American scholars have been particularly aware that consuetudinarian international public law can evolve out of insinuations that in their origins reflect national or regionalistic fears or interests, but not established law. The point at which the assertion of preferences crosses over from international politics and into the domain of normative order is often hard to find. There does seem to be an epoch in such evolution where it is important to be mindful of "international law chiefly as applied" by a particular state or regional grouping of states.

3. The present article complements, in a sense, an issues paper prepared earlier in 1976 for a conference on The Constitution and America's Third Century, held at Philadelphia in April 1976, under the auspices of the American Academy of Political and Social Science. See Oliver, *The United States and the World*, 426 ANNALS 166 (1976).

4. This phenomenon appears to be true notwithstanding that sometimes great history is written by members of a generation or two beyond personal recollection of events, as the case of Thomas' history of the Spanish Civil War amply demonstrates. Usually, however, there are serious losses as to the "feel" of the times.

5. As far back as the early 1950's, I was breaking lances with two distinguished fellow Americans, George F. Kennan and Myres S. McDougal, whose attitudes toward international law they believed could not have been farther apart and that I considered, among other things, equally ethnocentric. See Oliver, *Thoughts on Two Recent Events Affecting the Function of Law in the International Community*, in LAW AND POLITICS IN THE WORLD COMMUNITY 197 (S. Lipsky ed. 1953). Time has shown that there are serious operational and acceptance difficulties with an international law flatly premised upon: (1) rejection of the common or consuetudinarian world concept of law as normative in structure and effect; (2) impervious to the fact that in the real world of international relations, lawyers as lawyers do not make major decisions; (3) significant, unheeded differences in stance and attitude between diplomacy and legal argumentation and decision; and (4) blissful insensitivity to the knowledge that introspectively-revealed "goal values" of vintage Americans are not necessarily and scientifically demonstrable "common goal values" for the world as a whole, especially as to specifically technical matters of great moment.

PERSPECTIVE

In describing and analyzing national attitudes toward the international legal order, one must be aware at all times that in some, but perhaps not most, states there are several acting groups other than the state itself. This aspect of the perspective is especially important in the case of the United States where significant communities of interest in the subject of international law exist entirely independent of the government and its attitudes toward international law. It would be seriously inaccurate, for example, to equate the American Society of International Law and its prestigious journal with any particular foreign affairs agency of the United States Government.

The community of American scholarly interest in international law is highly developed, generally independent of the American state, and divided into two interacting but distinct scholarly groups: the lawyers and the political scientists. In the socialist states, and in some nonideological authoritarian states, the degree of independence of the scholarly community as to international law is not nearly so definite as it is in the United States. In addition, there are very few states in which the scholarly sector of international legal studies is so generously supported by foundations and other nongovernmental sources.

The foregoing is not, of course, a denial of the existence in nongovernmental quarters of preferences as to what international law is—or should be—that reflect an “American” system of values, those embraced by various groups in a pluralistic, free society. Nor is it to be taken as denying that many American international law experts are drawn into public service for temporary duty. Finally, as to this particular, it is true in the United States, as elsewhere, that there exists a “grey zone” in which what a government or a scholarly community or an economic interest group wishes a rule of international law to be is asserted as being what the law is.⁶

6. The United States, for example, still officially insists on a customary international law rule concerning the duties of a nationalizing state when the investments of another's citizens are nationalized, that is not followed by a considerable numerical majority of states. On the other hand, the United States has recently given legal effect to its version of a 200 mile economic (fisheries) zone that it has previously resisted as illegal, even when authority was restricted to the regulation of fisheries. In these two instances the key preferences, cast as law, have been those of certain economic interests and their lawyers, including among the latter some recognized scholars who have functioned as advocates without making this role explicit.

Despite these linkages and interrelationships, however, the American role as to legal order must of necessity be viewed from distinctly governmental and nongovernmental standpoints. Generally, United States contributions to major affirmative developments of international law in the twentieth century have originated with the nongovernmental sectors and have eventually attracted some degree of official support as U.S. foreign policy on the international legal order.

Finally, in viewing governmentally-supported principles of international law, one must bear in mind that as a member of a community of states, the United States has historically perceived international law in essentially the same way as have other major Western powers. The history of international legal order in the present century has been that of curbing—or seeking to curb—national state will to use its military power and other advantages in the pursuit of immediate or shorter-range national interest. In this grand development—still far from accomplished—the United States has played an ambivalent role, now that of just another national-interest-pursuing state among states in the world arena, and at other times that of an idealistically inclined nation, determined to bring about the legal and political ordering of freedom, justice, equality, and human dignity.

THE PERIOD FROM 1900-1917

In the nineteenth century the United States, acting as states classically had been permitted to act by international public law, used force to attain national objectives of a territorial, strategic, and ideological nature. The European Age of Imperialism⁷ (1871-1913) was briefly reflected in the political style of the United States; in this early period resistance to “normal power politics” came mainly from the internal peace movement in the American scholarly sector.⁸ Later in this period, Latin American scholars, and more gradually some Latin American governments, began to develop counter-doctrines, such as the Drago and Calvo doctrines,⁹ although it was

7. This is a phrase that entered intellectual history through the work of a great historian, the late Carlton H. J. Hayes. C. H. J. HAYES, *HISTORY OF EUROPE* 847-59 (rev. ed. 1949).

8. But it should be recalled that as early as the Mexican War in 1845, some politicians, such as Congressman Abraham Lincoln, opposed the use of force to expand the nation at the expense of a neighbor.

9. Both doctrines are very widely and adequately dealt with in North America and other English language works on international law and foreign relations. The full flavor of these

not clear whether these oppositions were being asserted as principles for the conduct of international relations or as norms of international law.

A tendency toward ambivalence in official United States policy is clearly seen during the presidency of Theodore Roosevelt. On the one hand, President Roosevelt used American power to dissipate the threat of Great Britain and Germany collecting debts from Venezuela by force, thereby supporting the Drago Doctrine.¹⁰ He also took a strong, personal initiative in the use of arbitration to settle the Russo-Japanese War. On the other hand, this early twentieth century American President, in his own words, "took Panama." Professor Beale by the title of his study, *Theodore Roosevelt and the Rise of America to World Power*,¹¹ correctly suggests that it was the Age of the First Roosevelt, not World War I, that brought the United States into a major role in world power politics. Further, Professor Beale gives us an insight into one aspect of the United States national character, as exemplified by Roosevelt, which has had enduring significance throughout the century, both for international relations and for American preferences as to what international law is: "Roosevelt was convinced, as are many nationalists in most countries, that his country would never act unjustly or wrongly. Hence, whatever position America took was right So morality, America's idea of international morality, became an important element in the foreign policy of the Roosevelt expansionists."¹² It is to be noted that Roosevelt did not have to flaunt international law to

doctrines, however, can only come from the Latin America writers. See C. SEPULVEDA, *DERECHO INTERNACIONAL PUBLICO* (7th ed. 1976) (index references to the Calvo Doctrine and the Calvo Clause).

10. See 6 J. MOORE, *DIGEST OF INTERNATIONAL LAW* 531-33 (1906); cf. D. PERKINS, *THE MONROE DOCTRINE* 377-78 (P. Smith ed. 1966), where this most detailed and exact of students of the Monroe Doctrine suggests that President Roosevelt embellished the degree of American physical threat in later years as Imperial Germany's unpopularity increased.

The Roosevelt Corollary to the Monroe Doctrine, asserting a United States policy of intervening to prevent Latin America countries from violating the rights of extracontinental powers forbidden by the Doctrine from territorial occupation themselves, is a very important part of the history of inter-American relations. But it is not dealt with in the text of this paper because the development is not a law-related one, despite Secretary of State Olney's famous flight, "[t]he United States is practically sovereign in the [Western Hemisphere], and its fiat is law" D. PERKINS, *THE MONROE DOCTRINE* 161 (P. Smith ed. 1966). The Corollary was officially announced in President Theodore Roosevelt's Message to Congress of December 3, 1901. See 6 *DIGEST OF INTERNATIONAL LAW* § 968, at 595-96 (J. Moore ed. 1906). But it was later revoked by President Franklin Roosevelt as part of his Good Neighbor Policy.

11. H. BEALE, *THEODORE ROOSEVELT AND THE RISE OF AMERICA TO WORLD POWER* 25-26 (1956).

12. *Id.* at 25-26.

achieve his goals, for in his time, the actions he initiated were not regulated by international law, even as asserted by weaker states.

Before and during Roosevelt's presidency, the beginnings of opposition to a normative order that was neutral on the use of force by a state when it so willed were taking form outside government. In this primitive stage, the quest was for an alternative to war. The alternative most often chosen was peaceful settlement of disputes by arbitration. Scholarly men of good will and of conscience in many countries—including, notably, Mexicans, Brazilians, and other Latin Americans—came to support an expectation that by 1907 had moved from scholars' cabinets to international conferences of states. Private philanthropy, notably that of Andrew Carnegie, strongly supported such efforts and enabled the United States to play a strong role.

The tendency of American foreign policy operations to reflect a strongly moralistic¹³ and ethnocentric bias is most strongly seen in this period in what still may be the single most important foreign policy blunder of the United States: the Woodrow Wilson doctrine of "constitutionalism" as a factor in the recognition of governments within a previously recognized state. Tremendous political consequences have flowed from this unfortunate American policy vis-a-vis Mexico during the Revolution, but it is extremely difficult for a scientific observer to find in this policy any overt or conscious self-service of materialistic American interests. From these political consequences have come some changes in international law as well, such as the rise of either a "right to be recognized," a rule against the withholding of recognition on other than purely factual grounds,¹⁴ or a rule of law based upon the Estrada Doctrine,¹⁵ to the effect that the very attempt to apply derecognition or recognition

13. Such an attitude of criticism of American national character was quite common among professional American diplomatists. Cf. G. KENNAN, *AMERICAN DIPLOMACY, 1900-1950*, at 95 (1951). And it is significant that "moralism" is linked in this perception with "legalism," thus begging the question whether a rule of law—which, of course, requires minimal, continuous, and rational respect in order to be credible and thus to exist—is or is not in the national interest of a country having the characteristics of the United States. See Oliver, *Thoughts on Two Recent Events Affecting the Function of Law in the International Community*, in *LAW AND POLITICS IN THE WORLD COMMUNITY* 197, 206-11 (G. Lipsky ed. 1953); McDougal, *Law and Power*, 46 *AM. J. INT'L L.* 102 (1952).

14. See *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* §§ 96, 101 (1965).

15. *Id.* § 99, Reporters Notes 1; C. SEPULVEDA, *DERECHO INTERNACIONAL PUBLICO* 265 (7th ed. 1976); C. SEPULVEDA, *LA TEORIA Y LA PRACTICA DEL RECONOCIMIENTO DE GOBIERNOS* (1954).

procedures to internal insurgency and civil war is illicit intervention.

Prior to becoming a belligerent in 1917, the United States, both officially and through unofficial groups, such as the famous Henry Ford Peace Mission, sought to end hostilities through good offices, mediation, and arbitration. Until a strong moralistic aversion against unrestricted submarine warfare evolved into foreign policy lines of action, the United States strongly supported the international legal status quo as to the trading and navigational rights of neutrals under the Declaration of Paris (1856) and objected to those economic warfare blockade practices of the Allies that contradicted the older formulations. In the area of rules of war the United States also tended to prefer the Principle of Humanity to that of Military Necessity and to support traditional views as to the limited authority of an occupying power.

In summary, this first epoch is one in which traditional, usually consuetudinarian,¹⁶ principles of international public law inherited from past centuries continued to be recognized, applied, and asserted by the United States. But also during this period, certain preferences and values of either the American people or of their powerful Presidential leaders had begun to work in the international relations field. The step from the formulation of foreign affairs doctrines to that of seeking legal, normative status for them is sometimes a short one. The quest for an alternative to war was an ever more urgent motivating factor as American involvement in the first global war approached.

WORLD WAR I AND THE PEACE TREATIES

Except for denouncing gas warfare by the Central Powers and continued objections to the "sink without surfacing" and "firing on life boats" policies of the Imperial German Navy, the United States and its allies had no new initiatives as to international legal rules relating to the conduct of war. The use of aircraft for the bombing of manufacturing and supply centers was tacitly accepted, and incidental injuries to nonbelligerents were treated as unavoidable side effects.

16. Recently, to my astonishment, some younger, but quite mature, North American scholars in international law had difficulty with the semantic referent of this term. I have come to prefer it to "customary," because it is common to both English and the Latinate tongues, especially the Iberic ones.

American entry on the Allied side involved the United States in acceptance of an economic blockade system that was legally asserted to be grounded in doctrines of reprisal and retorsion against allegedly illegal Central Powers' policies of mining international waters and of unrestricted submarine warfare. The most significant longterm effect of this involvement was not seen until World War II when "economic warfare" became highly developed on the basis of World War I models.

The 1919 peace treaties imposed unrealistic financial burdens through reparations upon the Central Powers and failed to deal with the normative order for terms of trade under which these burdens might have been discharged.¹⁷ The notion of punishment of aggressive war is discernible in the general thrust of the treaties; however, with the exception of their annexes, they were not very different, as an example, from the treaty results of the Congress of Vienna. It is to that annex of Versailles, known as the Covenant of the League of Nations, that we now turn.

THE UNITED STATES AND THE LEAGUE OF NATIONS

The fateful tragedy of Woodrow Wilson, the Carthaginian peace treaties, and the League of Nations are too well-known to require detailed reexamination here. It suffices to note that out of the American quest for a moral equivalent to war,¹⁸ an American President, cast on the global screen as a leader of all mankind, convinced the international community, with the exception of his own nation, to accept his proposal of the world's first international organization for peace. This first international organization also included the world's first international, as distinguished from regional,¹⁹ tribunal.

Actually, the "legal" commitments of League membership were slight, as the history of the relationships of member states to the League amply demonstrates. But without the membership of the United States the League seemed fated, at best, to remain frozen in its statutory form, rather than to evolve into a viable international organization. Actually, the League was not even able to main-

17. J. KEYNES, *THE ECONOMIC CONSEQUENCES OF THE PEACE* 158, 167-69 (1920). *But see* E. MANTOUX, *THE CARTHAGINIAN PEACE* (1946).

18. After the outcry over the sinking of the *Lusitania* without warning, Wilson, in his "Too Proud to Fight" speech, asserted that some moral issues were so strong as to require no use of force to put them into effect. Eventually, however, morality had to be enforced at Chateau and Belleau Wood. *See generally* W. LIPPMAN, *U.S. FOREIGN POLICY* 33-39 (1943).

19. The Permanent Court of International Justice was transformed by the United Nations Charter into an institution of almost identical function, the International Court of Justice.

tain its effectiveness as specified in the Covenant. Whether United States membership would have brought a different League response to Italy's aggression in Ethiopia, an ultimate function of the League as an effective instrumentality, can never be answered. But those who have considered that the total armed forces of the United States in 1939 were 240,000 effectives might well surmise that the result would have been the same. The League did not, after all, legally require its members to be prepared to enforce peace.

Wilson's failure to make the United States a member of the League of Nations demonstrated to the world once again that the United States truly practices separation of powers and that even a strong President cannot assure the world that United States foreign policy will always follow his preferred line. Another consequence of nonmembership in the League was that the United States gradually reverted to isolationism. The country was also legally incapable of participating fully in the post-Versailles political settlements in Europe, such as Locarno, with its implications as to peaceful settlement of disputes.

Even had the United States joined the League of Nations, modern issues related to the world's economic and social needs would not have been anticipated, for the world's first international organization for peace almost entirely ignored such nonpolitical, nonsecurity matters. The United States entered World War I a debtor nation; it emerged a creditor nation with the world's largest and strongest single economy. In short, it became the world's leading state, but one whose detailed and continuous participation in world affairs was isolated to such an extent that it did not even influence growth of an economic component in international organizations.

During the period under review, American scholarship in international law grew rapidly, both as to numbers of persons involved and as to intensity of treatment. The American Society of International Law and its journal, founded in 1907, are especially notable in this regard. It was in this period that a new, postwar generation of international law teachers and scholars found a sense of mission.²⁰

THE AMERICAN NONLEAGUE QUEST FOR WORLD PEACE IN THE 1920's *Disarmament, Munitions Control, and Neutrality*

One development in the United States that can be traced to na-

20. This was a natural development that was repeated after World War II.

tional frustrations over the failure to prevent future wars was the drive toward the limitation of the means to wage modern war and to fix by treaties the relative armament strengths of the major powers. The various sessions of the Washington disarmament conferences of the early 1920's attempted to come to grips with the challenges of weaponry, without lasting success, except as to providing very primitive models for what is still being attempted through the Strategic Arms Limitations Talks (SALT) and otherwise.

During the decade of the twenties, and even into the early 1930's, the United States also showed concern and took initiatives to control the export of instruments of warfare, particularly to those bound for actual combat zones. Ironically, one of the effects of the "neutrality" program was to deny the Republic of Spain the purchase of arms from the United States with which to counter Nazi-Fascist military supplies to the nationalist rebels. This period included an extensive congressional investigation into the so-called "merchants of death," nongovernmental entities who, according to some beliefs, were more responsible for the carnage of World War I than were their governmental counterparts.

The Kellog-Briand Pact of 1927

A significant antiwar step of debated legal significance occurred at the primary initiative of the United States when the world was presented with a treaty whose parties accepted the renunciation of war as an instrument of national policy. This is a step beyond the various League and League-related arrangements for alternatives to war and for the development of international political pressure against a state that was tending toward war without having given evidence of exhaustion of other means of conflict resolution.

The question whether this Pact legally "outlawed" war by signatories so as to render them liable from that point on for the crime of waging aggressive war became a pivotal issue in the Nurnberg War Crimes Trials after World War II.²¹ Eventually, the United Nations Charter accomplished the textual outlawry of all but self-defensive use of force.

21. The ex post facto issue especially was a critical issue at the Nurnberg War Crimes Trials.

LEGAL ASPECTS OF THE FRANKLIN D. ROOSEVELT GOOD NEIGHBOR AND
TRADE LIBERALIZATION POLICIES

The prewar administrations of Franklin D. Roosevelt improved relations with Latin America through the Good Neighbor Policy; except for a few American states, these improved relations developed into extraordinarily close mutual efforts against the Axis after the United States was attacked at Pearl Harbor. The essence of the legal contribution of the Roosevelt Era was the transmutation of the original Monroe Doctrine of 1826 from a unilateral political expression into a multipartite principle of inter-American cooperation at the Montevideo Conference of 1933. This development was accompanied by the renunciation of the highly controversial Roosevelt Corollary to the Monroe Doctrine, a principle of United States international relations that justified intervention in other countries of the hemisphere in order to alleviate situations that were deemed likely by the United States to provoke those extrahemispheric powers excluded by the 1826 declaration from further colonization or exploitations of positions of power.

In addition, the Roosevelt Good Neighbor policy of the prewar period considerably reduced the nationalization controversy with Mexico, although Roosevelt's Secretary of State never agreed with his Mexican counterpart over the content of the international minimum standard for the treatment of alien investments.²² Progress was also made toward the eventual restructuring of the inter-American system. In style and spirit the Roosevelt administration was noninterventionist. In the general areas here discussed, that administration drew heavily upon the accumulated views of American scholars.

Trade liberalization, the reduction of artificial barriers to the movement of goods and services across frontiers, while reflecting a long-held "free trade" political principle of the Democratic Party, before the Roosevelt-Hull era had not included a drive for a network of international agreements based upon the unconditional most-favored-nation principle (MFN). Also missing was a bargaining procedure under which reductions in tariffs and quotas between two bargaining states would automatically extend throughout a wider

22. See N. LEECH, C. OLIVER & J. SWEENEY, *THE INTERNATIONAL LEGAL SYSTEM* 1075 (1973) (one of the many secondary sources to the interchange between "Judge" Hull and the Mexican Foreign Minister, Hay); 5 *FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS* 1940, at 1019 (1961) (official version).

trading community. The pioneering work of the United States in this important sector of international economic law eventually brought about the General Agreement on Tariffs and Trade²³ (GATT) arrangement, which provides a loose normative system for proper trade conduct for the members. It also created a "big tent of MFN" under which trade negotiations can be structured to ensure that large scale tariff and quota reductions can be carried out, such as those involved in the "Kennedy Round" in 1967 and soon to begin anew under the Trade Reform Act of 1974.

The Franklin D. Roosevelt administration lasted so long that the full measure of its contributions to international legal order extended into the World War II and postwar periods. It is difficult to fit the total effect of Franklin Roosevelt into the analytical scheme being followed, but perhaps it is as well to generalize here, rather than later, as to certain attitudinal projections of Roosevelt that are not explicitly linked to periods later to be examined. Surely Latin Americans would generally agree that, given the tragic denial to President Kennedy of a full opportunity to put into effect programs for inter-American betterment, the period of the second Roosevelt was the most successful so far in reducing basic difficulties between the United States and its hemispheric neighbors. In large part this resulted as much from what the world perceived Roosevelt as standing for as for what he actually did. Roosevelt was an anticolonialist and an anti-interventionist. As to the latter, he ended the presence of American armed administrators in certain disadvantaged small countries of this hemisphere. As to the former, in January 1945, less than four months before his sudden death, he instructed his highest level subordinates to have nothing whatsoever to do with the restoration of French colonial rule in Southeast Asia.²⁴ His influence bearing upon the independence of India is also a historical fact. Both he and his wife in her specifically humanistic way, built through expression and expectation what in later times has come to

23. The General Agreement on Tariffs and Trade is based upon interim arrangements provided in an international agreement that did not survive beyond negotiation, the Charter of the International Trade Organization (ITO) (1948). GATT is a self-executing treaty, not subject to advice and consent of the Senate, primarily because of the Senate's history of opposition to the original ITO Charter and the expectation that within time a new, multipar-tite trade arrangement would be negotiated and implemented. GATT is usefully and compre-hensively dealt with in K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970) and J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969).

24. See 6 *FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1945*, at 293-316 (1969), *highlighted in* Oliver, *Book Review*, 66 *AM. J. INT'L L.* 901, 902 (1972).

be perceived as "human rights"—human rights for the common men and women of this world.

WORLD WAR II AND ITS LEGAL CONSEQUENCES

The actual conduct of military operations in World War II presented no particular problems of international law, although it is well known that the Geneva Conventions on Prisoners of War and on Civilian Populations were frequently violated. The United States, which in World War I had objected to unrestricted submarine warfare, practiced it in World War II.²⁵ Both sides engaged in terror bombing of civilian populations, justifying their actions on a "military necessity" basis as to nearby industrial targets. The German V-1 and V-2 guided missile systems were baldly labelled "terror-revenge" weapons by the Reich. The atomic bombs dropped on Japan were considered to be only more effective explosive devices. Captured Polish officers were massacred at Katyn Forest; the fates of Soviet prisoners of war in Germany, and vice versa, were terrible and illegal. On the other hand, except for occasional shootings of prisoners, the Germans, British, and Americans were "correct" with each other's captured troops. The brutalities of the Japanese military are too well-remembered everywhere to require more than mention.

The Germans and Japanese opened new chapters of illegal horrors in their treatment of civilian populations of occupied states; but it remained, in the field of probable change in international law, for the victorious Allies to pioneer "occupation law." The Allied policy that their enemies must surrender unconditionally and their devastatingly successful military and naval operations brought Germany and Japan as near to complete disappearance of internal legal order as any surviving state has been since the Thirty Years War. Although the late Undersecretary of State Joseph Grew and other "old Japanese hands" in the Department of State were able to save the emperorship in Japan, the official policy of the Allies in both countries was that they had succeeded to "supreme" governmental authority and that no indigenous entities had any authority, except from the occupiers. Thus, the world was given a new legal pattern: complete foreign authority but no annexation.²⁶ It is fortunate that,

25. Admiral Chester A. Nimitz gave a deposition to this effect in the trial of Doenitz at Nurnberg. W. BISHOP, *INTERNATIONAL LAW* 808-15 (2d ed. 1962).

26. Prior to this post-World War II experience, "belligerent occupiers" were subject to

except for the Soviet areas of occupation, the occupiers generally sought an early return to first, regional and eventually, national self-government. The model thus created is in use today by Israel, with legal and political consequences yet to be determined, especially since no clear intention against annexation in whole or in part, can be inferred.

An almost academic, and therefore most interesting, aspect of Allied occupation policy was the classic question: Does the German State continue to exist? Writing early-on, the late Hans Kelsen, departing from his own stern injunction against interjecting relative valuation into legal science, contended, for admitted policy reasons, that the Reich should be deemed to have disappeared as a state.²⁷ For practical (continuation of treaty relationships) and political (the East German question) reasons, the United States and Great Britain sided with Kelsen's opposition among publicists.²⁸ At the 1951 Conference at London that dealt with the economic and legal prerequisites for the establishment of what is now the Federal German Republic, the French representative argued that Kelsen was right. Such a position was urged out of French reluctance, indubitably, to see a western German government so soon functioning again. Eventually, though, Ambassador Alphand gave way, quipping that if the Reich had not died, at least it was *en mise sommeil*.

Of course, the basic question of state succession in the former territory of the Third Reich is still not entirely settled legally, although now even the Federal German Republic admits that the German Democratic Republic is a state. Still, there is no peace treaty, and until there is, Yalta and related Allied agreements on the future of Germany remain unexecuted.

considerable limitations upon their governmental authority, especially as to civilian populations in occupied areas. These restrictions in part came from customary law and in part followed from the purposes and provisions of international agreements pertaining to the conduct of hostilities. See generally L. CLAY, DECISION IN GERMANY 1-19 (1950).

27. Kelsen's Theory of Pure Law, expounded in various books, monographs, and articles, confines, as a matter of what Kelsen admitted was merely his preference, "legal science" to analyzing the content of and authoritative relationships between "norms." Policy preferences—relativistic value judgments—are hence not properly the lawman's business in Kelsen's view. However, in stating his position that it should be a *new state* that would follow exercise of "supreme" occupier authority in the area of central Europe once known as Germany, Kelsen admitted he was arguing from policy premises. See Note, *The International Legal Status of Germany To Be Established Immediately Upon Termination of the War*, 38 AM. J. INT'L L. 689, 693 (1944). See also Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT'L L. 518 (1945).

28. Cf. *Rex v. Bottril*, [1946] 2 All E.R. 434.

The legal phenomena of "split states" was also encountered elsewhere as a result of ideological and nationalistic differences between the victors in World War II. Gradually, however, by one means or another these are being eliminated. Only Korea remains as a unique problem, one that, in legal theory at least, directly involves the United Nations, as will be noted in reviewing the United States initiative that brought about the Uniting for Peace Resolution of 1951.²⁹

World War II was concluded by peace treaties between most of the Allies and the enemy states of Italy, Hungary, Bulgaria, Finland, Rumania, and later, Japan. These treaties contain many innovations when compared with the peace treaties that ended earlier wars, especially in so far as economic problems are concerned. Many of these new provisions for peace treaties can be traced to the United States and, in particular, to the development between 1942 and 1946 of an "economic side" to the Department of State. Beginning with one senior official and his secretary in 1942, the "E" Bureau³⁰ got its first assistant secretary—the late Dean Acheson—within a year, and today is a highly significant element in the conduct of American foreign relations, which is of necessity linked to legal principles and rules. During the war years the Treasury Department also came to have a key role in the formulation of economic and monetary policy,³¹ which was cast in the form of normative arrangements.

Easily the most significant American contribution along the lines of "economic law," an area virtually barren of any legal order at the beginning of World War II, was the United States Treasury-based drive for a new postwar monetary system. In 1944 the fighting was still heavy when the Bretton Woods Conference opened in New England. From this conference the world now has, not only the International Monetary Fund (IMF), but also the International Bank for Reconstruction and Development and its legal progeny, the International Finance Corporation, the International Development Association, and the Centre for the Settlement of Investment Disputes.

It is interesting, and perhaps instructive, to recall that the IMF

29. See text accompanying notes 41-43 *infra*.

30. The "E" Bureau was changed during the Nixon Administration to the Bureau of Economic and Business Affairs.

31. This resulted perhaps as much because of close personal ties of friendship between the Squire of Hyde Park and his Dutchess County neighbor, Henry Morgenthau, Secretary of the Treasury, as for functional reasons.

and the "World Bank Group," later to be listed among the "specialized agencies" of the United Nations, actually preceded the United Nations Organization and are both based upon a weighted voting formula that contrasts with the "one country, one vote" principle of the General Assembly and its subordinate entities, commissions, and instrumentalities.

History tells us that it was concern for the future of the world's monetary relationships that called the Bretton Woods Conference, but that in the course of working on that problem the conferees came to see that a new system of aggregating capital for public sector support of, first, reconstruction and, later, development was also essential. Thus, the first step in world legal history was taken toward the internationalization of support for the development process. Despite the fact that the quip of the time was that, "[t]he Fund is a bank and the Bank is a fund,"³² the twin institutions are increasingly becoming engaged in the world's greatest challenge, that of Rich Nations-Poor Nations and of the injustices of unequal distribution of food, jobs, energy, individual opportunities, health, and aggregate human dignity. These "Hombre Masa" needs are considered by many to be essential preconditions for the achievement of individual human rights.

As World War II ended, American technology produced the new and awesome force of the split atom. Such a force if not controlled effectively by national and international law will surely bring us all, to paraphrase Bernard Baruch, to a choice between "the quick and the dead."³³ America's efforts, with varying degrees of acceptability to other nuclear powers, toward legal control of the atom have been continuous but so far have failed to prevent misuse of the so-called "peaceful purpose atom" or the spread of atomic weapons. Along with the Soviet Union, the United States supports what is probably an inherently unacceptable idea, that of a discrimination in positive international law between nuclear "have" and "have not" nations.³⁴

32. The quip was one of J.M. Keynes' many, it is said, and it is functionally true. The IMF is a bank from which member states may borrow needed foreign exchange "deposited" by other members under Fund rules, conditions, and supervision. The World Bank Group is a development assistance lending agency that uses capital that it has borrowed on its own credit, but with ultimate recourse for lenders on the basis of the good faith of the member states.

33. It should be remembered that it was Baruch, as an American representative, who offered the atom to the international community under international safeguards in 1949.

34. Nuclear weapons proliferation is rapidly occurring, and the syndrome by which the new user state rejects efforts to subject it to legal denial has become very familiar. For an

As against this awesome specter the Latin American initiative as to a nuclear weapons free subhemisphere seems only tragically laudable.

THE UNITED STATES AND THE UNITED NATIONS: THE QUEST FOR PEACE
REVIVED AND RECAST

Franklin Roosevelt had been at Versailles with President Wilson. As a rising American politician he had a close view of the failure of the Wilsonian effort to go to the people in support of the League. By World War II Roosevelt's notions of what the postwar arrangement against war should be were well advanced. He told his Secretary of State to see to it that the settlement of the war be kept separate from the negotiation of the treaty to create a new world antiwar international organization. He believed that a universal major difficulty for the League of Nations was that the Covenant of the League was an annex to the politico-military Versailles Peace Treaty.³⁵ As the American working drafts for the San Francisco Conference came to him, Roosevelt made the basic decisions. The major one was to reject the concept of the United Nations as a coordinating entity for a series of regional arrangements. This notion had been advanced partially in deference to what some believed to be the expectations of Latin Americans for an inter-American regional system of considerable authority and partially in recollection of the historical fact that the minority, but effective, Lodge-led opposition to the League in the Senate during President Wilson's time had been based in part on a preference for regionalistic, rather than universal, types of international organizations. Roosevelt boldly declared for a universal organization. It remained for the Latin Americans, basing themselves upon the Chapultepec Conference of 1945, and certain other "smaller states" to create a resistance at San Francisco. Out of this resistance came the American "Vandenberg Compromise," which brought regional security systems into phase with the worldwide system through what we know as article 51 of the Charter of the United Nations.

earlier, gloomy estimate, see Oliver, *Unmet Challenges of Inequality in the World Community*, 118 U. PA. L. REV. 1003, 1021 (1970), reprinted in THE OWEN J. ROBERTS MEMORIAL LECTURES (1975).

35. In a review of United States Foreign Relations for 1943, I recalled a handwritten note to this effect from Franklin Roosevelt to Secretary Hull. Oliver, Book Review, 66 AM. J. INT'L L. 411 (1972)(reproduction of F.D.R. note).

The Dumbarton Oaks Draft was a major American initiative relating to the economic and social needs of peoples and states. Many of the uses that have since been made of these new powers to consider and propose in the economic and social fields were not, of course, foreseen in 1945. But without the American initiatives of that epoch, certain later and highly controversial proposals, such as the so-called "Charter" of Economic Rights and Duties of States, would have been ultra vires for the General Assembly to consider.³⁶

It is clear from the entire structure of the United Nations charter, however, that the major thrust of the Organization was to achieve international legal control of the use of force. Admittedly, compromises had to be made to achieve a reasonable degree of effectiveness along these lines, such as the Yalta concession of three United Nations votes to the U.S.S.R. and the giving of the veto to China and France, as well as to the major military powers. Nonetheless, observant Americans who lived through the formative period of the Organization will remember that the United States then, unlike now, was willing to go much farther than peer states towards the cession of important aspects of "sovereignty" to the United Nations. For example, it supported the formation of an effective, Secretariat-dominated Military Staff Committee and the transfer to it of what was believed to be a potent United Nations Strike Force.³⁷ More conventional world powers were opposed, including that most conventional of all,³⁸ the U.S.S.R. The Baruch Proposal of 1949 would have turned control of atomic power over to the United Nations, but only under "safeguards."

On the human rights front, American initiatives, especially through the membership of Eleanor Roosevelt on the United Nations Human Rights Commission, are too well known to require more than mention. But at the same time it must be noted that, acting together, contradictions in America's free society, in which isolationism has never entirely died out, and a rigid separation of powers system that provides only unreliable extraconstitutional

36. United Nations-based initiatives on multinational enterprises, world trade law, and many aspects of development would have also been considered ultra vires had it not been for American efforts.

37. In that period such strike forces had not been tested and found wanting, as were other notions of "painless war," in situations such as Viet Nam.

38. Certainly as to concepts of "sovereignty" and the like, the Soviet Union has not moved much beyond the 1815 Congress of Vienna. It has never shown any willingness to transfer any significant national powers to international or supranational entities. It is not a member of the IMF, IDB, or GATT.

bridges over the gap between executive and legislative power, have prevented the approval by the United States Senate of the United Nations Human Rights Conventions that were the intellectual and humanistic result of the entire United Nations effort. Finally, the degeneration of the serious sense of mission of the Human Rights Commission and its politicization by states infamous for their disregard for human rights, have tended to turn American attention to other channels for the achievement of decency and compassion.³⁹

THE TRUMAN-EISENHOWER YEARS, 1946-1961

In this period the major postwar American foreign policy lines of action were forged in the crucible of the Cold War. American expectations that the U.S.S.R. would moderate its nationalistic and ideological drives were frustrated; this frustration, in turn, encouraged those elements in American society that for either ideological or patriotic and security reasons wished to "contain" Soviet power. Despite differences in style, the two Presidents united to pursue essentially the same international relations policies with the following legal effects:

(1) *The development to a high level of operational sophistication of the collective self-defense notion of article 51 of the Charter.* It is interesting to note that the prototype of all collective self-defense organizations that were established in advance of any specific threat of armed attack was the Rio Pact of Reciprocal Assistance which had been called for by the Latin American countries. While it is true that the military origins of the Rio Pact go back to Allied concerns during World War II, it was the Act of Chapultepec, resulting from an inter-American conference called by Mexico, that produced the Rio Pact. Truman and Acheson were the catalytic forces behind the North Atlantic Treaty Organization (NATO), whose core concept, like that of the Rio Pact, was the formula,

39. President Carter and spokesmen for his administration have hinted at a renewal of the use of the UNO's Human Rights Commission for the achievement of better standards of decency for people, especially against the governments over them. But that American devil, ethnocentricity, is also at work: certain earnest supporters of the human rights cause argue that customary law has developed a fairly explicit set of rules against "patterns of violation," without, of course, there being the slightest indication that, in a reverse situation, the United States would give serious weight to such an assertion if made against it. If the *consentio juris* from whence comes consuetudinarian law is to be determined from what states do, there is no "nearly unanimous" acceptance of the notion that by general international law—as distinguished from treaty obligations—a state is restrained as to what it may do to its own citizens. Positive law is required for this.

"[a]n attack on one is an attack on all." But NATO, unlike the Rio Pact, provided for joint military forces, a transnational command, and specific defense base areas. The Rio Pact, it might be said, was a shadow international organization for mutual defense, while NATO was one in being. Legally, the latter came closer to the line drawn in article 51 of the Charter between privileged self-defense and proscribed threat of force. Succeeding Secretary Acheson, his fellow "international lawyer,"⁴⁰ John Foster Dulles, worked hard to organize other collective self-defense organizations: Australia-New Zealand-United States (ANZUS), the Southeast Asian Treaty Organization (SEATO)—illfated, as events were to show—and one for the Middle East that failed to develop. These later organizations were each variants of the major models, the Rio Pact and NATO; but not one of them achieved the power-in-being standing of NATO or the previous degree of acceptance that the Rio Pact enjoyed.

(2) *The development of the concept of the UNO as an evolving, organic, international organization.* The contrast between the United States experience with a growing, written constitution and the view that the Charter of the United Nations, as a treaty, should be strictly construed and changeable only by formal amendment is clearly grasped through a rereading today of Hans Kelsen's early work on the United Nations Charter.⁴¹ The American experience with basic domestic law was naturally imputed in the American expectation that as times and situations changed the United Nations should also change by evolutionary growth.

This American attitude toward constitutions and other organic acts resulted in many initiatives in the United Nations, the most significant of which is the Uniting for Peace Resolution. All scholars of international law and organizations recall the situation: had the Soviet Delegation not ill-advisedly walked out of the Security Council, the United Nations Police Action in Korea would have been vetoed. Thereafter, Mr. Acheson and his associates, with the danger in mind that the Soviets might learn from their mistakes, proposed a doctrine under which the power of the General Assem-

40. The term "international lawyering" is used in the sense of the practice, usually for corporate clients, of counselling and advocacy on a transnational scale. This is a different role from that of the scholar-publicist who specializes in "international law." Some specialists do both things, although not usually at the same time.

41. H. KELSEN, *THE LAW OF THE UNITED NATIONS* (1950 London ed.) (1964 Am. ed.).

bly⁴² to consider any question not under exclusive Security Council jurisdiction could be used to make a qualified majority *recommendation*⁴³ that would have the legal effect of legitimating the recommended use of force. This was a major development, as the Suez Crisis was to show half a decade later. In leading this evolutionary change, the United States obviously took serious risks that this very proposal would one day diminish the effectiveness of the veto. It remained for the U.S.S.R. to resist the Uniting for Peace Resolution by arguing along doctrinal lines of strict construction of the Charter, but obviously for the real purpose of maintaining intact the full rigor of the veto principle under article 27. It was not until the Israeli attack on Egypt in 1967 that the U.S.S.R. came to admit the slightest possible legitimacy in the Uniting for Peace Resolution.

(3) *Use of United Nations force against Illegal National Force.* In the Suez Affair of 1956 the United States aligned itself against the actions of its NATO allies, Britain and France, and Israel because, as history will some day show,⁴⁴ President Eisenhower told his Secretary of State that unless this illegal use of force were resisted, the United Nations would fail, as the League had when its members failed to respond to Japanese and Italian aggression in the 1930's. This action followed the pattern that President Truman had pioneered in proposing a United Nations "police action" in Korea. However, as is all too-well recalled, no nation, including the United States, found it possible to oppose Soviet aggressions in Hungary in the same year as the Suez crisis or in Czechoslovakia in 1968. Also, during the period under study the United States took a major role in regard to the use of United Nations "peace-keeping" or buffer forces in areas emerging from colonialistic tutelage into nation-statehood.

42. The power to be granted was to consider, under articles 10, 11, and 12 of the Charter, any question within the scope of the Charter, so long as it was not under consideration by the Security Council. If the question was decided by the appropriate voting majority, then a recommendation was made to member states as to what their course of common action ought to be.

43. *Recommendation* is a term of art under the Charter and not equivalent to *action* to be taken by the UNO as such. In strict Charter terms, only the Security Council may act in this sense, as to threats to and breaches of the peace. In the General Assembly important questions require two-thirds, or "qualified" majority, vote. U.N. CHARTER art. 18, para. 2.

44. At the time of Suez, President Eisenhower went to the media with the argument, that "two wrongs do not make a right;" but I have been told by a person very close to the late Secretary of State Dulles that he was instructed by President Eisenhower in the terms paraphrased in the text.

(4) *Bilateral assistance to devastated or developing countries.* To date there has not developed either a consuetudinarian or a positive international legal obligation⁴⁵ on the more affluent states to assist less advantaged states. American initiatives toward the creation of the World Bank Group and, in Eisenhower's time, the Inter-American Development Bank, the first of the multipartite regional development banks, resulted in the first international organizations devoted to economic and social betterment on a transnational scale. Through the Marshall Plan of 1948-49, the United States pioneered the world's first major bilateral foreign assistance program.

Out of the Marshall Plan initiatives other important international institutions have developed, such as the European Economic Community. The present Office of Economic Cooperation and Development (OECD) evolved from the Office of European Economic Cooperation (OEEC), which helped the benefitted European countries plan the provident uses of the massive American Marshall Plan grants. The OEEC was also a forum for American support of the Monnet-Schuman Plan, the grand design of European unification. As to the European community, the United States deliberately chose to encourage the complete federalization of western Europe, beginning at the economic base, even though it was foreseen that in time European unification would probably create, as it has, some grave problems for the United States.

In summary, it might be said that the United States has sought to make a contribution toward the better sharing of development resources and toward the evolution of political structures beyond the national state through financial encouragement to such movements and the creation of appropriate structures needed to accomplish such activities. But it has avoided the legal commitment to pay an international tax for development, as have other wealthy states.

(5) *Nationalization claims.* Without abandonment of its traditional contention that the international minimum standard of international law as to state responsibility for its treatment of the economic interests of aliens within the state requires prompt, adequate, and effective compensation to the alien direct investor, regardless

45. The developing countries continuously seek to develop a rule of law imposing such an obligation; see, among other examinations of this effort, Oliver, *State Export Cartels and International Justice*, 72 Nw. U.L. Rev. No. 2 (1977).

of the treatment accorded to nationals, the United States actually proceeded during the period studied to negotiate global or "lump sum" nationalization settlements with several of the new socialist countries, a practice that was later followed by some other capital exporting countries as well. In the United States this practice was accompanied by the legislative creation of a national administrative tribunal or agency to adjudicate the pro rata rights of American citizens to share in the global sum paid to the United States by the other state involved in the negotiation in legal satisfaction internationally of all American claims comprehended within the settlement agreement.⁴⁶

THE SIXTH DECADE

Throughout the periods previously discussed concerning the legal impact of the United States upon international law in this century, American legal scholarship played a strong part, sometimes as innovator, sometimes as critical evaluator of governmental initiatives. During the last two periods examined, moreover, American international law scholarship broadened its scope of inquiry to "United Nations Law," "Transnational Law,"⁴⁷ and to the application to international law of new legal philosophies being developed in the United States.⁴⁸

During the 1960's American legal scholars tended once again to be drawn back into governmental operations or to polarize as groups highly critical of governmental actions. The key to this decade, both legally and politically speaking, is not the illicit folly of the Bay of Pigs or the semantic elegance of the use of the term "quarantine,"

46. See generally R. LILICH & B. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* (1975) (two volume work).

47. Then professor, later International Court of Justice judge, Philip C. Jessup is the originator of this powerful and widely-accepted concept, Transnational Law. It is a blending of domestic and international public law principles bearing upon the increased tempo of nongovernmental international life.

48. The developing philosophies include those of Harold Lasswell-Myres S. McDougal and their followers. See Oliver, *Thoughts on Two Recent Events Affecting the Function of Law in the International Community*, in *LAW AND POLITICS IN THE WORLD COMMUNITY* 197 (G. Lipsky ed. 1953). So far, however, American international law scholarship has not followed domestic American law in its movement (so far slight) toward "counting" techniques for value choice, such as input-output analyses, modelizations, and risk-benefit distributions. For an example of how legal science may move from exegesis and verbalization toward measurement, see Ackerman, Ackerman, & Henderson, *The Uncertain Search for Environmental Policy: The Costs and Benefits of Controlling Pollution along the Delaware River*, 121 U. PA. L. REV. 1225 (1973).

rather than "blockade" in the Cuban Missile Crisis. It is the American military defeat in Southeast Asia.

United States involvement in French efforts to recolonize "French Indo China" began within months after Roosevelt's death, with considerable activity by De Gaulle and Bidault dedicated to this end. By October of the year of Roosevelt's death, the British minister in Washington was complaining that the British military elements that the United States had urged to be supplied were having hostile receptions from the Ammanese people of Saigon.⁴⁹

From a beginning in political accommodation of the French, American foreign policy, particularly after the spectacular defeat of the French forces in Vietnam, came to be based, genuinely but misguidedly, upon notions of legal obligation. First, there was the obligation to resist aggression. Closely related was the legal concept of collective self-defense, institutionalized into the SEATO system. Thirdly, there was the notion of *pacta sunt servanda*: If the United States fails to perform any one of its international collective self-defense obligations, it loses its credibility as to the rest of them. Initially, American action in Vietnam was widely viewed as legitimate, both as collective self-defense and as assistance to a "state" whose government had requested American help.

The first occurrence to mar the symmetry of this legal rationale was the Dominican affair in 1965 in which the United States acted unilaterally on factually and legally unconvincing grounds. A "we were invited in" theory was not used, and humanitarian intervention was only thought of by an unbriefed American legal scholar confronting students invading the American Embassy in his charge.⁵⁰ The Dominican crisis opened the United States to severe criticism—some of it honest and some of it expedient, or even vengeful—that the asserted justifications for use of force were not in fact truly grounded in legal principles. Of course, far more flagrant violations of international law by the U.S.S.R. were not similarly responded to in world public opinion, a discrimination that has become commonplace in world affairs and even in domestic politics.

The Dominican debacle was followed by the failure in the field of an American "painless war" strategy in Vietnam.⁵¹ Exotic wea-

49. See note 24 *supra*.

50. See J. GUNTHER, *INSIDE SOUTH AMERICA* 477 (1967) (details given in a long footnote in the chapter on Colombia).

51. Victory through means other than the commitment of large numbers of infantry and artillery, or artillery-surrogate forces, to take and hold ground, such as interdiction bombing

ponry, defoliants, and other substitutes for capacity to wage jungle warfare began to fail; and with such failure, criticism from within the scholarly community of the United States increased markedly. This close in time to the events of 1967-69, it is difficult to appraise the technical legal grounds upon which domestic opposition to the United States Government as to Vietnam developed. Debates among scholars in the *American Journal of International Law* seem doctrinally inconclusive and of little lasting value. Abroad, the objections seem not to have been based on disputes about law, but upon doubts as to the wisdom of the foreign policy assumptions upon which action in Vietnam was continued after the Tet Offensive showed the incapacity of the American military leaders to conclude the fighting with the military modalities and force levels permitted to them. Many, everywhere, disagreed with the American assessment of the threat situation.

The sixth decade saw the publication of two important studies of the international legal system by Americans. Majorie Whiteman's *Digest of International Law* is the third compilation of United States practice in relationship to international legal issues that has been published by the Department of State. Its modernity, completeness, and objectivity commend it to all who need to know the United States viewpoint on the legal aspect of international affairs. It is now being used as a model for similar compilations in some other foreign ministries. In 1965 the American Law Institute, a serious and prestigious nongovernmental law improvement association, gave its imprimatur to the *Restatement of the Foreign Relations Law of the United States*. This *Restatement*, some six years in preparation, attempts a cross-sectional statement of the principles drawn from all categories of law—constitutional law, conflict of laws, administrative law, legislation, and international public law in particular—that apply in United States foreign affairs operations. It was awarded the American Society's annual prize as the outstanding contribution in the year of its publication, and its analysis of the usually tangled problems of "jurisdiction" seems to have been of general assistance to legal thinking. Courts in the United States have relied considerably on it in dealing with international legal issues. The *Restatement's* authors have been supported by later judicial decisions here and in Europe in their statement in

of targets of psychological opportunity, the deployment at critical points of airborne strike forces, and the utilization of a grim "boyscoutism" called "counter-insurgency warfare."

section eighteen that the objective territorial principle of legislative jurisdiction includes reaching, under national law, injury produced by the economic effects within the territory of cartel-like activities outside it. This occurred despite strong opposition by international lawyers representing, in particular, certain major oil companies. The draftsmen of the *Restatement* correctly foresaw in section forty that the major problems of national jurisdiction to regulate economic activity would very soon come to be those of formulating principles for determining priorities between various concurrent national jurisdictions, rather than to deny the existence of such concurrent jurisdiction itself by confining the objective territorial principle to effects produced by bullets, poisoned chocolates, and the like projected into the territory from outside—but denying it to economic effects.⁵²

THE SEVENTIES — DOWN TO CARTER

Through its scholars, the United States continues to enrich international law. But increasingly, important segments of that scholarship seem out of step with discernible legal trends. One major problem faced by the American international law community is that some domestically popular contemporary philosophies of international law seem ethnocentric and unreliable to scholars elsewhere. The strong reiteration by the Nixon Administration of the supposed consuetudinarian minimal standard for nationalizations, for example, is clearly out of step with world trends. Also, the action of Congress, applauded by a number of American scholars, envisaging that customary international law authorizes the remedy of specific restitution in illicit nationalization cases, raises doubts as to the detachment of certain American writers from client-serving positions.

The isolation of the United States as Israel's solitary supporter in international affairs also raises difficult problems as to legal objectivity. While the United States itself has managed to steer clear of the slippery slope of nondefensive self-help and of "anticipatory self-defense," the virtual unanimity of American public commentary as to the launching of the 1967 Seven Days War and, more recently, the rescue mission into Uganda still remain legally uncate-

52. The importance of the principle involved has become apparent everywhere as a result of the economic effects of OPEC. See generally Oliver, *State Export Cartels and International Justice*, 72 Nw. U.L. Rev. No. 2 (1977).

gorized with respect to the Charter dichotomy between licit and illicit use of force by a national state.

On the one hand, the disenchantment of American official and public opinion with efforts of the new United Nations majority to extend United Nations authority in an evolutionary way by the "one country, one vote" principle is a well-known fact; but the international law consequences of this disenchantment are not yet discernible. On the other hand, however, in the comparatively new field of regulatory concern about transnational or multinational private sector establishments, both American scholarship and official attitudes seem to have much in common with the United Nations-based efforts to formulate codes of proper conduct for international business.

In the fields of human rights and of concern about distributive injustice, the positive support actions of the United States are still the world's most numerous and forceful. At the same time, however, the federal legislative authority has developed a clearly discernible "will to participate" in foreign affairs operations.⁵³ Whether this tendency will continue during the Carter Administration cannot at this writing be predicted. But it seems certain that so long as the Congress chooses to extensively involve itself in foreign affairs operations, solecisms related to international legal order are more likely to occur than if there should be a return to the traditional patterns of American executive-legislative relationships in international affairs. The reason is very simple: In any country where there is developed legislative authority independent of the executive power—very few in today's world—there is a tendency on the part of the legislative mass to be less sensitive to international constraints upon national will than is the case with the executive. In 1907, in the very first article to be published in the *American Journal of International Law*, a great American internationalist of the early twentieth century, Elihu Root, wrote:

One of the chief obstacles to the peaceable adjustment of international controversies is the fact that the negotiator or arbitrator who yields any part of the extreme claims of his own country and concedes the reasonableness of any argument of the other side is quite likely

53. The implications of the Congressional "will to participate" in foreign affairs operations for our constitutional structure in America's third century were considered at a Bicentennial Conference on the Constitution, held in April, 1976. See Oliver, *The United States and the World*, 426 ANNALS 166 (1976).

to be violently condemned by great numbers of his own countrymen who have never taken the pains to make themselves familiar with the merits of the controversy or have considered only the arguments on their own side.⁵⁴

While this quotation states the problems that all nations have in supporting objectively and in good faith the growing needs of international order, the problem is presently a particularly acute one in the United States, because of its system of authority as to foreign relations and the current political climate.

AN EXPECTATION

The concerned community in the United States as to the role and importance of law in global affairs is large, engaged, and financially better supported than in almost any other country. For all of their trials of patience and conscience as to the amoral cosmos of international relations, the American people are not comfortable with *Realpolitik*. And in time, as we have seen, even our own masters of Metternichian diplomacy begin to utter idealistic, moralistic—even legalistic—thoughts. The United States is still probably the state most committed to the transfer of will-imposing authority from states to universalistic international organizations. Since World War II, however, even the United States has considerably restricted the array of areas of governance that it would cede to something beyond the nation-state. There have been losses. The majority of the states in the world community today are poor states, highly conscious of their disadvantaged condition and desirous of betterment. This majority is also in the grip of nationalism, sometimes linked to the will to achieve genuine self-determination and to assure the abolition of foreign hegemony, but all too often the product of authoritarian, military rulers who, as always, find chauvinism of help to tenure in office.

Of the minority of the developed nonsocialist states, most are relatively quiescent about change in world affairs. The socialist countries, polarized between the "Moscow Way" and the "Peking Way," continue to attempt to apply nineteenth century, automatic solutions to problems with which only specific management and interventionist administration can deal. For instance, what does Marx have to say about pollution? And the socialist states are them-

54. Root, 1 AM. J. INT'L L. 1 (1907).

selves highly nationalistic, whatever Marx may have prescribed.

Therefore, in this state of affairs, the expansion of the rule of law in the world seems to be today, more so than ever in the past, to rest with the United States and its community of internationalists.