INTERNATIONAL LAW AS AN INSTRUMENT OF NATIONAL POLICY

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I am disturbed by the pronounced tendency of our international law fraternity to bemoan the moribund state of international law. There appears to be a widespread presumption that in practice international rules of law are largely irrelevant to high level decision-making in governments around the world, and, therefore, that we have failed. Since our historical puritan ethic, at least by implication, equates failure with sinfulness, analysis quickly becomes apologia and our discussions assume the character of an expiatory ritual.

I for one, however, believe that our profession need not act like a timid supplicant whose very demeanor defies confidence in his creed. I suggest that international law today, rather than falling into disuse, is becoming a more vital force than ever before in the development of our international relations. In order better to explain the basis for this positive outlook I think it necessary first to expose the false assumptions on which our self-deprecating tendencies have been premised.

In decrying the inefficacy of international law we have concentrated too much on its adjudicatory aspect, and, finding an absence of effective international machinery, have concluded that international law must be in sad straits. Speaking conceptually, however, institutionalized adjudicatory machinery has a quite different place in international law than it does in municipal law. Nations, more so than private litigants within a single country, have informal, nonjudicial means of enforcement by virtue of the fact that their bilateral and multilateral relations with one another provide a dynamic process for the adjustment of their respective interests, including the satisfaction of legal rights. As our experience of some hundreds of years has proven, the absence of a comprehensive and dispositive system of adjudication does not necessarily lead to international anarchy. States comply with law among other reasons because it is politic to do so. Furthermore, domestic enforcement is heavily devoted to adjustment of legal disputes between the sovereign and the governed, rather than between private litigants, and it is precisely these adjustments of legal relations which encompass a vast majority of the decisions of the U.S. Supreme Court. There being no international sovereign, however, there is no international need of corresponding magnitude for formalized means of redress.

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I might say, parenthetically, that a factor which tends to compound the gloomy view of international law is the high rate of unemployment in our chosen field. Very few of those who style themselves as international lawyers ever have more than a modest, if even a fleeting, chance to practice public international law. The American Society of International Law, under whose co-sponsorship we are assembled today, has over 5,500 members, yet I doubt that there are even 550 lawyers in the country today substantially engaged in the practice of public international law, and the vast majority of them are employees of government or international organizations. It is precisely the lack of a widespread system of adjudication in this field which accounts in large part for the dearth of opportunity, particularly private practice opportunity; fewer lawsuits require fewer lawyers. It is natural that a profession high in numbers relative to opportunities should exhibit signs of dissatisfaction. If the priesthood consistently exceeded by tenfold the number of parishes available to be served one would be inclined to conclude that religion was out of style.

Lest there be misunderstanding I wish to emphasize that we at the Department of State shall always be among the first to promote wider acceptance for the impartial adjudication of international disputes. Secretary of State Rogers clearly expressed our support for the International Court of Justice in his address three years ago this week (April 25, 1970) on "The Rule of Law and the Settlement of International Disputes" before the American Society of International Law, and we continue to pursue with vigor the policies outlined in that address. We reject the thesis recently advanced by two notable Canadian authorities[1] to the effect that the absence of any prospect of international adjudication actually aids the development of international law. I only make the point that we must consider adjudication in perspective, and not conclude from its relative absence that international law itself is dead or even suffering reduced vitality.

It is worth remarking also that utilization of international litigation and the situation of the World Court in particular have in some ways improved during the last few years. The Court's advisory opinion in the Namibia case has restored some of its previous luster, and it appears that judges of the Court are about to be involved simultaneously in a total of five cases. The fact that two such disputants as India and Pakistan can engage in successive litigation, first the Rann of Kutch Arbitration, then the ICJ Appeal Relating to the Jurisdiction of the ICAO Council, is encouraging. The action of Belgium, France, Switzerland, the United Kingdom, and the United States in

1. Gotlieb & Dalfen, *National Jurisdiction and International Responsibility: New Canadian Approaches to International Law*, 67 AM. J. INT'L L. 229 (1973).

submitting to the Arbitral Tribunal for German External Debts disputes with the Federal Republic of Germany concerning the amounts of payments due on the Young Loan — a matter that has been estimated to involve up to fourteen million dollars for the dollar tranche alone — is another hopeful sign. Only time will tell, of course, whether these straws in the wind foreshadow a greater harvest.

If we indeed can turn away from our historical preoccupation with the question of adjudication, we see that in recent years the role of international law itself has been changing, and its importance in international events has swelled. It has graduated from being a somewhat esoteric discipline, incident to the conduct of international affairs, to become an important instrument of national policy in the United States and around the world. This world-wide expansion is abetted by a growing realization within most governments that many of the common problems affecting States can only be solved by international cooperation. In a number of fields we in the State Department have found that the development of international law can be one of the primary weapons used to develop an international climate favorable to the accomplishment of our national aims, and we are happily participating in this considerable expansion of the role of international law.

For example, as your program reflects, the enormity and the seriousness of drug abuse is well recognized as one of the most critical national social problems we are facing at the present time. Because of the international character of drug production and commerce, it is clearly impossible to end such abuse through national measures alone. We have attempted to deal with this national crisis, at least in part, through a substantial effort to broaden and strengthen international legal provisions regulating production and traffic in those drugs. We have proceeded on the multilateral level, for example, through amendments to the 1961 Single Convention on Narcotic Drugs and the Convention on Psychotropic Substances, and on the bilateral level through a series of specific agreements particularly with States which have been the sources of raw materials for drugs. We have been able to conclude these agreements, embodied in solemn legal documents, because other States are also increasingly aware of the dangers which spreading drug abuse poses to all countries. These international legal arrangements have already proved valuable, and hopefully will be of continuing significance in reducing the supply of drugs reaching this country.

Your program also includes a discussion on terrorism and I should emphasize here two projects which are in the forefront of the international legal struggle against terrorism, namely the Draft Articles on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons prepared by the

International Law Commission under the leadership of its American President, Mr. Richard D. Kearney, and the Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism prepared by the U.S. government and introduced at the 27th General Assembly of the United Nations by Secretary of State Rogers. The forerunner of both of these, of course, was the convention on this subject prepared by the Organization of American States, which represents a regional approach to this universal problem.

Several other examples are, I think, pertinent to drive home the point that international law is thriving and active as a national policy instrument. A problem of profound national, as well as international, concern is that of environmental protection. For example, during the past four years we have responded to the serious problem of marine pollution with a series of multilateral agreements, including: (1) the 1969 International Convention on Civil Liability for Oil Pollution, and the 1971 Convention for the Establishment of an International Fund for Compensation, which together provide an international system for compensating victims of damage from vessel oil spills; (2) the 1969 Convention Relating to Intervention on the High Seas, which provides for actions on the high seas by coastal States to protect their coastlines from grave oil pollution damage resulting from serious maritime accidents; (3) several amendments in 1969 and 1971 to the 1954 International Convention for the Prevention of Pollution of the Sea by Oil designed to strengthen controls over vessel oil discharges and oil tanker construction; and (4) the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, which regulates the disposal at sea of toxic land-generated wastes. We hope that this work will be advanced further through the adoption later this year of a comprehensive International Convention for the Prevention of Pollution from Ships, which will regulate the intentional or accidental discharge of all types of harmful substances from ships, including oil, toxic chemicals, sewage and garbage.

Outside of the marine pollution area, a number of other important legal steps have been taken to protect the world environment following the 1972 Stockholm Conference, including: (1) the 1972 World Heritage Convention, which provided international funding and machinery to assist governments in the restoration and protection of areas of cultural and natural significance; (2) the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, which established controls on trade in endangered species and their products; and (3) a series of bilateral environmental agreements, including the agreement with Canada for the protection of the Great Lakes from pollution and with the Soviet Union for cooperation and exchange of information on environmental questions.

We have been able to conclude these agreements largely because

we and other States have realized that our common interests are far better served by restricting certain of our own activities, and persuading others to do likewise, than by continuing to behave in the free, but costly, manner with regard to our environment that we had been pursuing. States increasingly realize that broad international problems can be solved at least in part by broadly based legal agreements. We have every reason to believe that even though the operation of these various agreements may not solve all of our problems completely, they will make a most significant contribution to their reduction.

In the field of hijacking and aircraft sabotage, the United States, together with other countries, has spearheaded strenuous efforts within the International Civil Aviation Organization (ICAO) which over the past ten years have resulted in the conclusion of the Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking Convention), and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage Convention). I had the pleasure of serving as Chairman of the U.S. Delegation at the diplomatic conference which approved the third of these conventions and I can testify to the fact that in this very important field the development of international law has been a major instrument for the realization of our own national policy as well as the shared interests of many other States. The bilateral agreement has a role to play here also as illustrated by the recent hijacking agreement with Cuba, which undoubtedly has been an important factor in the recent total absence of hijackings to that country. At the present time strong efforts are concentrated on the hoped for conclusion of an Air Security Enforcement Convention which, together with related instruments, will be the subject of a combined diplomatic conference and Extraordinary Assembly of ICAO to be held this summer in Rome. In this field even the mere existence of strong and widely publicized international law serves to help eliminate the scourge which for so long has threatened the safety of international civil aviation.

For several years the United States and 90 other nations have been engaged in the United Nations Seabeds Committee's effort to achieve international agreement on a comprehensive new legal regime for the oceans. This is one of the most extensive and ambitious international law making projects ever undertaken. It proposes nothing less than a new legal regime for the 70 percent of our world covered by oceans. In doing so it addresses questions of the breadth of the territorial sea, international straits, scientific research, pollution and exploitation of the living and non-living resources of the oceans. Hopefully, these efforts will produce results at the diplomatic conference which is scheduled to convene in New York late this year.

While this effort is motivated in part by the traditional needs for international regulation, there is no doubt that now, as compared to the Geneva Conferences of 1958 and 1960, the nations involved regard development of the law of the sea as an important way of implementing their national policies with respect to fundamental economic and defense interests.

Perhaps the most striking proof of the new political importance of international law was presented by the Moscow Summit of last May, where my indefatigable colleague, the Assistant Legal Adviser for Treaty Affairs, Mr. Charles I. Bevans, presided over the execution of nine documents in six days including agreements on strategic arms limitation, prevention of naval incidents, scientific cooperation, environmental matters and joint space ventures, signed by President Nixon, Chairman Brezhnev, Secretary of State Rogers and other senior officials. Those of you who have had international legal experience in the government will know that the bulk of such work is created by relationships with friendly countries. Countries with whom relations are not so friendly, and with whom we therefore do not have substantial dealings, present comparatively few legal problems. Many governments, including ours, feel increasingly that the development of a complex array of legal relationships should be conducive to a general atmosphere in which military conflict is less likely. As this theory is applied, an ever increasing wealth of international legal relationships results. The result is a deeper and broader network of structured communications among States, an expanded range of institutional bases for cooperation, leading to greater reliability and predictability of State action, a greater number of formalized standards and channels for cooperation among States, and in time hopefully a greater tendency to try to solve problems through international cooperation rather than conflict.

A special word regarding international conflict is appropriate at this point. As a profession we have tended to believe that international lawyers are too little consulted in connection with the great crises of war and peace. Naturally this is the area in which the most difficulties will be confronted. Here, too, however, we may rightfully take heart from recent experience. As is abundantly clear from the documents and correspondence printed in recent issues of the *American Journal of International Law*[2] the Legal Adviser was consulted in a timely fashion with respect to the mining of North Vietnamese ports announced by President Nixon on May 8, 1972, and the President's speech on that occasion clearly bore the imprint of those consultations. The various Protocols to the Agreement on Ending the

2. *See* Nelson, *Contemporary Practice of the United States Relating to International Law*, 66 AM. J. INT'L L. 836-40 (1972); also Letters from Thomas Ehrlich and Carl B. Spaeth to John R. Stevenson, Legal Adviser, Department of State, May 31 and July 12, 1972, 67 AM. J. INT'L L. 325-27 (1973).

War and Restoring Peace in Vietnam signed January 27, 1973, as well as the succeeding Act of Paris, were negotiated with the constant personal assistance of my principal deputy, Mr. George H. Aldrich, and we continue to be very much involved in decisions related to lingering conflict in that area. In recent years, personnel of my office have contributed significantly not only in this area, but in contentious matters involving Berlin, the Middle East, and indeed every region of the world. The broader concern of the Government for the role of international law in armed conflicts is evidenced by our heavy commitment to ongoing efforts to revise the humanitarian international laws related to war. Quite clearly the role of the international lawyer as action-adviser to his or her government in times of conflict is growing along with a role in building the structure of laws and agreements designed to reduce conflict.

As might be expected, the forces which have expanded the role of international law tend to bring change to the profession as well. In the past, the traditional international lawyer has been a government employee functioning primarily as a professional specialist or technician of a high order. Legal committees of international organizations have regarded themselves as technical bodies into which politics should not intrude. As international law has begun to play an increasingly important role as an instrument of national policy, however those responsible for its creation and application have become more politically astute. While government representatives in international legal meetings still, for the most part, are highly competent jurists, they increasingly manifest political sensitivity and talents as well. This is a development which doubtless will prove troubling to some who have grown to professional maturity in a more traditionalist environment, and one which should give us all pause for thought. We must take care that in the process of making international law not become too politicized, that we do not, through political overexposure, impair the essential character of our chosen instrument.

With this single caveat I believe we may view the future with justifiable optimism. International law and its practitioners now occupy an increasingly significant role in the formulation and application of national policy and each day brings new opportunities. Private practice lawyers, too, benefit from this expansion, reducing the problem of our professional underemployment. Of the specific fields previously mentioned at least three—environmental control, law of the sea, and civil aviation security—impact directly on commercial interests, which increasingly will look to their legal counsel for advice on international law. Just as the growth of domestic law has been the hallmark of U.S. internal political development over the past decades, so may international law development be a dominant characteristic of our foreign policy in this and future decades.