

RELIGION AND INTERNATIONAL LAW

The panel was convened at 2:30 p.m., April 21, 1988, by its Chair, Mark Weston Janis.*

REMARKS BY MARK WESTON JANIS

The connection between religion and international law is close but, surprisingly, little studied or described, at least by international lawyers. This lack of attention is, I think, due to two causes. First, there has been a real effort made in the 19th and 20th centuries to turn law into a science. The legal positivists who have made this effort have felt that doing law scientifically means keeping religion and morals absolutely out of the discipline. Second, in recent decades, we have seen more than a hundred new, mostly non-Western, nations added to the world community that is more or less ordered by international law. Conscious that Western religious, moral and ethical values are not necessarily shared with other cultures, many may be reluctant to talk about religion and international law for fear of excluding those whose religious, moral and ethical beliefs differ from their own.

I have little sympathy with the first possible cause, for I doubt that the expectations for making international law a "science" were ever or are now very realistic. Indeed, as Thomas Kuhn has pointed out, even science is a lot less scientific than we used to think. In any event, I conceive of international law not as a science but as an art or a humanistic discipline, one that is, at best, descriptive and prescriptive of human attitudes and styles. For international lawyers, in the name of science or positivism or realism, to reject religious motivations or concerns is to curtail any attempt to account adequately for the actual nature and aspects of the subject.

With the second possible cause of neglect I am, however, fully sympathetic. One of the great tasks, perhaps the greatest, imposed on modern international lawyers is the crafting of a universal law capable of ordering relations among diverse nations with differing religions, histories, cultures, laws, languages and economies. In so crafting, we need to take the world's peoples as we find them and not pretend out of existence their wide variety. This respect, though, cuts both ways. We should neither be presumptuous about Western religions, morals and ethics, nor should we avoid them. Given their real importance, we ought to pay them, along with other traditions, due regard.

Today our panel can only begin to explore the connections between religion and international law. You will see that our topics are largely Western and Christian, but we know that we have only begun an exploration that must be much more diverse. All of us hope to contribute to a book on religion and the development of international law, and one of our objects today is to encourage others to join us in that venture which, I expect, will be much more inclusive than today's panel.

Turning first to religion and international law in 19th-century America, I should explain that the topic interests me because of its 20th-century dimensions. My own observation is that a great deal of the popular support for international law in the United States comes not from professional international lawyers, numerically insignificant as we are, but from Americans whose beliefs in the possible role of law and morality in world affairs spring from religious sources. To understand where we are today, I thought it best to begin my enquiries with yesterday.

*Professor of Law, University of Connecticut.

At no time have expectations been greater for the role of law and morality in international relations than in the hundred years between the end of the Napoleonic Wars and the beginning of the First World War. And nowhere were the hopes for international law and ethics brighter than in America. In the United States, law had established a privileged place in society. Many Americans stoutly believed that law and its concomitant moral traits would emerge victorious in international relations, as they had in national affairs.

James Kent, once Chancellor of the State of New York, later law professor at Columbia, began the four volumes of his *Commentaries on American Law*, the first great American law treatise, with 200 pages devoted to the law of nations. Kent's inaugural paragraph reverentially intertwined international law with the American Revolution and the sovereignty of the United States, defined and praised his subject, and, presciently, remarked on some of the difficulties that would engage Anglo-Americans in the coming decades:

When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom, had established among the civilized nations of Europe, as their public law. During the war of the American revolution, Congress claimed cognizance of all matters arising upon the law of nations, "according to the general usages of Europe." By this law we are to understand that code of public instruction, which defines the rights and prescribes the duties of nations, in their intercourse with each other. The faithful observance of this law is essential to national character, and to the happiness of mankind. According to the observation of Montesquieu, it is founded on the principle, that different nations ought to do each other as much good in peace, and as little harm in war, as possible, without injury to their true interests. But, as the precepts of this code are not defined in every case with perfect precision, and as nations have no common civil tribunal to resort to, it is often very difficult to ascertain, to the satisfaction of the parties concerned, its precise injunctions and extent; and a still greater difficulty is the want of adequate pacific means to secure obedience to its dictates.¹

Just a little further along in his text, Kent emphasized the particularly Christian and ethical aspects of his subject:

The law of nations, so far as it is founded on the principles of natural law, is equally binding in every age, and upon all mankind. But the Christian nations of Europe, and their descendants on this side of the Atlantic, by the vast superiority of their attainments in arts, and science, and commerce, as well as in policy and government; and, above all, the brighter light, the more certain truths, and the more definite sanction, which Christianity has communicated to the ethical jurisprudence of the ancients, have established a law of nations peculiar to themselves. They form together a community of nations, united by religion, manners, morals, humanity, and science, and united also by the mutual advantages of commercial intercourse, by the habit of forming alliances and treaties with each other, of interchanging ambassadors, and of studying and recognising the same writers and systems of public law.²

Kent underlined for Americans the importance of the Dutch Protestant jurist and diplomat Grotius who, "the father of the law of nations, . . . arose like a splendid luminary, dispelling darkness and confusion, and imparting light and security to the intercourse of nations." The benevolent influence of Grotius was even more pro-

¹ J. KENT, COMMENTARIES ON AMERICAN LAW 1-2 (2d ed. 1832).

²*Id.* at 3-4.

nounced in the first American treatise on international law, Wheaton's 1836 *Elements*. Henry Wheaton, Minister of the United States to the Court of Berlin lamented "the state of public law and European society in the beginning of the sixteenth century: one mass of dissimulation, crime, and corruption, which called loudly for a great teacher and reformer to arise, who should speak the unambiguous language of truth and justice to princes and people and stay the ravages of this moral pestilence." That great teacher and reformer was Hugo Grotius:

[His] age was peculiarly fruitful in great men, but produced no one more remarkable for genius and for variety of talents and knowledge, or for the important influence his labors exercised upon the subsequent opinions and conduct of mankind. Almost equally distinguished as a scholar and a man of business, he was at the same time an eloquent advocate, a scientific lawyer, classical historian, patriotic statesman, and learned theologian. His was one of those powerful minds which have paid the tribute of their assent to the truth of Christianity."³

What was it in Grotius that triggered the American platitudes? Plainly, the paternity of international law is more complex than simply to admit Grotius as its only father. Look at Grotius' own definition of his problem. Here is some of the prologue to Grotius' great treatise of 1625, the *Law of War and Peace*:

I have had many and weighty reasons for undertaking to write upon this subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy has openly been let loose for the committing of all crimes.

Confronted with such utter ruthlessness, many men who are the very furthest from being bad men, have come to the point of forbidding all use of arms to the Christian, whose rule of conduct above everything else comprises the duty of loving all men. To this opinion sometimes John Ferus and my fellow countryman Erasmus seem to incline, men who have the utmost devotion to peace in both Church and State; but their purpose, as I take it, is, when things have gone in one direction, to force them in the opposite direction, as we are accustomed to do, that they may come back to a true middle ground. But the very effort of pressing too hard in the opposite direction is often so far from being helpful that it does harm, because in such arguments the detection of what is extreme is easy, and results in weakening the influence of other statements which are well within the bounds of truth. For both extremes therefore a remedy must be found that men may not believe either that nothing is allowable, or that everything is.

Nineteenth-century Americans, too, were looking for ways to be realistic about peace but to remain Christian all the while. Grotius was attractive, not only because he recognized the conflict between the potential for awful behavior in international relations and aspirations of Christians for universal love and brotherhood, but because he also explained how it might be possible to reconcile the conflict. His explanation, forming the basis of what we now know as the classical law of nations, was based on a system of rules that mixed practical and moral elements.

This is not to say that Grotius was by any means the first to write about what has become modern international law. Indeed, Grotius was particularly in debt to those 16th-century Spanish theologians who sought to marry the Catholic Church's medieval theories of natural law to the new realities of international politics. What was

³H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 27 (1836).

special, however, was a peculiarly Protestant "twist" to Grotius' work. Kunz has explained:

The Protestant Grotius, who wrote the first treatise on international law, was still strongly influenced by the traditional natural law, but he secularized it by stating that natural law would be valid even if there were no God. This secularization profoundly changed the character of natural law. True, the Catholic natural law is not based on divine revelation; it is to be discovered by man's *recta ratio*—a term stemming from the Stoics; yet the *jus naturae* is man's "participation in the *lex aeterna*"; it necessarily presupposes the Christian faith in the Creator, who has written these norms into the hearts of all men. "Right reason" is only the tool to discover the natural law; with Grotius this right reason becomes the basis of natural law. Grotius distinguished the "natural" and the "voluntary" *jus gentium*; although modern international lawyers are sometimes of exactly opposite opinions as to what part he emphasized.⁴

That Grotius in particular and Protestants in general should put faith in law as a means to moderate the cruelties affecting the relations of states should come as no surprise, for a respect for law runs deep in the Protestant tradition.

My comments are only a hint of the kind of materials and analysis that can be mustered in discussions about religion and international law in America. Like the lawyers, those concerned with religious questions leave an impressive paper trail behind them. Marrying the paper records of American law and American religion will, I submit, yield some interesting fruits. The results will, I think, help illuminate the story of America's commitment over more than 200 years to the rule of law in international affairs.

REMARKS BY DAVID KENNEDY*

Our discipline tells a very specific story about its historic relationship to religion, a story that reveals more about our self-image than about religion or international legal history. Indeed, to my mind, scholarship about "religion and international law" is primarily interesting for its industrious work embellishing, improving and reflecting international law's sense of self. As one part of a larger effort to rejuvenate and redefine our discipline, I would like, quite briefly, to describe and interrogate our collective psychosis about religion and suggest a thoroughgoing relationship between our discipline and our cultural faith.

The short "historical introduction" to the 1987 edition of the West casebook by Professors Henkin, Pugh, Schachter and Smit presents international law's relationship to religion in classic form. Let us read it together. The text is indeed short—11 pages at the very start (*before* the Table of Contents) of a 1500-page basic text. We should pay close attention to religion here for it appears more in these pages than elsewhere in the book, seems inseparable from international law's history, indeed, seems essentially a historical phenomenon. What do these brief pages tell us about the relationship between international law and its history? That history is over, short, early, preliminary, severable from the "cases and materials" of international law. And so also religion—we know already what is most important—religion is something we used to have.

The history is written in the collective voice of the editors, guiding us in unison to the present, where the voice fragments explode into a dizzy confusion of cases, notes,

⁴Kunz, *Natural-Law Thinking in the Modern Science of International Law*, 55 AJIL 951 (1961).

*Professor of Law, John Harvey Gregory Lecturer on World Organization, Harvard Law School.

commentaries and questions. And religion belongs to that earlier, more comprehensible period, belongs to the era of a unison from which we have fallen into ecumenical dispersion—itsself a quintessentially religious narrative. Things in the past make sense, had a coherent pattern that brings us sadly, inexorably, with resolve and also with aspiration to the challenge of the materials—can the reader bring them together, resolve contemporary doctrinal, theoretical, even political disarray as successfully as have the editors our history? And what is this but the ambition—the very project of the religious? Our resolve in pursuing this project is the earnest resolve of the ex-religious, our aspiration that of the nostalgic.

This text, the text most overt about religion, sets up our approach to the “problems” of contemporary public international law and patterns successful responses, textually and historically. We should be particularly attentive, then, to its messages, for the book recapitulates this structure each time historical “context” is deemed relevant to an “understanding” of the materials “themselves.”

The story is developed in eight weird stages—eight phases that reduce to a familiar three-part time line: before 1648, 1648–1918, and 1918 to the present. The first four take up the period before what is termed the “foundation” of international law in 1648, and foreground political or social change. The next two (covering the period from 1648 until 1918) shift dramatically to philosophy, documenting the displacement of the relationship between “principles of international law” and “natural law philosophy” by the “turn to positivism.” The last two consider “modern” institutional developments following each of the two world wars.

Already we find an interesting structure—political and social roots transformed by philosophy into institutional modernity. Religion begins as a social force, is transformed into a “philosophy” and survives only as a set of “principles,” guiding the practice of institutions. So far, a standard bit of enlightenment ideology. International law inherits principles from religion, is born of chaos, is refined by philosophy, tried by war and confirmed as an institutional response to military sacrifice. And what is this but the most familiar religious narrative?

This structure, the structure of international law’s historical self-image, we find recapitulated at the heart of contemporary international law doctrine—in the movement from jurisdiction through the merits to remedies—or, more familiarly, from sources through process to substance. At first, word appears wrested from politics—sources or jurisdiction. Immediately word explodes as speech, proliferating as process and debate about the merits. But each complex dispersal projects its resolution, in resolve, text, outcome that will give way to the epiphany of substance or the institutional instrument of implementation. And we find this structure also at the core of modern institutional life—in the movement from membership or “constitution” through plenary debate by vote to administration. It is politics displaced by speech and transformed into bureaucracy.

But let us take up the argument more slowly. The first section, introduction to the introduction, concludes: “[I]n a strict sense, therefore, the history of the modern law of nations begins with the emergence of independent nation-states from the ruins of the medieval Holy Roman Empire, and is commonly dated from the Peace of Westphalia (1648).” Choosing the end of the Thirty Years War, rather than, say, the beginning, implicates international law in the conflict itself not at all. States emerge naturally from “ruins.” Indeed, later we will read: “[A]s the medieval Holy Roman Empire disintegrated, the void was filled by a growing number of separate states.” International law is the response of philosophy, of reason, to this emerging fact, and shares nothing with the messy collapse itself.

Coming after the religious wars, moreover, international law is seen as a response to the inadequacies of religion. In this first section, these, the failures of religion, are the inadequacies of "universal political ideologies." The text begins by distinguishing the eternal situation to which international law responds from pre-1648 religious resolutions. Here is the opening:

Human history has long known tribes and peoples [which we also know, which international law knows, knows as history knew them, namely], inhabiting defined territories, governed by chiefs or princes, and interacting with each other in a manner requiring primitive forms of diplomatic relations and covenants of peace or alliances for war. These relations between peoples or princes, however, were not governed by any agreed, authoritative principles or rules.

So far, the text is familiar: in the beginning, man lacked law, for this, agreed/authoritative principles/rules, not primitive alliances or princely authority, is law. But now comes a strange turn, a turn to empire and religion.

At various times, moreover, most of the peoples of the known world were part of large empires and relations between them were subject to an imperial, "domestic" government and law. Empire, actual or potential, was also sometimes supported by an ideology that claimed universal authority over all peoples, or otherwise rejected the independence and equality of nations or any principles governing relations between them other than imperial law.

The text then illustrates by comparing "classical Chinese philosophy," Islam, Christianity (at least "in its formative phase") and Judaism as ideologies which "legitimate . . . conquest and subjugation of others." Judaism's failure to develop a "universalist political ideology" is attributed to the fact that Judaism "has not been the ideology of a politically independent people for 2000 years."

These are powerful associations: religion/empire/ideology. International law stands forward of subjugation, in "independence and equality," if only the independence and equality of "nations." Can we read this passage without thinking about communism, without prefiguring the post-1918 institutional structure of decolonization, self-determination and international administration? Without reaffirming international law as having done with all that, with empire, with universalism, with ideology, with war? The enlightenment attack on religion ends here, in the institutional, democratic West, with an intellectual McCarthyism. Challenges to international legal order are now to be expected from modern primitives, imperial ideologies.

And yet we find an immediate doubt. The second section, telling us about the "origins of international law" takes us back, back to Greece and Rome. Greece, we learn, "never achieved unity" before the Macedonian conquest and therefore "alternated between peace and war." Given the earlier emphasis on the "void" of intersovereign conflict calling forth law, we might think that the Greeks therefore lacked international law. But no, we read: "[A]s a result, [precisely 'as a result'] the Greeks . . . developed rules governing relations between the various Greek states, rules that more closely parallel the modern system of international law than those of any other early civilization," perhaps because they avoided universalist ideologies. Here we find international law grounded in the oscillation between war and peace, distinguished from the religious wars of "ruin" precisely in their secularity. Religion marks the difference between the passions of imperial ruin and the merely remedial inadequacies of an early, partial accommodation of international conflict.

And the Roman Empire, we read: "[A]t its height comprised hundreds of different races, tribes and religions." Following the logic of part one, you might think it therefore lacked international law "in the strict sense," possessing only a "domestic" impe-

rial order. So we also are told, but now “the significance of the Roman contribution to international law” is foregrounded; namely the *jus gentium*, “a system of legal rules governing the relations between Roman citizens and foreigners.” This might have seemed the very stuff of empire, of subjugation rather than civilization, but it is instead “one of the sources of contemporary international law,” perhaps because its rules were not tainted by “ideology,” indeed, by religion. Religion thus marks the difference between acceptable and unacceptable empire, exactly as it marked the difference between acceptable and unacceptable international conflict. The 1648 date situates international law forward of both empire and conflict by situating itself forward of religion, while tracing its roots proudly to Greece and Rome.

Parts three and four confirm this development. By 1648 we find a “void,” slowly being, having been, filled by “a growing number of separate states.” Only then, after the void has been filled, after religion has been voided, does international law appear—as a philosophy, a study, a “system of rules” made “necessary for the newly emerging independent states.” As a philosophy, it arose “where the Renaissance had revived the study of classical civilization and, in particular, the study of Roman law.” However secular the presentation, this narrative of law’s arrival from the void as word is a familiar one from religion. And indeed, how else than as religious mythology could law be imagined to arrive so fortuitously or in such a disembodied form?

Activities, commerce, “improvements in navigation and military techniques” all “give rise” to concepts and principles that, when unified, recorded and rationalized, comprise the first works of the discipline. And our story moves now to the priesthood of believers, for the chaotic facts have done their work, have “called forth” a law.

By the beginning of the 17th century, the growing complexity of international customs and treaties had given rise to a need for compilation and systematization. At the same time, the growing disorders and sufferings of war, especially of the Thirty Years’ War, which laid waste hundreds of towns and villages and inflicted great suffering and privation on peasants and city dwellers, urgently called for some further rules governing the conduct of war.

Although the emphasis shifts now to the work of systematization and compilation, we learn that the “details of their systems are not of much contemporary importance.” And indeed, we find little study of the particular relations among the practices “calling forth” doctrine and the doctrines called forth. Instead, we follow what “is of interest and not without importance:” namely, “the basic ideas underlying the evolution of international law and . . . the principal phases of development from the time of Grotius to the present.” Ironically, at the very moment of religion’s disappearance, international law appears as a universalist ideology of its own, temporally freed from its origin and context.

But it will not present itself so. Indeed, the story of idea’s triumph is told as the triumph of the will. The traditional intellectual story of international law’s evolution from 1648 to 1918 is familiar. Begun as a series of disassociated doctrines about navigation, war and relations with aborigines within a “natural law” philosophy, international law slowly matured as a comprehensive doctrinal fabric rendered coherent by a set of “general principles” and authoritative by its “positivist” link to sovereign consent. The shift from fragmentation to coherence is accompanied, then, by a shift from “natural law” to a combination of “principles” and “positivism.” Eventually even the “principles” became subordinated to the “positivism,” and subject to codification—exactly at the moment political conflict again breaks the narrative surface—after 1918. This narrative of authority’s triumph over principle is repeated—in the shift from

natural law to principle, from naturalism to positivism, and finally from law to institutions in the post-World War One era.

The move is paradoxical. On the one hand, international law is a matter of ideas, born in the move from state to law, instantiating law to facilitate the state. On the other, maturity is achieved at each stage through a double reversal of this order—first by a movement from thought to action, from belief to practice, from law to state, and second, exactly at the moment of law's movement from principle toward practice, law is set up against the state, separated from the sovereign it facilitates and mirrors. This double movement is sustained by law's singular and repressive relationship to religion.

By repressing religion back to origins, law first achieves a space to operate against the state—to inherit the critique. Second, by expelling religion, establishing it in a continuing extralegal field—as principle, and eventually ideology—law seems entwined with sovereignty, inseparable in its origin and practice from authoritative will. We thus find a trilogy, religion-law-state, that constructs law as recollection and anticipation. Remembering faith, anticipating the state, projecting it forward as law's completion, object and origin—for it is the state that split law from religion. Could there be a more familiar religious narrative?

And it is a narrative that gives law a most peculiar set of obsessions. It must remember, but safely, and it must anticipate, both humble and discerningly critical of the state, for only law can certify the return of its origin. It is unsurprising that a law so constructed would be obsessed with the relationship, the line, the distinction, between international law and sovereignty, between the ideas that comprise our discipline and various historical practices of willed authority. And indeed, in a furious repetition compulsion, we theorize about little except the normative/descriptive relationship between law and state behavior, exactly as our doctrines repeatedly trace (and seek to enforce) the line between law and politics—to differentiate custom from treaty, substance from procedure, and so on.

There are the preoccupations of a discipline that locates its origins in the word. The post-1648 discipline of international law retains this preoccupation ever after its 1918 move to modernism, in both the increasingly idiosyncratic battles of "neo"-positivism and "neo"-naturalism, and the fragmenting rhetorics of realism, state behavior theory and institutional pragmatism. But it should be no surprise that after the reemergence of the deed, in the disconnected space of modernism—after, say, the invention of world war, the triumph of the machine or the insistence of objectivism—these obsessions seem ever less stirring. Indeed, the post-1918 discipline of "international institutions," which locates its origin in deed, presents a mirror image of preoccupations. If international law frets about word's effect on deed, about law's influence, international institutions tinker with the word's bureaucratic instantiation—reforming, revising, getting it "right." Law presents itself as that which has been able to differentiate and defeat religion, by inheritance and banishment. Yet, we must smile at law here, repeating in a secular key a practice of distinction that, recast as the separation of the sacred and the profane, seems the most central concern of religion itself.

So far, I have told the traditional story of international law's relationship to religion. Religion belongs to our past, surviving in the present only as origin and principle. International law, although threatened by contemporary ideologies, is essentially ecumenical and anti-imperial. However universal, indeed proud of its universality, international law confirms, even institutionalizes, the Enlightenment struggle for an international order of respected will.

The center of our modern concern will be here—in the effort to square will with order. The solution will be some accommodation of law and state, of positivism and

principle, of institutional democracy and administrative or judicial restraint. The place of religion in international law will be understood now to be simply trivial, arcane, historical. The secular order offers outsiders "self-determination." So long as religion can be kept marginal, the offer will be accepted. In short, the outsider only can come into being as an institution—a "state," a "people," a "citizen." And we will insist on the marginality of religion at the core of our practice, writing and rewriting the practice of chastened participation, of faith reduced to inspiration, of religion as the animator or handmaiden of international order—never quite forgotten, indeed insisted upon in its intermittency. Thus, our odd fascination with the occasional importance of Quakers, Bishops and Christian civil disobedients.

But however often we interrogate and reconfirm religion's arcane historicity, its centrality as inspired loss, we find ourselves redoubled in doubt, cynical about our normative aspiration, threatened by faith. For now the entire terrain outside the struggle between state and law, whether presented as ideology, fanaticism, or terrorism, challenges the security of our doubts, recalling an authenticity we believe ourselves to have lost. And when there is an other, an outside, it will be most compelling, most fascinating, when it can be labeled religious—as early Soviet "ideologists" or, more recently, Islamic fundamentalism. In our lexicon, these threats seem powerful because they remind us of the history we have repressed—a history that would recast relations between law and state and among our doctrines and theories as repetitions of the work of faith, distinguishing the sacred and the profane. Yet we know we are not faithful, being all reasonable men.

Rather than review again the marginality of faith, or reconfirm the inheritance of religious principles, let me, in the minutes that remain, unsettle this traditional story somewhat. It is at least striking that the story of religion's disappearance should present such a mythologic face—recapitulating the motive, origin and plot of the religion it escapes. But there are other difficulties. However insecure as a secular narrative, our discipline's sense of its relation to religion is simply incorrect, both about its origins and religion. Let me then begin to outline a different story about religion, a story that rethinks our origins to permit a continuing relationship between international law and religion—as doctrine, ritual and narrative.

We might begin such a story with a second look at origins. After all, why commence the discipline in 1648—why not 1618, or 1518, or 1220? Were we to focus on the evolution of a culturally independent, self-confident legal culture—professionally, doctrinally, institutionally—we would surely need to begin with religion, seeing the roots of law's arrogance, universality, indeed univocality, in the project of canon law and the development of catholicity. Catholicity not as we now regard it, as a virtual synonym for "general, universal"—in the sense, strangely enough (according to the American Heritage Dictionary) of "all-inclusive, broad and comprehensive in interests, . . . liberal,"—but as it developed from the Greek *kata* and *holon*—as the ecclesiastical equivalent of the ancient *maior et sanior pars*—meaning the opinion of the greater, wiser, older, healthier part, in short, the orthodoxy established by council as arbiters of the public good. And we would see in the catholic not merely a precursor but an origin, a companion for international law's generalizing pretense—even unto its roots in the institutional structure of plenary and consent.

Second, launched back into the interplay of religion and law—to a time when the "two swords" mingled, indeed established themselves as "two" swords precisely because of their intermingled bureaucratic and territorial involvements—we would think again about the collaborative project of division, exclusion and repression. Not simply the division of sacred and profane—a division as marked by law as by religion—or the

division of true and false, the legislation of common judgment into orthodoxy, although these were collective, interactive projects of law and religion. But not these—more crucially, more critically, the exclusion and suppression of actual social difference.

And we would find in the origins of international law not a moment of tolerant generality, of liberality, but a well-articulated practice of social intolerance. For it was the law of peoples that worked to exclude the Jew, the homosexual, the heretic, and perhaps most crucially, worked to suppress the exuberance of spiritual fervor, displacing it with bureaucracy. The suppression of witchcraft, sorcery, but also of ecstatic millenarianism, whether of early Amaurians or late Anabaptists, and their displacement by the logic of state orthodoxy, was a collaborative practice of religious inter-sovereign action. In this context, the relationship between the historical Antichrist and contemporary institutional images of chaos and utopia seems unavoidable. This story would recapture the trace of Judaism, particularly of the mystical Jew, in the early literatures of international law—and I think here most readily of Gentili's obsession with Judaism—a Judaism that seems at once the law that revelation and redemption replace and the mysticism that law and state refuse. Paradoxically enough, we find here our own complex relationship between international law and religion exactly mirrored in the relationship between Christianity and Judaism. And we would need to explore the repetition of this opposition to ecstasy within Christianity in the secular consolidation of St. Augustine (indeed, in his own odd relationship to his confessions) and in the more general loss of agnostic possibilities.

Telling this story would return us to the development of interrogations, common rituals, taxations, citizenships and exiles, to the recognition and enforcement of papal enunciations and imperial denunciations, rooting the doctrines of international law in the earliest consolidation of authority in the West, and the first turn from enthusiastic to bureaucratic power. It would return us also to the Reformation, not as the divisive precursor to the collapse of "universalist ideologies," the precondition for the "rise" of statehood and the instantiation of international law, not, in other words as fact, but as law.

The Reformation would need to be told as a set of political and religious accommodations, conditioned by the consolidation of dynastic rivalry and the Ottoman "threat," as crucial, even as, perhaps even particularly as a division, to the centrality of Europe to international law. To tell this story, we would need to look more closely at the relationship between Luther and the Empire in the suppression of peasant uprisings, in the military and ecclesiastical displacement of Thomas Muentzer by Martin Luther, of uprising by protestation, and again at the political displacement of enthusiasm by sovereign tolerance and religious calculation.

Doctrinally, we would need to follow the development of exile, and the slow territorial consolidation and reinterpretation of the doctrine of two swords. For the development of a territorial jurisdiction, so crucial to the image of a disembodied state, was first and foremost a religious notion, replacing and instantiating a disembodied deity as state. This is an association that could be explored both factually, in the reciprocal development of local mercantile and princely authorities, and conceptually, in the rituals of the sovereign body.

Third, leaving now the origins, we would rethink international law's conceptual and ritualistic structure in religious terms. Telling this story would see our eclecticism, and indeed our rationalism, not as the displacement of religion, but as a continuation of religion's will to power. We would need to recapture work done elsewhere—in

psychoanalytic theory, literature and anthropology—on the state as father, monotheistic, abstract, unnameable and obsessed with naming and possession.

Such an inquiry would trace images of personal redemption through acceptance through to international positivism's obsession with consent. For Christianity's self-image as chosen, as willed through conversion, both isolates the redemptive insight—safely barricading ecstasy to the moment of faith's origins, exactly as international law isolates inspiration to its origins—and develops an account of personal responsibility, objectivity, readability familiar from positivism. Indeed, it seems impossible to think of contemporary debates about state succession (with all their rhetoric of reciprocal participation and consent) without recalling the history of organized intolerance that hit upon the idea that the excluded chose to remain Jewish, or aboriginal or homosexual or heretical, at a particular historical moment, when the state needed to implement the exclusion through objective procedures.

Following this line, we would develop the theory of the self as both internal, subjective and manifested, the theory so crucial to both the boundaries between fathers and deity and between international and municipal legal order. Finally, it might be profitable to uncover religious narratives of fall and redemption through intervention of the Messianic hero in our hopes for the state and its transformation through law—as well as in the images of international political redemption through reform of the state that we normally take for “realism.” Suddenly, the “realist” adage that “some eggs must be broken to make an omelet” seems unthinkable except in the language of sacrificial violence, a violence channeled both domestically and internationally by the discursive practices of our discipline.

At this point, it seems impossible to do more than sketch the possibilities opened up by an interrogation of our discipline's traditional story of its relationship to religion. Once our Enlightenment narrative has been jostled, the deep and abiding interaction of international law and religion seems unavoidable. I have sought to develop two different strategies of inquiry into that interaction. First, a strategy of narrative homology, tracing structural similarities among the stories told by law and religion—about themselves, about each other, and about the “other.” Second, a strategy of historical recovery, recovery of the mutual participations of religious and legal in the construction of the state, the sovereign and his law. I welcome any suggestions for the pursuit of these inquiries.

REMARKS BY MAHNOUSH H. ARSANJANI*

My assigned task is to explore the impact of the rise of so-called Islamic fundamentalism in the Middle East and North Africa on international politics and law. The term “fundamentalist” must be used with care, for it is applied now to a wide and diverse variety of phenomena, from Evangelicals, Pentecostals and Snake-handlers in the United States to a diversity of quite distinct Moslem sects. It is associated with rigid dogmatism and a demand for absolutes, as though those traits were unique to certain religious expressions. In the West it appears to be associated with religion and not politics, between which there is presumed to be a sharp distinction. Islamic fundamentalism in essence is a political revolution, a political movement organized by new elites, having a separate list of preferred values and using different methods for seeking power. Religious fundamentalism has an additional characteristic: it uses religious as

*Office of Legal Affairs, United Nations. Ms. Arsanjani spoke in her personal capacity. The views expressed are her own and are not necessarily those of the U.N. Office of Legal Affairs.

opposed to secular language and relies on religious rather than secular symbols loaded with emotion.

In studying Islamic fundamentalism, what is of interest to us are the approximations, if any, of the goals of the fundamentalists to those accepted in international politics and the approximation of their method of the use of power to doctrines of the international permissibility of and tolerance for use of force. The impact of these values on minimum world order (minimizing violence) and the optimum order (promoting human rights) should determine the urgency and possibly the types of international response.

Islamic history has been marked by many political movements that may be called fundamentalist. Some, such as Sufism, were more benign politically. Others have had larger impacts, as the Wahabi movement, now the state religion of Saudi Arabia; Shiism, the state religion of Iran; the Moslem Brotherhood that shook the Arab world; and now the Hezbollah, the Party of God in Iran and Southern Lebanon. These are just a few of such movements. Although some of these movements initially did not have nationalistic content (for example, Sufism, Wahabism, and early Shiism) many of them also were inspired by nationalism, for example, as later Shiite movements, Mahdism in 19th-century Sudan, the Moslem Brotherhood of Egypt, and the latest Iranian revolution. The nationalistic content of most Islamic fundamentalist movements was unavoidable. The expansion of Islam as a religion was subsequent to its military expansion and its conquest of many territories and tribes that later converted to Islam. Even after Islam was accepted, the authority of the Islamic Calipha, the supreme political and religious leader, was threatened constantly. On the other hand, the constitutional theory of Islamic law made the religious component of nationalistic movements indispensable. Under Islamic law there is no separation between a spiritual and a temporal sphere. They both form a unity under the inclusive authority of the Sharia (the prophetically revealed law of Islam). The Islamic Calipha was a supreme constitutional authority, an ultimate source of this integrated religious and political power, and was responsible for the application of Sharia in the Moslem World. Theoretically, this supreme constitutional authority could be challenged or disobeyed only for offenses against Sharia, but never for want of effective power. Any disobedience of the central authority of the Calipha inspired by nationalism had to be disguised by allegations of violation of true Islamic law. This explains the invariability, if not always the apparent relevance, of religious doctrines to early nationalistic movements in the Islamic world.

Contemporary Islamic fundamentalism also is marked by its nationalistic content, but that content is shaped much more by the colonial experience under Western Christianity. Sometimes the nationalistic content of contemporary Islamic fundamentalism has been suppressed consciously, out of a desire to distinguish fundamentalism from competing secular nationalistic movements manifestly shaped by the Western colonial experience and often inspired by Western values. To distinguish itself, fundamentalism began to reshape itself, identifying more with Islamic value and focusing on Islamic universalism.

Secular nationalists in Moslem countries are in many ways molded and influenced by Western culture. In seeking independence from the West nationalist strategies were chosen consciously from among means familiar to the West and legitimization sought in international political and legal structures using more or less the same Western symbols and common language.

All this only confirmed the Moslem fundamentalists' historical suspicion that the Christian West was still fighting the Crusades with the ultimate aim of conquering

Islam. This fear stimulated territorial goals of the fundamentalists. Contrary to secular nationalists who had the limited goal of independence from foreign powers, the fundamentalists began to develop a larger picture of the world. Their goal embraced the entire Moslem world. For them, any protective goal limited to a territorial state is insufficient to protect the Moslems from the expanding Western infidels.

Fundamentalists' professed values are selected from early Islam. These values are more likely to be familiar to all Moslems, for they surpass the differences caused by diverse historical experiences among Moslem states. Going back to early Islamic history and messianic claims not only allows the fundamentalists to preach values that are respected by all Moslems and to use symbols comprehensible to them, but also to undermine the authority of secular nationalists.

Fundamentalists' professed Islamic values, to the extent that they have been articulated and are identifiable, are not all inconsistent with those accepted in the international legal culture. Fundamentalists are not necessarily antiscientific. They do not prohibit the interference of science to save, improve or extend human life. They do not advocate a primitive life style. On the contrary they are well aware of the importance and the political need for improvement of the material conditions of human life. Some important differences so far can be identified, however. Fundamentalists demand total commitment of individual Moslems to the community of Moslems. They perceive earthly human life as a process of preparation for a more important eternal life. Therefore, individual Moslems are constantly tested against their conviction to God and their commitment to their fellow Moslems. With this perception, the scope and the extent of individual rights become conditioned upon the welfare of the community of Moslems.

The Islamic fundamentalists never have had a better chance to test their power. The secular nationalists' public appeal has been diminishing. The nationalists have been unable to continue to make themselves indispensable. Lack of experience, corruption, their authoritarian style of government, their lack of coherent political ideology, from Marxism to socialism and capitalism, marking their unsuccessful economic policies, all made their perception of the future blurry and unappealing to the new postcolonial generation. Worse still, they touted nationalism while reinforcing a continued sense of ideological and material dependence on the former imperial civilization from which independence supposedly had been wrung.

The attraction of Islamic fundamentalism to the second and third postcolonial generations is much greater than is appreciated in the West. The promise of a return to Islamic values appears to many younger Moslems not as fanaticism but as a promise of a larger breathing space in which they can experiment with models and values more familiar to them. It gives them self-esteem, and it promises self-respect and confidence.

The Islamic fundamentalists' promise of a return to earlier times is not new to major revolutions. As Harold Berman has remarked, all successful major Western revolutions were marked by such a promise. Promises of return to earlier times, therefore, is a deliberate strategic choice by fundamentalist elites that allows them a maximum option for a radical change of the present rather than a true intention of conforming to the original intent of the respective founders.

To understand and identify the real value preferences and goals of fundamentalists, one should go beyond the elite speeches to common people at Friday prayers or those given to volunteers on their way to the front and martyrdom. The elites of the Islamic fundamentalism, like their counterparts in secular politics, carefully tailor their speeches so as to fit their audiences. Nor is this a recent innovation. The necessity of

adapting a rhetorical style confronted Mohammed when he had to persuade the merchant urban class of Mecca, as well as the surrounding tribal Bedouins. The Islamic philosophers of the Middle Ages openly wrote about and justified the necessity of communicating to masses in an emotional, simple and religious language, while reserving rational and scientific communication for the elites. Analogies may be found in many other political organizations.

Historically, the Islamic perception of public order was expansive. The world was divided between Moslems and others. These two worlds were governed by different laws. The Islamic mission was to spread the word of Islam and to unite the two divided parts. Among contemporary fundamentalists, this perception of public order has been modified. Rather than uniting the two worlds, the policy of expansion and proselytizing the world has contracted to one of preservation and reinforcement of Islamic values in that part of the world already Islamicized. The world, it is accepted, remains divided.

The goal of reinforcement of Islamic values within the Moslem world is supported by Islamic conceptions of sovereignty and authority. Authority is divine, not popular, as in Western democracy. God is the sole sovereign power on earth. God entrusts his authority to his chosen ones on Earth.

So for fundamentalists as well as secularists, the division of Moslem communities into territorial units is irreversible and perhaps even a practical and useful management technique. The difficulty is not territorial division, which they are happy to respect, but the reconciliation of territorial distribution with their ultimate goal of reinforcement of Islamic values in all Moslem states. It is most likely that fundamentalist governments would be more tolerant of the diversity between themselves and the non-Moslem world than of diversity within the Moslem world. In practice, Islamic fundamentalists hope for the establishment of a zone of influence in all Moslem countries. They seek a framework that would allow them to appraise or prescribe policies important to Islamic values. This will not be an easy task since, differing from Christianity, Islam does not allow the separation of church and state. Islamic values are state values. Therefore, the zone of influence cannot be conceived in terms of the influence of the Holy See in the Catholic world, nor can such a zone be compared to those of the Superpowers, since there will not be a single Moslem state sufficiently strong to exercise influence continuously.

Within the zone of influence of Moslem fundamentalists, however, the influence of the West or the East will encounter a significant challenge. Fundamentalists are less likely to be tolerant of non-Moslem foreign influences than the secular nationalists. Besides, fundamentalists are acutely aware of the different contending ideological world public orders. While they do not wish to become entangled with them in the international arena, they see them as a potential threat to their own power and authority and would resist them fiercely domestically.

Fundamentalist elites see themselves as outsiders in the present international system. For now, their source of inspiration and rectitude is basically independent of the international system. Contrary to the nationalists, they do not feel obliged always to justify themselves in internationally recognized and accepted terms, which they consider Western Christian house law. But the initial hostility of the fundamentalists to the international system should not be interpreted as rejection of all aspects of the system. It is likely that many areas of international law will be accepted by Moslem fundamentalists. They will be justified in terms of Islamic principles.

The fundamentalists will encounter great difficulty with international human rights norms for much of it is inconsistent with their deeply held and uncompromising sense

of rectitude. Since the primary goal of the fundamentalists is the preservation and reinforcement of Islamic values, they will resist any policy that would equate the status of non-Moslems with Moslems in Moslem countries so far as political rights are concerned. While Islam recognizes certain other religions and tolerates their coexistence with Islam, it does not allow assigning the management of important Moslem affairs and policymaking that requires deep Islamic conviction and divine authority to non-Moslems. Similarly, Islamic conceptions of family and a definite separation of rights and responsibilities based on gender are deeply held by the fundamentalists. Islamic fundamentalism is a step backward for the cause of international human rights.

The method of use of power in Islamic fundamentalism may prove to be its single most disruptive element in the present system of international law. Fundamentalists feel little restraint in the use of force against a stronger enemy, including the calculated use of terror. The use of terror is justified in terms of a broad conception of self-defense. In early Islam, Moslems were a ruling stratum within the conquered societies. This gave Islam a unique quality and, in particular, precluded any doctrine of suffering and weakness. A martyr in Islam is a soldier fallen in battle entering the gates of Paradise, roughly comparable to the suffering Christian martyr. There is nothing honorable in retreat in a war for a just cause. The equation of martyrdom of a fallen soldier with personal victimization for a just cause against a stronger enemy was installed in the 11th century by Hassan Sabbah, when the Persian Shiites refused to accept the successor of the Calipha in Baghdad. Because a conventional war against the superior military capacity of the Calipha was doomed to failure, Hassan Sabbah trained the Shiite Assassins for the calculated use of terror. Personal victimization was regarded as a sacramental act and was supported by a secret organization. Terror was not used by all Islamic fundamentalist movements, but the more contemporary ones have made occasional use of it, and they seem, in principle, to have regarded it as a legitimate use of force for self-defense. The Moslem Brothers of Egypt used terror and assassination to eliminate their enemies. And the Hezbollah has adopted it as a legitimate self-defense against the stronger enemy and an expression of condemnation of the international system which, in its view, tolerated the denial of its rights.

The international community always has taken a hostile view of new major and successful revolutions and has mobilized itself against them. But, in time it has come to accept them, influence them and even incorporate some aspects of them. Similarly, all great revolutions eventually settle down and incorporate themselves into the existing legal system without abandoning some of their own key goals. Islamic fundamentalism is not growing in the decentralized world of the 11th or the 12th century, nor, of course, is it facing the more dominant and self-confident Western legal tradition of the turn of the century. It is coming to life in a world of tremendous global interdependency, but a much divided and uncertain public order.

REMARKS BY ALBERTO R. COLL*

I propose to deal with six contributions that Christianity has made to international law. At the outset, I would like to make it very clear that we should not see any of these as exclusively Christian. Nevertheless, I do believe that Christianity has made a very important contribution in helping to incorporate these values in contemporary international law. The values are first, humanitarianism in warfare; second, the notion of the dignity of man; third, the idea of a global community; fourth, the quest for

*Professor of Law, Naval War College.

peace and the primacy of peace; fifth, the just war tradition, and sixth the idea of prudence.

Of these, the first four values are the least controversial, and I will deal with them first. Concerning humanitarianism in warfare, we are all familiar with the tremendous impact that Christianity has had on the laws of war beginning, of course, with the writings of Vitoria and Grotius. These publicists, when viewed in their historical context and in the light of state practice, made a major contribution to the idea that there should be limits placed on war. We also know that in the 19th century, Christians motivated by their faith played a leading role in the formation of such humanitarian organizations as the Red Cross.

The notion of the dignity of man and the idea that there are natural rights has been conveyed to modern international law partly, though not exclusively, by writers such as Thomas Aquinas, Vitoria and Grotius. The concept of natural or human rights and of the dignity of man, even in its later secularized version, became an important part of international law and of modern political philosophy.

The concept of the global community, or of "the family of nations," is emphasized very strongly in international law. It is interesting to reflect that, as the notion of universal Papal temporal authority lost ground in Medieval Europe, it was replaced by theorists such as Aquinas with the idea of a global community imposing certain rights and duties on politically autonomous member units. Beginning with the medieval theologians, one can find recognition of the principle that international society is divided into politically independent entities whose policies may vary but who are nevertheless tied by certain common rights and duties and by a sense of solidarity.

Father J. Bryan Hehir examined this idea in a very interesting monograph a few years ago, in which he showed that for the medieval theologians, such as Thomas Aquinas, intervention was part and parcel of the duty of solidarity. In other words, it was quite proper to go to war to protect other peoples from outrageous violations of their human rights quite simply because they are an integral part of the human family.

This notion of a global community has survived through centuries of positivism and despite the efforts of the 18th and 19th centuries to render it irrelevant. The concept of "the family of nations" emerged with renewed vigor after the First World War.

There is an obvious tension, however, between the notion of a global community, on the one hand, and the principle of national sovereignty, on the other. We can see this quite clearly in the United Nations where demands for the recognition of human rights often clash with the so-called principle of nonintervention. Nor should we forget that the notion of a global community can often foster what I have called a "global consciousness" which, regardless of its praiseworthy moral intentions, can be destructive of international order, and even of other values.

Our fourth value, the quest for peace and the primacy of peace, has been strongly emphasized in Christian teachings. Unlike Clausewitz and other secular theorists of war, who viewed war as a regular instrument of politics, Christian theorists from Augustine onwards have seen war as a last resort, to be used only when vital principles such as security and justice are at stake and when all peaceful means of protecting these values have failed. Christian theorists also have posited a just and peaceful order as the only legitimate end toward which war should be directed.

In my view, the principle of the quest for peace and the primacy of peace have made a positive contribution to international law. As with the concept of a global community, however, this element of the Christian legacy is problematical. The concern with peace can have dangerous and destructive consequences. It can turn into a form of pacifism such as was evident in the League of Nations during the twenties and thirties

and in the United Nations today. Such pacifism weakens collective security, encourages aggression and renders open democratic societies vulnerable to secret and non-conventional modes of warfare.

I have left the "just war" tradition and the notion of prudence to the last. I emphatically reject the notion that the Christian idea of the just war necessarily implies, as has often been said, a religious crusade. If one reads the Catholic and Protestant literature, it is clear that the "just war" doctrine involves the belief that war is justified only in response to aggression and for the sake of justice and provided that it is waged in accordance with prescribed norms and within defined limits.

In modern international law, *jus ad bellum* is in disarray. The legal principles enshrined in the U.N. Charter in articles 2(4) and 51 have given rise to major problems. In particular, the high political and economic costs of conventional warfare since 1945 have resulted in many states and groups around the world resorting to nonconventional forms of warfare that are not readily susceptible to the strict legal regulation envisaged by the U.N. Charter in 1945. Whether we consider guerrilla warfare, terrorism, political assassination, misinformation or other forms of secret warfare, it is clear that these are much more difficult to subject to clear-cut legal analysis than aggression by conventional armies of the type that preoccupied the framers of the U.N. Charter in the immediate aftermath of the Second World War.

Most international lawyers are rather unwilling to come to terms with this disturbing development and continue to cling to absolutist interpretations of the U.N. Charter. They are still trying to interpret articles 2(4) and 51 as if the forms of violence that are most common in today's world were the modes of conventional warfare prevalent before 1945.

This is where I believe that the principles of "just war" and prudence can be helpful. If we were to interpret article 2(4) in the light of these concepts the first question that we would have to ask ourselves is, what does aggression really mean in the world of 1988? Aggression obviously can mean more than regular armies crossing recognized borders. It can involve all kinds of other measures as well that are resorted to by states and nonstate groups at the present time. Thus, the just war tradition would enable us to analyze the prohibition implicit in article 2(4) in a much broader fashion than legal absolutism would permit. Similarly, it would allow us to interpret article 51 much less restrictively than is commonly the case today.

I would also invoke the concept of prudence and suggest that it is implicit in the Western tradition of legal reasoning. The concept of prudence can be traced back to Aristotle, although it was developed greatly by Thomas Aquinas and by the medieval theorists. It holds that one always has to choose between competing values, whether in moral reasoning or in legal reasoning.

In the same vein, I was struck by an article by W. Michael Reisman on the U.S. invasion of Granada. Professor Reisman dwelt on the need to balance the principle of self-determination implicit in the U.N. Charter with the prohibition of the use of force. That kind of analysis is in keeping with the concept of prudence. Prudence involves balancing competing legal norms against one another, instead of choosing one norm as an absolute and somehow trying to rearrange all the other norms beneath it.

In his book on just war thinking, James Turner Johnson suggests that one of the criteria by which a legal norm should be measured is that of "adequacy." In order to determine the adequacy of a norm, Johnson suggests that we should ask ourselves the following question: is a norm appropriate as a means of achieving the kind of outcome that we would like, from a moral as well as from a legal viewpoint? In Professor Johnson's view, which I share, absolutist interpretations of articles 2(4) and 51 are

utterly inadequate. They do not take into account the stark realities with which international law on the use of force is confronted today.

As a concluding footnote, I should add that decisionmakers today, whether in the United States or in other societies, are already engaged in "prudential" decisionmaking. I would refer you to the classic observation of Dean Acheson, in the aftermath of the Cuban Missile Crisis, who noted that "the most perplexing aspect of President Kennedy's decision was the difficulty of comparing, of weighing competing considerations." Dean Acheson added: "How could one weigh the desirability of less drastic action at the outset against the undesirability of losing sight of the missiles or having them used against us, all of which may be avoided by more drastic action at the outset such as destroying the weapons? The president had no scales in which to test these weights, no policy litmus paper." In parentheses I would add: "such as the legal absolutists would like us to have." "Wisdom for the decision," said Dean Acheson, "was not to be found in law but in judgments, prudential judgments. Principles, certainly legal principles, do not decide concrete cases."

Thus, at the decisionmaking level, responsible statesmen already engage in a process of prudential decisionmaking. I would suggest that it would be fruitful for us to explore the degree to which international law and international lawyers have to catch up with the reality of what decisionmakers already do in practice and that we should try to incorporate the notion of prudence and of prudential decisionmaking into our interpretations of the rules governing the use of force in international law. That would, of course, represent a very significant contribution that Christianity and the Western tradition in general could make to the continuing development of international law.

REMARKS BY NICHOLAS GRIEF*

Conscientious objection to the payment of taxes for arms is not a new phenomenon. There are records of such objection going back several centuries, notably among early Quakers in Britain and America. This presentation will focus upon reliance upon international law by individuals whose religious convictions compel them to make conscientious objection to the payment of taxes for military spending.

The rules of international law relied upon can be considered to fall into three groups. First is the right to freedom of thought, conscience and religion as recognized by the Universal Declaration of Human Rights, the European Convention on Human Rights and the International Covenant on Civil and Political Rights. This forms the basis of a claim to be exempt from paying taxes for military spending in the same way that those who conscientiously object to serving with the armed forces are exempt from such service in time of conscription.

Second is the illegality of the deployment and/or use of nuclear weapons. This principle is recognized in various treaties and by various rules of customary international law of which the most important are the following: the Hague Conventions of 1899 and 1907, the Geneva Protocol of 1925, the U.N. Charter, the Nuremberg Charter of 1945, the Geneva Conventions of 1949, Additional Protocol I of 1977, the principle of the prohibition of unnecessary suffering, the obligation to distinguish between combatants and noncombatants, and the obligation to respect neutral territory.

Third is the principle of individual responsibility for war crimes under the Nuremberg Charter and the judgment of the Nuremberg Tribunal itself.

*Lecturer in Law, University of Exeter.

There are at least four reasons why international law is invoked. The first is in support of claims based upon domestic law. For example, the Genocide Act of 1969 incorporates the Genocide Convention into English law. Similarly, the Geneva Conventions Act of 1957 created certain offenses to enable the United Kingdom to ratify the Geneva Conventions of 1949. Finally, section 3 of the Criminal Law Act of 1967 permits the use of reasonable force to prevent the commission of a crime including, it is alleged, violations of the laws of war.

The second reason why international law is invoked is as an appeal to a higher authority, in the belief that international law is on one's side and must necessarily prevail. Note the assumption of the supremacy of international law by nonlawyers, similar to the argument that the law of God prevails over the law of men.

Third is the feeling that there is something inherently virtuous about international law, that international law is more closely in harmony with convictions about the kind of society we want to live in and leave for our children. In the words of one objector (Pickstone): "I felt as though a new order of human society is struggling to be born and that its first cries are being heard through the slow growth of international law".

Fourth is a tendency to throw every conceivable argument, whether legally relevant or not, at the registrar or judge, particularly by litigants without legal representation.

I would like to discuss three cases in which I was involved as a witness. All of them concerned the withholding of income tax by Quakers, a central tenet of whose belief is pacifism. It should be emphasized that they were not unwilling to pay their taxes in full. The money was usually held in a bank account, to be tendered on condition that it would not be used to finance the deployment or use of nuclear weapons. The Registrar had struck out their defense that the expenditure would be unlawful, and they were appealing to the County Court.

In the first of these cases, heard in Exeter in November 1984, the appellant (Hayter) withheld £26.30 from the Inland Revenue. Evidence at the appeal included an affidavit suggesting that the use of nuclear weapons would violate international law and English law and that the issues disclosed a reasonable defense.

The judge was quite sympathetic. He allowed the appellant's solicitor sufficient time to put forward his arguments. He held, however, that there was no defense in English law to nonpayment of taxes. He therefore upheld the striking out. Nevertheless, he gave leave to appeal to the Court of Appeal, the first time that this had happened in such a case, and he asked to be informed of the result of the appeal. It was important that the judge himself gave leave to appeal, as it is most unlikely that the Court of Appeal would have granted leave.

At the hearing in the Court of Appeal, in June 1985, the appeal was dismissed without discussion of the international law arguments. The leading judgment held: "We have not considered whether expenditure on nuclear weapons is or is not lawful, because it is unnecessary to do so. I am quite clear that Mr. Hayter has no defence whatever to the demand for taxes which has been made, because there is no sufficient connection between taxation and expenditure." Leave to appeal to the House of Lords was refused by the Court of Appeal and later by the House of Lords itself.

The fact that this was the first "peace tax" case to reach the Court of Appeal made legal history in the United Kingdom. The Court of Appeal's ruling, however, was a binding precedent that effectively laid to rest any hope others might have had of protesting against nuclear weapons expenditure in this way. It was therefore a "two-edged sword."

The second case was heard in Birmingham in the spring of 1985, after the County Court decision in *Hayter*, but before the Court of Appeal ruling in that case. An

affidavit dealing with international law was handed to the County Court judge at the hearing. He appears to have considered that the Inland Revenue's rather peremptory assertion that the defense was invalid was not a satisfactory response to the arguments put forward in the affidavit. The case was adjourned, and a whole day was set aside, compared with the 15 minutes originally allocated! The Inland Revenue was told to be prepared to discuss the wider issues, and the judge suggested that the Inland Revenue should be represented by a barrister and not merely by an Inspector of Taxes.

It should be noted that the Inland Revenue's representative at the first hearing was inexperienced. The judge also seems to have lacked experience, or possibly he was sympathetic to the appellant, who was unrepresented. The appellant later lost and had to pay the £48 involved, however. The case generated a great deal of publicity, which is the next best thing to winning.

The third case I would like to discuss was heard in Aberystwyth, Wales, in December 1985. This was after the Court of Appeal's ruling in *Hayter*, although this did not appear to influence the judge. I attended in person to give evidence about the status of nuclear weapons in international law. The judge was markedly hostile toward the appellant and her solicitor. It was not the first time that the appellant had been before that particular judge on such a matter!

The solicitor made three submissions about the illegality of nuclear weapons expenditure, one of which was based on international law. He was not permitted to substantiate them, however. The judge refused to allow the solicitor to call any of the three expert witnesses on the grounds that he did not consider that the appellant had a valid defense in English law. The evidence, he said, was irrelevant. The appellant had to pay the £410.43 outstanding. In the light of *Hayter*, this was really the only possible outcome.

These cases highlight an understandable confusion about the domestic status of international law. Why, it is asked, if a law is binding upon the United Kingdom, cannot defendants rely upon it in the courts? Under U.K. law, however, international treaties need to be incorporated into domestic law by an Act of Parliament. Otherwise, they can be used only as an aid to construction in the event of ambiguity in a statute. Thus, although the United Kingdom ratified the European Convention on Human Rights in 1951 the Convention has not been incorporated into English law and thus cannot be applied by domestic courts.

Does the *Spycatcher* ruling of the House of Lords indicate a possible relaxation of the traditional view? Three of the Law Lords cited article 10 of the European Convention on Human Rights, which is concerned with freedom of expression. For example, Lord Templeman observed: "This appeal . . . involves consideration of the European Convention on Human Rights to which the British government adheres. The question is therefore whether the interference with freedom of expression was necessary in a democratic society in the interests of national security." This was a direct quotation from article 10.

Note should also be taken of the fact that, in *Trendtex Corp'n. v. Central Bank of Nigeria* (1977, Court of Appeal), Lord Denning and Shaw L.J. distinguished between treaty rules and customary rules, holding that: "the [customary] rules of international law as existing from time to time do form part of our English Law."¹ Arguably, the freedom of thought, conscience and religion, recognized in article 18 of the Universal Declaration of Human Rights, may be regarded as a rule of customary international law and thus part of English law.

¹16 ILM 471 (1977).

The obstacles created by dualist theory have led objectors to seek remedies outside the British court system. In particular, efforts have been made to petition the European Commission on Human Rights. In 1983, an application was made to the European Commission under article 25 of the European Convention, which recognizes the right of petition to the Commission by a person claiming to be the victim of a violation of a right guaranteed by the convention, provided that the state against which the complaint is lodged recognizes the right of individual petition. The United Kingdom, against whom the complaint was lodged, has recognized the right of individual petition since 1966.

As in the cases discussed above, the applicant was a Quaker who objected to paying taxes to finance military expenditure and who, having exhausted all domestic remedies, one of the criteria of admissibility, invoked articles 9 and 13 of the European Convention on Human Rights. The applicant was represented by Françoise Hampson of the University of Essex.

Article 9 of the convention provides:

- (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to . . . manifest his religion or belief, in worship, teaching, practice and observance.
- (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The applicant argued that the manifestation of his Quaker beliefs required him, in practice, to oppose recourse to force in the settlement of disputes and not to support directly or indirectly weapons procurement, weapons development or other defense-related expenditure. It was therefore his contention that 40 percent of his income tax (the percentage of income tax which, it had been estimated, was spent on armaments, weapons research and allied industries) should be diverted to peaceful purposes. This step, he argued, was not consistent merely with the beliefs of Quakers, but was in fact necessary for their manifestation.

The Commission rejected the applicant's arguments and declared the application manifestly ill-founded on the grounds that:

Article 9 primarily protects the sphere of personal beliefs and religious creeds . . . ; in addition, it protects acts which are intimately linked to these attitudes, such as acts of worship or devotion which are aspects of the practice of a religion or belief in a generally recognised form. . . . However, in protecting this personal sphere, Article 9 . . . does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief: for instance, by refusing to pay certain taxes because part of the revenue so raised may be applied for military expenditure." As held in an earlier Application [a similar one lodged by a pacifist, *Arrowsmith*, in 1975] the term 'practice' in Article 9(1) does not cover each act which is motivated by a religion or belief.

The Commission went on to observe, *inter alia*, that the obligation to pay taxes is a general one that has no specific conscientious implications in itself and that "[i]ts neutrality in this sense is also illustrated by the fact that no taxpayer can influence or determine the purpose for which his or her contributions are applied, once they are collected." This line of reasoning, of course, was employed later by the English Court of Appeal in *Hayter*.

The Commission noted, further, that "the power of taxation is expressly recognised by the Convention system and is ascribed to the State by Article 1, First Protocol,"

which makes the right to the peaceful enjoyment of one's possessions subject to the right of a State to secure the payment of taxes. The Commission concluded:

Article 9 does not confer on the applicant the right to refuse, on the basis of his convictions, to abide by legislation, the operation of which is provided for by the Convention, and which applies neutrally and generally in the public sphere. . . . If the applicant considers the obligation to pay taxes an outrage to his conscience, he may advertise his attitude and thereby try to obtain support for it through the democratic process.

Reference to the democratic process leads us back, finally, to the Peace Tax Campaign. In the United Kingdom, the campaign has growing grassroots support, as well as the support of several Members of Parliament, members of the House of Lords and various Christian leaders. Bills have been introduced in Parliament but have not commanded enough support yet to effect a change in the law.

In 1983, the Peace Tax Campaign submitted a proposal for extending provision for conscientious objection to the Council of Europe's Steering Committee on Human Rights. Having set out the reasons for the growing belief that provision for personal exemption from fighting is inadequate, it continued: "We ask that it be recognised as a Human Right that we may claim as a matter of conscience that we cannot pay for arms. . . . It will be argued that citizens have a duty to obey their country's laws and to contribute to her defence. But these national demands ignore our responsibilities to international law."

Clearly, therefore, although one avenue of protest has been closed by the British courts, international law continues to inspire and undergird the efforts of those who campaign through the democratic process for changes in British taxation law, so that it will eventually recognize the right to object on grounds of conscience to the payment of taxes for arms.

DISCUSSION

JOSEPH WEILER:* I think the debate about the correct interpretation of article 2(4) of the U.N. Charter, *i.e.*, whether or not force may be used in defense of democracy, is perfectly legitimate. I view with considerable alarm, however, the attempt by Professor Coll to enlist Christ, or Christianity, on one side of the debate. I do not like it when President Reagan acts in the name of Christianity, and I don't like it when Christianity is put at the service of the state in relation to this issue. With great respect, I think that this was not a particularly helpful contribution to the legitimate and important debate about article 2(4).

I should also like to express some comments on Professor Kennedy's paper, with particular reference to the Jewish paradigm. He has tried to draw certain conclusions from the Christian-Jewish relationship, particularly the idea that Christianity has sought to suppress Jewish exuberance. My comment to that is simply to say that Jewish exuberance has been an exception rather than the rule in the Jewish tradition and in any event is not its typical or archetypal characteristic. It's been overemphasized because of the misinterpretation of people such as Martin Buber or, in the United States, of the Lubavitch movement.

I would tend to view the Christian-Jewish relationship, over the centuries, more in terms of the Jew as the "persistent objector," adhering to a legalistic rule-bound concept of religion and resisting charismatic movements, whether pagan, Christian or

*Professor of Law, Michigan Law School.

statal. This resistance frequently has infuriated the surrounding Gentile environment. I think that the characteristic relationship between Christians and Jews typically has been the reverse of the one Professor Kennedy has suggested.

A second observation I would make on the Jewish experience is that, its beginning notwithstanding, its essence has been the experience of the diaspora. Throughout 2,000 years, the Jews have adopted in their practice the ultimate forms of positivism, even if a positivism that rests for its ultimate grundnorm or divine command. What unites Jews and what defines them beyond widely differing rationalizations, is observance of a specific legal code. Admittedly, one has to add a footnote here and acknowledge that this story has been challenged in the last 200 years, but that's a very short period of time in a 3,000-year history. Nevertheless, the fascinating facet of Jewish history is that this positivism assumes some type of faith. The important question is whether a parallel can be drawn between international law and its engagement with positivism and the Jewish experience. Can there be an implicit type of faith of international law. If so, what is it?

The third comment I would make is this. The authentic relationship between Judaism, or Christianity, and the state is antithetical, *i.e.*, religion as subversive of the state, as against the state or as indifferent to the state. Thus, if you look at the ancient Jewish experience, the Jewish kings, with only two exceptions, always are condemned in the Old Testament for violating the law of God. One is almost led to the conclusion that it is the destiny of the state to violate the law of God. Religion is subversive because it transcends the boundaries of the state, and it negates the authority of the state.

It's entirely comprehensible that the state should wish to incorporate religion into its structure. But why has religion corrupted itself again and again by allowing itself to be incorporated into the state, or by incorporating the state into its own structure? That question remains to be fully explored.

The fourth and final comment I would make is this: One may think of religion, especially in its legalistic aspect, as a horizontal system that often lacks enforcement mechanisms. This furnishes a further parallel between religion and international law which may yield some insight.

LILLY E. LANDERER:* Panelists have drawn attention to the alleged deficiencies of article 2(4) of the U.N. Charter as a comprehensive definition of aggression. I'm sure almost everyone here is aware that the United Nations has in fact adopted definitions of aggression (*cf.* G.A. Res. 3314(XXIX) and 2625(XXV) annex, 1., first principle) and that many people are unhappy with them because they contain details that lend themselves to manipulation. Consequently, many people prefer to fall back on the basic concepts stated in article 2(4).

Concerning the status of treaties in domestic law, a topic touched upon by Mr. Grief, I have two questions. I thought that in the parliamentary democracies implementing legislation has to be adopted before a treaty can be ratified. I was therefore amazed when Mr. Grief said that Britain had ratified the European Convention without adopting any implementing legislation.

My second question is more factual. I do not understand the British Peace Tax Campaign. If 40 percent of Mr. X's taxes are not used for defense, then 100 percent of my taxes will be used for defense purposes. What's the difference?

Mr. GRIEF: On the question of implementing legislation, the British Government's position is that it never ratifies any treaty unless it considers that Britain's domestic

*Senior Officer, U.N. Secretariat, retired.

law is adequate to enable it to fulfill its treaty obligations. The government cannot predict all eventualities, however. Thus, while it is the government's view that our domestic law satisfactorily fulfills our international obligations, the government well may be proved wrong in due course.

As for the questioner's remarks concerning the Peace Tax Campaign, her point is well taken. For those participating in the campaign, however, their consciences simply will not permit them to pay that proportion of their taxes that would otherwise be spent on nuclear weapons. I'm sure that they recognize that any sums they may withhold will be found elsewhere. They, however, can feel at least that their own consciences have been salved as a result of their stand. Although I am not myself a member of the campaign, I do sympathize with them.

JOHN BRABNER-SMITH:* I would draw Professor Coll's attention to the fact that Clausewitz emphasized in the introduction to his book that war is the last resort. Most people don't read that part of Clausewitz. He emphasized that there are other methods, and that one should never go to war unless one is sure of victory.

I also have a question for the panel. The Genocide Convention, as recently approved by Congress, had appended a provision to the effect that it was binding unless it was contrary to the U.S. Constitution. Now, this should have read "unless it is contrary to the Declaration of Independence". The Constitution is merely positive law, like any other legal instrument, and is therefore open to change. By contrast, the Declaration is concerned with unalienable rights that cannot be changed. It is based on the laws of nature, as in Grotius.

Professor JANIS: I think the speaker has underlined one of the strands that bind together the various presentations here and probably investigations generally about religion and international law. This is that, in talking about the relationship between international law and municipal law (including constitutional law), we're all familiar with the pulls of different legal systems and the way in which different legal systems are matched and mixed. One of the fascinating things about the study of religion and international law is that it deals with yet another rule system.

Professor COLL: The questioner's point about Clausewitz is well taken. I did not intend to say that, for Clausewitz, war was something to be resorted to lightly. I do think we're doing him a disservice, however, if we fudge the difference between Clausewitz's view of war and the perception of war evident in the Christian tradition.

For Clausewitz, as for many of his contemporaries in the 18th and early 19th centuries, war, while not an option of first resort, was nevertheless a familiar instrument of politics. For those such as Clausewitz there was nothing intrinsically different about war, when compared with negotiation or conciliation, except that war was more unpredictable and risky. By contrast, the Christian tradition, especially as elaborated by the great Catholic writers, strongly emphasizes that war is a last resort. There is no comparable inhibition in the writings of Clausewitz, at least as understood by his contemporaries and successors in the German General Staff.

BERNARD J. REVERDIN:** I am very grateful to Ms. Arsanjani for her presentation on Islamic fundamentalism. I would like to raise two issues. First, what is the future of Islamic fundamentalism in the Arab World? Will it take over the entire Arab world, both religiously and politically? Second, is there a possibility of coexistence between the Judaeo-Christian civilization of the Western world and Islamic fundamentalism if the latter takes over the entire Arab world?

*Director, Institute of Jurisprudence.

**Of the New York Bar; President, American Foreign Law Association.

Ms. ARSANJANI: I believe that Islamic fundamentalism will become the dominant political movement throughout the Middle East and North Africa. It is too early to say, however, whether fundamentalist regimes will replace secular governments, or whether fundamentalists will function rather as powerful political movements without exercising power directly. Nevertheless, as I indicated in my earlier remarks, fundamentalism appears much more attractive to the younger generation. Therefore I believe that fundamentalism will play a great role in the politics of the Middle East.

As to whether Islamic fundamentalism can coexist with Christianity and Judaism, I believe that the fundamentalist elites are, in essence, politicians. They have a strong sense of survival, they respect power, they respond to pressure, and they understand collaboration. I'm not altogether sure that their collaboration and understanding of cooperation mean that they will embrace an ideology that is alien to Islam on any long-term basis. Nevertheless, I do believe that there will be some sort of cooperation.

I think, however, that Islamic fundamentalism will pose a stronger religious force, in the Middle East, to Judaism or Christianity than these religions have heretofore faced in that region. I also believe that there will be a continuing tension between Islamic fundamentalism and the West for quite some time.

JEROME B. ELKIND:* I'd like to make a brief comment on the status of treaties under English Law. The position as stated by the speaker is, of course, the commonly accepted one. It is based, however, on a misinterpretation of the judgment of Lord Phillimore in the *Parlement Belge*. What Lord Phillimore actually said was that treaties that affect private rights require an act of Parliament in order to give them effect under English law, not that treaties to which the United Kingdom is a party can never affect municipal law. I would suggest, therefore, that there is far more scope for applying treaties under English law than is commonly recognized, provided that the treaties are concerned with executive discretion rather than with private rights.

My second comment is on the statement about prudence in international law. I think I detect a bit of policy-oriented jurisprudence creeping back into international law, only this time in the name of prudence.

ISTVAN POGANY:** I must confess that, as one who has taught British Constitutional Law for several years, I find Professor Elkind's comments about the status of treaties under British Law somewhat puzzling. In a number of relatively recent decisions, such as *Malone v. Metropolitan Police Commissioner*, the traditional rule concerning the status of treaties has been reaffirmed by British courts. This is to the effect that, without enabling legislation, there is no constitutional basis on which a treaty to which the United Kingdom is a party may be directly effective within the United Kingdom. At best, such treaties may be used as an aid to construction of the relevant rules of British law.

Professor ELKIND: That is the traditional position. I submit that it is incorrect.

Professor COLL: I appreciate the questioner's comment about the resemblance between prudence and policy-oriented jurisprudence. I agree with him. I think that the notion of prudence involves the same kinds of considerations as policy-oriented jurisprudence.

MICHAEL W. GALLIGAN:*** In listening to Professor Janis' paper, I was struck particularly by the thought that 19th-Century American Protestant thinkers basically tended to take the state for granted as a good thing and promoted the idea of interna-

*University of Auckland, New Zealand, and Visiting Professor, University of Wyoming.

**Lecturer in Law, University of Exeter.

***Of the New York Bar.

tional law. It's interesting that, by contrast, official Catholic teaching in the 19th century hardly commented on international law. This may have been due, at least in part, to the fact that during the first two-thirds of the 19th century, the Holy See and the Pope were not yet reconciled to the idea of the modern nation-state, particularly as it emerged after the French Revolution, and to the reduced power of the Church over domestic matters within the various "modern" states.

In the 20th century, by contrast, there has been much greater emphasis in Catholic teaching on the importance of international law, starting with some speeches of Pope Pius XII after the outbreak of World War II. It is also apparent in the teachings of Pope John XXIII and Pope Paul VI, and in the pronouncements of the Second Vatican Council. There are even some traces of it in the thinking of Pope Benedict XV after the First World War. Catholic interest in international law, in the 20th Century, has paralleled the increasing concern, especially after World War II, about the viability of the nation-state, and the growing interest in the possibility of establishing a world government.

Professor KENNEDY: I would raise the question of whether international law is a check on the nation-state or whether it operates in conjunction with religion to support the nation-state. It seems to me that, if we survey the recent history of international law, we can observe certain religious traditions operating in each of these ways. This demonstrates that international law is a more varied intellectual phenomenon than we may have thought.

ISTVAN POGANY
Reporter

BUSINESS MEETING

The Business Meeting was convened at 4:00 p.m. on April 21, 1988, by the President of the American Society of International Law, Keith Highet. After the adoption of the agenda, President Highet recognized Richard Lillich and Louis Sohn to memorialize William Bishop, Jr.

Professor Lillich:

Time, that ever-rolling stream, has taken Bill Bishop away, but his legacy will remain with us—as individuals and as a society—forever. Many of his contemporaries and colleagues also have recorded their memories of the man. This memorialist, his collaborator on various joint ventures within and without the Society over the past decade and a half, saw Bill not so closely nor over so long a period, but from a different perspective perhaps no less worth recording.

Bill Bishop came from the heartland of America, and Bill was a man of the heart. No one who ever saw him in the corridors of the Mayflower or the Statler at Annual Meetings of the American Society of International Law, or in the paneled rooms of Tillar House for *American Journal of International Law* or other meetings, ever will forget his warmth, his interest, and his concern—in individuals, in international law, in the Society. In his blue suit, with the white shirt, red plaid tie, and high black boots, for four decades he seemed one of the few constants in a society and a world in flux. Acknowledged as a master teacher, he reached far beyond his students at Michigan to teach us all—and in many ways. Truly can it be said that he was mentor to our profession.

A recent Editorial Comment in the *American Journal of International Law* bemoaned the demise of the international law treatise, and implicitly that of the type of man with the experience, insight, knowledge, and stamina to write one. Bill Bishop was that type of man—one of international law's last great general-

ists. His General Course lectures at the Hague Academy of International Law—comprehensive but discriminating, thematic but detailed, stylistic but clear and concise—remain today a model for all scholarly writing. So do his other books, articles, and panel presentations. Following in the footsteps of Moore, Hackworth, and his sometime colleague Whiteman, he was also a great compiler. His casebook, over three decades and three editions, introduced hundreds of thousands of students here and abroad to the basic principles of international law.

Bill Bishop was no jurist, like several of his prominent contemporaries, nor was he actively involved in private practice or international consulting. He was, however, the international law scholar-teacher par excellence. He needed no foundation grant to spur his research interests. He required no reimbursement of travel expenses to attend international law conferences. Always ready to assist his government when called upon, he revered the Office of The Legal Adviser and considered its holder to be the international legal conscience of the United States. He had nothing but sadness to express for government lawyers who regarded their country as just another client to be defended at all costs—whether to it or the world community. Near the end of a long and meaningful life, he viewed with distress the United States walking away from the International Court of Justice. Yet, he remained ever optimistic about the future. That future will be better for his having been in our midst.

Professor Sohn:

Professor William Bishop died suddenly of a heart attack on December 29, 1987, after feeding birds in his snowy garden. He will be missed greatly not only by his family, but also by his many friends, colleagues and former students around the world. A great teacher and scholar, he was at the same time one of the most kindly and modest persons, a selfless individual, who never sought a limelight, accepted honors with grace, and was most happy when he was informed that one of his students had achieved a position of importance.

Born in Princeton, New Jersey, Bill Bishop attended the University of Michigan where he studied international law first as an undergraduate under Professor Reese, and then at the law school, working with one of the outstanding international law teachers, Professor Edwin D. Dickinson. He spent four years as Dickinson's research assistant and, after a year at the prestigious New York law firm of Root, Clark, Buckner and Ballantine, he returned to his native Princeton as Lecturer in Politics. From there he went in 1939 to Washington and as an Assistant Legal Adviser of the Department of State became a prolific writer of memoranda on various topics of international law, many of which are enshrined in Marjorie Whiteman's *Digest of International Law*. After short stays at the Universities of Pennsylvania and Columbia, he settled at the University of Michigan Law School in 1948 and taught there not only until his official retirement in 1976, but also for ten years thereafter. He was very pleased when Michigan conferred on him in 1966 the title of Edwin DeWitt Dickinson Professor of Law, a professorship bearing the name of his former mentor and intended to honor professors who "shall have attained national and international recognition for originality and scholarly achievements; and . . . shall have demonstrated teaching skill and recognized breadth of interest as well as depth of achievement."

His brethren in international law conferred on him many honors. He was twice Editor-in-Chief of the *American Journal of International Law* (1953-55, 1962-70); he was elected Vice-President of the American Society of International Law in 1960 and Honorary President in 1982. He became an Associate Member of the International Law Institute in 1961, and was appointed a member of the Permanent Court of Arbitration in 1975. He was also active in the American Bar Association, in both the Section of International Law and Practice and the Special Committee on World Order Under Law; in the Association of American Law Schools; in the International Law Association; in the American Law Institute's

Advisory Committee for the Restatement on Foreign Relations Law (1956-65); and in *Harvard Research in International Law* (1932-35, 1955-61).

Bill Bishop was not a prolific writer, as he was a perfectionist who refused to publish even a short piece until he was sure that it was just right. His main interest was in perfecting his *Casebook on International Law*, first published in 1953. As one reviewer said about it, his book was "a masterful reflection of its author's own rich experience, striking a nice balance between legal theory, teaching needs, law office realism, and governmental pragmatism." (Alwyn V. Freeman, 48 *AJIL* 340 (1954).)

His colleagues often implored Bishop to give them also a textbook which could be a worthy companion to his casebook and would answer the tantalizing questions scattered throughout that book. He usually replied, with a smile, that he was not yet ready to do it. He was finally persuaded, however, to present at the Hague Academy of International Law in 1965 the general course on international public law, disclosing his views on the latest developments in international law. While he usually was considered a cautious conservative, his lectures finally disclosed that he was willing to accept some views which then were still considered rather liberal or even radical.

The older he became, the younger he was in spirit, searching for new truths and positive approaches. He ended his lectures on a hopeful note, looking forward "to an international legal system in which the law is likely to be far more intense and to cover many more aspects," at least between like-minded nations.

We should, like Bill Bishop himself, be guided by the quotation from his mentor, Edwin Dickinson, with which Bill concludes his beautiful farewell statement on the passing of that great internationalist:

History teaches that without ideals there can be no progress, only change. The stars that guide you may never touch with your hands, but 'following them you will reach your destiny'. (55 *AJIL* 637, 644 (1961) quoting from Dickinson, "Progress: The Middle Way.")

President Hight then recognized John Stevenson to eulogize Arthur Dean.

Arthur Dean was not only an outstanding practitioner, having served as Chairman and Senior Partner of Sullivan and Cromwell for a number of years, but was also very active in public international law, particularly where it impinged on private practice, such as in the area of nationalization or sovereign immunity.

In addition to his distinguished career, both with Sullivan and Cromwell and as a participant in many international organizations, such as the American Society of International Law (of which he was a long-term member of the Council and Honorary Vice-President, as well as one of its first Patrons), he served as Chairman of the U.S. delegation to the first and second Law of the Sea Conferences in Geneva and also as head of the U.S. delegation negotiating with the mainland Chinese on Korea.

Mr. Dean was an exceptional person in his very broad interests in so many topics. He will be missed.

Seymour Rubin was recognized by President Hight, to comment on Carlyle Maw.

Carlyle Maw, who died on December 2, 1987, was a man of accomplishment and distinction. His career included great success in public service and in private practice. He was an editor of the *Harvard Law Review*, and joined a prestigious New York law firm thereafter. Though his career at the bar was highly successful, he took leave of it on several occasions to enter public service, perhaps most notably when he graduated from having been Henry Kissinger's lawyer to becoming The Legal Adviser of the Department of State, and subsequently Under Secretary of State for Security Assistance. He accompanied Kissinger on the journeys to the Middle East which resulted in the disengagement between Egypt and Israel, and he contributed much to the negotiations of the Law of the Sea Conferences.

His friends, who were many, had an even higher regard for his personal qualities than for his admirable public service. He was always a force for reason. His courtesy was an essential aspect of his way of dealing with people, as was his calm and friendly attitude. He could disagree without bitterness, and that was one part of his persuasive effectiveness. He was a lifelong friend of international law and of the rule of law and of justice. He lived a long and fruitful life, and, especially in an age when public discourse is marked by rancor, he will be—and is—sorely missed.

President Hight recognized Harry Almond, Jr., who spoke in tribute to Waldemar Solf.

I have been asked to say a few words concerning the contributions of Waldemar A. Solf to international law. Wally passed away on June 20, 1987, bringing to an end an outstanding career as a practitioner of international law, with the exceptional, and added, competence of working with that law as a subject of objective inquiry.

Because the Society has already requested an obituary for Wally to be published in its "Notes and Comments," I will not repeat what will be added to that paper. I would like to stress here instead Wally's role as a practitioner-scholar. Wally had ample opportunity to perform this role and he amply did so. He was in a strong position, both in terms of office, and in terms of the problems that came to him, to provide opinions and recommendations on matters involving international law for the Department of the Army. Wally's opinions flowed into our national policy and the decisions of our public officials. His contributions to numerous Opinions of the General Counsel of the Department of Defense gave those opinions the backbone essential to both the elegance of statement and the sureness of touch. These were contributions on the realities of warfare.

But as a practitioner in international law Wally often had little in the way of guidance in the form of effective rule. The practitioner must, instead, draw deeply upon policy, the trends of policy, the conditions under which decisions are made and so on. The global order is gradually being formed, and the formative process largely lies in the decisions of states. The practitioner, more than his counterpart in domestic law, finds himself as part of the formative process of law-making; even the World Court has a less substantial role in this. The practitioner, as Myres McDougal has said, acts both in the interest of his nation-client, and in the interest of the emerging public order.

Wally attended daily to the problems that involved decisions concerning the United States. With such problems in view, he could not escape the problem of policy. He concerned himself with a wide variety of subjects. Among these were terrorism and extradition, the myriad problems of the law of war, the problems of humanitarian treatment raised during war and regulated by the familiar group of Geneva and related conventions, the problems of arms control, and the problems of aggression. I have chosen these primarily to stress that so much of his work addressed the critical problem of global order: the regulation under law of coercion—especially the use of military force—and the overriding need to distinguish between force that is permissible and impermissible under the standards of the global community.

In facing the problem of coercion, Wally was facing the underpinning of order. The problems of regulating coercion are problems we are seeking still to clarify and understand. Wally provided us with useful and clear-sighted guidelines for looking at these problems. He could draw not only on his law experience, including the practice of law in Chicago, but also on his wartime experience as an artillery officer in World War II, when he ultimately found himself in the "battle of the Bulge" where artillery was put to substantial use. But artillery taught Wally, and Wally taught us, that the principles guiding the military man in war—refraining from invoking weaponry for "indiscriminate attacks," or attacks that

may lead to considerable damage to targets that are not military in nature—were principles that must be understood in context.

More than in any other subject, the context of the law of war, aggression and the use of force generally is bewildering. We are presented with a host of problems on the cutting edge of an emerging global order and its concomitant legal order. These problems couple our understanding of law in terms of its effectiveness, enforceability, and sanction. And here of course much of the law is formed. Most international lawyers—and these are the lawyers concerned with public international law—are unable to acquire, and probably would seek to refrain from acquiring, the experience of wartime combat. However, short of the context of combat, and of applying such principles and making them operate under wartime conditions, the laws are quickly reformed, not by the lawyers or jurists, but by the “operators”—that term of jargon that refers to the combat forces and their command.

In view of Wally's wide interests in law, especially international law, the problems he faced could not be considered adequately unless the operative perspectives of the practitioner were coupled effectively with the study of law in terms of its policy implications. This, in his field, Wally did well, and we can only regret that intense activity in Wally's job assignments prevented his providing more of the reflective study that had proved to be so helpful to all of us. Only at the end, in working out the book for his classes at the Washington School of Law (now being completed by Professor Robert Goldman) was he able to do some of this. But his book had an added appeal for us at the Society: it was based upon one of the Jessup problems, enabling the instructor, using the book, to follow a situation of armed combat unfolding before his eyes and opening to the multitudinous ramifications of belligerent activity.

The proof of Wally's competence lay in his ability to learn, and learn unstintingly. We had much more to learn from Wally, and his untimely death has deprived us of what might have come.

President Hight thanked those who had spoken and asked the members to rise for a moment of silence in memory of those who had departed during the preceding year.

REPORT OF THE EXECUTIVE DIRECTOR

John Lawrence Hargrove

Introduction. My objective in this report is to supplement, from the presumably more inclusive perspective of the Executive Director, the various reports of staff departments and Society officers and committees, including notably those of the Budget Committee and the Treasurer. It is thus not a comprehensive tour d'horizon on the state of the Society. It is intended to present some practical issues, particularly in the domain of “development,” which should be brought to your attention.

It is a 12-month report; for this reason it incorporates to some extent materials presented to the Executive Council at its mid-cycle meeting in October, my recent 12-month report to the Board of Review and Development, as well as new materials which will be presented as the Executive Director's annual report to appear in the forthcoming issue of the *Newsletter*.

Finance and development, and the completion of the 75th Anniversary Campaign. For more than six years the Society's management was preoccupied with the 75th Anniversary Campaign, which in due course became virtually synonymous with the effort to match the 1983 half-million dollar challenge grant received from the National Endowment for the Humanities (NEH). Both efforts now appear successfully concluded, inasmuch as the Society has now certified to the NEH receipt of slightly more than the required \$1.5 million in eligible matching funds. We were able to do this,

meeting an August 31, 1987, deadline, as we had hoped, without resort to another mid-year fundraising appeal and without relying on several classes of gifts in kind on the eligibility of which the Endowment had yet to pass judgment. The entire enterprise, which has commanded very large numbers of hours from unpaid supporters and officers of the Society—most recently Keith Hight as President—also has been an extraordinary drain on the time and energies of the staff.

Financially, the Society is very importantly, and I would hope permanently, stronger as a result of the 75th Anniversary and NEH matching grant campaign. Obviously we could make good use of much larger capital resources. But what has been accomplished amounts to a quantum leap. The Society owes renewed thanks, and congratulations, to many: Seymour Rubin, who conceived the idea of the 75th Anniversary Campaign while Executive Director; David Gill, and other Society Presidents during the period including notably the present one, Keith Hight; Jack Clarke, John R. Stevenson and Virginia Leary, co-chairs of the 75th Anniversary Fund Committee; George Denney, a faithful member of the Society's Budget Committee who served at Tillar House as manager of the effort in its early phase; and a great many others who contributed especially generously in money or time and energy. This perhaps uniquely protracted anniversary celebration (the Society is now approaching age 85) is for this organization an achievement of a high order. This is true even though not all contributions to the campaign were set aside as capital—a number of foundation grants, for example, were intended to be applied directly to the costs of study programs or various other Society activities.

The way is now clear to redirect our energies to other aspects of the Society's development and financial health, including some that necessarily have been somewhat neglected in the interim. In the course of the 75th Anniversary Campaign many members have indicated their willingness to contribute to the Society financially beyond the amount of their membership dues, and a substantial number of firms have become regular contributors. Providing a regular opportunity each year for such special contributions is now clearly in order. Systematic invitations of major gifts and bequests other than for purposes of the now concluded campaign, never a very vigorous feature of the Society's program in the past, should be undertaken. Corporate and law firm support in the form of institutional membership should be energetically pursued. And, perhaps most important, we need to sustain and enlarge individual membership, by enlarging the benefits of membership to all of the Society's various constituencies wherever located, and making those benefits more widely known.

For such purposes Keith Hight and I have discussed at some length a proposal of his to establish a Development Committee, whose responsibilities would embrace all of the foregoing, and which would replace the present Committees on Membership, Corporate Membership, and Finance and Endowment. The Executive Council discussed this proposal at its October meeting and such a Committee is now being formed.

Membership and Development. I expressed my concern to the Council in October about the attrition of the Society's individual membership over the last several years—at a rate, in the last two or three years, in the neighborhood of 2 to 2.5 percent. It is still too early to say whether that rate has continued into the current year, although the Membership Director indicates that the rate of renewal is 1 or 2 percent better than at the same time in recent years. As I noted in the fall, even holding attrition to the recent rate through 1988 might be a cause for relief, in view of the 1986 increase in dues and the more fundamentally threatening changes in the federal tax law that will have taken full effect by that time.

In this connection it is encouraging that over the last five years, the Society has apparently done reasonably well in retaining existing membership: the proportion of existing members renewing their membership each year has tended to increase (notwithstanding the dues increase in 1986, when, interestingly, the percentage of members from the previous year dropping their membership was the lowest—11.83 percent—of any in the last five years). The problem would appear to be that the proportion of new members each year has declined over the same period (from 14.34 percent in 1983 to 11.79 percent in 1987, with a sharp dip to 10.59 percent in 1986). A plausible extrapolation: once we get members, we have been doing increasingly better at keeping them (notwithstanding increases in dues); but we have had increasing trouble getting them (presumably in part because of increases in dues).

Any conclusions to be drawn from this proposition must bear in mind that a further increase in membership revenues in the near future is likely to be necessary in order to avoid an unsustainable budget deficit; indeed, an increase in dues for 1989 would be strongly suggested by the continuing increases in real costs of basic operations that the current budget reflects, but seemed unwise in view of the special factor of the changes in the U.S. tax law. By far the more attractive means of increasing effective net revenues from dues is to increase the size of the membership, taking advantage of the declining marginal costs of servicing an individual membership as the numbers increase.

These considerations make all the more important such efforts as that reported in the Membership Director's report, and remarked on below, in which we have arranged for each individual member of the various student international law societies comprising the newly constituted International Law Students Association (ILSA) to be presented automatically a very attractive half-price offer of Society membership, and to receive the Society *Newsletter* in any event.

Efforts both to attract and to hold members will be helped materially by further enhancing the scope and substantive content of the *Newsletter*, much discussed but too long delayed by the press of other business. I intend to devote major effort to this change in the next 12 months, along with members who already have indicated their willingness to help in the effort. We must keep in mind that the *Newsletter*, besides the *Journal*, is the sole tangible and automatic incident of Society membership, and that our membership is both international in composition and widely dispersed geographically so that most members cannot share collegial benefits such as participation in the Annual Meeting.

The same beneficial result can be expected from the gradual, if still frustratingly slow, progress being made on bringing the *Proceedings* publication into currency—all the more so because they are becoming increasingly attractive as their substantive content expands with the increase in scope and diversity of the Annual Meeting itself. (This very increase has enlarged the challenge confronting Michael Malloy, who has taken on the Editorship of the *Proceedings* for 1987 through 1989, but I think has not daunted him. He, assisted by Judith Hall, has aggressively attacked the problem of getting the publication onto schedule with no sacrifice of its quality and value to the membership, and the Society owes him major thanks.

The *Proceedings* is not an automatic incident of membership, but it once was. In view of the progress being made on its publication schedule, I think we well may want to consider in the near future the costs and benefits of restoring it to that status.

Jessup Competition and Society Fellowship. I have been reporting to the Executive Council on new efforts to get major capital funds for the Jessup Competition, including the Society Fellowship held by the administrator of the Competition each year.

Sadly, each of these proposals, and one smaller scale request, have been turned down during the last 12 months. The Exxon Corporation, which has been a consistent and generous supporter of the Competition, and the Bank of Boston (in honor of the site of the 1987 international rounds) did make very helpful contributions totalling some \$9,000 toward the operating expenses of the 1987 Competition.

On the face of the Competition's budget, it would appear that the competition is fairly close to being able to sustain itself—a mere \$4,000 deficit not including the Society's indirect costs is envisaged for 1988. This appearance is misleading, however. The Society's subsidy in the form of indirect cost or overhead support is a real cost to the Society; the Competition's budget is a restrictively minimal one, placing arbitrary limits on the growth that could be sustained reliably; and some of its sources of revenue are somewhat precarious. There is every reason to seek to reestablish a regular annual financing arrangement like that enjoyed with the Dana Fund for some years, and to obtain significant capital support. Not the least of these reasons is the fact that the Competition is so attractive for these purposes that the chance of success is greater than with other Society-related programs that may be of equal merit. The Society's efforts in this regard must be planned of course in light of the full range of finance and development issues that the newly formed Development Committee can be expected to address.

Some important changes in the organization of the student-related activities centered in Tillar House have taken place as a result of the adoption of the new constitutional set-up for the student organization, formerly the Association of Student International Law Societies (ASILS, an association of associations), now the International Law Students Association (ILSA, an association of individuals as well as the students' associations). As already indicated, this change, among other things, affords an opportunity for systematic, continuous identification of a pool of potential recruits into the Society and the larger community of international law that I think is of considerable potential significance.

In addition, these changes offer opportunities for strengthening the Competition and other student-related activities through introducing greater continuity into their management. The new arrangements envisage a two-year fellowship, the holder of which administers the Competition and serves as executive officer of the student association, and of course the formal continuation of the permanent staff position now occupied by the invaluable Pamela Young. They envisage also a junior fellow, who would be expected to become the senior person after a year. Needless to say, all concerned realize that implementing this arrangement would require substantial additional funds, but I believe it to be soundly conceived in view of the present needs and the potential of the Competition and other student-related activities. The Society's development efforts in this regard, and parallel efforts such as those of the newly established "Friends of the Jessup", should I believe proceed on that assumption.

Meanwhile, during this period of transition to the new arrangements, Jonathan Green, the present Fellow, has agreed to stay for a third year. The tenure of his two immediate predecessors was two years, and in my own view that should be the standard tenure hereafter even if—as we may hope is not the case—efforts to finance an overlapping junior fellow should prove unsuccessful. Mr. Green has been largely responsible for the formal adoption by the student association of these changes, which only now are being put into practical effect, and I believe the interest of continuity and stability will be well served by his staying for a third year.

Research and Study and related substantive programs. The last 12 months have seen a certain resurgence of the Society's research and study program, in respect of the

number of currently active projects at every stage of their individual life cycles, and particularly in respect of new grants received. As summarized in the Society's current *Newsletter*, these new grants support proposed projects that have been in development over a number of years. The largest of these is a grant of \$125,000 from the Ford Foundation to support a study on the future role of the United Nations system in the international legal order. The Special Working Committee on United Nations Relations, appointed by President Keith Highet and chaired by Ernest Gross, is to serve as the nucleus for organizing this study. A number of participants in the Society's Interest Group on International Organizations are members of that Committee.

That Committee and four other such Special Working Committees will be assisted in carrying out their respective mandates by grants from the United States Institute of Peace (USIP) and the Ford Foundation. The Committees on Nonviolent Responses to State-sponsored Terrorism, chaired by John Murphy, and on Nonviolent Protection of Maritime Claims, chaired by Bernard Oxman, will benefit from a grant totalling \$14,900 from USIP. Both of these committees have draft reports in hand, as does the Optional Clause group mentioned below. A Ford Foundation grant in the amount of \$22,750 will support work of the Committee on U.N. Relations, the Committee on U.S. policy toward the Optional Clause of the ICJ Statute, and the Committee on the U.S. position respecting the ICJ decision in the case of *Nicaragua v. United States*. The latter two groups are chaired by Monroe Leigh and Oscar Schachter, respectively.

The special working committees are intended principally to produce brief reports on topics of special current interest. A further such group, on Legal Aspects of Arms Control and Disarmament, was recommended by the Board of Review and Development at its last meeting and is to be chaired by Paul Warnke.

A project on the resolution of ocean boundary disputes, to be headed by Jonathan Charney in collaboration with Lewis Alexander, is the recipient of a grant in the amount of \$81,000 from the Ford Foundation. This grant is conditional on the receipt of funds from other sources sufficient to meet the project's full anticipated financial needs.

A fresh grant of \$10,000 was received from the Institute for Continuing Education in Law and Librarianship for support of the fourth annual symposium on international economic issues to be held during the two days preceding the Society's 1988 Annual Meeting. The conference this year will deal with "broader aspects" of international trade and investment, with special reference to the Uruguay Round of multi-lateral trade talks, and at this point has attracted an unprecedentedly large number of registrants. These symposia are the only conferences for which the Society charges a substantial registration fee (aside from the Annual Meeting itself, for which the fee is much smaller), and have been looked upon as something of an experiment.

Grant proposals currently pending or in preparation include proposals to the Andrew W. Mellon and Donner Foundations to supply funds to match those of Ford in support of the last project mentioned. This would be, for the Society, a major research project budgeted at around \$175,000. Some \$50,000 from the Mellon Foundation in fact has been committed informally for the project for perhaps about 18 months. The Donner Foundation (a substitute for USIP, which declined to participate) has not been formally approached yet; it has a continuing interest in ocean-related matters.

Last fall, the USIP deferred action on a Society proposal for an international study on the international law of force and self-defense, pending further consideration of its own in-house activities.

Finally, Sy Rubin and the U.S. Agency for International Development are fairly advanced in discussion of a further, larger grant of around \$162,000 in support of a

second phase of activity on the project on administration of justice in Latin America and the Caribbean, of which the first phase now has been concluded. A memorandum from Mr. Rubin on this project is attached.

A number of the foregoing activities were begun as *new projects undertaken without special grant funds*—the beneficiaries of a practice which we have felt sustainable, on a limited basis, in light of the marked improvement in the Society's financial position as a result of the 75th Anniversary Fund campaign. The idea has been that some useful work could be carried on even if no special funds could be found, and that in general a project may be able to make a more convincing appeal for special support if it is already a healthy going concern. A current project falling into this category is the special working committee, mentioned above, on Legal Aspects of Arms Control and Disarmament Policy that is now underway.

Somewhat similarly, a new presidentially appointed special working committee on the role of the State Department Legal Adviser, and problems of international legal advice to the federal government generally, is being formed. Last fall the American Branch of the International Law Association had asked Society President Keith Highet to chair a group on the Office of the Legal Adviser which it had decided to form under its auspices, and the concept of this joint group emerged.

A number of activities of the sort just mentioned have been undertaken in the last several years on the initiative, or with the cooperation, of Society Interest Groups. (As essentially self-starting and self-sustaining groups of open-ended membership, dealing with topics of special common interest to their members and recognized and facilitated in various ways by the Society, the Interest Groups have become an important new institutional development in the life of the Society.) A significant and novel activity of this sort is the project devised by the Interest Group on International Economic Law, for publication of a periodically updated volume of documents in that field. A contract has been signed by the Society with Commerce Clearing House for such a publication, to be edited by Professors Stephen Zamora and Ronald Brand. Subsequent discussions have now led to a second contractual relationship, with West Publishing Company, for the inclusion of this publication and its subsequent supplementary material in the WESTLAW computer database. For the computer publication, Marilou Righini, Editor of *International Legal Materials*, will be added as co-editor, and that enterprise will entail substantial collaboration with *ILM*. Royalties for both publications will be shared between the Society and the outside coeditors.

This development is the realization, in part, of plans long under discussion and development with West for the inclusion of *International Legal Materials* as a whole, on a continuous and cumulative basis, in WESTLAW, along with a classification system to facilitate systematic and ready retrieval of material according to subject matter, and certain other materials including the existing alphabetical index to *ILM*. That project was shelved when West rather abruptly pulled out in 1985 as a part of larger policy shifts within the company, although the recently added summaries and headnotes now carried by *ILM* were a useful product of it.

Interestingly, West recently approached the Society with a proposal to include the *American Journal of International Law* on WESTLAW. It indicated its willingness to consider inclusion of *ILM*, although not to entertain the possibility of itself meeting the cost of "inputting" the material—a major cost of such an enterprise, which would be especially high in the case of *ILM* because much of its material is photocopied and probably not readily "input" by electronic scanning. More promising is a later approach by Mead Data, publishers of the competing computerized legal research ser-

vice LEXIS, about the possibility of putting both *AJIL* and *ILM* on LEXIS, at their expense, possibly including the various "editorial enhancements" mentioned above.

New publications during the last year include *The International Court of Justice at a Crossroads*, edited by Lori Damrosch, the product of the Panel on International Adjudication and the International Court of Justice formed in 1985; audio cassette tapes, *European Communities-United States Trade Relations*, the edited proceedings of the symposium on this subject held in advance of the 1987 Annual Meeting; and *The Gulf of Maine Case: An International Discussion*, the edited proceedings of the conference on this subject cosponsored by the Society and the University of Rhode Island, published in the Society's occasional paper series *Studies in Transnational Legal Policy*. (Regrettably, that paper will be the last of the series to be published by West Publishing Company, which for a number of years had done so, quite competently, at no cost to the Society. A similarly favorable publishing arrangement for the series may be difficult to find.)

The foregoing discussion of the Society's Research and Study and related activities has dealt primarily with new grants and projects, to the exclusion of activities already well underway. For the most part it does not touch on the other major elements of the Society's substantive programs—its periodical publications, Annual Meeting, and Regional Meetings. And like other portions of this report it is presented largely *sub specie bureaucratatis*, rather than from the perspective of the Society's mission in the national life of this country and in the global community of those concerned with international law, or the issues that command that community's attention. I believe it does, however, tend to confirm that the Society is continuing to discharge that mission vigorously and in ways, some of them novel, that are in keeping with our special competence and comparative advantage.

President Highet thanked Mr. Hargrove for his report.

ELECTION OF OFFICERS AND EXECUTIVE COUNCIL

The following officers and Executive Council members were elected by a single ballot cast by the Secretary:

Honorary President: Edward Dumbauld

President: Louis B. Sohn

Honorary Vice Presidents:

Herbert Briggs

Maxwell Cohen

David G. Gill

Leo Gross

John N. Hazard

Keith Highet

Monroe Leigh

Cynthia Lichtenstein

Myres S. McDougal

Covey T. Oliver

Franz M. Oppenheimer

Elliot L. Richardson

Stefan A. Riesenfeld

William D. Rogers

Seymour J. Rubin

Dean Rusk

Oscar Schachter

Stephen M. Schwebel

Eric Stein

John R. Stevenson

Executive Vice President: John Lawrence Hargrove

Vice Presidents: Goler Butcher, Rita Hauser, Louis Henkin

Secretary: Michael H. Cardozo

Treasurer: James C. Conner

Assistant Treasurer: Joseph Guttentag

Executive Council, term ending 1991:

Francis Armstrong
James Busuttil
Malvina Halberstam
Joan F. Hartman

Harold K. Jacobson
William T. Lake
Patricia A. Sherman
George Walker

Mr. Hight then turned the chairmanship of the meeting over to the new president, Louis B. Sohn.

ANNOUNCEMENT OF AWARDS

Honorary Member: Jose Sette-Camara

Certificate of Merit:

Lori F. Damrosch, Editor, *The International Court of Justice at a Crossroads*;
Stephen M. Schwebel, *International Arbitration: Three Salient Problems*.

The shared award was made without explicit characterization of either work as falling exclusively in one category or the other.

REPORT OF THE EDITOR-IN-CHIEF OF THE AJIL

Thomas M. Franck: The *Journal* completed another year in which we published four issues with a total membership and subscriber circulation marginally higher than the previous year's standing at about 6,500. The Board received some 120 manuscripts of which 10 percent were published as articles or comments. The authors included not only Americans but persons from Australia, Europe, and Africa. Special effort has been made to encourage authors to publish research based on historic, philosophic, and archival sources, a form of discipline that has suffered particular neglect in recent times. The April issue is now available and the July issue, which will feature an important article by Elliot Richardson, has been put to bed. Next winter, a symposium issue on the Constitution and international law will be published.

Election of the Board of Editors of the *American Journal of International Law*:

Four-year terms:

Frederic Kirgis
Richard Lillich
Theodor Meron

Peter Trooboff
Detlev Vagts
Edith Brown Weiss

One-year term:

Edward Gordon

ELECTIONS TO THE ADVISORY COMMITTEE OF ILM

Marjorie Ann Brown
Georges Delaume

Lee Kimball
Edith Brown Weiss

Following these announcements, Paul S. Szasz asked to be recognized for a comment from the floor. He was asked by President Sohn to come forward and speak.

Mr. Szasz: Mr. President, within the past six weeks, without too much notice, a major disaster has befallen the American international legal system. The U.S. Ambassador to the United Nations has written to the U.N. Secretary General, and the U.S. Ambassador to the Netherlands has written to the International Court of Justice, that irrespective of any international legal obligation that the United States might have under the Headquarters Agreement of the United Nations, the Attorney General of the United States would move to close the Palestine Liberation Organization (PLO) Observer Mission to the United Nations. They added that, in view of this determina-

tion and proposed enforcement through U.S. courts, submission of this matter to international arbitration, as is also required by the Headquarters Agreement, would not serve any useful purpose.

Of course, all of us are aware that under well-established U. S. law, congressional legislation can, for domestic purposes, supersede treaty obligations, though usually a serious attempt is made to avoid any contradiction between the domestic and foreign legal postures of the United States by insisting that a statute should only be given such an overriding effect if Congress clearly so intended. All of us also know that the United States as well as other governments from time to time violate international legal precepts, sometimes seriously. But I don't think I would be contradicted if I asserted that almost never has a government openly declared that it proposes to act in disregard of international law.

Thus, an important threshold has been crossed. It is one thing to do an act that may violate international law in the hope or belief that an argument will be found to justify such action, even if such an argument is perhaps not made in good faith. Such is the tribute that vice usually considers it must pay to virtue.

Two years ago I had occasion to stand before this distinguished group to raise the unfortunate question of the legality of U.S. withholding of assessed contributions from the United Nations and from other international organizations. It is important to note that since then this legal issue has been conceded. The U.S. now officially admits that it should pay in full, but it merely pleads inability to do so.

To my mind, our government's position on the PLO Mission is, however, a much worse matter. Here it is officially and publicly stated that the United States proposes to act irrespective of its international legal obligations.

Mr. President, this Society was chartered by Congress to stimulate and further the growth of international law. But I fear that our collective task as a society and our individual tasks as teachers and practitioners of international law threaten to become entirely irrelevant if nations, and particularly our own, not only disregard international law but openly and publicly declare that they will take no account of it in determining governmental action. I must admit, Mr. President, that I am not in a position to propose any solutions. All I know is that we are faced in this country with a crisis in the area of international law, and that this crisis is certainly relevant to the program of the Society—indeed to its very existence.

President Sohn thanked Mr. Szasz for this comment, and after much discussion from the floor the members voted to refer to the next Executive Council meeting a motion on the matter. Two resolutions were forthcoming. The first, by Francis Boyle, stated that: "The American Society of International Law strongly encourages the United States Government to submit its dispute with the U.N. over the closure of the PLO Mission to the United Nations to international arbitration, as required by the terms of the U.N. Headquarters Agreement." The second, by Richard Lillich, stated that: "A committee should be created to deal with the question: 'What should the Society do about repeated violations of international law by the United States?'" The Executive Director pointed out that the Society's Committee on U.N. Relations had sent letters to the Secretary of State and the Attorney General on the matter. This letter had received a response from the Attorney General's office stating that the matter was being pursued in U.S. courts and until that opinion was clear it would be premature to submit to arbitration. It was agreed that the committee would continue to study the situation. After further discussion, the resolutions were referred to the next Executive Council session.