On Relative Sovereignty

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ON RELATIVE SOVEREIGNTY†

PART II

HANS AUFRICHT

VI. RELATIVE SOVEREIGNTY AND THE STRUCTURE OF THE RULE OF LAW

Many students of international law maintain that the rules of international law are basically different from those of domestic law. The most frequent arguments denying the legal nature of international law are: (1) The sources of international law differ from those of domestic law; (2) The addressees of international law differ from those of domestic law; (3) International law cannot be enforced.

As for the sources of international law, it is evident that treaties originate in legislatures and that executive agreements emanate from the executive branch of government. Hence, treaties and executive agreements are created in the same way as statutes and ordinances, the main sources of domestic law. In respect to the rules of customary law, it should be recalled that neither domestic nor international rules of customary law originate in legislative or administrative branches. General principles of law recognized by civilized nations in the sense of Art. 38, Section 3 of the Statute of the Permanent Court of International Justice are by definition principles of law borrowed from domestic law. Accordingly, the conten-

†This is the second of two installments appearing under this heading. The first part of Mr. Aufricht's article appeared in (1944) 30 Cornell L. Q. 137.

109 See Triepel, Le rapports entre le droit interne et le droit international (1923) 1 Recueil des Cours 82. "L'opposition entre ces deux systèmes [sc. international and domestic law] est . . . une opposition des sources juridiques."

110 Id. at 81. "Le droit international public règle des rapports entre des Etats et seulement entre des Etats parfaitement égaux." Italics supplied.

111 See the statement of the Grotius Society on the "Future of International Law," unanimously accepted by the Society in December 1941. "It is often overlooked that the term 'law' is used in the expression 'international law' in a sense different from that in which it is used in the expression 'municipal law.' In the municipal sphere States are in a position to enforce their laws, and these receive authoritative interpretation from Courts of law with unlimited authority to determine all disputes which may arise within their jurisdiction. In regard to international law, there is at present no authority having the power and means of enforcement. . . . Without enforcement ability to appropriate organs, international law will continue to be defied with impunity. . . ." quoted in (1942) 36 Am. J. Int. L. 451. Cf. contra Borchard, The Place of Force in International Law (1942) 36 Am. J. Int. L. 628 et seq.

112 For the various meanings implied in the term "sources" of international law see Briggs, The Law of Nations (1938) 45.

113 In theory "case law" is of minor importance in international law. On the principle of stare decisis in international law see Art. 38 and 59 of the Statute of the P.C.I.J. and M. O. Hudson, The Permanent Court of International Justice 1920-1942: A Treatise (1943) 627 et seq.

114 See Finch, The Sources of Modern International Law (1937) 97.
tion that the sources of international law are fundamentally different from
the sources of domestic law is hardly justifiable.

The controversial question whether and to what extent "natural law"
constitutes part of domestic or international law is outside the scope of this
essay.\footnote{On the relationship of natural and international law see LeFur, \textit{La théorie du droit naturel depuis le XVIIe siècle et la doctrine moderne} (1927) 18 \textit{Recueil des Cours} 263, 398, 438. See also Herbert Wright, \textit{The Moral Bases of International Law} (1941) \textit{Proc. Am. Soc. Int. L.} 52.}

The argument that international law is directed to other addressees than
domestic law is by no means more convincing. In a federal system, for
example, many rules bearing upon the federation as such are addressed
to the "nation as a whole." Likewise, certain rules of international law
are directed to the federation rather than to the individual units of which
the federation is composed.\footnote{See Art. 2 of the \textit{Conventions of Rights and Duties of States}, signed at Montevideo, December 26, 1933. "The Federal State shall constitute a sole person in the eyes of
international law." See \textit{contra} the Soviet Autonomy Decrees of February 1, 1944 in \textit{International Conciliation No. 398} (March, 1944) 247.} On the supposition that there are rules
of international law which are addressed to private individuals,\footnote{See note 40 \textit{supra}.} private
individuals too are subjects of international law. In addition, even an
international or supranational body may be the addressee of domestic acts.
If, for instance, Congress appropriates funds in support of the United Nations
Relief and Rehabilitation Administration, a domestic act of the United
States is addressed to an international or supranational agency. Conse-
quently, the attempt to cast doubt on the validity of international law on
the ground that the subjects of international law fall necessarily under an-
other category than the addressees of domestic law is futile.

The most serious attack against the legal nature of international law
comes apparently from that quarter which points to the shortcomings of
law enforcement under international law.

It should be clear, however, that many domestic agencies "enforce,"
that is to say "apply," international law, and American courts have time
and again served as enforcement agencies of international law.\footnote{See the subtitle of C. C. \textit{Hyde, International Law: Chiefly as Interpreted
and Applied by the United States} (1922). See also H. H. \textit{Sprout, Theories as to
the Applicability of International Law in the Federal Courts of the United States}
(1932) 26 \textit{Am. J. Int. L.} 280.} This is
not surprising, since the Constitution expressly designates treaties as the
supreme law of the land,\footnote{U. S. \textit{Constitution}, Art. VI, § 2.} and since all other rules not embodied in treaties
are covered by the common law maxim that international law is incorporated
in and in some sense forms part of the law of the land. Similarly, administrative agencies such as customs officials and the Coast Guard are entrusted with the administration of international law.

As previously indicated, foreign states are not subject to the jurisdiction of the United States courts unless they waive their immunities under international law; this, however, should not detract from the often neglected fact that American courts and administrative agencies administer not only domestic but also international law.

To be sure, evidence of the legal nature of international law need not be confined to disproving more or less arbitrary criticisms of international law. It can also be demonstrated in a positive manner that the structure of the rule of law is virtually the same in international and domestic law. This statement requires clarification, the more so, because so far no agreement on the legal nature of the domestic rule of law has been reached among jurists.

There are at least two methods of defining law: The one that follows the classical method of definition by reference to the superior concept and the specific difference, the other by reference to the necessary conceptions of law. Austin has applied the former method in his famous definition of law as a command, issued by the sovereign, inflicting evil or pain. On the other hand, Austin considers it as one of the prime tasks of general jurisprudence to determine the necessary concepts of law.

It is conspicuous that the leading authors of the school of analytical jurisprudence followed, as far as domestic law is concerned, Austin's second suggestion in attempting to build their systems of jurisprudence on the necessary concepts of law. Of course, every new writer presented his table of essential legal concepts as the definitive one, but looked upon those of his predecessors, including Austin, as more or less unnecessary concepts of law.

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120On this maxim see E. D. Dickinson, Changing Concepts and the Doctrine of Incorporation (1932) 26 Am. J. Int'l. L. 239.
121For other problems of law enforcement see note 279 infra.
122See note 206-208 infra.
123Cf. e.g., J. Hall, Readings in Jurisprudence (1938) passim and Pound, Fifty Years of Jurisprudence (1936-1937) 50 Harv. L. Rev. 171, 444, 777.
124See Austin, Lectures on Jurisprudence or the Philosophy of Positive Law (Campbell ed. 1875), Lecture I, §§ 19, 20, 29.
125Id., Lecture XI, § 354. "Of the principles, notions and distinctions which are the subject of general jurisprudence, some may be esteemed necessary. For we cannot imagine coherently a system of law (or a system of law as evolved in a refined community), without conceiving them as constituent part of it."
126For a synoptic table of the basic concepts of Austin, Holland, Terry, Salmond, Hohfeld and Kocourek, see Hall, op. cit. supra note 123, at 527.
127The writer does not feel free from this sin. See note 138 infra.
The great majority of jurists who followed Austin's suggestions in their analysis of domestic law ignored his imperative doctrine of law. But when the nature of international law was under discussion, many jurists blamed international law for not conforming with Austin’s definition of law as a command.

However this may be, an attempt shall be made in this essay to define the rule of law by reference to the necessary concepts of law. Every rule of law includes a person, a fact, a legal effect, and a norm. Every rule of law is addressed to at least one person. In every rule of law a legal effect is attached to a “fact” in the legal parlance. But not every “fact” is legally relevant. A fact which today is legally irrelevant may tomorrow be subject to legal regulation. Conversely, a fact which today brings about a legal effect, may tomorrow be legally irrelevant. For example, a commodity which is rationed today may be taken off the ration list tomorrow. Thus the same fact or the same transaction may have different legal effects under different circumstances.

The legal effect need not necessarily be a “sanction.” Although many rules of law provide for punishment, it would be erroneous to assume that “law” is “law” only if a sanction is attached. Many rules of domestic law contain no sanction, but create legal effects nevertheless.

The norm, although it does not appear on the surface of a rule, indicates the level of the rule—for instance, the international or the constitutional level—and determines the legal effect.

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128 “Rule of law” when used in this paper in a generic sense is the general pattern of law to which each individual legal rule conforms. The writer is aware that from the viewpoint of common law “... the rule of law is a great ideal; and useful in the social struggle are all the elements of this ideal—the inviolability of the ‘law of the land,’ the responsibility of the state for the wrong of its servants, the independence of the judiciary, equality before the law, and the individual civil liberties.” SEAGLE, THE QUEST FOR LAW (1941) 227. See also Pound, Rule of Law, 13 ENCYC. SOC. SCIENCES 463.

129 See notes 134 and 138 infra.

130 See Justice Brandeis in Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 410, 52 Sup. Ct. 443, 449 (1931). “In every such case the decision, in the first instance, is dependent upon the determination of what in legal parlance is called a fact, as distinguished from the declaration of a rule of law. When the underlying fact has been found, the legal result follows inevitably.”

131 See Austin's definition of "sanction." AUSTIN, OP. CIT. SUPRA note 124, at § 24: “The evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty be broken, is frequently called a sanction. The command or duty is said to be sanctioned by the chance of incurring the evil ...” See id. at § 26: “If we put reward into the import of the term sanction, we must engage in a toilsome and probably unsuccessful struggle with the current of ordinary speech.”

132 See note 19 supra and 205 infra.

133 See note 205 infra.
These elements of the rule of law, namely, person, fact, legal effect, and norm, are linked by the category of imputation. Actually, a legal effect results only, if a definite fact can be imputed to a definite person in accordance with a controlling norm.

Moreover, the legal order as a complex system of rules of law is to be understood as a set of rules of different levels. This principle is, for instance, at the bottom of the American system of judicial review of acts of Congress claimed to be unconstitutional.

In general, every developed system of law is a hierarchic system. To be sure, not all legal systems encompass the same number of levels. It is obvious that a federal system of government is more complex than a unitarian system. In any case, the very distinction between international and domestic norms presupposes that these two types of norms are of a different rank in the underlying hierarchy of norms.

Since a legal system composed of meaningless or mutually contradictory rules would be absurd, it is generally assumed that the rules of law are based upon a common meaning. Unless meaning is recognized as a necessary concept of law, any effort to interpret a given rule or to justify the reasoning of a court would be in vain.

If, at last, the categories of space and time are added, the catalogue of the necessary concepts of law appears completed; it includes: person, fact, legal effect, norm, imputation, hierarchy, meaning, space and time.

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134 Imputation as the category of legal correlation can be visualized as having two endpoints whereby two elements of the rule of law are mutually connected. The following scheme may illustrate this statement:

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<table>
<thead>
<tr>
<th>Norm</th>
</tr>
</thead>
<tbody>
<tr>
<td>Person</td>
</tr>
<tr>
<td>Fact</td>
</tr>
</tbody>
</table>
```

Thus one might be justified in speaking of a normative, personal, and factual endpoint of imputation.

135 Cf. Marbury v. Madison, 1 Cranch 137, 176, 2 L. ed. 60, 73 (1803) "The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, is alterable when the legislature shall please to alter it."

136 The so-called Austrian school of international law styled the hierarchic structure of the legal order the "Pyramid of Law" or the "Stufenbau der Rechtsordnung." See Kunz, *The Vienna School and International Law* (1934) 11 N. Y. U. L. Q. Rev., 385 ff. This terminology may be misleading. By confounding the hierarchy of law with the hierarchy of the rules of law the structural elements of the rule of law may be obscured. See also Dickinson, *The Law Behind the Law* (1929) 29 Col. L. Rev. 319, n. 78.

137 On conflict between rules of different levels see note 209 infra.

138 See notes 206-208 infra.
The foregoing analysis permits of the preliminary conclusion that the structure of international and domestic rules is, in principle, identical. Only on this assumption is it meaningful to designate international law as "law."

It should be added that the concept of the hierarchy of rules when applied to the relationship between international and domestic law signifies that international rules, because of their higher rank in the hierarchy of rules, prevail in principle over conflicting domestic rules.

The superiority of international over domestic law, or the primacy of international law\(^{139}\) is, however, subject to the following qualifications: A domestic act which is at variance with international law is voidable but not void.\(^{140}\) So long as the domestic act has not been challenged either in the courts or through the ordinary channels of international intercourse, it remains in force, its incompatibility with international rules notwithstanding. Furthermore, limitation of a state's sphere of domestic jurisdiction is not presumed.\(^{141}\) Whoever asserts such a limitation carries the burden of proof.\(^{142}\) Finally, it is not presumed that a legislature, in passing a statute, intended to evade or to counteract international law.\(^{142a}\)

As previously indicated, within every rule of law a distinction can be made between what might be called the "normative" and the "personal" endpoint of imputation.\(^{143}\) In determining the highest or supreme endpoint of imputation one should differentiate between the sovereign State as the typically highest person\(^{144}\) in an underlying hierarchy of persons and the international norm as the supreme norm in the hierarchy of norms.\(^{145}\) An awareness of this distinction may contribute to avoiding the all too frequent confusion of the sovereignty of the state with the sovereignty of international norms.\(^{146}\)

In short, "relative sovereignty" as expounded in Sections II to VI\(^{147}\) fits into the pattern of the rule of law, because it is closely related to the necessary concepts of law. Accordingly, relative sovereignty has been described as a

\(^{139}\)See note 210 infra.

\(^{140}\)See VERDROSS, VÖLKERRECHT (1937) 71.

\(^{141}\)See P. C. I. J., Ser. A, No. 24, at 12 (1930): "In case of doubt a limitation of sovereignty must be construed restrictively."

\(^{142}\)See the interpretation of the Xth Amendment to the Constitution in The Collector v. Day, 11 Wall. 113, 124, 20 L. ed. 122, 125 (1871). "It is a familiar rule of construction of the Constitution of the Union that the sovereign powers vested in the State governments by their respective Constitutions, remained unaltered and unimpaired except so far as they were granted to the government of the United States."

\(^{142a}\)See note 187 infra.

\(^{143}\)See note 134 supra.

\(^{144}\)For supranational persons see supra p. 143.

\(^{145}\)See note 13 supra.

\(^{146}\)See note 7 supra.

\(^{147}\)See supra pp. 138-142.
relationship between two normative elements of the rule of law, when it has been designated as a relationship between international and domestic norms (Section II). In discussing the legal position of the "independent" state, relative sovereignty has been characterized as a relationship between the normative and the personal elements of the rule of law (Section III, A). This holds true, everything being equal, with respect to international norms addressed to supranational persons (Section III, C), or to private individuals (Section III, F). In regard to "equality of states," relative sovereignty has been presented as a relationship among two or more persons of equal rank. (Section III, B). Facts in the legal parlance have been touched upon in conjunction with discussion of the sphere of domestic jurisdiction (Section III, G). Finally, relative sovereignty has been discussed in reference to space and time (Sections IV and V).

VII. RELATIVE SOVEREIGNTY AND DEFINITION OF INTERNATIONAL LAW

A. The Vertical View on International Law

Insight into the hierarchic structure of the legal system may help to elucidate the apparent paradox that something "absolutely" highest is to be considered relative at the same time.

Above all, the distinction between a hierarchy of norms and hierarchy of persons may contribute to dispelling widespread confusion concerning the legal nature of sovereignty.

The hierarchy of norm levels, which in American public law is reflected in the distinction between city ordinances and charters, state statutes and state constitutions, federal executive and legislative acts, the Federal Constitution, treaties and other rules of international law is a rigid one. In other words, if one disregards norms of natural law, international norms are the absolutely highest norms in relation to the subordinated levels of law.

In contrast, the hierarchy of persons is a variable one, that is to say States, in the sense of international law, are the normal persons of international

148Ibid.
149See supra pp. 139 ff.
150See supra pp. 142 ff.
151See supra p. 147.
152When a Federal State is transformed into an unitarian State the hierarchy of domestic norm levels may be "streamlined" or even eliminated as evidenced by German measures of Gleichschaltung after 1933. Nevertheless, international and domestic norms are still conceived as of different levels. For the attempt of National Socialism to eliminate even the difference between international and domestic norms by defining international law as Aussenstaatsrecht, see note 33 supra.
Therefore, unless a special agreement is concluded between "independent" states, no personal unit is of a higher level than the State. Yet, whenever by international agreement a supranational agency is instituted or authorized to function ad hoc, the supranational agency is thereby made the immediate addressee of international norms. In addition, all legal acts originating in the supranational agency may affect States, States and individuals, or individuals only.

Similarly, the private individual may be the addressee of rules of customary international law or of international conventions.

Nevertheless, international law is still traditionally defined as law binding exclusively upon states. This definition obviously disregards all international rules that are addressed to supranational agencies and/or private individuals.

On the whole a vertical view on international law permits the following definitions of international law:

1. international law includes rules addressed to states;
2. international law includes the foregoing rules plus those which are addressed to private individuals;
3. international law comprises rules addressed to states, private individuals, and supranational persons.

In the writer's view, only the last definition does justice to the development of international law prior to 1938 and is in keeping with current endeavors to reconstruct and to extend international law.

The prevailing tendency to exclude private individuals and supranational persons from the definition of international law is probably due to more or less conscious nationalistic preconceptions. However that may be, the exclusion of supranational agencies and private individuals from the realm

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158See note 13 supra.
154See, for example, the distinction between ad hoc and institutional courts in Lammasch, *Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfange*, in HANDBUCH DES VÖLKERRECHTS (1913) 55.
155See, for instance, measures taken by the Council of the League of Nations under Art. 15 § 6 of the Covenant.
157The European Commission of the Danube exercises "legislative powers for drawing up regulations and executive powers for carrying them out; it even has judicial powers because it gives sentences in its own name." P. C. I. J., Ser. B, No. 14, at 105 (1927).
158See Politis, NEW ASPECTS OF INTERNATIONAL LAW (1928) 18. See also Glueck, WAR CRIMINALS: THEIR PROSECUTION & PUNISHMENT (1944) 128, 213.
159See note 288 infra.
160Several authors now plead for the recognition of the personality of the individual,
of international law actually results in protecting the State, as the absolutely highest person, from any interference from above and in precluding all international limitations of the States’ freedom of action with respect to private individuals under its jurisdiction.

B. The Horizontal View on International Law

(1) General and particular international law.—The vertical view on international law is primarily focussed on the rank of persons in the hierarchic legal system. From this viewpoint the characteristic features of international rules, indicating both the differences in regard to rules of a lower level as well as the structural identity with these rules, could be defined even if there were only one independent State and only one supranational agency.

A horizontal view of international law takes into consideration the number of addressees rather than their rank and furnishes the frame of reference for the following categories: unilateral, bilateral and multilateral legal relations; regional and universal relations.

At times “universal law” has been looked upon as synonymous with international law. Although there are several rules of international law which are of universal applicability, such as rules of customary international law and general international conventions, it should be noted that there are many particular international arrangements which are international without being applicable on a worldwide scale.

It may be politically desirable to enlarge the scope of individual rules by extending their range to all members of the community of nations. But to confine the horizontal view on international law only to those rules which are universally applicable would lead to eliminating from the field of international law a great number of the most significant international conventions.

Several non-universal conventions contain clauses which invite adherence by non-signatory powers. By and large, agreements which serve a recipro-

but the issue of the international personality of international or supranational agencies has to the writer’s knowledge never been explored in a systematic manner. For an excellent distinction between international and supranational agencies and action see Staley, The Economic Implications of Lend Lease (1943) Supplement to 38 Am. Econ. Rev. 363, 376. For sovereignty and international agencies see also A. G. B. Fisher, International Institutions in a World of Sovereign States (1944) 59 Pol. Sci. Q. 1.

161 Cf. Oppenheim, op. cit. supra note 2, at 46 ff.
162 Ibid.
163 Ibid.
164 See Justice Story in United States v. The Schooner La Jeune Eugénie, 2 Mason’s Reports 409 (1822). “... the slave trade is a trade prohibited by universal law. . . .”
cal interest of all adherents, such as the Universal Postal Union, are more readily adhered to than those agreements which serve the special interests of individual powers or a power grouping. In the latter case, clauses suggesting the accession of outsiders may not always express the true intentions of the original signatories. On the contrary, such a clause by rendering lip service to universality may merely be designed to cover up the actual exclusiveness of an international arrangement.\endnote{106}{In the Austro-German Protocol of March 19, 1931 both parties declared “their willingness to enter into negotiations for a similar arrangement with any other country expressing such a desire.” P. C. I. J., Ser. C, No. 53, at 608 (1931). Nevertheless the Protocol was generally interpreted as an exclusive arrangement. Cf. P. C. I. J., Ser. A/B, No. 41, at 52 (1932). The Court held: “It is difficult to deny that the projected régime of customs union constitutes a special régime and that it affords Germany, in relation to Austria, ‘advantages’ which are withheld from third Powers.”}

Unfortunately, not only the vertical but also the horizontal view on international law is at times hazy. International rules are occasionally criticized because they fall short of universal applicability. Contrariwise, rules of limited applicability are often interpreted as if they were universal; thereby a few nations arrogate the right of speaking on behalf of the community of nations.\endnote{107}{See Tobin, The Role of the Great Powers in Treaty Revision (1934) 28 Am. J. Int’l L. 487, 493. On treaties on behalf of “third” powers see also Kelsen, loc. cit. supra note 21, at 207, 209.}

On the whole, an adequate description of the nature of international law presupposes a combination of the vertical and the horizontal view on international law as outlined above. The most inclusive international rules—customary or conventional—are those addressed to all States, to one or several supranational agencies, and to private individuals. However, non-universal rules may also be international law, provided they comply with the previously stated requirements.\endnote{108}{See note 138 supra.}

In sum, to determine clearly the legal character of an individual rule of international law it is prerequisite to determine the rank of norms as well as the rank and number of persons implied in a given legal situation.

(2) Public and private international law.—Another attempt to systematize legal materials has been based upon the distinction between public international law and private international law.\endnote{109}{See note 138 supra.}

\endnote{110}{The term private international law should not be confounded with “international private law” or “conflicts of law”; for “conflicts of law” is almost generally considered a branch of domestic law. However, with reference to that branch of law which is at the present day usually described as private international law or the doctrine of the conflict of laws,” the Permanent Court of International Justice held that the “rules thereof may be common to several States and may even be established
of public international law usually are subsumed those rules addressed to States or supranational persons, rules usually applied to private individuals have occasionally been styled private international law.

The unification of private law\footnote{171} has often been considered a matter of international concern. For uniformity of private law may help to eliminate legal uncertainty and confusion. In this connection the question arises whether uniform rules of "private" law, adopted by two or more states, are international law, although their primary purpose is to regulate relations among private persons.\footnote{172}

Since uniform rules of "private" law are in general\footnote{173} based on international agreements the provisions of which are incorporated into the domestic legal order, the classification of these rules under the heading of international law seems to present no problem, were it not for the fact that according to the traditional definition of international law states alone are addressees of international rules.

An outstanding example of a far-reaching unification of private law is the convention concerning the "unification of the law of Bills of Exchange," concluded under the auspices of the League of Nations. This convention has been instrumental in bringing about extensive equalization of the law on Bills of Exchange in 26 States.\footnote{174} The ultimate addressees of these rules may be private individuals, including private corporations, an organ of a

by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States. But apart from this, it has to be considered that these rules form part of municipal law." See, however, Hilton v. Guyot, 159 U. S. 113, 163, 16 Sup. Ct. 139, 143 (1895); for jus gentium privatum see id. at 164, 16 Sup. Ct. at 143.

\footnote{171}{In 1928 the League of Nations established in Rome an International Institute for the Unification of Private Law designed "to study methods for the assimilation and coordination of private law as between states or groups of states and to prepare for a gradual adoption by the various states of uniform private law legislation." See \textit{League of Nations Official Journal} (1928) 1752. For similar efforts in the Western Hemisphere see Res. XVII on \textit{Methods for the Codification of International Law} adopted at the 8th International Conference of American States, Lima, Dec. 21, 1938, and especially \textit{Code of Private International Law (Bustamente Code)} in \textit{League of Nations Treaty Series No. 1950} (1929).}

\footnote{172}{On the relationship of "private" law to international law see also \textit{Lauterpacht, Private Law Sources and Analogies of International Law} (1927) \textit{passim}.}

State, or even a supranational person. In principle, there is no necessity of limiting to private individuals the capacity of a person to bind himself by a negotiable instrument. It is even conceivable that a Bill of Exchange in which the League of Nations appears as the "drawer" and the Permanent Court of International Justice as the "drawee" would be subject to the rules established by the conventions of June 7, 1930, since the Netherlands as well as Switzerland have ratified the conventions.

This case may illustrate that rules of "private law" are not always exclusively applicable to legal relations among private individuals. In short, private law rules are those which usually regulate matters affecting private individuals. This statement does not preclude exceptional cases, where even relations between states or supranational agencies are controlled by these rules.

International Labor Law is perhaps the field in which, from 1920 to 1939, unification of private law has been most successfully advanced. It has even been possible to codify the main rules of Labor Law drafted by the International Labor Conference. The International Labour Code, 1939, though a quasi-official venture, bears witness to the work of the International Labor Organization in this field. But, here again, one should beware of confounding "international" agreements with universally applicable agreements. Of the 46 Labor conventions which were in force on September 1, 1939, 28 had been ratified by 15 or more members and of these 28, 21 had been ratified by 20 or more members, and 10 by 30 or more members.

International Labor Law, though primarily designed to regulate the relationship between business and labor, is not exclusively private law. Apart from the drafting procedure which entails cooperation of government, business, and labor in accordance with the principle of tripartite representation,

174 The persons capable of being bound by bills of exchange were not defined by these conventions. See Art. 2 of the Convention for the Settlement of Certain Conflicts of Law in Connection with Bills of Exchange and Promissory Notes, signed at Geneva, June 7, 1930. League of Nations (1934) 143 Treaty Series, 325. Art 2 (§§ 1, 2) of this Convention reads as follows: "The capacity of a person to bind himself by a Bill of Exchange or Promissory Note shall be determined by his national law. If this national law provides that the law of another country is competent in the matter, this latter shall be applied. A person who lacks capacity, according to the law specified in the preceding paragraph, is nevertheless bound, if his signature has been given in any territory in which according to the law in force there, he would have the requisite capacity." For the various problems related to this provision see Hupka, op. cit. supra note 174 at 236, 240.

175 Id. at XIII.

176 See International Labor Office. The I. L. O. and Reconstruction: Report by the
the rules concerning the supervision of International Labor Conventions are addressed to a supranational agency, namely the Governing Body of the I. L. O.\(^\text{179}\) In addition, the Constitution of the I. L. O. provides that "Any question or dispute relating to the interpretation . . . of any convention . . . shall be referred for decision to the Permanent Court of International Justice."\(^\text{180}\) Hence, international labor law includes rules which encompass private individuals, states,\(^\text{181}\) and supranational agencies.\(^\text{182}\)

VIII. RETROSPECT AND PROSPECT

A. Monistic Construction of International Law

The so-called "monistic construction of international law"\(^\text{183}\) aims at an understanding of domestic and international law from one viewpoint. Granted that there are differences between international and domestic law, the monistic approach emphasizes those features that are common to the two sets of rules rather than the discrepancies between them.

It is submitted that certain legal maxims which are an integral part of American common law and American constitutional law are predicated upon a monistic approach,\(^\text{184}\) to wit: (1) International law is part of the common law;\(^\text{185}\) (2) Treaties are the supreme law of the land;\(^\text{186}\) (3) An intention to "violate" international law is not to be presumed, even if a statute contradicts controlling international law.\(^\text{187}\)

It is perhaps no exaggeration to state that the foregoing principles are

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*Acting Director of the International Labour Office to the Conference of the International Labour Organization* (1941) 95, 96.

*179*Treaty of Versailles, Art. 408-411.

*180*Treaty of Versailles, Art. 423.

*181*See especially the rules concerning the supervision and the execution of International Labor Conventions. For the "unofficial" interpretation of these conventions by the International Labour Office see C. H. Dillon, International Labor Conventions (1942) 135.

*182*See supra p. 143.

*183*On "monism" and "dualism" in international law see Triepel, *op. cit. supra* note 109 at 84; see also Verdross, Die Verfassung der Völkerrechtsgemeinschaft (1926 VI, 34; W. Schiffer, Die Lehre vom Primat des Völkerrechts in der neueren Literatur (1937) 11; Starke, Montism and Dualism in the Theory of International Law (1936) 17 Brit. Y. B. Int. L. 66.

*184*It is interesting to note that Triepel, the most ardent advocate of the dualist doctrine, admits that the monistic approach might be sound in reference to United States practice. "Aux États-Unis la doctrine traditionelle moniste semble être respectée plus fidèlement," Triepel, *op. cit. supra* note 109, at 90.

*185*See note 120 *supra*.

*186*See note 4 *supra* and 213 infra.

*187*See Schroeder v. Bissell, Collector (Over the Top) 5F (2d) 838, 842 (D. Conn. 1925) note 216 infra.
meaningless on the assumption that the international and the domestic legal spheres are basically different.\textsuperscript{188}

B. Rule of Law and Monistic Construction of International Law

Several jurists, especially European jurists, see the main task of jurisprudence in conceiving of law as a system of rules of law, \textit{(Rechtssätze)}\textsuperscript{189}. Stammler,\textsuperscript{190} in particular, has postulated a definition of the rule of law by reference to what he calls categories of law.\textsuperscript{191} Unfortunately, Stammler's theory, though sound in stating the methodological prerequisites of jurisprudence, fails to live up to its self-imposed standards. For Stammler's categories of law are only loosely connected with his definition of law; and the definition of law itself is debatable.\textsuperscript{192}

In this essay an attempt has been made to show international rules as structurally identical with domestic rules. Insofar as there are differences between international law and domestic law, they can be traced back, above all, to the supreme rank of international norms.\textsuperscript{193}

Although many jurists have proposed to express "law" in terms of the rule of law, they do not agree on the form or the content of the rule of law.

As for the form, two types of grammatical formulas may be distinguished: Rules of law are usually expressed either in imperative clauses\textsuperscript{194} or in hypothetical clauses.\textsuperscript{195} The imperative doctrine considers law as a command.\textsuperscript{196} Yet there are many legal situations which cannot be reconciled with the imperative theory and which nevertheless are "law." Many rules do not require the establishment of legal relationships, but simply furnish the opportunity of doing so. For instance nobody is forced to marry or establish a corporation; the law only provides for certain legal effects if people marry or set up a corporation. Moreover, "violations of the law" or disobedience to its command cannot be explained by virtue of the definition

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\begin{itemize}
  \item \textsuperscript{188}See Austin, \textit{op. cit. supra} note 124.
  \item \textsuperscript{189}For \textit{Rechtssätze}, see Stammler, \textit{Lehrbuch der Rechtsphilosophie} (1922) 255; Kelsen, \textit{Hauptprobleme der Staatsrechtslehre: Entwickelt aus der Lehre vom Rechtssätze} (1923) X ff.
  \item \textsuperscript{190}See Stammler, \textit{ibid.}
  \item \textsuperscript{191}\textit{ibid.}
  \item \textsuperscript{192}Cf. Cohen, \textit{Positivism and the Limits of Idealism in the Law} (1927) 27 Col. L. Rev. 241 f.
  \item \textsuperscript{193}See note 7 \textit{supra} and note 233 \textit{infra}.
  \item \textsuperscript{194}For example: "Thou shalt not kill," Exodus 20, 13.
  \item \textsuperscript{195}It is conspicuous that in the Code of Hammurabi, the oldest Law Code extant, the rules are couched in conditional clauses. See \textit{The Code of Hammurabi} (2d ed., R. F. Harper, 1904). Likewise the formulae issued by the Roman \textit{praeceptor} were hypothetical clauses. For the conditional nature of law see N. M. Korkunov, \textit{General Theory of Law} quoted in Hall, \textit{op. cit. supra} note 121, at 421. See also Kelsen, \textit{Hauptprobleme}, \textit{op. cit. supra} note 159, at VII.
  \item \textsuperscript{196}See \textit{e.g.} Austin, \textit{op. cit. supra} note 124.
\end{itemize}
of law as command, since law would cease to exist the moment it is disregarded. Another consequence of defining law as command is the assumption that law is a rule for behavior. This view has been countered by some legal realists who think that law is a rule of behavior rather than rule for behavior.\textsuperscript{107} Whatever may be the merits of these views, it is probably safe to say that law invites or suggests rather than prescribes human behavior.

A criminal code, in setting forth that a murderer shall be executed, does not regulate the behavior of the murderer the moment he commits the crime. But by attaching certain legal effects to the fact “murder” the law attempts to deter persons from committing murder. In many cases the law does not suffice to prevent murder, nor can it revive the assassinated person; all the law can do and usually does is to punish the murderer by depriving him of life or liberty.

Many jurists who are indifferent to the imperative theory as such maintain that its corollary, the element of “sanction,” is an indispensable criterion of law, when they argue as follows: Law is a command. Who disobeys the law breaks the law. The community is entitled and obliged to impose sanctions against the law-breaker.

In international relations sanctions are usually not advocated as an end in itself but as a means to enforce peace.\textsuperscript{188} Yet in reality, sanctions or coercive measures are not always apt to enforce peace.\textsuperscript{199} They cannot render undone an act of aggression, though they may in the long run prevent the aggressor from enjoying the fruits of aggression. In the Italo-Ethiopian incident, however, the only test case of international “economic” sanctions under the League, the aggressor lost his spoils not on account of sanctions but only as a consequence of a full fledged war.\textsuperscript{200}

In any case it is hardly correct to speak of “sanctions” as though they were community actions if and so long as only an individual state or a power grouping resorts to coercive measures. It is probably not incidental that the term sanction cannot be found in the Covenant of the League of Nations,

\textsuperscript{197}See K. N. Llewellyn, \textit{The Constitution as an Institution} in \textit{Legal Essays in Tribute to Orrin Kip McMurray} (1935) 277; see also Pound, \textit{Fifty Years of Jurisprudence} (1938) 51 Harv. L. Rev. 790-797.

\textsuperscript{188}See, \textit{e.g.}, the proposals of the League to Enforce Peace in \textit{Bartlett, The League to Enforce Peace} (1944) especially 28, 35, 71. See also P. C. Nash, \textit{An Adventure in World Order} (1944) especially 81, 86. See also J. S. Alguy, \textit{Permanent World Peace} (1943) 73, 77.

\textsuperscript{199}See Borchard, note 111 supra.

\textsuperscript{200}The Emperor Haile Selassie, who was driven into exile May 2, 1936 returned to his throne in Addis Ababa on May 5, 1941. It should be noted that the term “sanction” is also conspicuously absent in the Dumbarton Oaks proposals.
not even in Art. 16,\textsuperscript{201} the so-called sanctions clause.

Coercive measures taken at the instigation of a non-universal organization \textit{vis-a-vis} states differ from coercive measures imposed by states \textit{vis-a-vis} individuals under their jurisdiction, because in the absence of a world state, the community of nations cannot claim that monopoly of power that many think characteristic of the internal sovereignty of the state.\textsuperscript{202}

Moreover under domestic law the private individual does not meet the State on an equal plane, and even in democracies he has but limited rights which at times must be sacrificed for the sake of "public policy." Again in domestic law a sanction imposed by the state upon an individual affects just this individual and his partners in "lawbreaking"; whereas international sanctions \textit{vis-a-vis} states may bring about the downfall of the whole community.\textsuperscript{203}

In addition, if sanctions are deemed an integral part of law, and economic or military coercion is considered the prototype of sanctions, international law would be valid only in wartime or in situations "short of war."

Hence, the legal and social implications of sanctions in international law are to be clearly distinguished from those in domestic law. Generally speaking, the use of the term sanction in international law is apt to be even more misleading than in domestic law.

It is difficult to understand why so many jurists and politicians have been so eager to introduce the term "sanction" into the vernacular of international law. Presumably one motive for this attitude is the desire to prove that international law is in part compatible with Austin's imperative doctrine. Though it is conceded that international law is not a command emanating from a superior will, it is presented as at least endowed with the power of sanctions. A more pragmatic motive is the tendency to pretend that actions of individual states or groups of states are taken on behalf of the community of nations with the sole purpose of upholding law.

However that may be, the formulation of the rule of law in the form of a

\textsuperscript{201}On the genesis of Art. 16 see Hunter Miller, \textit{The Drafting of the Covenant} (1928), \textit{passim}.


\textsuperscript{203}International sanctions differ from domestic sanctions for at least two reasons: (1) Under traditional law the whole community is "responsible" for acts of the government. (2) Due to total war even the traditional distinction between combatant and non-combatant has frequently been rendered inapplicable in law and fact. For the question of collective and individual responsibility see Kelsen, \textit{Peace Through Law} (1944), especially pp. 71-81.
hypothetical clause\textsuperscript{204} may avoid the pitfalls of the imperative theory. From this viewpoint a legal relationship is created \textit{if} one or more persons act in a certain manner and \textit{if} thereby a certain legal effect is brought about. The term legal effect is broader than the term sanction, above all because it covers social advantages as well as disadvantages.\textsuperscript{205} In international relations, for example, if two or more States conclude a commercial agreement the resulting mutual reduction of tariffs is the legal effect of the agreement.

At this juncture, an attempt to define law may be ventured:

\textit{Law is a hierarchic system of meaningful rules of law, limited in time and space.}\textsuperscript{206}

\textit{The individual rules of law which constitute the legal system are patterned as follows: If a legally relevant fact can be imputed to a person a legal effect results as provided for in the controlling norm.}\textsuperscript{207}

This definition of law is designed to cover rules of international as well as of domestic law and to furnish the structural foundation of a truly monistic construction of international law.

\textbf{C. Primacy of International Law}

In contradistinction to the doctrine of the primacy of domestic law, which implies that in any conflict between international and domestic law the latter prevails,\textsuperscript{208} the doctrine of the primacy of international law recognizes, in principle, international law as paramount.\textsuperscript{209}

The primacy of international law has been challenged by many international lawyers on various grounds. It has been refuted because it has been considered just a theory, and not positive international law; because it is an Austrian theory; because it has usually been presented in conjunction with more or less unrelated doctrines of philosophical jurisprudence.

Actually, the primacy of international law is not merely a theory,\textsuperscript{210} but

\begin{footnotesize}
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\item \textsuperscript{204}See note 195 \textit{supra}.
\item \textsuperscript{205}See, \textit{e.g.}, Austin's definition of "sanction," \textit{supra} note 132.
\item \textsuperscript{206}See note 138 \textit{supra}.
\item \textsuperscript{207}For the sake of simplicity only facts are imputed to persons in the above definition. for "imputation" in relation to norms see note 134 \textit{supra}.
\item \textsuperscript{208}"Person," "fact" and "norm" are here used as generic terms including also a multiplicity of persons, facts and norms.
\item \textsuperscript{209}On the primacy of domestic law see Kelsen, \textit{Das Problem der Souveränität und die Theorie des Völkerrechts} (1920) 151. See also P. B. Potter, \textit{Relative Authority of International Law and National Law in the United States} (1925) 19 Am. J. Int. L. 315, 326. "... Strictly speaking there is never a conflict of valid laws, of course, for where laws appear to conflict it will always be found that one of the laws in question is invalid as \textit{ultra vires}, and therefore not law at all. But the presentation of the problem in terms of a supposed conflict has certain merits of simplicity. ..."
\item \textsuperscript{210}See note 233 \textit{infra}.
\item \textsuperscript{211}Cf. Schiffer, \textit{op. cit.} \textit{supra} note 183, at 12.
\end{itemize}
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a rule which is to be found in many decisions rendered by international as well as domestic courts. Thus in *Missouri v. Holland* the Supreme Court of the United States held that international law prevails whenever there is a conflict between international and state law.

No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.

Similarly, every presidential ordinance, whether a proclamation or executive order, is voidable if it is at variance with a controlling international rule. Thus the Supreme Court declared void a presidential blockade proclamation insofar as it was in conflict with a recognized principle of international law long before an English Court in the *Zamora* case asserted the right to examine whether an executive order issued by the King in Council, is compatible with international law.

It cannot be denied that it is controversial whether a statute which contradicts international law is to be upheld in the courts. American practice reveals a conspicuous divergence of opinions on this issue. In *Schroeder v. Bissell, Collector (The Over the Top)* a statute clearly at variance with international law was reaffirmed on the ground that the Court has no option to refuse the enforcement of legislation in contravention of principles of international law...

212 See the award of the American-Mexican Claims Commission of March 31, 1926 in the case of *Company of Texas* “It is as little doubtful nowadays as it was in the day of the Geneva Arbitration that international law is paramount to decrees of nations and to the municipal law...” (1926) 20 Am. J. Int'l L. 803; see also P. C. I. J., Ser. A, No. 7, at 19 (1926).


214 *Mitchell, State Interests in American Treaties* (1936) 151. "Examination of certain treaties concerning administrative and police power matters revealed that in all of these—those dealing with health, drugs, white slavery, obscene publications, the protection of migratory birds and the protection of the livestock industry—the federal government has entered the field of power reserved to the states under the Tenth Amendment. The state governments, however, were still permitted to enact any legislation in the fields which they saw fit, provided that those measures did not conflict in any way with the treaties or enabling acts passed under them." See also W. McClure, *International Executive Agreements* (1941) 355 and United States v. *Pink*, 315 U. S. 203, 233, 234, 63 Sup. Ct. 70 (1942).

215 See *The Peterhoff*, 5 Wall. 28, 18 L. ed 564 (U. S. 1866).

216 See *The Zamora* L. R. 1916, 2 A. C. 77. “The fact that the Prize Court in this country would be bound by acts of the imperial legislature [sc. even if these acts are at variance with international law] affords no grounds for arguing that they are bound by the executive orders of the King in Council.” See also Quincy Wright, *Conflicts of International Law with National Laws and Ordinances* (1917) 11 Am. J. Int'l L. 1. With reference to the *Zamora* case Professor Wright says: “It shows that international law is not only regarded as a source of law in British Courts, but that, as compared with the law embodied on Orders in Council it is a superior authority.” Id. at 2. (Italics supplied).

2165F (2d) 838, 842 (D. Conn. 1925).
By contrast, the Court of Claims held in *The Ship Rose*:

if . . . there was any conflict between the municipal law of the United States, as exemplified in the statute, and well recognized principles of international law, the latter must prevail (in this court) in the determination of the rights of the parties. . . .

In short, American courts have recognized that international law prevails over state law and federal ordinances; but when it comes to statutes opinions are divided. Actually, the great majority of American decisions rule that in a conflict between a statute and a treaty that which is later prevails.

In other words, American courts recognize the primacy of international law in conflicts between international law on the one hand, and state law and federal ordinances on the other; whereas in conflicts between statutes and international law the primacy of domestic law is usually taken as the guiding principle. The issue of whether the Constitution of the United States or any one of its individual articles is at variance with international law has apparently never been the object of judicial scrutiny. But a recent statement of a group of leading international lawyers in the United States postulates recognition of international over and above constitutional law.

Although the so-called Austrian school of international law has undoubtedly furnished many valuable contributions to the formulation and to the refinement of the primacy of international law doctrine, it should not be overlooked that the supremacy of international law also has been explored by many non-Austrian international lawyers. Among others, the following European writers have attempted to analyze the nature of the primacy of international

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219Ibid.

220See *The International Law of the Future: Postulates, Principles and Proposals* (1944) 38 Am. J. Int'l L. 41, 55; see especially Principle 1: "Each state has a legal duty to carry out in full good faith its obligations under international law, and it may not invoke limitations contained in its own constitution or laws as an excuse for a failure to perform this duty." Ibid.; see also Kunz, *The International Law of the Future* (1944) 38 Am. Pol. Sci. Rev. 354, 358.

221For a critical evaluation of the European doctrines see Schiffer *op. cit. supra* note 183.
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law: Krabbe, Duguit, Scelle, Mirkine-Guetzévitch, and Salvioli. Moreover, several American authorities can be cited who advocate the primacy of international law. Thus, Professor Hyde maintains: "International law, as the local law of each State, is necessarily superior to any administrative regulation or statute or public act at variance with it. There can be no conflict on an equal plane." Similarly Professor Potter writes: "... not only are treaties and customary international law of authority superior to national statutes and the Constitution of the United States, but also national courts in the United States are bound in observing sound principles of law to act upon this fact." Professor Stowell presumably subscribes also to the primacy of international law doctrine, since he proposes to replace the term international law by supranational law. Recently, Professor Corbett has emphasized the need for recognizing the superiority of international law over domestic law.

Several critiques have indirectly attacked the primacy of international law doctrine by finding fault with some true or alleged inconsistencies in the philosophical presuppositions of the advocates of the doctrine. It may be submitted, however, that primacy of international law, subject to the above enumerated qualifications, is a principle of positive international law whose validity is independent of personal preferences for Neo-Kantian or Neo-Thomistic jurisprudence.

The writer firmly believes that every attempt to rebuild the prestige of international law after World War II in disregard of the primacy of international law will be self-defeating. A new respect for international law cannot be expected so long as many theorists of international law encourage

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222 Krabbe, L'idée moderne de l'Etat (1926) 13 Recueil des Cours 579.
223 Duguit, Souveraineté et Liberté (1922).
224 Scelle, 1 Précis de Droit des Gens (1932) 32. "Ce principe de la subordination nécessaire du droit interne au Droit international est fondamental."
225 Mirkine-Guetzévitch, Droit international et droit constitutionnel (1931) 38 Recueil des Cours 317, 462.
226 Anzilotti, 1 Corso di Diritto Internazionale (1928) 49. "... il diritto internazionale è superiore allo Stato nel senso che deriva da un principio che s'impone alla volontà dello Stato."
227 Salvioli, Les Règles Générales de la Paix (1933) 46 Recueil des Cours 31.
228 C. C. Hyde, 1 International Law (1922) 12.
229 See Potter, supra note 209, at 326. See also C. M. Picciotto, Relation of International Law to the Law of England and the United States (1915) and Quincy Wright, International Law in its Relation to Constitutional Law (1923) 17 Am. J. Int. L. 234.
230 See Stowell, International Law (1931) 9: "International law' is a misnomer, for this law controls states and for that reason should be designated 'supranational law'."
231 P. E. Corbett, Post-War Worlds (1942) 104.
232 See notes 140-142a supra.
nationalists everywhere to escape their international obligations by the simple device of enacting or decreeing a domestic rule which evades these obligations, and so long as the same theorists encourage judges everywhere to enforce domestic rules irrespective of conflicting international rules. If the primacy of international law will again be denied, the international law of the future, alas, will very soon be a thing of the past.

D. *Is there a higher law than international law?*

The principle of the primacy of international law implies that international norms are absolutely highest in the hierarchy of norms. Occasionally, it has been contended that even within the sphere of international law different levels should be distinguished. In particular the Covenant of the League of Nations has been interpreted at times as constituting not only a new but also a higher legal bond. Art. 20 of the Covenant apparently bears out this assumption when it provides that all arrangements among League-members which are incompatible with the provision of the pact are abrogated.

The main purpose of this provision was presumably to discourage the formation of alliances and counter-alliances within the League. Unfortunately, political reality fell short of these expectations.

On the whole, the issue of alliances is still primarily a political one, although it is, in principle, conceivable that at a more advanced stage of international organization all alliances may become outlawed. At present, it is doubtful whether even after World War II any international court will be entrusted with deciding on the compatibility of a “defensive” alliance with other international security arrangements, the more so because even “defensive” alliances can decisively affect the omission or commission of aggressive

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233 See notes 193 and 210 supra.
234 See note 244 infra.
237 See Art. VIII § 2 of the Peace of Westphalia, Strupp, 1 Documents pour servir à l'Histoire du Droit des Gens (2d ed. 1923) 17. Here the members of the German Empire are authorized to conclude alliances (foedera) with foreign powers provided these alliances are not directed against the Emperor and the peace of the Empire. On alliances and the new “State system” consequent on the Peace of Westphalia see A. Rapisardi Mirabelli, *Le Congrès de Westphalie* (1929) 8 Bibliotheca Vissariana 90.
acts. Thus the not even ratified Franco-Soviet Mutual Assistance Pact, signed on May 2, 1935,239 furnished the pretext for the German march into the Rhineland in 1936.240

International agreements other than alliances might have been outlawed by Art. 20 of the Covenant. Especially legal questions as defined in Art. 13 Section 2 of the Covenant could have been declared incompatible with the Covenant.241

The question of the "higher law" is in still another sense related to the principle of the primacy of international law. The most thorough critical analysis of the principle so far published suggests that the primacy of international law is an outgrowth of a typical League of Nations ideology, and therefore designates the various theories on the primacy of international law as League of Nations theories.242 Consistent application of this interpretation would lead to the conclusion that the primacy doctrine is only meaningful, if at all, within the framework of the League of Nations system. However, this inference is misleading. For the theoretical superiority of the substantive international norm over the substantive domestic norm, as evidenced by many court decisions, is in principle independent of the existence or non-existence of supranational or international agencies.243 Actually, the question of the relative weight of the main sources of international law, to wit, customary law, treaties, and general principles of law recognized by civilized nations, may arise even outside the League system. Yet, analysis of this by no means insignificant problem is beyond the scope of this study.244

The politico-theological approach which places the sovereignty of God above the sovereignty of the State cannot be discussed here. However, a recent Declaration on World Peace issued by the representative religious

239 For Text see League of Nations, 167 Treaty Series 404.
240 For the German contention that the Franco-Soviet Pact of May 2, 1935 is incompatible with obligations undertaken by France under the Covenant and the Locarno Pact see the German Memorandum of May 29, 1936, A. B. Keith, 2 Speeches and Documents on International Affairs, 1918-1937 (1938) 39 and the French reply, Id. at 42.
241 By virtue of Art. 36 of the Statute of the P. C. I. J., the Court was authorized to decide this issue. An interesting proposal to have the Council scrutinize every treaty prior to its publication by the League has been submitted by the Bulgarian Government. It reads in part as follows: "... all agreements, treaties or Conventions submitted to the League for registration and publication should not be registered and published before the Council has decided that they are compatible with the Covenant." League of Nations Official Journal, Special Supplement No. 154, at 89.
242 See Schiffer op. cit. supra note 183 at 264.
243 For supremacy of international law in reference to an overall international organization see A Design for a Charter of the General International Organization in International Conciliation No. 402 (August 1944) 541.
244 Cf. Finch, The Sources of Modern International Law (1937) 97.
groups in the United States—reaffirming that nations, states, and international society are subject to the sovereignty of God, deserves mention as an attack on the absolute sovereignty of the State.245

E. Sovereign equality of peaceloving nations.

The rank of the State in the hierarchy of persons entails the mutual equality of States.246 Accordingly, all sovereign States have certain minimum rights in common. This does not preclude that several States, usually called the Great Powers, have additional rights over and above the minimum rights of every member of the community of nations. In other words, although States are equal in some respects they are not necessarily equal in all respects.

A diplomatic representative of San Marino, it is true, enjoys the same immunities as every other diplomat of the same rank. But the sum total of international rights of the United Kingdom, e.g., exceeds by far those of San Marino.247 Consequently the difference between small and great powers is not only a difference in fact but also a difference in law.

The unqualified statement that States are equal or unequal under international law is misleading. The truth of the matter is that even from the viewpoint of international law, States are equal in some respects but unequal in others.248

On this premise, and on this premise only, it is not inconsistent to propose an international organization based on the “sovereign equality of peaceloving nations” which would grant certain rights to all states, or at least to all of its members, but would reserve certain rights to a limited number of Powers.249

245 See Catholic, Jewish, and Protestant Declaration on World Peace in International Conciliation No. 394 (November 1943) 586. “The organization of a just peace depends upon practical recognition of the fact that not only individuals but nations, States, and international society are subject to the sovereignty of God and to the moral law which comes from God.” Id. at 587. Italics supplied.
246 See note 21 supra.
247 Liechtenstein, Monaco and San Marino, which had applied for admission to membership in 1920, were not admitted to the League of Nations because they were “small states.” See League of Nations Records of Second Assembly, Plenary Meetings 820.
249 See the functions reserved to the permanent members of the Security Council under the Dumbarton Oaks Proposals for the Establishment of a General International Organization, especially Chapter VI of the proposals. For text see International Conciliation, No. 405 (November 1944) 734 ff. See also Statement by Secretary Hull on Sovereign Equality for all Nations (June 1, 1944) in 10 DEPARTMENT OF STATE BULLETIN 509.
It is doubtful, however, whether an organization of the "peaceloving nations" can rightly claim to be a "general," that is to say, universal, organization so long as the leading Axis powers will not be admitted to membership. Until the Axis powers will have furnished sufficient proof that they have been converted from war-loving into peaceloving nations, the United Nations organization as proposed in Dumbarton Oaks will at best be a general organization of the United Nations, but not a universal or global organization.²⁵⁰

Pending the establishment of a global organization there will be at least five different classes of powers:

1. Members of the United Nations Organization:
2. Non-Members:
   1. States that were enemies of the United Nations during World War II.²⁵¹
   2. States that were neutrals during World War II.

In view of the privileges granted to the leading Powers in the Dumbarton Oaks proposals, it is to be expected that the inequality of states²⁵² will become more pronounced the more effective the proposed peace organization will be.

One way of counteracting this trend towards increasing inequality among individual members of the community of nations may be to provide for functional representation of the secondary and small States in as many fields as possible.²⁵³ In this way, it is hoped, will the small and secondary States have a chance to furnish essential contributions, provided they will be in a position to develop their cultural inheritance in an environment of economic opportunity and military security.²⁵⁴

In any case it appears probable that the international organization of the future, as envisaged, will be a hegemonial²⁵⁵ rather than egalitarian structure.

²⁵⁰Cf. The Statement by the Commission to Study the Organization of Peace: "All nations must live within the circle of international law and order." *International Conciliation* No. 403 (September 1944) 547.
²⁵¹The status of Italy, Rumania and Bulgaria as of January 1, 1945 is not quite clear. After having belonged to the Axis camp for several years they are now co-belligerents of the United Nations following declaration of war against Germany.
²⁵⁵See note 252 *supra.*
F. Progress of International Law.

In the inter-war period from 1919-1939 many measures were hailed by international lawyers and statesmen as outstanding progress in international law. And it cannot be denied that in several instances, at least temporarily, progress was achieved.

One way of improving international legal situations was to declare a subject-matter that had previously been considered within the exclusive domestic jurisdiction of a State as a matter of international concern. The Minority Treaties concluded under the auspices of the League of Nations are perhaps the most striking example of this tendency. Similarly, Articles 10-16 of the Covenant and the Kellogg-Briand Pact were attempts to transfer the right to resort to war, the *ius ad bellum*, from the domestic to the international sphere. Also, the International Labour Organization, by setting international standards for working conditions and related issues, treats labor problems as a matter of international concern.

Yet, it should be remembered that States, especially the Great Powers, took great pains lest the League of Nations assume the character of a Super-state. This approach to the League prevented the effective and consistent transfer of competences from domestic to League jurisdiction; it enabled the members of the League to retain their anxiously guarded freedom of action in matters of economic and military armament. The League members were even entitled to remain neutral, all emphatic statements to the contrary notwithstanding.

Currently various efforts to raise certain issues to the international level

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259 See the Dumbarton Oaks proposals *op. cit. supra* note 249, at 730 ff.

260 See note 176 *supra*.


262 See League of Nations Covenant, Art. 23(e).


have been resumed, especially by those individuals and groups who advocate international safeguards of human rights.265

In addition to declaring certain matters as being of international concern, the establishment of new types of legal machinery has been extolled by many as progress in international law. Although considerable progress has in the past been achieved by international agencies, their effectiveness was frequently hampered by lack of agreement on the policies to be carried out as well as by the lack of universality. Fortunately, current proposals for future international organization evidence the desire to avoid at least some of the mistakes of the past in their new emphasis on economic issues266 and on the need for constant coordination on the policy making level.267

The increased interest in international law and relations,268 which is characteristic of the inter-war period, has also been reflected in the refinement of international rules. Above all, the decisions and advisory opinions of the Permanent Court of International Justice have greatly contributed to the more precise formulation of previously hazy concepts and rules of international law.269 And no statesman or international lawyer who honestly prefers lucidity to double talk can afford to ignore the findings of the Permanent Court of International Justice.

G. Limitation of Sovereignty.

The attack against the absolute sovereignty of the State270 is meaningful insofar as it rightly emphasizes that under international law even sovereign States are limited by international law in relation to other States, to supranational agencies, and to private individuals. Customary international law provides such jurisdictional limitations with respect to other states and individuals, whereas international conventions may be extended to limitations of sovereignty concerning States, individuals, and supranational agencies.

There can be no doubt that the "absolute sovereignty" of the State has been and can be restricted by international law.271 It is quite a different

266See note 253 supra.
267It is the declared purpose of the proposed United Nations Organization "to afford a center for harmonizing the actions of nations in the achievement of these common ends." Loc. cit. supra note 249, at 730. See International Conciliation No. 405 (Nov. 1944) 730.
269See HUDSON, op. cit. supra note 113.
270See note 2 supra.
271Contra M. ADLER, HOW TO THINK ABOUT WAR AND PEACE (1944) 92 "... there
proposition, however, whether States want to limit their sphere of domestic jurisdiction and their freedom to take political decisions independently of other states. Furthermore, a distinction must be made between unilateral and mutual limitation of sovereignty. The victors in World War II will probably be in a position to impose unilateral limitations of sovereignty upon the vanquished by requiring, for instance, disarmament of the Axis powers but reserving the right for themselves to remain armed "pending the establishment of a wider and permanent system of general security." 

For the "period of transition" this and similar unilateral limitations of sovereignty will presumably be a wise policy. But let there be no mistake, unilateral limitations applied to State B in favor of State A do not necessarily lead to an equalization of the power position of these States, but rather to a strengthening of State A at the expense of State B. How far the United Nations will go in limiting sovereignty in their mutual relations remains to be seen.

On the whole, limitation of national sovereignty, that is to say limitation of the sphere of domestic jurisdiction, is neither an end in itself, nor a sufficient safeguard of peace. Its effectiveness will depend on the soundness of the legal, social, and economic setting in which it is designed to operate.

H. The outlook for international law.

Time and again, international law has been subject to severe criticism by its opponents and adherents.

A considerable number of jurists maintain that international law is not law, because the structure of international rules is basically different from the structure of domestic rules. An attempt has been made here to disprove this argument. Other critiques of international law deny the legal char-

is no meaning to the phrase 'limited sovereignty' in the sphere of foreign affairs. The external sovereignty of a political community is either complete or nonexistent."

See Becker note 252 supra pp. 44-74.

See C. A. Riches, The Unanimity Rule and the League of Nations (1933) 216. "The debates in both the Assembly and the Council indicate clearly a belief on the part of most of the members that the existence of the unanimity rule, even though not adhered to strictly, constitutes a protection for the sovereignty of states. Moreover, the great powers, especially those which do not feel that a League which can act with promptness and dispatch is essential for their security, find the maintenance of the unanimity rule convenient, although frequently acquiescing or even conniving in its circumvention."

See Point 8 of the Atlantic Charter.

See Aufricht, supra note 31, at 123.

Ibid.

See notes 206-208 supra.
acter of international law on the ground that international law often does not fulfill its prime function, the safeguarding of peace. It should be recalled, however, that even constitutional law, though almost generally recognized as true law, does not always prevent the outbreak of civil wars.

Unfortunately, even the adherents of international law who sincerely aim at the advancement of international legal relations are not always agreed on how to improve international law.

One school sees the essence of law in punitive sanctions and is bent upon "putting teeth" into international law. Yet, it is more than doubtful whether the mere threat of physical force will actually bring about the expected effect, namely, peace on earth. Another theory of international law, recently proposed by Niemeyer in his thoughtful book Law without Force suggests in substance to pull down the whole structure of international law as we know it and to subscribe to the "functional" approach to international law.\(^{278}\)

To be sure, even if Austin's definition of law as a command issued by the sovereign, inflicting evil or pain, were an adequate description of domestic law, it is unlikely that the endeavor to conceive of law solely in terms of criminal law will yield satisfactory results in international legal relations.\(^{279}\) Also, Niemeyer's vision of the community of nations as a more or less amorphous agglomeration of social units hardly contributes toward clarifying the basic issues of international law and society.\(^{280}\)

More realistic are those post-war planners who think in terms of "federation,"\(^{281}\) for federations are not necessarily confined to the realm of legal theory, but may become living institutions. In general, a distinction should be made between proposals that follow closely the pattern of genuine federations and those plans that refer to the concept of federation merely by way of analogy. On the whole, the pattern of federation, even if it cannot be immediately realized on a world-wide scale, may serve at least as a yardstick of the actual status of international organization.

At present, the creation of independent regional\(^{282}\) or subregional\(^{283}\) fed-

\(^{278}\)See Niemeyer, Law without Force (1941) 98, 101, 312.
\(^{279}\)See Borchard, note 111 supra.
\(^{280}\)For Niemeyer's criticism of the personalistic concept of international law see op. cit. supra note 278, at 293, 298, 299, 348.
\(^{281}\)For a critical survey of recent literature on Federalism see Corbett, op. cit. supra note 230; see also Wynnner and Lloyd, Searchlight on Peace Plans (1944).
\(^{282}\)See Corbett, id. at 20, 37, 50; on European Federation see also Research Seminar for European Federation. New York University. Draft Constitution of the United States of Europe (1944).
\(^{283}\)Many projects for subregional federations, especially for Europe, have been advanced; see, for instance, Gesekoff, Balkan Union (1940) and F. Gross, Crossroads
erations as well as the creation of a world federation appears unlikely. In the circumstances, it is to be expected that future international legal relations will in many respects resemble those relations that prevailed prior to the outbreak of World War II. Accordingly, progress in international law will presumably follow the general trend of the inter-war period. In other words, new facts, such as television, will be the object of international law; several matters that heretofore had been regulated exclusively by domestic law will be transferred to international jurisdiction; new persons or personal units—States, individuals and supranational agencies—will emerge as legal entities.

(a) Redefinition of international law.—The theory of international law will have to keep pace with the above outlined trends; in particular the dogma that only States are persons in international law will have to be discarded. Supranational agencies as well as individuals will have to be recognized as addressees of international law.

Failure to recognize the legal personality of international or supranational agencies would mean that all existing and all future international agencies will operate in a sphere of lawlessness. The traditional theory of international law is apparently still under the spell of Aristotle's statement that "States" have no magistracies in common that will enforce their engagements; different states have each their own magistracies. Obviously, such an attitude makes for legal uncertainty. It remains obscure whether international or supranational agencies can be parties to a dispute before an international or domestic court; whether these agencies are authorized to issue rules addressed to states, individuals, or other international agencies; whether acts emanating from these agencies may be reviewed as to their compatibility with the underlying charter that in most instances furnishes the basis for the legal existence of these agencies. In short, international or...


For literature on World Federation see note 281 supra.

See Shotwell supra note 2 at V.

See Postulate 4 for the International Law of the Future, op. cit. supra note 220 at 54. "Any failure by a State to carry out its obligations under international law is a matter of concern to the Community of States."

See Principle 5, id.: "Each State has a legal duty to cooperate with other States in establishing and maintaining agencies of the Community of States for dealing with matters of concern to the Community, and to collaborate in the work of such agencies." See also SUMNER WELLES, THE TIME FOR DECISION (1944) 365, 373.

See note 159 supra.

See ARISTOTLE, POLITICS, 1280 b.
RELATIVE SOVEREIGNTY

Supranational agencies should, for the sake of legal certainty, be treated as legitimate legal entities\textsuperscript{290} rather than as \textit{de facto} corporations.\textsuperscript{291}

In addition, denial of legal personality to private individuals may hamper the progress of international law. Were individuals excluded from the realm of international law, all treaties for the protection of minorities, all international labor conventions, all proposals for an international Bill of Rights\textsuperscript{292} would be legally meaningless.

These illustrations may serve to indicate the practical significance of the above proposed redefinition of international law.\textsuperscript{293}

(b) The future of sovereignty.—In the current literature on post-war planning the following attitudes toward the concept of sovereignty can be distinguished: First, several authors propose to discard the concept of sovereignty altogether and to delete the term from the political dictionary;\textsuperscript{294} Second, there are skeptics who maintain that nothing can be done about sovereignty;\textsuperscript{295} Third, there are advocates of limitation of sovereignty;\textsuperscript{296} Fourth, it has been proposed to make use of sovereignty rather than to renounce it.\textsuperscript{297}

It is extremely improbable that “sovereignty” will be completely banned from legal and political parlance. For in a hierarchic system such as the legal system certain rules, norms, or persons must be recognized as supreme.\textsuperscript{298} Furthermore, several rules of international law are contingent on the sovereign rank of States\textsuperscript{299} as well as on the recognition of the sphere of exclusive domestic jurisdiction.\textsuperscript{300}

\textsuperscript{290}See Aufricht, (1941) \textit{Proc. Am. Soc. Int. L.} 46. See also \textit{International Labour Office. Intergovernmental Commodity Control Agreements} (1943) LV. With reference to the legal status of international Commodity Control Boards the preface states: “The legal status enjoyed hitherto by the control authorities is highly indeterminate. All these authorities appear to lack any defined status in either international or municipal law. . . . This consideration strengthens the case for some clarification of the legal status of the control authorities, probably involving the attribution to them of legal personality.”

\textsuperscript{291}On \textit{de facto} corporations see Pound, \textit{loc. cit. supra} note 197.

\textsuperscript{292}See note 265 \textit{supra}.

\textsuperscript{293}See \textit{supra} p. 325.


\textsuperscript{295}See Adler, \textit{op. cit. supra} note 271, at 93.

\textsuperscript{296}See Eagleton, \textit{Organization of the Community of Nations} (1942) 36 \textit{Am. J. Int. L.} 229, 234.

\textsuperscript{297}See Wendell Willkie, \textit{Our Sovereignty: Shall We Use It?} (1944) 22 \textit{Foreign Affairs} 347.

\textsuperscript{298}See Merriam, \textit{op. cit. supra} note 294, at 31: “The framework of sovereignty as the legal apex of a hierarchy will remain where it is.”

\textsuperscript{299}See notes 18 and 19 \textit{supra}.

\textsuperscript{300}See \textit{supra} p. 147.
Another school holds that nothing can be done about sovereignty, at least nothing about "external sovereignty." Such a rigid approach is obviously at variance with legal experience. For States may and can limit their "national sovereignty" by reaching international agreements to this effect or by simply living up to the limitations imposed by general principles of international law.

Limitations on sovereignty may lead and have led, at least temporarily, to a decrease of international frictions. Limitations on sovereignty over and above those implied in customary international law and the general principles of law recognized by civilized nations may be brought about either by outright renunciation of rights otherwise reserved to states under international law or by transfer of certain rights from the domestic to the international sphere.

Granted that "sovereign rights" can be limited under international law, it should be remembered that a State retains, so-to-say, residual sovereign rights inherent in its rank under international law. These residual rights which a state enjoys after having submitted to limitations of national sovereignty should not be ignored, but should be used in the service of sound and constructive policies. In sum, limitation of national sovereignty and use of national sovereignty are not mutually exclusive. The reciprocal trade agreements program of the United States is a case in point. While it provides for the lowering of tariff barriers and thereby limits the sovereign power of the United States to regulate tariffs at will, it seeks to encourage trade activities within the agreed limitations of sovereignty.

(c) The rule of law in international relations.—World War II reflects an unprecedented crisis in confidence. In a world of international anarchy it will be impossible to restore confidence in human decency. Instead, all-devouring suspicion will constantly undermine mutual trust, the very foundation of human society.

The reconstruction and advancement of international law can be one means, but not the only one, of restoring confidence on a world scale. Even "realists" will concede that neither sound political nor sound economic relations can be resumed unless man will regain a minimum degree of certainty about the legal consequences of his actions. No State could function effectively and humanely unless the great majority of its citizens could anticipate the legal consequences of their deeds and omissions. And the same holds true of international relations among states and individuals.

301See Adler, *op. cit. supra* note 271, at 93.
Reaffirmation of the "rule of law" in international relations is generally considered a prerequisite of durable peace. Hence it is one of the foremost tasks of international lawyers to define more clearly than heretofore the meaning of the rule of law. Furthermore, if international law is to be effective, the principle of the superiority of international law over domestic law, subject to the aforesaid qualifications, must be recognized.

In conclusion, the rule of law in international relations and sovereignty are not necessarily incompatible concepts. They are incompatible only on the basis of a doctrine of "absolute" sovereignty that considers States to be entirely independent of international law. By contrast, "relative" sovereignty can and should be construed in reference to the necessary elements of the rule of law.

Today, states and individuals face the alternatives of submitting to chaos or attempting once again the advancement of legal relations among nations. Whoever strives in the face of tremendous difficulties to extend the rule of law to the conduct of States may be heartened by the words of Elihu Root: "It was during the appalling crimes of the Thirty Years war that Grotius wrote his De Jure Belli ac Pacis and the science of international law first took form and authority. The moral standards of the Thirty Years war have returned again to Europe with the same intolerable consequences. We may hope that there will be again a great new departure to escape destruction by subjecting the nations to the rule of law."

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302 See notes 206-208 supra.
303 See notes 140-142 supra.
304 It is noteworthy that even Hobbes, who probably more emphatically than any one of his predecessors advocated the principle of absolute and undivided sovereignty apparently meant only that the internal sovereignty should be absolute and undivided under the law of God. See Hobbes, Leviathan, (1651) Part 3, Chap. 33. "... the question of the Authority of the Scriptures, is reduced to this, Whether Christian Kings, and the Sovereign Assemblies in Christian Commonwealths, be absolute in their own Territories, immediately under God..." Thus even Hobbes' absolute and undivided sovereignty, was sovereignty under law.
305 See note 33 supra.