ship, especially in the international sphere—are far more dangerous than the "liberals," but it seems regrettable that this unholy alliance should exist.

Finally we may ask for a verdict on the "liberal"-totalitarian attitude—frankly admitting that we desire international peace and justice and believe that international law and organization are essential to these ends—and for a tentative formula of procedure for the immediate future. Now the principal defect of the opposition to international law and order appears to reside in its oversimplicity. International law is not always perfect and at times should be modified or put aside or defied—this is true of all law—in the interests of peace and justice. International organization and administration are very defective and should be supported and employed with discretion. But any dogmatic and complete opposition to the national state, international law and organization, and peace and order, based on international authority, whether for partisan purposes employing totalitarian techniques or for "liberal" humanitarian purposes, seems too simple to correspond with reality and contrary to the welfare of the international community and of humanity.

What can be done about this situation? The countries—peoples and governments—remaining faithful to the principles of liberty, law and order based on voluntary agreement, justice and peace, must remain strong and outlast the totalitarian adventure. Everything possible must be done to demonstrate the value of world-wide understanding and coöperation—through law and organization—again on a basis of mutual consent. To this outcome the "liberals" might—perhaps, may—be expected to lend their support. Perhaps the totalitarian international anarchists may yet be convinced of the futility of their effort.

PITMAN B. POTTER

INTERNATIONAL LAW BY ANALOGY

Some years ago at an annual meeting of the American Society of International Law, as this writer recalls, there was a discussion from the floor as to cases decided by the United States Supreme Court concerning river boundaries between States of this Union. The opinion was voiced tentatively that this Court perhaps no longer applies international law in such cases and that perhaps the maxim "International law is a part of the law of the land" is in decline. Such and similar opinions, it is submitted, are based on two theoretical errors and it is the purpose of this paper to clarify them.

The first error has to do with the legal significance of the quoted maxim which, it is said, is typical of the Common Law.[1] That international law,

[1] See on this problem: Blackstone, Commentaries upon the Laws of England, Bk. IV, Ch. 5; J. B. Moore, A Digest of International Law (Washington, 1906), Vol. I, pp. 9–11; Picciotto, The Relation of International Law to the Laws of England and of the United States (1915); H. Lauterpacht, "Is International Law a Part of the

to its *full extent,* is a part of the law of England and of the United States, has been stated frequently by English and American judges.[2] There are, further, Article VI, clause 2 of the Constitution of the United States and articles in recent European constitutions.[3]

Where such municipal rules are in force, international law can thus far be directly and immediately applied by national courts. But even under such an hypothesis, the international and municipal validity need not necessarily coincide. For instance, treaties may need, in addition to their coming into force in international law, internal promulgation. There is, further, in this country the important distinction between self-executing treaties and treaties requiring legislation.[4] Finally, a treaty does not prevail over a later Federal statute.[5]

Naturally, even under such rules of municipal law, it must be the question of a true norm of international law, not, for instance, of recommendations by international organizations, a declaration which is not legally binding, a statement by the International Law Commission, or even clauses in treaties, where these clauses do not constitute legally binding norms, but merely ethical considerations or political programs for the future.[6] The often voiced opinion that British Prize Courts are "courts of international law" is, of course, theoretically untenable. These courts are courts of His Britannic Majesty and are, as was fully recognized in the case of *The Zamora,* bound by a British Act of Parliament, even if it is not in conformity with international law. Municipal law can naturally go further, as the norms of the American and some European constitutions do. Under Swiss law the rules of international treaties to which Switzerland is a

Law of England?" (Grotius Society Transactions, Vol. 25, pp. 51–88); E. D. Dickinson in this JOURNAL, Vol. 26 (1932), pp. 239–260; Walz, *Völkerrecht und staatliches Recht* (1933); Oppenheim-Lauterpacht, International Law, Vol. I (7th ed., London, 1948), pp. 37–44.

[2] See the Earl of Mansfield in Triquet *v.* Bath (1764), 3 Barrows 1478; Respublica *v.* DeLongchamps (1784), 1 Dallas 111; Marshall, C. J., in *The Nereide* (1815), 9 Cranch 388; Lord Campbell, C. J., in Magdalena Steam Navigation Co. *v.* Martin (1859), 2 Ellis and Ellis 94; Turner, L. J., in Emperor of Austria *v.* Day and Kossuth (1861), Great Britain, High Court of Chancery, 2 Gilfard 621; Lord Alverstone, C. J., in West Rand Central Gold Mining Co. *v.* The King, [1905] 2 K. B. 391.

[3] Weimar Constitution, 1919, Art. 4; Austrian Constitutions, 1920, Art. 9, 1934, Art. 9; Spanish Constitution, 1931, Art. 9. See also the present so-called Bonn Constitution (*Grundgesetz*).

[4] See Marshall, C. J., in Foster and Elam *v.* Neilson (1829), 2 Peters 253; Robertson *v.* General Electric Co. (1929), 32 F. (2d) 495.

[5] See Hooper *v.* U. S. (1887), 22 Ct. Cl. 408.

[6] That is why the decision in Sei Fujii *v.* State of California (Calif. Dist. Ct. App. 2nd Dist. April 24, 1950) is doubly attackable: The corresponding clauses of the United Nations Charter are not self-executory, nor do they constitute legally binding norms. See Manley O. Hudson in this JOURNAL, Vol. 44 (1950), pp. 542–548.

party prevail not only over cantonal law but even over *later* Swiss Federal laws which are in contradiction to international law.[7]

"The doctrine that international law is a part of the law of the land," writes Lauterpacht,[8] "is a rule of law." That is correct insofar as this rule is a norm of *municipal* law; but it is not a norm of international law. The latter binds the states legally to execute and enforce rules of general and particular international law binding upon them. But it delegates to the sovereign states the competence to do so according to their discretion. They can enact such municipal law, but it is equally in conformity with international law if they choose to "transform"[9] the norms of international law into municipal law in each single case.

Lauterpacht further states correctly that the maxim that international law is a part of the law of the land must not be confused with the issue of the supremacy of international law. But if he continues that one may assert the first, but deny the second proposition, we would rather emphasize exactly the contrary. International law does not bind the states to have a municipal law of the "part of the law of the land" type. But whether a state has such municipal law or not, the norms of international law are always and, by their very nature, intrinsically superior to municipal law. Whatever the municipal law of a state may be, violation of the superior norms of international law, whether by its legislative, administrative or judicial organs—even if the latter are under a legal duty to apply municipal law which is in contradiction to international law—always makes the state internationally responsible. It is of the greatest importance to distinguish clearly between a municipal norm of the "part of the law of the land type" and the clear supra-statal validity of international law, regardless of the contents of municipal law.[10]

The second theoretical error in the discussion, quoted at the beginning, is of an entirely different nature. In most discussions and treatments of "international law in national courts," certain decisions by the United States Supreme Court in conflicts between States of this Union are quoted simply as applications of international law.[11] The Supreme Court has,

[7] Paul Guggenheim, *Lehrbuch des Völkerrechts* (Basel, 1948), Vol. I, pp. 34, 35.

[8] In Oppenheim-Lauterpacht, *op. cit.*, Vol. I, p. 44.

[9] H. Kelsen, "*La transformation du droit international en droit interne*," *Revue Générale de Droit International Public*, 1936, pp. 5 ff.

[10] This distinction is now brought out with the utmost clarity by A. Verdross, *Völkerrecht* (Vienna, 1950), pp. 65–66.

[11] See Charles K. Burdick's paper "Decisions of National Tribunals" and discussion in Proceedings of the 5th Conference of Teachers of International Law and Related Subjects, Washington, 1933, pp. 162–166, 172 ff. See also the Digests of International Law by Moore and Hackworth, the treatise by Oppenheim-Lauterpacht. On the subject of international law in national courts, see in general: D. Anzilotti, *Il diritto internazionale nei giudizi interni* (1905); James Brown Scott, Judicial Settlement of Controversies between States of the American Union (1918); H. A. Smith, The American Supreme Court as an International Tribunal (1921); Ruth D. Masters, International

indeed, often applied rules of international law in controversies between States of this Union; the same has been done by the German *Staatsgerichtshof* in controversies between member States and by the Swiss Federal Tribunal in conflicts between the Cantons,[12] as, *e.g.*, in determining the mountain borderline between the Cantons of St. Gallen and Appenzell. Rules of international law have been applied here, in Germany and Switzerland, in controversies between member States, concerning bays,[13] diversion of water and utilization of rivers and lakes,[14] nuisances,[15] river boundaries,[16] problems of accretion and avulsion,[17] jurisdiction,[18] boundaries (prescription) [19] navigation, state succession.[20] American cases abound.

But in order to gain a theoretically correct insight into this type of application of international law it is necessary first, to consider that the sovereign

Law in National Courts (1932). It seems also that Prof. Willard B. Cowles, in his 1950 lectures on the application of international law within federal states at the Hague Academy of International Law, taught that international law as such is applicable in the relations between non-sovereign parts of federal states, and even to provinces and municipalities.

[12] On Swiss cases see Guggenheim, *op. cit.*, Vol. I, p. 34, note 33.

[13] See Louisiana *v.* Mississippi, 202 U. S. 1; Michigan *v.* Wisconsin (1926), 270 U. S. 295; Wisconsin *v.* Michigan (1935), 295 U. S. 455; decision of the German *Staatsgerichtshof* of July, 1928, in the controversy between Lübeck and Mecklenburg-Schwerin (Annual Digest 1927–28, case No. 88).

[14] See Kansas *v.* Colorado (1907), 206 U. S. 46 (Arkansas River); Wyoming *v.* Colorado (1922), 259 U. S. 419, and (1936), 298 U. S. 573 (Laramie River); Connecticut *v.* Massachusetts (1931), 282 U. S. 660 (Ware and Swift Rivers); New Jersey *v.* New York (1931), 283 U. S. 336 (Delaware River); Washington *v.* Oregon (1936), 297 U. S. 517 (Walla Walla River); Wisconsin *v.* Illinois (1929), 278 U. S. 367, (1930), 281 U. S. 179, (1933), 289 U. S. 395 (diversion of the waters of Lake Michigan); decision of the German *Staatsgerichtshof* between Baden and Württemberg of June 19, 1927 (use of the Danube).

[15] Missouri *v.* Illinois (1906), 200 U. S. 496; New Jersey *v.* City of New York (1931), 283 U. S. 473.

[16] Iowa *v.* Illinois (1893), 147 U. S. 1; Louisiana *v.* Mississippi (1906), 202 U. S. 1; Indiana *v.* Kentucky (1890), 136 U. S. 479; Nebraska *v.* Iowa (1892), 143 U. S. 359; Washington *v.* Oregon (1908), 211 U. S. 127, and (1909), 214 U. S. 205; Arkansas *v.* Tennessee (1918), 246 U. S. 158; Arkansas *v.* Mississippi (1919), 250 U. S. 39; Oklahoma *v.* Texas (1920), 252 U. S. 372, and (1923), 260 U. S. 606; Minnesota *v.* Wisconsin (1920), 252 U. S. 273; Georgia *v.* South Carolina (1922), 257 U. S. 516; New Mexico *v.* Texas (1927), 275 U. S. 279; Vermont *v.* New Hampshire (1933), 289 U. S. 593; New Jersey *v.* Delaware (1934), 291 U. S. 361.

[17] See Nebraska *v.* Iowa (1892), 143 U. S. 359; Louisiana *v.* Mississippi (1931), 282 U. S. 458; Jraolo *v.* Province of Buenos Aires, Supreme Court of Argentina (Annual Digest 1919–1922, case No. 62).

[18] See Central Railroad Co. *v.* Jersey City (1908), 209 U. S. 473.

[19] See Rhode Island *v.* Massachusetts (1838), 12 Peters 657; Virginia *v.* Tennessee (1893), 148 U. S. 503; Louisiana *v.* Mississippi (1906), 202 U. S. 1, and (1931), 282 U. S. 458; Maryland *v.* West Virginia (1910), 217 U. S. 1; Arkansas *v.* Tennessee (1918), 246 U. S. 158; Arkansas *v.* Mississippi (1919), 250 U. S. 39; Michigan *v.* Wisconsin (1926), 270 U. S. 295.

[20] Virginia *v.* West Virginia (1911), 220 U. S. 1; (1918), 246 U. S. 568.

states, although they are no longer the only persons in international law, are still the most important, permanent, and full persons in international law and, at the same time, its creators. In this sense, the Permanent Court of International Justice [21] could say, although not absolutely correctly, that "international law governs relations between *independent* States." One must distinguish, in the terminology of this writer,[22] between "States in the sense of international law" and "States in the sense of municipal law." Member States of a Federal State are, generally speaking, not states in the sense of international law,[23] although they may have a partial personality in international law, which is, naturally, derived from international, not from municipal, constitutional law.[24] But the member States of this Union, as well as the Cantons of Switzerland, are merely "States in the sense of municipal law," and not sovereign states.[25] This correct insight is often expressed in decisions of the United States Supreme Court.[26] The legal relations between the States of this Union or the Cantons of Switzerland do not belong to international, but to "interstate" or "intercantonal," *i.e.*, national law.

The norms of international law concerning international rivers apply, by the supremacy of international law, only to *international* rivers which flow through or form the boundary between two or more *independent* states. But the rivers involved in these interstate cases, like the Arkansas, Colorado, Laramie Rivers, are, unlike the Rio Grande, not international, but "inter-

[21] In the *S. S. Lotus* Case, P.C.I.J., Series A, No. 10, Sept. 7, 1927, pp. 16, 18.

[22] Josef L. Kunz, *Die Staatenverbindungen* (Stuttgart, 1929).

[23] They are not members of the international community; that is why the federal state alone is internationally responsible for them; that is why they enjoy no immunity in foreign courts (State of Ceara (a member State of Brazil) *v.* Dorr, France, *Cour de Cassation*, 1932, *Recueil Dalloz*, 1933, p. 196). The U. S. Supreme Court decision in Monaco *v.* Mississippi (1934), 292 U. S. 573, is based on American constitutional, not on international law.

[24] See now Byelorussia and the Ukraine. Treaties can, of course, confer a limited international personality even on a territorial entity which is not a state and is not independent and self-governing, such as the proposed Free Territory of Trieste (See Jos. L. Kunz in The Western Political Quarterly, Vol. I, No. 2 (1948), pp. 99–112).

[25] That they are often called "sovereign" means sovereignty in the sense of the Constitution of the United States, not sovereignty in the sense of international law.

[26] Thus, Justice Holmes, in Missouri *v.* Illinois (1905), distinguished between "international" and "interstate law." Justice Cardozo, in New Jersey *v.* Delaware (1934), said of the rule of the "thalweg" that "such considerations have less importance for states united under a general government than for States wholly independent." Justice Field, in Iowa *v.* Illinois (1893), spoke of the application in this interstate controversy "of the same rule when a navigable river constitutes the boundary between two *independent* States," and added that "the reasons and necessity of the rule of international law may not be as urgent in this country where neighboring States are under the same general government." In New Jersey *v.* New York (1931), the Court held: "*Different considerations come in when we are dealing with independent sovereigns. . . . In a less* degree, perhaps, the same is true of the *quasi-sovereignties* bound together in the Union" (Italics supplied).

state'' rivers.[27] International law, of course, raises no objection to the application of international rules to interstate conflicts or to interstate rivers. In Wisconsin *v.* Michigan (1935) Justice Butler stated that ''principles of international law apply also to boundaries between States constituting the United States.'' But it must be understood that, if they do, they apply by force of municipal, not international law. This legal situation fully justifies the fact that the United States Supreme Court in these cases sometimes applies rules which, as to their contents, are identical with the corresponding norms of international law, and sometimes does not, but applies common law, statutory law, local customary law, interstate agreements, long usage or acquiescence.[28] In Iowa *v.* Illinois (1893) Justice Field stated that the rules of international law ''will be held to obtain, unless changed by statute or usage.''

We must distinguish between what this writer, for purposes of theoretical clarification, would call *genuine* international law and international law *by analogy*. The application of international norms in these interstate cases is neither a duty imposed by international law, nor has it anything to do with the municipal ''part of the law of the land'' rule which envisages only *genuine* international law. It is purely a matter of municipal law to apply in such cases international law *by analogy*.[29]

Such international law by analogy appears also in other fields. Genuine international law binds the states to grant to diplomatic agents the immunities prescribed by international rules. But the states are free to grant the same privileges *by analogy* to inter-imperial delegates who are *not* diplomatic agents in the sense of international law.[30]

The two theoretical clarifications here given—distinction between the municipal character of the ''part of the law of the land'' rule and the always existing supremacy of international law on the one hand, and the

[27] Thus, Justice Van Devanter, in Wyoming *v.* Colorado (1922), spoke of the Laramie River correctly as an ''interstate stream.''

[28] It depends on the case. In Wyoming *v.* Colorado (1922), not international law, but the local ''doctrine of appropriation,'' shared by both States, was applied. But see Kansas *v.* Colorado (1907), where Colorado had the appropriation, but Kansas the common law system; or Connecticut *v.* Massachusetts (1937), where both States had the common law system. See also the ''Colorado River Compact'' of 1922. In Central Railroad Co. *v.* Jersey City (1908) Justice Holmes applied no international law, but an agreement and statutory law.

[29] Guggenheim (*op. cit.*, Vol. I, p. 344, note 38) correctly states that the Swiss Federal Tribunal applies to intercantonal cases international law ''*in analoger Weise.*''

[30] ''Representatives which Great Britain and the Dominions send to one another as High Commissioners do not enjoy diplomatic status'' (Oppenheim-Lauterpacht, *op. cit.*, Vol. I, p. 692). But ''the Finance Acts of 1923 and 1928 confer upon High Commissioners of the Dominions and India . . . the same immunity from income tax, super tax and land tax as is enjoyed by the accredited ministers of a foreign State'' (*idem*, note 5, pp. 692–693).

distinction between genuine international law and international law by analogy, on the other—are by no means, as some would believe, a consequence of the theoretical construction known as the "dualistic doctrine." The latter is certainly untenable, because it is unable to construe positive international law as superior to national law. Only the monistic doctrine of the supremacy of international law is correct, for the sole reason that it alone is able to furnish a construction in conformity with the positive international law actually in force. But it is a theoretical construction of positive international law, not an *a priori* natural law hypothesis, out of which rules of positive international law could be gained by mere logical deduction. What the rules of positive international law at a given time are, can only be found by its analysis.

Such analysis clearly shows that present-day positive international law does not prescribe that the states must have a "part of the law of the land" norm—although such municipal norm is welcome, convenient and beneficial; on the other hand, international law is always, and regardless of the contents of municipal law, superior to the national legal orders. Such analysis further shows that, like every legal rule, the rules of international law have a certain temporal, personal, territorial and material sphere of validity; they are binding upon the sovereign states and superior to national law. The sovereign states may also apply international law rules beyond their spheres of validity. But this is a matter of municipal law. If the states do so, they do not apply genuine international law, but apply international law merely by analogy.

JOSEF L. KUNZ

THE FOURTH MEETING OF CONSULTATION OF MINISTERS OF FOREIGN AFFAIRS

The outstanding characteristic of the Union of American Republics, now provisionally designated as the Organization of American States, is that it has developed by slow stages, widening step by step the scope of its activities and adjusting its organization to the needs of the conditions presented. For more than a half-century the "International Union," established in 1890 along the lines of the Universal Postal Union and other similar groups created for a specific purpose, pursued its objectives on the basis of successive resolutions of inter-American conferences without the need of resorting to formal treaty obligations. An effort was made in 1928, at Habana, to establish the Union upon more strictly legal foundations, but the failure of the American States to ratify the convention did not in any way impede the functioning of the existing system. Only in 1948 were the relations of the American States reduced to the terms of a formal Charter, which is still only in effect provisionally by virtue of a resolution of the Bogotá Conference.[1]

[1] Ten states have now (March 16) deposited their ratifications of the Charter, four more being needed to meet the requirement of two-thirds.