Philip Jessup, Transnational Law (New Haven: Yale University Press, 1956), pages 1-8.

1. THE UNIVERSALITY OF THE HUMAN PROBLEMS

The subject to which these chapters are addressed is the law applicable to the complex interrelated world community which may be described as beginning with the individual and reaching on up to the so-called "family of nations" or "society of states." Human society in its development since the end of the feudal period has placed special emphasis on the national state, and we have not yet reached the stage of a world state. These facts must be taken into account, but the state, in whatever form, is not the only group with which we are concerned. The problems to be examined are in large part those which are usually called international, and the law to be examined consists of the rules applicable to these problems. But the term "international" is misleading since it suggests that one is concerned only with the relations of one nation (or state) to other nations (or states).

Part of the difficulty in analyzing the problems of the world community and the law regulating them is the lack of an appropriate word or term for the rules we are discussing. Just as the word "international" is inadequate to describe the problem, so the term “international law" will not do. Georges Scelle seeks to meet the difficulty by using the term *droit des gens*, "not taken exclusively in its Latin etymology, which still implies the notion of a collectivity, but

in its common and current meaning of individuals, considered simply as such and collectively as members of political societies."[1] I find no satisfactory English equivalent along these lines. Professor Alf Ross of the University of Copenhagen, speaking of the term "private international law," has wisely said: "Normally it is both hopeless and inadvisable to try to alter a generally accepted terminology, but in this case linguistic usage is so misleading that it seems to me right to make the attempt."[2] Ross's own experiment in word-coining -- "interlegal law" for "private international law" -- is not encouraging to me. My choice of terminology will no doubt be equally unsatisfactory to others. Nevertheless I shall use, instead of "international law," the term "transnational law" to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.[3]

1 Georges Scelle, *Précis de droit des gens* (Paris, Recueil Sirey, 1932), pt. 1, p. vii.

2 Alf Ross, *A Textbook of International Law* (London, Longmans, Green,1947), p. 73.

3 Myres McDougal has familiarized us with the use of the adjective "transnational" to describe groups whose composition or activities transcend national frontiers, but he does not apply the term to law in the sense in which it is used here. Joseph E. Johnson suggested more broadly the utility of the word "transnational" in place of "international" in his address of June 15, 1955, at the annual meeting of the Harvard Foundation and Law School Alumni. Occasional use of the word has also been made by Percy Elwood Corbett, *The Study of International Law* (Garden City, N.Y., Doubleday, 1955), p. 50, and by Arthur Nussbaum, *A Concise History of the Law of Nations* (rev. ed., New York, Macmillan, 1954).

The concept is similar to but not identical with Scelle's monistic theory of *un Droit intersocial unifié*.[4] One is dealing, as he says, with "human relationships transcending the limits of the

various states."[5] But while I agree with him that states are not the only subjects of international law,[6] I do not go to the other extreme and say with Scelle that individuals are the only subjects. Corporate bodies, whether political or nonpolitical, have certainly been treated in orthodox theory as fictions, but their essential reality as entities is now well accepted and law deals with them as such.[7] Scelle agrees that states have characteristic features distinguishing them from other organizations, but for him these features are not of a legal order but *historico-politique*,[8] a distinction which is not drawn here.

Transnational situations, then, may involve individuals, corporations, states, organizations of states, or other groups. A private American citizen, or a stateless person for that matter, whose passport or other travel document is challenged at a European frontier confronts a transnational situation. So does an American oil company doing business in Venezuela; or the New York lawyer who retains French

4 Scelle, pp. 32ff.

5 *Ibid.*, p. 51, as paraphrased by Walter Schiffer, *The Legal Community of Mankind* (New York, Columbia University Press, 1954), p. 259.

6 Having argued in 1948 that this was a desirable position (*A Modern Law of Nations*, New York, Macmillan, 1948, ch. 2), I am prepared to say it is now established.

7 Henry E. Foley, "Incorporation, Multiple Incorporation, and the Conflict of Laws", 42 *Harvard Law Review 516*, 517-19 (1929).

8 Scelle, p. 83.

counsel to advise on the settlement of his client's estate in France; or the United States Government when negotiating with the Soviet Union regarding the unification of Germany. So does the United Nations when shipping milk for UNICEF or sending a mediator to Palestine. Equally one could mention the International Chamber of Commerce exercising its privilege of taking part in a conference called by the Economic and Social Council of the United Nations.

One is sufficiently aware of the transnational activities of individuals, corporations, and states. When one considers that there are also in existence more than 140 intergovernmental organizations and over 1,100 nongovernmental organizations commonly described as international,[9] one realizes the almost infinite variety of the transnational situations which may arise.

There are rules, or there is law, bearing upon each of these situations. There may be a number of applicable legal rules and they may conflict with each other. When this is the case still other rules may determine which law prevails. In certain types of situations we may say this is a question of "choice of law" which is to be determined by the rules of "Conflict of Laws" or "Private International Law." The choice usually referred to here is between rules of different national laws; and the choice, we assume, is to be made by a national court. In other types of situations the choice may be between a rule of national law and a rule of "Public International Law," and the choice may be made by an inter

9 *Yearbook of International Organizations, 1954-55* (Brussels, Union of International Associations, 1954).

national tribunal or by some nonjudicial decision maker. In Scelle's monistic conception: "When the legislator of a state, or when national jurisdictions establish rules governing conflicts of laws

or conflicts of jurisdiction, they lay down *rules of international law*. . . . When a national judge delivers a judgment in a case between nationals and foreigners or between foreigners, he ceases to be a *national* judge and becomes an *international* judge."[10] Another pattern of thought insists that "the only law in force in the sovereign state is its own law" and that the state's own law determines whether in certain instances some other rule from some other jurisdiction will be applied, which is made part of its law for the purpose.[11] This does not prevent the foreign law from being treated, for purposes of proof, as a "fact."[12] Similarly, the Permanent Court of International Justice has said: "From the standpoint of International Law and the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures."[13] In the United States and in other states international law is declared to be "part of our law" and therefore

[10] Scelle, p. 56.
[11] See American Law Institute, *Restatement of the Law of Conflict of Laws* (St. Paul, American Law Institute Publishers, 1934), ch. I, Topic I, sec. I (1) and comment on sec. 5.
[12] Joseph H. Beale, *A Treatise on the Conflict of Laws* (New York,Baker, Voorhis, 1935), secs. 621.4-621.6. Cf. Arthur Nussbaum, "Proving the Law of Foreign Countries", *3 American Journal of Comparative Law 60* (1954).
[13] Case concerning certain German interests in Polish Upper Silesia (The Merits), P.C.I.J., ser. A, no. 7 (1926), p. 19.

can be applied directly by the courts. "Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations."[14] To envisage the applicability of transnational law it is necessary to avoid thinking solely in terms of any particular forum, since it is quite possible, as we shall see, to have a tribunal which does not have as its own law either a body of national law or the corpus of international law.

A problem may also be resolved not by the application of law (although equally not in violation of law) but by a process of adjustment -- an extralegal or metajuridical means. Thus certain heirs may renounce their rights in an estate, or their conflicting claims may be compromised without resort to litigation. The unification of Germany might be brought about without reference to the Potsdam Agreements by a negotiated settlement acceptable to all concerned. But the results may have legal effect and be in legal form. In other words, the solution arrived at without utilizing law may itself provide the law of the case, just as in a commercial arbitration where the arbitrators are authorized to make a fair compromise. One notes that the problem of extracting and refining oil in Iran may involve -- as it has -- Iranian law, English law, and public international law. Procedurally it may involve -- as it has -- diplomatic negotiations, proceedings in the International Court of Justice and in the Security Council, business negotiations with and among oil companies, and action in the Iranian Majlis.

[14] *The Paquete Habana*, 175 U.S.677, 700 (1900); *The Scotia*, 14 Wall. 170, 188 (1871).

Perhaps it is some innate instinct for orderliness which leads the human mind endlessly to establish and to discuss classifications and definitions and to evolve theories to justify them. In international law one may be a monist or a dualist; a positivist, a naturalist, or an eclectic. The intellectual process is essential but it involves dangers. The more wedded we become to a particular classification or definition, the more our thinking tends to become frozen and thus to have a rigidity which hampers progress toward the ever needed new solutions of problems whether old or new. Conflicts and laws

are made by man. So are the theories which pronounce, for example, that international law cannot confer rights or impose duties directly on an individual because, says Theory, the individual is not a subject but an object of international law. It is not inappropriate here to invoke again the high authority of an earlier Storrs lecturer and to say with Cardozo: "Law and obedience to law are facts confirmed every day to us all in our experience of life. If the result of a definition is to make them seem to be illusions, so much the worse for the definition; we must enlarge it till it is broad enough to answer to realities."[15]

As Lord Justice Denning of the Court of Appeal has said, some lawyers find solutions for every difficulty while other lawyers find difficulties for every solution. The solution suggested here is that, for the time being at least, we avoid further classification of transnational problems and further definitions of transnational law. You will not need to be a

[15] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, Yale University Press, 1921), p. 127.

lawyer to find the difficulties for this solution; they will be only too apparent.

What, then, is the general problem: This planet is peopled with human beings whose lives are affected by rules. This is true whether one considers the people who live in New Haven among all the complexities and refinements of civilization or the people who live in the unimproved jungle recesses of New Guinea. *Ubi societas, ibi ius.* People form groups which we call families, clans, tribes, corporations, towns, states, international organizations, or by other names. "History is, among other things, the record of groupings of human beings which for some strange reason stay together."[16] Individual interrelationships continue, but to these are added the relationships of the individual to the groups and those among the groups themselves. As Max Radin points out: "Any one grouping cuts through and across other groupings, a fact which makes all social study so difficult."[17]

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[16] Adolf A. Berle, *The 20th Century Capitalist Revolution* (New York, Harcourt, Brace, 1954), p. 21.
[17] Max Radin, *Law as Logic and Experience* (New Haven, Yale University Press, 1940), p. 126.