napalm and other incendiary agents, against targets requiring their use are not violative of international law; but they must not be employed in such a way as to cause unnecessary suffering to individuals.[49] Paragraph 42 lays down that "there is no prohibition of general application against bombardment from the air of combatant troops, defended places, or other legitimate military objectives." As to gas and bacteriological warfare, paragraph 38 states that

> the United States is not a party to any treaty, now in force, that prohibits or restricts the use in warfare of toxic or non-toxic gases, of smoke or incendiary materials, or of bacteriological warfare. The Geneva Protocol of 1925 has not been ratified by the United States and is not binding on this country.[50]

Paragraph 35 states that

> the use of explosive atomic weapons, whether by air, sea, or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment.[51]

It is obvious that a restriction or prohibition of chemical, bacteriological, and atomic war is only possible by international agreement to which at least all militarily important states are parties. Negotiations for such agreement have been under way since the end of World War II, but, in a world which is lacking confidence, have not yet led to positive results.

JOSEF L. KUNZ

INTERNATIONAL PARLIAMENTARY LAW

There seems to be a tendency in the current literature on international law to introduce an abundant new terminology. The terminology suggests in many instances that the field should be broken up and studied under separate captions. Some of the labels parallel equivalents in the national legal system; thus we have references to "international administrative law" and "international constitutional law." One is familiar with the classifications of Professor Schwarzenberger, particularly his "international economic law."[1] There is also a well-known school which deals with "international penal law" or "international criminal law."[2] "International air law" was the subject of a round table in the 1956

[49] Par. 36.

[50] Par. 38 is restricted to this negative statement. Law of Naval Warfare, sec. 612, states that the U. S. is not a party to any treaty forbidding or restricting these methods of warfare and that it, therefore, "remains *doubtful* that, in the absence of a specific restriction established by treaty, a State legally is prohibited at present from resorting to their use." Footnote 8 adds that poisonous gases and bacteriological weapons may be used only if and when authorized by the President.

[51] In the same sense Law of Naval Warfare, sec. 613. Footnote 9 adds that nuclear weapons may be used by U. S. forces only if and when directed by the President.

[1] See Schwarzenberger, "The Province and Standards of International Economic Law," 2 International Law Quarterly 402 (1947).

[2] See Glaser, Introduction à l'Etude de Droit International Pénal (1954).

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Proceedings of this Society.[3] One also recalls the school which stresses a regional international law, for example, "American International Law."[4] A less familiar label is "international uniform law" which, it is suggested, "is entitled to occupy a separate scientific position next to Public International Law and Private International Law."[5] There has even been a recent suggestion that all of these legal fields, including the traditional public international law and private international law, should be combined under the label "transnational law." As one examines the use of this terminology one has the impression that one finds here more than new labels for subtopics in public international law comparable to the traditional subjects of treaties, responsibility of states, jurisdiction, etc. These labels may be useful as a means for emphasizing new problems which deserve separate study, but their indiscriminate use might lead to a situation in which one loses a sense of unity. Professor Schwarzenberger has warned us:

> When, therefore, there is a new *dernier cri,* such as suggestions for the development of an international criminal law, it is advisable not to follow uncritically in the train of the enthusiastic protagonists of such an idea, but to pause and reflect on the meaning and value of it all.[6]

Nevertheless the writer risks suggesting still another label for the purpose of calling attention to a subject which may be of growing importance and which might throw further light on the study of international organization; this comment therefore deals with "international parliamentary law."

The term "international parliamentary law" is used to refer to the equivalent in international organizations of the familiar parliamentary law in national legislative assemblies. One is aware that in all national legislative bodies, whether based on the parliamentary form of government or not, the term "parliamentary law" is commonly used to describe the rules of procedure which govern the actions of the legislative body. In the United States and elsewhere some of these rules of procedure are incorporated in Constitutional provisions and others are laid down in statutes. In any case, the standing rules are commonly adopted by the legislative body. Recently the matter has attracted considerable attention in the United States because of the debates in the Senate concerning a proposed change in the rules to limit filibusters. Vice President Nixon as presiding officer of the Senate on January 4 made a ruling concerning the power of the Senate to change its rules, resting his conclusion upon Constitutional principles.[7]

The question is posed whether these rules of procedure are properly denominated "law." There is a rather surprising paucity of literature

[3] See 1956 Proceedings, American Society of International Law 84–115. *Cf.* Mateesco, Droit Aérien Aéronautique (1954).

[4] See Alvarez, Le Droit International Américain (1909).

[5] Vallindas, "Autonomy of International Uniform Law," 8 Revue Hellénique de Droit International 8, 9 (1955).

[6] Schwarzenberger, "The Problem of an International Criminal Law," 1950 Current Legal Problems 263.

[7] See New York Times, Jan. 5, 1957.

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on the subject, but the question has received a vigorous affirmative answer from Professor R. K. Gooch.[8] Gooch argues that the ultimate source of legislative rules of procedure is the Constitution and that therefore the rules have the same legal character as other rules of law derived from the same source. He notes that in some instances this parliamentary law even has a penal sanction as, for example, where the rules give authority to the presiding officer to discipline a member by suspension or expulsion.

In the United States the cases involving parliamentary law which have come before the courts involve generally a problem of evidence.[9] The question generally is whether it is possible to go behind a statute as enrolled or published to show that it was not passed in conformity with the rules of the legislature. The English rule is that an Act of Parliament is final and valid if it is good on its face. But where the Act was on its face "by the King with the consent of the Lords," omitting the Commons, it was judged void.[10] The courts cannot inquire into the procedures in Parliament to see if any rule was not observed.[11]

The situation in England is simpler than that in the United States, where the American system of judicial review and the doctrine of separation of powers introduce different elements. While most cases involving legislative actions are disposed of in accordance with the rules of evidence, there is an implied and sometimes explicit consideration that the courts and the legislature are equal, co-ordinate, and independent branches of government, neither being subject to control of the other. In some cases, based upon this view, the courts have refused to act because they did not feel they had the power to consider or review the questioned actions of the legislature.[12] But the American courts tend to follow the same basic rule. In *Carlton* v. *Grimes* an Act of the Iowa legislature was amended after being voted by both houses and was not voted upon or passed in the final form as signed by the President of the Senate and the Speaker. The court sustained the validity of the Act, saying that, except for a few mandatory constitutional provisions, the legislature was free to determine its own procedure.[13] Under the Iowa rule, therefore, the enrolled bill is "an absolute verity" and cannot be impeached by reference to the legislative journals. So the Michigan court held that rules of legislative procedure, adopted by the legislature but not prescribed by the Constitution, may be suspended and therefore action, even if contrary to the rules, cannot be reviewed by the courts.[14] But the court may look at and interpret the rules in the light of the journals in the course of sustaining the validity of

[8] Gooch, "Legal Nature of Legislative Rules of Procedure," 12 Virginia L. Rev. 527 (1926).

[9] The writer is indebted to Mr. Leon Spoliansky of the Columbia Law School for a study of these cases.

[10] The King and the Lord Hunsdon *v.* The Countess Dowager of Arundel and the Lord William Howard, Hob. 109, 80 Eng. Rep. 258 (1617).

[11] Edinburgh Railway Co. *v.* Wanchope, [1842] 8 CL. & F. 710, 8 Eng. Rep. 279.

[12] Hunt *v.* Wright, 70 Miss. 798, 11 So. 608 (1892); State *v.* Jones, 6 Wash. 452, 34 Pac. 201 (1893).

[13] 237 Ia. 912, 23 N. W. 2d 883 (1946).

[14] Anderson *v.* Atwood, Secretary of State, 273 Mich. 316, 262 N.W. 922 (1935).

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a statute.[15] Where the Constitution required that a certain Act must be passed by a two-thirds vote and it appeared that such a majority was not obtained, the court held the Act had not been validly passed.[16]

In a South Carolina case, a resolution had passed both houses and on the same day was sent to the Governor. The Assembly then adjourned *sine die*. The Governor vetoed and sent it back to the Senate when it reconvened a year later. The Senate overrode the veto by a two-thirds vote, voted to reconsider and then overrode again by the same vote. The House followed suit. The court investigated the question to see whether there was a two-thirds vote of a quorum or of the members present, but upheld the action, saying:

> Treating a vote upon the passage of the joint resolution over the Governor's veto as upon the reconsideration of the original resolution, it is not a judicial question whether the Senate had the right to reconsider the vote upon such reconsideration. That is merely a matter of parliamentary procedure which each body by special rule, may, and usually does regulate for itself.[17]

In *People* v. *Devlin*[18] the court did say that a legislature could act only "according to *their* law" and that they could not arbitrarily depart from their own parliamentary law, but in the result the court sustained the validity of the Act. The more usual rule is in favor of the plenary authority of the legislature to vary its procedure.[19] It has also been said that while the rules of procedure are mandatory to legislators, they exhaust themselves on the legislature and cannot be reviewed by the courts.[20]

These cases, however, do not in general deal with the question whether the rules of procedure should properly be designated as law insofar as they are actually enforced in the proceedings of the legislative body, although *People* v. *Devlin* and *Hunt* v. *Wright* look in that direction. It is of course true that the legislature may change its rules at any time, but as long as a rule has not been changed it is applied by the presiding officer and governs the proceedings of the legislative body. It is a matter of common observation that by and large the legislature does proceed under its rules and that the rules are enforced with rigor and control the actions of the members. The success or failure of a legislative proposal may thus depend upon the rules and their application by the presiding officer.

It was not until recent times that this subject had any pertinence for international law. Obviously its relevance comes from the modern de-

[15] Crawford *v.* Gilchrist, 64 Fla. 41, 59 So. 963 (1912).

[16] People ex rel Purdy *v.* Commissioner of Highways of Marlborough, 54 N.Y. 276 (1873). On the Idaho rule concerning resort to the journals, see Cohn *v.* Kingsley, 5 Idaho 416, 419 Pac. 985 (1897); In re Drainage District No. 1, 26 Idaho 311, 143 Pac. 299 (1914). *Cf.* Luce, Legislative Procedure 210 (1922).

[17] Smith *v.* Jennings, 67 S.C. 324, 45 S.E. 821 (1903).

[18] 33 N.Y. 269 (1865).

[19] *E.g.*, Schweitzer *v.* Territory, 50 Okla. 297, 47 Pac. 1094 (1897); St. Louis & S.F. Ry. Co. *v.* Gill, 54 Ark. 101, 15 S.W. 18 (1891); aff'd. 156 U. S. 649 (1891).

[20] Hunt *v.* Wright, 70 Miss. 798, 11 So. 608 (1892).

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velopment of international organization.[21] For purposes of illustration one may refer to the General Assembly of the United Nations. Article 21 of the Charter provides: "The General Assembly shall adopt its own rules of procedure."[22] The Charter itself also lays down certain rules of procedure as, for example, Article 18 concerning voting. In addition, the discussions in the General Assembly concerning certain rules of procedure have invoked the provisions of Article 2 (1) setting forth the principle of the sovereign equality of Members, and Articles 10 and 11 on the functions of the Assembly; certain rules and proposed rules have been attacked on the ground that they did not conform with these Charter provisions.[23]

The Charter provisions are comparable to the constitutional provisions which govern the rules of procedure in national legislative bodies. Since the Charter is a treaty and has the legal force of a treaty, it can be said that the rules of procedure enacted in pursuance of the authority granted by the Charter have themselves treaty force in the same sense in which it has been held by national courts that the rules of procedure of a national legislative body have a legal authority which stems from the Constitution. As in the case of national legislative bodies, the General Assembly or other organs of the United Nations may change the rules, but in the General Assembly the rules themselves provide the method of amendment. Thus Rule 164 of the Rules of Procedure of the General Assembly provides:

> These rules of procedure may be amended by a decision of the General Assembly taken by a majority of the Members present and voting, after a committee has reported on the proposed amendment.[24]

When a rule of procedure has been duly adopted by the General Assembly it is binding on all Members whether or not they had voted in favor of the adoption of the rule. The rules are enforced by the President of the General Assembly or by the Chairman of the committee as the case may be. The President has broad authority and may call speakers to order and deny them the floor in accordance with the rules. It is true that there may always be an appeal from the ruling of the Chair (Rule 73), but unless a majority overrules the President (Chairman) his ruling stands. In some international organizations, the presiding officer has the disciplinary power of the presiding officer of a national legislative body. For instance, under Rule 12 of the Rules of Procedure of the Consultative Assembly of the Council of Europe, the President may exclude a representative from the chamber if he repeatedly violates the President's rulings about being in

[21] The writer has developed this subject more fully in a series of lectures at the Hague Academy of International Law, to be published in its 1956 Recueil des Cours under the title "Parliamentary Diplomacy." Materials presented in those lectures have been drawn on here.

[22] See also Arts. 30, 72 and 90 for similar provisions regarding the Security Council, the Economic and Social Council, and the Trusteeship Council.

[23] See 1 United Nations Repertory of Practice of United Nations Organs 626 (1955). In general see the discussion in the Repertory under Art. 21 at 623 and following.

[24] See U.N. Doc. A/520/Rev. 3, June 1, 1954.

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order. In serious cases the President may propose that the Assembly pass a vote of censure which, if adopted, involves immediate exclusion for a period of from two to five days.

Thus it may be said that in the case of the adoption of rules of procedure and in decisions taken under the rules, we have another example of the situation in which a decision of the General Assembly is binding.[25]

To be sure, in connection with the General Assembly of the United Nations or similar international bodies, one is not likely to have any question of judicial review such as that which occurs in national courts as indicated above. One can conceive of a situation in which the Security Council might adopt a resolution containing a binding decision and where the validity of the resolution might be challenged on the ground, for example, that the veto applied and had been disregarded as in the "double veto" cases.[26] Such an issue might conceivably be referred to the International Court of Justice for an advisory opinion and the Court might then have to deal with the Charter provision on voting and might have to interpret the Four-Power Agreement of San Francisco and the practice of the Council under it. If the Court reached the conclusion that this was a situation requiring the votes of all the permanent members of the Security Council and if the record showed that one of the permanent members had voted against, the Court might reach the conclusion that the resolution was not valid. One might also envisage a situation in which the Security Council called upon Members under Article 41 of the Charter to interrupt telegraphic and radio communication with State X. The President of the United States, under authority of Section 5(a) of the United Nations Participation Act,[27] might then issue an Executive Order prohibiting such telegraphic and radio communications. Assume that a radio corporation is fined $10,000 under Section 5(b) of the Act for violation of the Presidential order and challenges the validity of the order on the ground that the action of the Security Council was invalid because of failure to comply with the voting rules laid down in Article 27 of the Charter and in Rule 140 of the Provisional Rules of Procedure of the Security Council. A United States court, viewing the Charter rule as equivalent to a constitutional provision, might determine whether the defendant's contention was correct.

Such hypothetical cases probably belong to a later stage of the development of the organization, but they cannot by any means be excluded.

The foregoing observations are merely designed to suggest a field of international law which contains some novel and interesting points, whether one prefers to consider the problem as an aspect of "treaty law" or as an

[25] For explanation of the word "decisions" see 1 U.N. Repertory vi, and United Nations, Répertoire of the Practice of the Security Council 2 (1954). See especially report of the Secretary General in U.N. Doc. A/1356, Annexes (V) 49 (1950), par. 22. See, in general, Sloan "The Binding Force of a 'Recommendation' of the General Assembly of the United Nations," 25 Brit. Year Bk. of Int. Law 1 (1948).

[26] See Jiménez de Aréchaga, Voting and the Handling of Disputes in the Security Council 3, 11 ff. (1950); 1 U.N. Répertoire 157.

[27] 59 Stat. 619; 63 Stat. 734.

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aspect of "international constitutional law" or "international administrative law." The writer shares the view of Professor Gooch that legislative rules of procedure possess a true legal character and that this is equally true of the rules of procedure of international organs like the principal organs of the United Nations. In this sense, international parliamentary law may be considered a part of public international law.

PHILIP C. JESSUP

THE END OF AMERICAN CONSULAR JURISDICTION IN MOROCCO

The relinquishment by the United States on October 6, 1956, of its consular jurisdiction in Morocco marks in several respects the end of an era. Not only did the action specifically terminate privileges in the Sharifian Empire which the United States had enjoyed in varying measure for 170 years; the steps taken had also a wider significance, since in effect they extinguished in American law the institution of consular jurisdiction in its classic form. The manner of its passing would seem to deserve at least brief notice in this JOURNAL.

American jurisdiction in Morocco in recent years rested in the first instance on the Moroccan-American treaty of September 16, 1836, which was substantially similar to the original treaty signed in Morocco in 1786.[1] This basic grant was supplemented by rights secured under two multilateral conventions relating to Morocco to which the United States was a party: the Convention of Madrid of July 3, 1880,[2] and the General Act of Algeciras of April 7, 1906.[3] Former American claims to a still wider jurisdiction, based on custom and usage and through a most-favored-nation clause in Moroccan treaties with other states which were no longer in force, were declared untenable in proceedings before the International Court of Justice in 1952.[4] As one result of these proceedings, American jurisdiction in Morocco after 1952 was confined in practice to cases between Americans—the original grant made in the 1836 treaty—although the theoretical jurisdiction under the Act of Algeciras and the Convention of Madrid was somewhat more extensive. In the Tangier Zone the United States not only maintained its own extraterritorial jurisdiction, but also from 1953 onwards participated in the mixed judicial system established there.[5]

With the trend of events in Morocco pointing definitely to its complete independence in the immediate future, the Department of State in January, 1956, declared it to be the policy of the United States to relinquish its jurisdictional rights there at the appropriate time.[6] To accomplish this

[1] 2 Miller, Treaties of the United States 185; 4 *ibid.* 33.

[2] 1 Malloy, Treaties of the United States 1220; 6 A.J.I.L. Supp. 18 (1912).

[3] 2 Malloy, *op. cit.* 2157; 1 A.J.I.L. Supp. 47 (1907).

[4] Case concerning Rights of Nationals of the United States of America in Morocco (France *v.* the United States), [1952] I.C.J. Rep. 176; 47 A.J.I.L. 136 (1953).

[5] U. S. Treaty Series, No. 2893; G. H. Stuart, The International City of Tangier 166–167 (2d ed., 1955).

[6] 34 Department of State Bulletin 204 (1956). This policy had been foreshadowed in the United States pleadings before the International Court.

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