THE RULE OF LAW AND THE RULE OF REASON IN INTERNATIONAL LEGAL RELATIONS

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I

In the anxious search for foundations on wich a workable and worthwhile world order could be cased, a set of principles treasured in the Anglo-American legal and political tradition under the name of the «rule of law» (1) has become increasingly an object of keen attention by statesmen and legal scholars in the West (2). Doctrines

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(1) Alternative phrases more current in America referring to the same set of principles are «government under law», «government of laws and not of men», and (in a broad sense) also «due process of law». For the use of these terms see, for example, various papers collected in A. E. SUTHERLAND (ed.), *Government under Law* (1956).

(2) See, for example, the address by Sir Leslie MUNRO, «*The Rule of Law among Nations*» (1957) 33 *New Zealand Law Journal*, 250-251, and references there made to speeches of Sir Anthony EDEN and Mr. Ernest BEVIN in 1945. See also President EISENHOWER's annual State of Union address before the Congress in January, 1959, published in 105 *Congressional Record* (1959) 358, noting especially his words (at 362): «It is my purpose to intensify efforts during the coming 2 years in seeking ways to supplement the procedures of the United Nations... to the end that the rule of law may replace the rule of force in the affairs of nations.» Note further the Draft Resolution submitted by Canada, Chile, Dahomey, Denmark, Japan, and Sierra Leone to the Sixth Committee of the United Nations General Assembly on the paramount importance of the Charter of the United Nations in the continuing development of the rule of law among nations...». See United Nations General Assembly, Doc. A/C, 6L. 507, p. 1.

propounding similar principles under the names «*Rechtsstaat*» and «*le principe de la légalité*» (3) or their equivalents in various languages have been influential in the Continent and in Latin-America. Some thoughts associated with the «rule of law» idea can also be recognised in the Soviet invocations of the principle of socialist legality (4).

Although the phrase «the rule of law» has been current and cherished in the Anglo-American world of law and politics for a long time, it does not appear that even here we are in a position to ask quite intelligibly the questions: «Is there a rule of law between nations?» and «Ought there to be a rule of law between nations?» let alone to expect intelligent answers to these questions. Even in this area of the world, the phrase has been highly ambiguous so that Sir Ivor Jennings, a distinguished English constitutional lawyer, was inclined to call it «rather an unruly horse» (5).

In spite of the indeterminacy of the meaning of the phrase «the rule of law», we may perhaps still assume that in the Anglo-American tradition of thought it has a fairly well established core of meaning, forming at least a sufficient basis for scholarly wondering about what precisely it is that the phrase conveys or ought to convey. But even then we can scarcely expect that the phrase will carry a sufficient sameness of meaning in its world-wide use as a term of international law or politics (6). It is liable to be conceived

(3) Alternative French phrases are «*la suprématie de la règle de droit*» and «*le règne souverain de la loi*». All the translations of «the rule of law» in other languages seem to be imperfect tending to «divert attention to differet aspects of the legal system». See C. J. HAMSON's General Report on the *Chicago Colloquium on the Rule of Law*, September 1957, published in (1960) 9 *Annales de la Faculté de Droit d'Istambul* 1, at 4.

(4) On the Soviet conception of legality in international relations see Academy of Sciences of the U.S.S.R. Institute of Law, *International Law* (*sine anno*, but apparently 1960 or 1961) 9, 16-17. See also A. T. von MEHREN, «*Conference in Warsaw*» (1958, December) 10 (No. 3) *Harvard Law School Bulletin* 8, 9, 12, reporting on Warsaw Colloquium on the Concept of Legality in Socialist Countries. And see Study Prepared by the Staff of the International Commission of Jurists under the supervision of the Secretary-General of the Commission entitled «*The 'Rule of Law' and 'Socialist Legality' in the USSR*» (1956) No. 6 *Bulletin of the International Commission of Jurists* 10-37.

(5) See Sir Ivor JENNINGS, *The Law of the Constitution* (4th ed. 1959) 59.

(6) The phrase can be found in the following important international instruments: the *Universal Declaration of Human Rights* of 1948: «It is essential ... that human rights should be protected by the rule of law» (Preamble,

decisively differently in different parts of the ideologically divided world, even though it may carry the same emotional impulse all over the world. Moreover, it may be doubted whether the residue of the meaning which the phrase still has in all parts of the civilised world is appropriate to international law at all. The idea of the rule of law has emerged in the consideration of intra-State legal relations. It may very well be that it is one of those municipal legal and political ideas which cannot be properly transplanted to the international law field.

By the ring of its sound and by its *prima facie* import, «the rule of law» invites adherence in the same way as do utterances such as «do good and avoid evil», «justice», «legality», freedom», and «human dignity». Like these, or the Divine name, it can inspire heroism, self-abnegation, and ultimate devotion, but it can also provide a banner (7) for endless quibbling, disputes, and strife between parties fighting for antagonistic causes having the same name. In this state of affairs, it is no wonder that the former President of the United States, Dwight D. Eisenhower, who had emphasised the

third paragraph) and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 1950: «The Governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law ...» (Preamble, last paragraph). It has been rightly observed by Norman S. MARCH that «it would be necessary to admit that the use of the phrase ... is largely meaningless» in these instruments. See his article «*The Rule of Law as a Supra-National Concept*» (published in A. G. Guest (ed.), Oxford *Essays in Jurisprudence* (1961) 221, at 229.

Recently there have been two symposia for clarifying the rule of law as a supra-national concept, both under the auspices of the UNESCO as a part of its plan to promote intellectual contact between Communist and non-Communist countries. The first was a Colloquium held in Chicago in September, 1957, under the general title «*The Rule of Law as Understood in the West*». The second was a Conference held in Warsaw in September, 1958, in order to afford an opportunity for a reasoned statement of the Eastern case for the rule of law in the presence of Western observers. For a report of this conference see A. K. R. KIRALFY, «*The Rule of Law in Communist Europe*» (1959) 8 *International and Comparative Law Quarterly* 465-485.

(7) Cf. Ch. S. RHYNE, «*Extending the Rule of Law in the World Community*» (1961) 37 *Notre Dame Lawyer* 70, at 81, wo contends that «World Peace Through the Rule of Law is not a slogan of visionaries and idealists, it is the objective of the realist.» But what sort of the realist? A realist as a matter-of-fact man or an epistemological, ontological, or axiological realist?

importance of the rule of law in international relations ([8]) and who had experienced disappointments in trying to convert this idea into rules in action even in his own country ([9]) applied a significantly modified phrase on a later occasion ([10]) when making reference to the same ideals. This phrase was «the rule of reason» ([11]).

The invocation of ideas such as «freedom», «legality», and «human dignity» raises problems of identifying their reasonable content and the criteria by reference to which they can be asserted. Thus the invocation of the idea of freedom raises the problems, Freedom from what ? and Freedom to what ? The invocation of the idea of legality raises the problems of its precise scope and nature. The invocation of the idea of human dignity raises the problems of worthwhile ends of human life and how to assess and to handle human indignity as an empirical factum. These all presents quandaries, but nevertheless they are not intrinsically incapable of answers which may help to clarify what is at issue and what a particular champion of these ideas is striving to say when he employs these words. With all their ambiguity and their uncertainty of meaning, these words still stand for fields or directions of inquiry. If nothing else is expressed by them, they may still be good as headings for rational endeavour in human affairs of our deepest concern. Much that has been said in using these words can well serve as prefatory remarks for

([8]) See EISENHOWER's address cited *supra* n. 2.

([9]) One of such disappointments was the rejection by the United States Senate of another effort to remove the notorious Connally Amendment which made an irony out of the United States' acceptance of the jurisdiction of the International Court of Justice. See J. STONE, *Law and Policy in the Quest for Survival* (1960) 5. In an address delivered to the American Bar Association, the United States' President Eisenhower remarked that he had a lawyer in his own family but he had not unfortunately been able to convert him yet to his ideas on the rule of law between nations. See D. D. EISENHOWER, «*The Role of Lawyers in Promoting the Rule of Law*» (1960) 46 *American Bar Association Journal* 1095, at 1906.

([10]) See *ibid.*

([11]) See *ibid.*, in which he said *inter alia*: «with our eyes on the rule of reason» we must «take a stand that makes» the accomplishment «of a perfect administration of international justice» realisable. It may be noted that we find a French correspondent to «the rule of reason» in LEIBNIZ, who in a letter to the Queen Sophia-Charlotte written in 1702 says: «Car dans la justice est comprise à la fois la charité et la régle de la raison.» For the text of this letter see C. J. GERHARDT (ed.), 6 *Die philosophischen Schriften von Gottfried Wilhelm Leibniz* (1885) 491, at 695.

work to be done. They can serve as broad indications of topics of reasoning.

The phrase «the rule of law», too, in sharing the nature of the above discussed words, appears to serve such a function. Its abuse in political harangues and in moralists' platitudes and its misuse in shallow scholarly writings does not remove the ground from its sound use. Whatever mischief has been committed with notions of the kind which this phrase conveys, however much they may have become parts of «commonplaces», they still retain their value as «places» in which tenable arguments can be sought or into which such arguments can be projected. Attempts to replace them by something else would lead us to sleeveless errands; for new names, new tags could only replace old signposts with new ones, the directions indicated by the old ones still to be pursued or avoided ([12]).

The above posing of the problem of the rule of law in international legal relations suggests that this problem is placed in the field of ideas springing from what since classical antiquity has been designated as topics, rhetorics, and dialectics. Throughout history, and especially in our time, each of these three designations has taken on meanings which cover the envisioned ideas with misleading connotations. In order to recover the original thought or what the original thought was tending to, it is necessary to trace the origins of what has received currency in contemporary philosohical and legal thought as the theory of argumentation. This task is facilitated by important work recently done by Chaïm Perelman, Theodor Viehweg, Alessandro Giuliani, and others ([13]) in bringing the classical ideas in our sight. What Perelman and others, equipped with tools and materials of contemporary learning, have contributed to the legal-philosophical thought of today in this area appears to be most relevant for collecting our intellectual resources to face problems thrown up by the contemporary international situation. What promise this line of inquiry holds out for us is still to be seen. So much is sure, however, that it is worthwhile to pursue it at least as a scanning of the horizons of legal and political thought for possibilities of thought-

([12]) It may be thought that new names would at least avoid contamination attached to the old names through their abuse and misuse. However, this is an illusory hope, for if the new ones obtain currency and familiarity, they will soon become contaminated in the same way as the old ones.

([13]) See Ch. PERELMAN & L. OLBRECHTS-TYTECA, *Traité de l'Argumentation* (1958) in two volumes; Th. VIEHWEG, *Topik und Jurisprudenz* (1853); A. GIULIANI, *Il Concetto di Prova* (1961).

constructions, some of which might materialise into principles and methods appropriate for coping with harsh realities in an area where our thinking has run into an impasse anyhow.

II

It is an age-old and universal problem for civilised man how to establish what one believes to be true, sound, trustworthy, tenable, or — to put it broadly — what is reasonable to accept. An important part of the principles governing the seeking and proving of what is reasonable has been provided by formal logic, understood as showing us how to think in order that the propositions involved in our thinking will not contradict each other but will stand together in well-determined relations of co-, sub-, and superordination. The principles and methods of formal logic have been recognised and practiced everywhere and at all times by men engaged in serious and responsible argumentation — even where they have not been explicitly recognised, and even where they have been misunderstood or their role has been denied ([14]). The *stringent* reasoning of formal logic is, however, not the only kind of *cogent* reasoning directed to the establishment of what is reasonable to accept. Logic, to lead to such acceptance, must operate with premisses which themselves are acceptable as reasonable. In the search for an proof of these premisses, formal logic still can and does play a role by linking steps of reasoning with each other in an exact manner, but at some stage, some point, the reasoner must arrive at grounds of argument which are no longer (or not yet in the given situation of argumentation) sustainable on purely formal logical grounds. Such premisses are sometimes sustained because they carry an incontrovertible force of conviction, a can't-think-otherwise, a self-evidence. The logical principles of identity and noncontradiction are, for example, often thus sustained. The force of conviction of an argument amounting to self-evidence is achievable only on rare occasions. We are really entitled to consider a proposition or a precept self-evident only (if ever) after very long, arduous, and wide efforts by competent men have not been able to produce anything which could conceivably stand as controverting it. In most

([14]) For some notable instances see J. Binder, *Philosophie des Rechts* (1925) 334; E. M. Konstam, «*Acceptance of Rent after Notice to Quit*» (1944) 60 *Law Quarterly Review* 232, at 232; H. J. Laski, *Studies in the Problem of Sovereingnty* (1917) 201.

cases we consider it as reasonable to accept a proposition or precept because in the given argumentative situation the arguments which speak for it carry a greater «weight» ([15]) than those which speak against it. Such cumulative effect of arguments is significant even where the principle of self-evidence and the principles of formal logic operate. For the former itself can be challenged, and has to be justified by recourse to the cumulative effect of the arguments for it, and in actual situations of argumentation stringent reasoning, even though available on principle, may be too awkward to pursue, because it is too involved or too exacting or too bothersome for the participants in the reasoning. This is often so in legal argumentation where the reasons offered for a statement whose acceptance is sought are usually, but not always necessarily, «like the legs of a chair not like links of a chain» ([16]).

Recognition of the nature and role of non-stringent and yet cogent argument in establishing what it is reasonable to accept raises important questions. Paramount among these questions are, what determines the strength of argument? What distinguishes mere persuasiveness in an argument from its tenability? How is arbitrariness to be excluded from this kind of argumentation?

These questions have not only great theoretical but also great practical significance, especially in the field of law. As regards the first question, it must be borne in mind that mere cumulation of reasons for an argument does not make it strong ([17]). Nor does the fact that

([15]) Cf. K. Baier, *The Moral Point of View* (1958) 92 ff., 106. Any such weighing requires, of course, standards by reference to which the «weight» is determined. These standards are usually available in the social environment of the reasoner, being, of course, relative standards.

([16]) See J. Wisdom, «*Gods*» published in his collection of papers entitled *Philosophy and Psycho-Analysis* (1953) 149, at 157. The paper was originally published in *Proceedings of the Aristotelian Society* in 1944.

([17]) The challenge, What is the criterium of strong argument? was the one which opened the discussion after Perelman had delivered his address «*L'Idéal de Rationalité et la Règle de Justice*» to the *Société Française de Philosophie* on 23 April, 1960. See 53 (No. 1) *Bulletin de la Société Française de Philosophie* (1960) 15. Perelman started his reply by saying: «Cette question est une des plus difficiles que soulève mon exposé». A point in his reply that is of particular interest to lawyers was that «un argument fort, dans un domaine envisagé, est un argument qui peut se prévaloir de précédents.» (p. 16). For the common lawyer this answer evokes the enormous problems involved in the doctrine of precedent, about which see J. Stone, «The *Ratio* of the *Ratio Decidendi*» (1959) 22 *Modern Law Review* 597, esp. at 610-620.

the argument is effective in a given social group. Through techniques of persuasion employed in brainwashing, mass-conversion, and advertisement, people can be made to believe what to those not so treated must appear absurd or appallingly foolish. As regards the second question, it is to be considered that an argument that actually does persuade — even when it persuades the persuader himself, who may talk himself into believing what he says — may still prove to be unreliable ([18]). Nor does the competence of the persuader and the persuaded in a particular field provide an infallible safeguard for the tenability of the arguments accepted through persuasion. Legal and political experience has shown on numerous occasions that most competent men in these fields are capable of committing legal and political blunders having fallen prey of the eloquence of their own or of other competent men. As to the third question, it is to be considered that the reasoner is always confronted with an open sea of possibilities from which he can choose reasons for his argument. He seems to have a *liberum arbitrium* to make or not make use of these possibilities, being free also to make abusive use of this *arbitrium* which gives sham strenth to his contentions but still effectiveness in putting them accros ([19]).

The above problems confronted Socrates, Plato, and Aristotle in classical antiquity. Taking up the Sophists' challenge to integrity of reasoning, they tried to develop principles and modes of sound reasoning occupying the area of thinking between stringent argument and the Sophistical *elenchi* ([20]). Lawyers in their field of work have been confronted with the same problems. To assure integrity

([18]) What Pascal called «your consent with yourself» (see Ch. PERELMAN, «*Proof in Philosophy*» (1954) 52 *Hibbert Journal* 352, at 356) is not always reliable in establishing what is reasonable to accept.

([19]) Cf. V. PARETO, *Tratado di Sociologia Generale* (1916, 2nd ed. 1923) § 2086: «Essi [gli uomini] hanno un certo bisogno di logica, ma lo appagono agevolmente con proposizioni pseudo-logiche». Norberto Bobbio in his article «*Pareto e la Teoria dell'Argomentazione*» (1961) 4 *Revue International de Philosophie* 376, at 397 ff. comments on this by saying that «gli uomini sono esseri irragionevoli che, strano a dirsi, sentono un irrefrenabile bisogno di ragionare e, ancor piú strano, sodisfano questo bisogno con ragionamenti scorretti.»

([20]) Note Socrates in Plato's dialogue *Phaedrus* saying that a good man ought to undergo a great deal of trouble required for becoming a good rhetor «not for the sake of speaking and acting before men but in order that he be able to say what is acceptable to God and always act acceptably to Him as far as in him lies».

of legal reasoning, they have been impelled to find ways and means to deal with trickery of advocacy, court oratory, and time-honoured irrationalities based on fallacious modes of thought ([21]). It has been a constant problem for both philosophers and lawyers to delimit what actually *does* carry conviction from what *ought* to carry conviction or, in other words, to delimit the art of persuasion from the science of *proper* persuasion ([22]). There is a delicate commerce between both activities of the mind and tenuous but important links. What lawyers have learnt from philosophers and what philosophers may have learnt from lawyers in this area requires a constant overhaul and replenishment in the light of the advance of thought in both fields. The contemporary surge of interest and parallel developments in the theory of argumentation in both philosophical and juristic writings, and the increased mutual awareness of each other's problems, ([23]) promise increased insights and expanded knowledge beneficial to both philosophers and lawyers. The mutual referrings of the respective problems ([24]) are a sign of the genuinely dialectical nature of the kind of thought in question, which advances towards and approximates to what is true, right, or good through encounters of minds preoccupied, in integrity, with essential matters of human concern.

([21]) See J. STONE, *The Province and Function of Law* (1946) ch. 7 for fallacies in legal reasoning. But see K. N. LLEWELLYN, *The Common Law Tradition Deciding Appeals* (1960) 19-61 on major steadying factors in the United States appellate courts. And see W. FRIEDMANN, «*Legal Philosophy and Judicial Lawmaking*» (1961 61 *Columbia Law Review* 821, at 839-841) on limits of judicial lawmaking.

([22]) See, for example, L. RECASÉNS SICHES, *Nueva Filosofía de la Interpretación del Derecho* (1956), chs. 2 and 3.

([23]) See PERELMANN & OLBRECHTS-TYTECA, *op.cit. supra* n. 13, WISDOM, article cited *supra* n. 16, and S. TOULMIN, *The Uses of Argument* (1958), representing philosophers and VIEHWEG, *op.cit. supra* n. 13, RECASÉNS SICHES, *op.cit supra* n. 22, and N. BOBBIO, «*Sul Ragionamento dei Giuristi*» (1955) 1 *Rivista di Diritto Civile* 3, representing lawyers.

([24]) We must note, however, that what is happening in this field is sometimes a mutual *relegating* of the task of articulating how we think, so that the philosopher thinks that the lawyer has the answer and the lawyer thinks that the philosopher has the answer. This creates the situation that the ball is simply tossed back and forth between the two players with the result that neither of them has a chance to run with it.

III

The first common ground that has emerged from the intellectual concern with non-stringent but still cogent reasoning is that it is an area of the operation of the reasonable. It is neither an arena for the brute thrust and parry of arbitrary assessments, nor an aery cloudscape for freesoaring flight of revelation or inspiration. It is governed by principles and methods. Reveries, flashes of illumination, or hunches ([25]) may play their part here, but they become significant only if they can be placed into the moulds of principles and methods of reasoned thinking.

What then are these principles and methods ? In answering this question we have to consult human experience in the area of non-stringent but still cogent thinking. First, it is to be noted that there are forms of inference which do not provide proof in the strict logical sense but serve for proof in an extended sense, establishing what is acceptable as sufficiently probable, plausible, or tenable for given purposes in an appropriate argumentative situation and in an appropriate context of reasoning and within an appropriate circle of reasoners. Examples of these forms of inference are inductive reasoning, *argumentum a simili,* and *argumentum a fortiori* ([26]). All of these fall short of the standards of strict deduction, but all of them lead to logically possible results of inference and are reputable in such important regions of human activities as science, law, and morals.

Secondly, it is to be noted that the reasoning in question employs premisses which fall short of the generally accepted standards of certainty in the given matter. That is to say, they do not fully satisfy the criteria of truth, or of validity, or — to employ a covering term — of *tenability* which they are expected to satisfy, but, on the other hand, they are not completely out of keeping with them either. Among such premisses are, for example, working hypotheses of

([25]) Intuition does not stand in a relation of coimplication with reasonableness. For, as Perelman has righty observed, «l'intuition peut aussi être l'intuition d'un fou» (see *Bulletin,* cited *supra n.* 17, at 40), and of course a foolish intuition of a fool.

([26]) See PERELMAN & OLBRECHTS-TYTECA, *op.cit. supra* n. 13, at 251-350; G. KALINOWSKI, «*Interprétation Juridique et Logique des Propositions Normatives*» (1959) 2 *Logique et Analyse* (N.S.) 128, at 135-137; A. G. GUEST, «*Logic in the Law*» published in A. G. GUEST (ed.), *Oxford Essays in Jurisprudence* (1961) 176, at 188-193.

science (that is, hypotheses serviceable in science but still awaiting verification), various moral and legal principles which may be self-evident to many people but are nevertheless challengeable by reasons deserving attention, and political party platforms ([27]).

Thirdly, it is to be noted that the reasoning in question employs thought-formations which fall short of the standards of precise formulation, but which are still capable of conveying ideas by way of intimation, adumbration, or broad indication. Such formulations rely on the «hinting», evocative, or soliciting function of language ([28]). Examples of this kind of formulations are the Golden Rule, the Categorical Imperative ([29]) dicta of the pre-Socratics, and many sayings of existentialists ([30]).

The technical term for organised thoughts which fall short of requisite standards of tenability or elaboration but which are still usable and useful in reasoned thinking as «seats» or even (perhaps) «sees» of argument is the Greek word «*tópos*». Etymologically it means «place» and is rendered by the corresponding words in other languages (e.g. by «*locus*» in Latin, by «*lieu*» in French and by «*Ort*» in German). The idea for which expression is sought through these words is that a *tópos* is a location of thought which accommodates arguments but which does not constitute a fully or firmly determined or determining ground of reasoning. There can always be some element of doubt, some challenge in relation to *tópoi*; conflicting interpretations and evaluations of them are a matter of course. «*Tópoi*» thus conceived are an arena of value judgments. There is a great variety of names under which *tópoi* are presented: sometimes they may be called «propositions», sometimes «canons», «tenets», «principles» (or «general principles»), «*dicta*», «conceptions», «ideas», «doctrines», etc. ([31]).

([27]) Cf. J. DEWEY, «*Logical Method and Law*» (1924-25) 10 *Cornell Law Review* 17, at 23-27.

([28]) See M. HEIDEGGER, *Unterwegs zur Sprache* (1959) *passim* devoted largely to reflections on this function of language.

([29]) Cf. BAIER, *op.cit. supra* n. 15, at 25, who says that «categorical imperatives are almost wholly empty», but proceeds to show that they are not altogether empty.

([30]) A striking example of those is Heidegger's interpretation of the Japanese esthetic term «*iki*» referring, as one may gather, to loveliness that is expressed through material embodiment of an artistic idea, as «the wafting of silence of luminous delight» («das Wehen der Stille des leuchtenden Entzückens»). See HEIDEGGER, *op.cit., supra* n. 28, at 141.

From the above described character of *tópoi* it follows that reasoning operating with them is subject to hazards. These hazards permit reasoning to slide into what is sometimes called «rationalisation», or into quibbling or mere arguing. Simply looking away from these hazards is not a way of dealing with them; this is liable to lead us to sterile rationalism or abject dogmatism ([32]). An argumentative discipline which would reduce or even remove the hazards of reasoning operating with *tópoi* is achieved through observance of principles of reasoning which have crystallised in human experience in essential areas of human activities requiring good argumentative behaviour. We shall briefly consider some of these principles.

A *tópoi*-orientated universe of discourse is an open and fluid universe of discourse. There can be no *tópoi* which would close argumentation definitely, but there may be well-established grounds of reasoning which, even though capable of abandonment or modification, deserve to be examined, acknowledged, and acted on. These grounds of reasoning can be rejected only if stronger overriding reasons become available ([33]). Although the universe of discourse in question is not governed by the requirements of self-consistency, independence, compendence, and decidability mandatory in axiomatic systems, some general standards of organisation of thought should be observed also here. Thus the reasoner must take care that his grounds of reasoning are not unnecessarily overlapping, redundant, irrelevant to each other, or mutually defeating. It is indispensable for disciplined thinking, where it operates with *tópoi* as elsewhere, that any step in reasoning be logically consistent with the argumentative steps preceding it. Wherever non-stringent («quasi-logical») forms of reasoning are employed in *tópoi*-orientated universe

([31]) The concept of *tópos* here adopted being rather wide is Ciceronian rather than Aristotelian. See CICERO, *Topica*, I, 8, and for contraposition of the mediaeval (following Cicero) and the Aristotelian concepts of *tópoi* see GIULIANI, *op.cit., supra* n. 13, at 143. On the concepts of *tópos* see generally PERELMAN & OLBRECHTS-TYTECA, *op.cit., supra* n. 13, at 112-132.

([32]) The theory of argumentation as conceived by Perelman is designed to avoid these dangers. Repeatedly he has said that it imports a break with the conception of reason and reasoning springing from Cartesian rationalism. See, for example, PERELMAN & OLBRECHTS-TYTECA, *op.cit. supra* n. 13, at 1. See also Ch. PERELMAN, «*Jugements de Valeur, Justification et Argumentation*» (1961) 4, *Revue Internationale de Philosophie* 327, at 327.

([33]) *Cf.* PERELMAN, in *Bulletin* cited *supra* n. 17, at 13, on the limits of the admissibility of doubt in argumentation.

of discourse, the reasoner must make sure that in the given area of discourse these forms are appropriate and respectable. In special universes of discourse operating with *tópoi,* special rules have been developed which impose limits and restraints on argumentation through exclusion of certain arguments (34).

The lack of precision which is often attached to formulations of *tópoi* is to some extent remedied by consideration of the common and special usages in which these formulations occur. If these are taken into account, the *prima facie* lack of precision that seems to be there may disappear altogether for practical purposes. It is to be noted that in thus taking account of the usage in which a given *tópos* is set, it is not always possible to provide reformulations in an absolutely clarified language. Often all that can and need be done is to avail oneself of the «hinting» or intimating or evocative function of language which produces an apprehension of what is meant by a certain word, phrase, or sentence in an appropriate range of addressees (35).

Reasoning operating with *tópoi,* to be a disciplined thinking, is bound to time, place, language, profession, education, etc. A fair amount of sameness, similarity, uniformity, or unity of these is required to avoid the hazards of the reasoning in question. In view of the absence of these in many important argumentative encounters, it is no wonder that argumentation gets out of hand, and indeed the reason why this does not happen even more frequently is probably to be found in factors such as common intensely felt needs making people anxious to cooperate with each other, leading to increased efforts to understand each other, and producing instinctive restraints in argumentation and intelligent guesses at what is in issue (36).

(34) A good example of these are the procedural rules relating to the admissibility and exclusion of evidence. As a classical example see also the Hermagorean «centres of argument» theory discussed by GIULIANI, *op.cit. supra* n. 13, at 55-62.

(35) *Cf.* Y. BELVAL, «*Libres Remarques sur l'Argumentation*» (1961) 4, *Revue Internationale de Philosophie* 336, at 339-341.

(36) When difficulties are met in these situations, the proper direction of efforts to avoid and remove them is to make the common needs of reasoners intensely felt — to seek what is fundamental to all participants as commonly human and to build on these thoughts by steps of reasoning which would be simple and lucid in the given circle of reasoners. It is the presence of common needs intensely felt that has made it possible in many areas of international action to reach agreements between otherwise antagonistic

Reasoning operating with *tópoi* requires various mental felicities, the paramount or most embracing of which is cognitive, emotive, and conative integrity. Among the qualities more particularly required are tact, moderation, circumspection, attentiveness, penetration, gentleness and calmness of spirit, readiness to reconsider, empathy, and others commonly linked with the wise or regarded as high standards of genuine scholarship ([37]). This kind of reasoning ultimately relies on insights of which authentic human consciousness is expected to be capable. It is ultimately based on the faith that man, even though largely an unreasonable being, is still a reason-*able* being, that is, a being capable of finding out and doing what is necessary for his survival and for his worthwhile existence ([38]). Mental disturbances and deficiencies, mental conditioning through adverse life experiences or through indoctrination, and prolonged dwelling in ignorance make multitudes incapable of reason. However, perhaps we may speak even of them as of potentially reasonable beings who could be helped to insights required in their stations and roles of life by the «*maieusis*» of capable and responsible fellow-men and through the knowledge or understanding which science and philosophy may be able to make available about human sanity and «unsanity».

IV

What was said in the first section about the idea of the rule of law suggests that this idea can be viewed as a *tópos*. What the idea imports is eminently a matter of evaluation. It can be challenged in

Powers, the law resulting from these agreements proving to be not mere «law in the books» but «the law in action». This is one of the leading themes in Wolfgang Friedmann's current thought on international legal affairs. See, for the present, W. FRIEDMANN, *Law in a Changing Society* (1959), 475-481.

([37]) On the integrity of the reasoner as a precondition of proper argumentation see, for example, BELVAL, article cited *supra* n. 35, at 347. *Cf.* E. W. PATTERSON, «*Logic in the Law*» (1940-41) 90 *University of Pennsylvania Law Review* 875, at 894 and H. W. JOHNSTON, Jr., *Philosophy and Argument* (1959) 123-137.

([38]) This faith is basic to the Socratic maieutic method, and it can be found to go through the mediaeval and modern philosophy like a golden thread.

reliance on the principles of socialist legality ([39]) and various conflicting natural law positions. Its worth is debatable on utilitarian grounds and on the grounds of political wisdom. It is an arena of conflicting views even as such; for what «the rule of law» precisely means is still an undecided matter even in the tradition of thought in which the idea has arisen. All these features give a certain status to the «rule of law» idea in reasoning; they do not constitute sufficient reason for dismissing the doctrine altogether as useless for reasoned thinking or discarding the idea as a misconception. It may still provide a string for important themes of thought that can be tuned to disciplined thinking; it can still be a «place» which if properly surveyed can lend itself to the drawing of proper arguments.

When we try to take a closer look at the «place» of argument ([40]) that is the «rule of law» idea, the first thing that is likely to draw our attention is the name of this idea. It would be worthwhile to inquire what is the lexical and grammatical meaning of the phrase «the rule of law». An answer to this question would help us to see what the phrase is likely to convey when it meets the ears or the eyes of a stranger to the tradition from which the idea has emerged. In taking this line of inquiry, we may first ask, How do the two words and notions «rule» and «law» relate to each other? Grammatically, there are two possibilities: one that the linking word «of» constitutes *genitivus subiectivus* and the other that it constitutes *genitivus obiectivus*. According to the former interpretation, the phrase in question can be rendered as «the law's rule», whereas according to the latter interpretation the idea conveyed by the phrase would be parallel to phrases such as «administration of law», «violation of law», and «school of law», that is, law is the object of the activities mentioned by these words. The appropriateness of these interpretations cannot be decided, of course, on purely lexical or

([40]) It has been emphasised by John Henry NEWMAN, *Gramar of Assent* given in the Soviet *Juridical Dictionary* (*Yuridichesky Slovar*) (2nd ed. 1956) vol. II, p. 196, quoted in English translation by MARSH, article cited *supra* n. 6, at 261. On *the Socialist Legality* v. *the Rule of Law* see generally *ibid.* 235-240.

([40]) It has been emphasised by John Henry NEWMAN, *Grammar of Assent* (1870) (Image Books edition 1955, which is here cited) 32-35, that in the area of thinking here in question close apprehension of the terms of propositions is of decisive importance. Formal logic can faultlessly be conducted without having any idea what the terms involved mean, but not *tópoi-orientated* reasoning.

grammatical grounds. If we take into account the historical fact that the «rule of law» idea has been conceived of as a guiding principle of the application and development of law, we may say that to understand the phrase as «the law's rule» is quite appropriate. However, the contexts in which the phrase «the rule of law» has been used make the second interpretation also plausible. For they seem to suggest that law is considered to be an object of some sort of rule, for example, of the rule of justice, of the rule of decency, or of the rule of reason. Hence it appears that the indeterminacy or ambiguity of the phrase «the rule of law» springs even from its grammatical construction ([41]).

Directing our attention to the word «rule» in the phrase in question, we are confronted with the following lexical meanings of this word: a directive, precept, or guide of behaviour; a uniform or regular or established course of events; a reign, dominion, or sway of something. All these semantic possibilities have at least some significance in the context of our present concern. For it can be said that «the rule of law» conveys that law is or ought to be an object for a guide of behaviour or for a precept or a directive. It can also be said that there is or ought to be an established, regular, or uniform process that is law. And it can be said that there is or ought to be a sway, dominion, or reign of law — in short: legality. These significant semantic possibilities compound ambiguities of the phrase «the rule of law» already appearing due to the amphiboly of the word «of».

The double indeterminacy or ambiguity of the phrase in question is further compounded by the notorious indeterminacy and ambiguity attached to the word «law» not only in general but also in juristic and jurisprudential language ([42]). This is so not only because there is no generally accepted formulation of the definition of law but also because there is a deep uncertainty as to what does properly belong to the range of entities denoted by the concept «law». The principal problem in the present context is whether «law» as occurring in the phrase «the rule of law» refers to the system of authoritatively enacted directives regulating the behaviour of a given social group, or whether it refers also and beyond that to directives which

([41]) In certain contexts the phrase means the same thing as is denoted by «legal norm». This meaning would be, however, obviously inappropriate in the contexts of our present concern.

([42]) See J. Stone, *«Meaning and Role of Definition of Law»* (1963), Beiheft No. 39, *Archiv für Rechts- und Sozialphilosophie*, 3-34.

in some sense are considered basic, fundamental, or unrenounceable to it.

Having considered the linguistic aspect of the «rule of law» idea, the next source of enlightenment to which we have to turn is the history of the idea. As with most of the ideas constituting great contemporary concerns, the «rule of law» idea, too, has its origins in classical antiquity. A sublime testimony to what the idea appears to contain was given by Socrates when he chose the cup of hemlock rather than an escape into freedom, in order to uphold the authority of the laws of his *polis*. Aristotle, too, seems to have been addressing himself to this idea when he said: «It is more proper that the law should govern rather than any of the citizens», that those who rule the community «should be appointed only guardians and servants of the law» ([43]), and that «it is of great moment that well-drawn laws should themselves define all the points they can and leave as few as may be for the decision of the judges» ([44]).

In English history, the idea of the supremacy of law as expressed by Aristotle can be found in Magna Carta, in the famous words of Bracton that «the King is not subject to man, but to God and the law», and in Sir Edward Coke's use of both ([45]). And John Locke, in words of great historical significance both in England and in America, seemed also to be directing himself to the «rule of law» idea: «Freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it: and not to be subject to the inconstant, unknown, arbitrary will of another man» ([46]).

On the treshold of contemporary learning on the rule of law there stands A.V. Dicey's still much discussed statement of the three «distinct though kindred conceptions» of which this idea is made up. The first of these is that no man is punishable except for a breach

([43]) See ARISTOTLE, *Politics*, 1287a.

([44]) See ARISTOTLE, *Rhetorics*, I, i, 354a.

([45]) See BRACTON, *De Legibus et Consuetudinibus Angliae* (mid 13th century) fol. 5b. *Cf.* the magnificent passage on fols 107a-107b. See also COKE's use of the Bractonian dictum in the case of *Prohibitions del Roy* (1608) 12 Co. Rep. 63, and Roscoe POUND's suggestion (in his *The Spirit of the Common Law* (1921) 182-3) that there is an underlying common element, namely *reason*, in both this Bractonian idea of the supremacy of law and the English doctrine of precedent (for which Bracton also laid the first foundations).

([46]) See LOCKE, *An Essay Concerning the True Original. Extent and End of Civil Government.* (1660) s. 22.

of the law, established in the ordinary legal procedures. In this sense the rule of law idea rejects «wide, arbitrary or discretionary powers of constraint». The second of these is «equality before the law», by which Dicey means equal subjection of all classes of people to the ordinary law of the land administered by the ordinary courts. The third of these is that such general principles of the constitution as the fundamental rights of the citizens to personal liberty, or freedom of speech and public assembly, are derived from decisions of the ordinary courts on the ordinary private law ([47]).

The most authoritative contemporary expositions of the «rule of law» idea are to be expected from the proceedings of the conferences of the International Commission of Jurists, an international body composed of judges, practising lawyers, and teachers of law, whose work is mainly dedicated to the universal acceptance of the principles of the rule of law and to exposing and denouncing all violations of them ([48]). In its Act of Athens, the rule of law is stated by the Commission as springing «from the rights of the individual developed through history in the age-old struggle of mankind for freedom; which rights include freedom of speech, press, worship, assembly and association and the right to free elections to the end that laws are enacted by the fully elected representatives of the people and afford equal protection to all». The Commission adopted the following solemn declaration as to the fundamental principles of the rule of law:

1. The state is subject to the law.
2. Governments should respect the rights of the individual under the Rule of Law and provide effective means for their enforcement.
3. Judges should be guided by the Rule of Law, protect and enforce it without fear or favour and resist any encroachments by governments or political parties on their independence as judges.
4. Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law and insist that every accused is accorded a fair trial ([49]).

([47]) See A. V. DICEY, *The Law of the Constitution* (9th ed. 1933) 188, 193, 195, 202-203.

([48]) See *Act of Athens,* published in November 1955, No. 3 *Bulletin of the International Commission of Jurists* 3.

([49]) See *ibid.*

In its New Delhi Congress, which took place in January 1959, the Commission reaffirmed the principles of the Act of Athens and recognised that

> the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society but also to establish social, economic, educational, and cultural conditions under which his legitimate aspirations and dignity may be realized... ([50]).

Various Committees of the Congress worked out in considerable detail the standards to which law ought to correspond in order to fall under the «rule of law» idea ([51]).

V

One thing that clearly emerges from the history of the rule of law is that it condemns arbitrariness ([52]). However, what precisely arbitrary political action is has not found a clear formulation even in the common law legal and political tradition ([53]). It may be thought that arbitrariness is incompatible with lawfulness: what is

([50]) See (1960) 38 *Canadian Bar Review* 248.

([51]) See *ibid.* 249-257.

([52]) *Cf.* the English *Report of the Committee on Administrative Tribunals* (1957) Cmd. 218. The Franks Committee said: «The rule of law stands for the view that decisions should be made by the application of known principles of laws. In general, such decisions will be predictable, and the citizen will know where he is. On the other hand, there is what is arbitrary. A decision may be made without principle, without any rules. It is therefore unpredictable, the antithesis of a decision taken in accordance with the rule of law». *Cf.* also FRIEDMANN, *op.cit., supra* n. 36, at 492.

([53]) For example, Dicey's attempt to give a content to it is not based on a consensus even of common lawyers and must be considered unsuccessful even in view of the political and legal realities not only in the United States (where fundamental rights of the citizens have been expressed and secured in a written constitution) but also in his own country (where administrative law has become a well established and approved part of the legal system). See FRIEDMANN, *op.cit. supra* n. 36, at 490; W. FRIEDMANN and D. G. BENJAFIELD, *Principles of Australian Administrative Law* (2nd ed. 1962) 19-22. For criticism of Dicey's conception of the rule of law from the standpoint of the International Commission of Jurists see J. T. THORSON, «*A New Concept of the Rule of Law*» (1960) 38 *Canadian Bar Review* 238, at 240-242.

lawful cannot be arbitrary. But this is a view by no means shared by all legal thinkers. That there have been arbitrary *laws* in the sense of their being outrageously unjust or tyrannical is what many lawyers would say. At any rate, historical as well as contemporary conceptions of the rule of law show in important instances that lawfulness is not the main thing imported by «the rule of law». Thus Bracton speaks of the subjection of the King to God *and* the law and the International Commission of Jurists has taken great pains to expose the vileness of many existing laws in some parts of the world and has formulated standards according to which such laws should be judged and replaced.

The «rule of law» idea is curious in that it contains in itself an affirmation and a negation which conflict with each other and thus create a tension within the idea itself. For by it fidelity to the existing law is stressed, but at the same time this law is challenged in the name of certain standards to which all law ought to conform (54). The idea is also curious because it is normative and descriptive withal, importing «an ideal as much as a juristic fact — an *ought* as much as an *is*» (55). The descriptive aspect of the «rule of law» idea represents the quintessence of the Anglo-American constitutional practice whereas its normative aspect offers standards for this practice.

Among the terms in which a specific content has been sought for the «rule of law» idea in its history, there occur «equality» (56) «liberty», and «human dignity». All these have proved to be words of evasive meaning, hard to formulate in definitions, and if so formulated, their definitions have not been able to secure any general assent. Even the requirement of the ultimate control of government by the people, nowadays usually linked with the «rule of law» idea, can be regarded as providing only a battleground for various political conceptions as to who precisely makes up the people and in what form the control ought to be exercised by the people (57).

(54) *Cf.* W. FRIEDMANN, *The Planned State and the Rule of Law* (1948) 7.

(55) See B. SCHWARTZ, *Law and the Executive in Britain* (1949) 11. See also Norman MARSH' pungent comment on these two aspects of the «rule of law» idea: «... in so far as the Rule of Law purported to be a statement of fact it was untrue and in so far as it expressed a value-judgment it was unsound» (article cited *supra* n. 6, at 223).

(56) For a good discussion of «the equivocal position of equality» see MARSH, article cited *supra* n. 6, at 245-248.

(57) *Cf.* FRIEDMANN, *op.cit. supra* n. 36, at 491 ff.

These dificulties do not mean, of course, that the history of the «rule of law» idea leaves us exactly where the linguistic analysis of the phrase «the rule of law» left us. In various sayings relating to this idea, something that serves as some *précisation* of it still comes forth. Thus Locke's view that men should not be subjected to «the inconstant, unknown, and arbitrary will of other men» can still be regarded as a common ground in Anglo-American civilisation, «arbitrary» here meaning what is whimsical, capricious, or patently unreasonable. Further, if Bracton's saying is «de-theologised» by replacing the word «God» with the word «reason», it still commands wide support. Moreover, as was already indicated above, an important negative finding results from the consideration of the history of the «rule of law» idea: this idea, even though it demands a respect for the law, does not require unconditional subjection to everything that passes the tests of legality ([58]).

The above quoted sayings of Aristotle and Locke and ultimately the pronouncements of the International Commission of Jurists bring out the ideological content of the idea in Western civilisation. It has been rightly observed that in view of this, «it is no easier to give an unchanging and absolute content to the «rule of law» than to the concept of 'natural law'» ([59]). This ideological content does not deprive the idea of scholarly status. For natural law, or let us rather say, reasonable law, can also be argued for in a scholarly manner — in a manner within all dignity of learned minds. There are above all two things which the ideological content of the «rule of law» idea imports. First, it relegates the precise determination of itself to the communities or civilisation areas in which elaborations of the contents of the idea may be given as the so-called «living law», as moral convictions, or as prevalent «*de facto* claims» of the people. Secondly, it relegates the precise determination of the idea to the realm of «fundamental justification» in which everything that is invoked or is contended for becomes subject to radical questioning and in response to this questioning everything becomes subject to

([58]) It may be even said that revolutions are conceivable in the name of the rule of law, likewise there can be «*des hommes revoltés*» or «*Überzeugungsverbrecher*» whose actions are justifiable on the grounds of the rule of law.

([59]) See FRIEDMANN & BENJAFIELD, *op.cit. supra* n. 53, at 17. For a discussion of the relation between the «rule of law» idea and natural law ideas see Marsh, article cited *supra* n. 6, at 233-4, and references there given to the work of the Chicago Colloquium on the Rule of Law.

explication, elucidation, clarification, and integration to the utmost possible limit of our rational endeavour.

Even a cursory look at the «rule of law» idea as expounded by historical and contemporary thinkers shows that this idea has been developed in order to counteract the plenitude of power which the State tends to assume over the individual ([60]). It thus pertains properly to the relations of the individual to the State-Leviathan, and only secondarily to relations of individuals *inter se*. Historically, the idea has not been developed at all in awareness of or in reference to the relations of the States among themselves under the classical or contemporary international legal system. Attempts to transpose the idea to the field of international law would entail truncating it of much of its contents, the remaining part being apparently only the principle of legality. If the doctrine of human rights linked with it is to be retained, this could only be regarded as imposing an international obligation on States to respect these rights with regard to individuals under their power. As to the relations of the States *inter se,* the acute contemporary problem is not an oppression by the international legal order of independent States but, on the contrary, the licence which these States still have under the present world law, which besides is alarmingly obsolete and falling alarmingly short of minimum ethical standards in some respects. If the idea of protection to be extended to individuals contained in the rule of law idea is to be implemented or, in other words, duties correlative to the rights flowing from idea should be given recognition, this would in fact lead to postulating a requirement for world organisation of a *Civitas Maxima,* a political organisation which would not be governed by international law at all but by a kind of State law. This implication, whether seen ([61]) or not, has not been intended by most

([60]) In the setting of the British constitutional history, the «rule of law» idea has provided a counterbalance to the principle of Parliamentary sovereignty. It was «the restraining factor which in England had prevented the theory of sovereignty, as expressed in the supremacy of the King in Parliament from destroying the liberties of the subject». See MARSIL, article cited *supra* n. 6, at 227.

([61]) This implication has been seen, for example, by Sir Leslie MUNRO. See his address cited *supra* n. 2, at 251. It may be noted that there is, of course, no linguistic obstacle to stretching the meaning of the phrase «the rule of law» so that it would become applicable also to international relations. Such stretching would lead, however, to absurdities with «*Rechtsstaat*» and «*estado de derecho*», which are Continental and Latin American names for doctrines corresponding to the Anglo-American doctrine of the rule of law.

advocates of the rule of law in international legal relations. At any rate, it could not be intended as long as the frame of reference of the discussion of the rule of law is to remain *international* law.

From these considerations it follows that the launching of the «rule of law» idea on the rough seas of international legal debates involves heavy intellectual commitments. We must be prepared when we speak of this idea to enter into the realm of fundamental justification in encounters with minds with whom we do not share many relevant fundamental convictions; and we must find a content for the «rule of law» idea which will make sense if the idea is applied to international legal relations. That we are properly equipped and manned to meet these commitments in our international encounters may be doubted. Discussions of matters of ideological implication have, indeed, often eventuated on a high oratorical level, but seldom on a fully satisfactory scholarly level. But even so, full awareness of these commitments is helpful. At the least it directs our attention to the need for restraint in international exchanges in which «the rule of law» is invoked, and to the need for further studies to increase the intellectual assets which we shall need if we are to be equal to the tasks imposed by these exchanges.

VI

When the ask what the intellectual and moral equipment required for our international legal encounters on ideological matters may be, it appears that our minds may be less handicapped in such encounters if we abandon the phrase «the rule of law» altogether when we want to bring what can reasonably be meant by it into the discussion. The above considerations on the meaning of this phrase suggest that the word «law» as it stands in the phrase is at least misleading. The thought for which expression is sought through «the rule of law» would be much more appropriately rendered by «the rule of reason relating to law». To abandon the current phrase

(62) As regards particular principles advocated under the rule of law heading, some of them require a lot of factfinding and thought before they can be unqualifiedly advocated for the entire world. Thus the requirement of representative government advocated as an essential part of the rule of law by the International Commission of Jurists (see Document cited *supra* n. 50, at 249) may be challenged in some circumstances. Perhaps such governments are luxuries which many new States cannot yet afford. What they really need for a while are charismatic leaders.

would be wise also because its use in international encounters is somehow offensive: it creates the impression of crusading with slogans precious in one part of the world against other parts of the world in which other slogans have become precious ([62]). To use the phrase «the rule of reason relating to law» would mean clear acceptance of the commitment to argue with full openess of mind instead of being fettered by shackles of the glory or shame of our political past.

It may be questioned whether any step towards clarity has been achieved by substituting the word «reason» for the word «law» in the phrase under consideration. This substitution may look very much like seeking light for *obscurum per obscuriorem*. However, this is not quite so. There may be indeed little (if any) gain in the *clarity of the statement* of the problem; but what this substitution does achieve is a transposition of the *setting* of the problem to an area where it more appropriately belongs, in other words, to a more fitting «place» of argument. This different *tópos* presents partly the same problems as we saw when discussing what the phrase «the rule of law» imported. But partly, this new *tópos* presents new problems specific to it, springing from the notion of reason. As to the former, what has been said above about the ambiguities springing from the words «of» and «rule» is relevant also here. As to the latter, what has been said above about reasoned thinking in general finds application in the elucidation of the notion of reason. In taking this into account, some additional remarks still need to be made towards rendering more reasonable the use of the word «reason» for the present purposes.

It is true that in common parlance as well as in specific learned universes of discourse such as the juristic universe of discourse, the word «reason» is scarcely less ambiguous, scarcely less indeterminate than the word «law». However, in all of them the notion «reason» is no less dispensable, no less renounceable than the notion «law». What has been called «reason» is «as old as the hills», has always been involved where sound-minded men have been engaged in good faith in serious argumentation. It has often been «buried and frivolously despised» but «has always to be acquired anew and can never be consummated» [63]. If nothing else can be said towards its delimitation, we can say that reason imports what is widely and persistently considered reasonable by competent and learned men abiding by established rules of reasoning.

([63]) See K. JASPERS, *Vernunft und Widervernunft in unserer Zeit* (1950) 9.

In its wide and often indiscriminate use, the word «reason» has become a «well-worn and misleading term» ([64]). Accordingly, it has been used to refer to «the power *to work out*» but also to «the power to 'see', the answers to certain questions» ([65]). It has also been conceived as a moderator of our intellections and as a supreme censor of our evaluations ([66]). It has been considered to lie «in the people's *acquired respect* for reasons», ([67]) being thus time and place bound, but also as being «ever on the wing» ([68]), and as such transcending all here-and-now situations ([69]).

Taking note of these and many other findings about reason does not defeat «reason» in its broad and rather indefinite sense as an unreasonable notion but brings out its pre-eminent *tópos*-character. Such findings may suggest that «reason» cannot be conceptualised, although within its «place» specific concepts such as «rationality» and «intellect» can perhaps rigorously be elaborated ([70]). Beyond and above these we still need to speak of a wider expanse of reason into which we can collect our rational or intellectual insights and within which we can find supports for them and for our intuitive holdings, and from which we can venture ascents to what may not yet be considered reasonable but what has a reasonable chance to be so considered in future ([71]).

In conceiving the problem of the rule of law in international legal relations as the problem of the rule of reason relating to international law, it is to be borne in mind that the problem of the rule of reason in general and in its applications to any particular field such as law or international law falls clearly within the scope of the theory of argumentation. For, as was indicated earlier in the present essay, the object of this theory is to provide principles and methods by recourse to which what is reasonable, that is, what reason would allow, can be shown to be worthy of consideration or acceptance.

([64]) See *ibid.* 45.

([65]) See BAIER, *op.cit. supra* n. 15, at 148.

([66]) See J. STONE, «*'Reason' and the Time-Dimension of Knowledge*» (1962) 58 *Archiv für Rechts- und Sozialphilosophie* 95, at 96, 99.

([67]) See BAIER, *op.cit. supra* n. 15, at 148.

([68]) See G. SANTAYANA, 5 *The Life of Reason* (1906) 308.

([69]) See STONE, article cited *supra* n. 65, at 99.

([70]) *Cf.* A. R. Blackshield, «*Empiricist and Rationalist Theories of Justice*» (1962) 58 *Archiv für Rechts- und Sozialphilosophie* 25, at 82.

([71]) *Cf. ibid.* 84.

In reliance on these principles and methods we shall make some exploratory steps in an attempt to apply what Perelman has called «*la nouvelle rhétorique*» ([72]) to some problems harrassing those who are solicitous of the contemporary legal and political situation of the world.

An attentive look at the *tópos* «the rule of reason relating to international law» reveals that it is a capacious «place»; in it there is room for any good argument that bears on given international legal issue. These arguments are not only situated horizontally but also vertically; that is, they have a dimension of depth allowing for formation of axiological hierarchies. This *tópos* not being intended for use only by common lawyers or Western lawyers but by all international lawyers, discussion of it will have to reckon with the different parts of the world. Thus problems relating to the concepts of sovereignty, the nature and structure of the international legal order, and the meaning, scope, and relations of the sources of international law are raised in advocating or in defending one's arguments advanced in the name of the rule of reason in international legal relations.

As regards the principle of sovereignty, this has constantly and continuously been brought up by the Soviet lawyers in their encounters with the Western lawyers on the basic issues of international

([72]) This is an alternative name which Perelman and Olbrechts-Tyteca use for the theory of argumentation. See, for example, the title page of their *Traité de l'Argumentation* cited *supra* n. 13. This name finds a justification in the fact that historically the theory of argumentation has been developed mainly in works on rhetorics. However, objections may be raised against the term on the grounds of the contemporary use of the word «rhetorics» which brings associations with oratory to prominence. This may be a place to query also whether Perelman's conception of logic as wider than what is called «formal logic» (so that «logic» would embrace also non-stringent reasoning) is fortunate in view of the contemporary learned usage of the word «logic». In many argumentative situations it would be handy to hold against one's partner in reasoning that he has made a logical error in his reasoning, meanings what may be clumsily expressed by the phrase «formal-logical error». The reproach: «Your statement is illogical» would normally be understood in learned circles as meaning that something is the matter with it from the formal-logical point of view. For Perelman's concept of logic see his article «*Logique Formelle, Logique Juridique*» (1960) 3 *Logique et Analyse* 226-230.

law ([73]). It is one of those chthonic legal and political concepts which govern the intellect from the underworld of the mind because of its obscurity and inscrutability derived from certain inbuilt puzzles productive of logical paradoxes ([74]). Wherever this principle becomes significant in argumentation, it is essential to see that it is not construed, as the principles of the sovereignty of God and of Parliament are ordinarily construed, in a way which will lead to logically correct but contradictory assertions. The proper argumentative behaviour in the face of an invocation of this principle is a radical questioning which would expose its logical nature and thereby any confusion or bad faith involved in invoking it, and which would force its advocates to clarify what they are asserting — compelling them to stand on one of its logical implications, and debarring them from standing also on its contradictory implications when these would suit them better in the given occasions. This «dialectical» behaviour in argumentation would do some good in making the ground of argumentation less slippery, avoiding logical slips and conscious double talk as well as unnoticed traps. For reasoners on international legal matters it would be conducive to alertness of mind and an antidote to somnolence.

As regards the nature and structure of the international legal order, a further question is essential. Is this order an absolutely flexible normative system allowing the production through appropriate modes of law-creation of norms which would abolish or modify any existing principle of international law ? Or is it at some point or points a rigid normative order built on a principle or principles which no law-creating procedure can legally affect ? It appears that sovereignty is a candidate for such a principle. If so, it may be argued, for example, that the United Nations Charter is illegal under international law and the law of the United Nations is not international law at all but a world legal system *sui generis* which has largely replaced and buried international law strictly so called in a legally discontinuous, in other words, in a juridically revolution-

([73]) For a recent example see United Nations General Assembly, Doc. A/C. 6/L.505 (p. 4) of 26 October 1962, for Czechoslovakian Draft Resolution on Consideration of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.

([74]) See I. TAMMELO, «*The Antinomy of Parliamentary Sovereignty*» (1958) 44 *Archiv für Rechts- und Sozialphilosophie* 495-513 and K. J. J. HINTIKKA, «*Remarks on a Paradox*», *ibid.* 514-516.

ary manner. Under the same heading it is also essential to make up one's mind, and to help partners in reasoning to make up their minds, whether the international legal system is logically closed or logically open ([75]). According to the former conception it is a gapless structure so that any problem arising under it would have a legally predetermined solution. Under the second conception it is a normative discretum with areas of no-law ([76]) to be filled in by norms resulting from appropriate law-creative methods. Problems arising under these competing conceptions have an obvious bearing on the concept of legality inevitably emerging from discussions on the rule of law in international relations. Under the same heading important questions arise as to how to deal with unforeseen and unforeseeable situations still governed by legal norms not created to deal with them, especially how can we reasonably rely on the international law formed in the pre-nuclear age for dealing with the situations peculiar to the nuclear age.

As regards the meaning, scope, and relations of the sources of international law, discussion of the rule of reason in international legal relations raises above all the problem of whether international law can be regarded as emerging only from the reasonable will or agreement of the States or whether valid law can also result from a capricious, completely arbitrary, or outrageously unjust will or agreement of the States. If we allow a part to reason in the formation of international law, what scope could we give to it if the word and notion «reason» itself becomes an issue ? How can we ensure that absurdities when finding formidable advocacy will not have a chance to be presented in the name of reason ? If we accept the «general principles of law of civilised nations» or the «general principles of international law» as a source of this law, reasonableness as a con-

([75]) See I. TAMMELO, «*On the Logical Openness of Legal Orders*» (1959) 8 *American Journal of Comparative Law* 187, esp. at 200 ff. *Cf.* PERELMAN, in *Bulletin* cited *supra* n. 17, at 27 for a contrary view on this matter with which, for the reasons stated in the article here cited, the present writer cannot agree. For an extensive consideration and analysis of this problem in relation to international adjudication see J. STONE, «Non Liquet *and the Function of Law in the International Community*» (1959) 35 *British Year Book of International Law* 124-161. Stone's findings do not support the widely held view, shared by Perelman, that all legal orders must be regarded as «logically closed».

([76]) *Cf.* F. GOLDIE, «*Legal Pluralism and No-Law Sectors*» (1958-59) 32 *Australian Law Journal* 220, at 224-227.

stitutive element of international law becomes particulary significant. For unless we consider it sufficient to represent them by a set of vague or empty or ill-organised maxims, recourse must be had to most fundamental principles governing human cognitive, emotive, and conative behaviour. Under the same heading it may also be asked, What is the precise meaning and role of doctrines in international law ? International law is doctrine-ridden law from the time of its classical beginnings. They have often been formed to promote selfregarding interests of the States, but in many important instances they have also been formed to bring humanitarian ideals into State practice. Doctrines, often a nuisance, are in many important instances indispensable, as the mortar which holds the bricks of the building of international law together. In many cases they have become parts of international law satisfying the conditions of international customary law formation. But being products of intellectual as well as moral drives, they are corroded by the change of climate in these areas and are subjected to the need to be fortified by such support as the drive to actualisation of reason can contribute in a given historical situation. Their persistence and their evolution thus depends on argumentation as the main vehicle of bringing reason to rule.

VII

When the *tópos* «the rule of law in international legal relations» is considered in discussing the problems of international law, legal justification constitutes a most important problem complex within this *tópos,* though it is far short of exhausting this area. However emphatically «the rule of law» may mean the rule of reason relating to law, it still imports to some extent also what is legally justifiable. It stands to reason that it is our duty to obey the law, even in case of *dura lex.* The moral duty to obey the law can be challenged only in the name of its patent and outrageous absurdity and incompatibility with what we cannot help regarding as indispensable and overriding requirements of common good. Under the rule of reason, legal justification finds its limitation in the stuation in which a law which might have been quite reasonable some time ago has now become grossly obsolete due to changes in the circumstances in which it is to be applied, so that its strict application leads to disorder, chaos, mass destruction, or anything else that is generally felt as revolting. The principle of sovereignty as conceived in the nineteenth century

provides a good example here (77), likewise a part of the security system of the United Nations.

Accepting that legal justification is challengeable by more fundamental considerations, the question arises how this challenge is to be carried out so that it would be reasonable. Since it is generally accepted that we owe obedience to the law to the utmost limits of what can be accepted as reasonable, we must avail ourselves of all possibilities to give the existing legal provisions a meaning which would stand as reasonable. That is to say that before we enter into argumentation supported by fundamental considerations which would justify our disobedience to the law we should look for possibilities whereby what appears to be reasonable for us in the given case can still be asserted to be the law if properly understood. International law because of its ill-defined and unsettled nature in many respects offers such possibilities to a great extent, so that in many cases it is not necessary to submit ourselves to what appears *prima facie* to be the law in international relations. On the general level, the never fully rejected or discredited doctrine of *rebus sic stantibus,* as against the principle of *pacta sunt servanda,* offers an important ground of argumentation in this area, likewise the principle of *bona fides* as a fundamental principle of international law in appropriate cases. On the same level, the overriding consideration of legal interpretation according to which law is to secure justified interests and not what would appear from the strict letter of law could be pressed. This consideration — although it may still seem heterodox — could be shown to be a fundamental attitude to law of all civilised nations today, an attitude implicit in the administration of the law in Western as well as in Soviet countries.

To illustrate the present point by a particular matter emerging from the United Nations security system, it can be argued that in the present political situation of the world the Security Council is not performing its functions as intended by those who framed the Charter and as might be justifiably expected in our time. Even though institutionally still alive, the Council is functionally dead. It may even be contended that the Security Council has a legal *duty* to take action to assure peace and security of mankind, and that this duty is not being adequately performed. It can further be contended, in reliance on an *argumentum ad absurdum* (which has always carried

(77) *Cf.* an aphorism of Sir Anthony Eden expressed in 1945: «Every succeeding scientific discovery makes greater nonsense of old time conceptions of sovereignty», quoted by Sir Leslie Munro, article cited *supra* n. 2, at 251.

great weight among juristic reasoners), that an institution which is functionally dead, or not performing its duties in the most important instances, is not legally deciding anything at all when a resolution submitted to it is not carried because it is vetoed by one Power. For it is absurd to assume that what emerges from a Great Power veto in the voting procedure of the Security Council is a *decision* in the sense of law at all; it is rather an absence of such decision. Legal decisions in the matters upon which the life and death of nations, nay, of the world, may depend must come from somewhere else, namely from the procedures under traditional international law which the United Nations security system has replaced only by appearance but not in effect. It may also be contended in this context that traditional international law has continued to develop even in the era of the law of the United Nations, wherever the latter has not effectively replaced it. Thus new rules as to the beginning and the end of the state of war, as to the legitimate measures of reprisal, as to actions under legitimate self-defence, and the like may have been formed or be in formation.

What has here been said is only by way of indicating feasible lines of argumentation and conducting experimentation with ideas, not by way of putting forth assertions with dogmatic incontrovertibility. This kind of indication and experimentation is characteristic of thinking operation with *tópoi,* which is here paradigmatised by reference to the contemporary international situation. The tenability of these lines of argument can be assured only by constant challenge and counterchallenge of the thoughts advanced, testing them and so leading to their confirmation, appropriate modification, reformulation, or withdrawal. The basic demand that can and must be made of these lines of argumentation is that they must not be usable only to serve certain political interests in the given historical situation, but must be «universalisable», that is, they must be capable of serving continuingly the common good of humanity.

The course of argumentation according to which what appears to be *prima facie* legal is not in actual fact the law cannot be indiscriminately pursued without the arguments advanced sooner or later becoming hollow, shallow, false, and unconvincing. Points are reached in this argumentation at which the fundamental questions, What is a legal decision ? ,What is a legal duty ?, What is a good legal argument ?, and the like will be thrown up. And points are reached at which the reasoner must avow, in integrity, that here the law *is* such and such but this law is no more a law that *ought to be* obeyed. These are the points at which fundamental justifica-

tion flows into or overrides legal justification. There are instances in which what can still be shown to be valid as the law can be shown not to be valid by reference to considerations that must be regarded as higher than legality. In these instances it can be argued that the reasoning lawyer as a concrete human being ought to cease to be a man whose function it is to be a lawyer, because he ought not to be a «lawyer with a bad conscience» but a human being with a good conscience ([78]).

Fundamental justification which becomes thus thematic leads to difficult terrains of ethics in which there is today much obscurity, rough going, and confusion. Yet this does not mean that such a course of argumentation is necessarily impracticable even in the contemporary international situation in the encounters of Western and Soviet lawyers and statesmen, for there are common grounds on which this argumentation can move. Acceptance of the maxims that mankind ought to survive; that mass destruction of innocent people ought to be avoided; that starvation, disease, and crimes of violence ought to be done away with; and that the maxim *fiat iustitia pereat mundus* has a rank lower than *fiat iustitia ne pereat mundus,* can be regarded as universal among people we are entitled to regard as sane. Maxims like these, if they should still not carry apodeictic self-evidence, are at least safe «places» of argument from which it is possible to proceed or within which it is possible to find arguments for good faith, clear and well-organised reasoning, readiness to reconsider even one's inveterate convictions, and to play the authority of reason against the authority of men, books, and myths.

Fundamental justification of international legal matters raises problems of most fundamental character about human affairs. It reveals that there is often a tyranny of established patterns of thinking, feeling, and expressing over the movement of thought. How can we learn the art of conducting argumentation which has to struggle against these odds so that in doing right things we will be doing them also in the right way? Here rhetorics as an art and rhetorics as a philosophy and science must somehow be joined. Today it is no longer sure that the human race is adequately protected and fostered by subhuman and superhuman forces, which erstwhile were quite reliable guardians of it. The former seem to be gaining in a mindless control over man; the latter seem to have abandoned him.

([78]) *Cf.* The editor's (Erik WOLF) Preface to G. RADBRUCH, *Rechtsphilosophie* (5th ed. 1959) 11: G. RADBRUCH, «*Juristen - böse Christen*» (1916) 9 *Die Argonauten* No. 9.

What are the good grounds for believing that man today is not God-forsaken or God-hated being or that a madman in a story of Nietzsche going around with the message «God is dead» was not saying something that today should cause us to stop and think deeply ?

In the present state of human affairs man, having become Promethean, must make supreme efforts to be his own maker and guardian by taking full charge of his institutions and of himself. It is indispensable and unpostponable for man to revise radically the very foundations of his individual and social existence — even what has been sacred and holy for him —, to surmount his actual being in order to realise his authentic possibilities, and to create conditions around himself and within himself which will give him a reasonable chance of continued existence on the earth ([80]). We may presume that there are still masses of men of good will all over the world, even where indoctrination has been heavy and enlightenment has been poor. They would still have some residual ability to welcome «reason as the torchbearer of the will» ([81]) so that they would not be helpless in the face of the «suction of the unwilled» ([82]) that manifests itself in our conduct of international affairs, but would know what to will and why to will so. A theory of argumentation concerned with the process of rendering good reasons for our thought and action has thus the highest priority today. A wide application and consistent unswerving practice of it would work towards assuring respect for reason and lead to a «revolt of the masses» of men of good will against shallowness, refusal to communicate, *mala fides*, and the overall *Götterdämmerung* in international legal and political relations.

Reason, among many other things which it may assentably mean, surely means abiding by rules of disciplined thinking as found in common wide experience of learned men to be conducive to insight, men who have shown that they can stand up agains any authority

([79]) See NIETZSCHE, *Die fröhliche Wissenschaft*, s. 125. *Cf. id., Also sprach Zarathustra*, pt. 1, s. 2.

([80]) See STONE, *op.cit. supra* n. 7, *passim*. esp. at 54-64.

([81]) A phrase used by H. WELZEL, *Naturrecht und materiale Gerechtigkeit* (3rd ed. 1960) 69, in his exposition of DUNS SCOTUS, *Opus Oxoniense* II, d. 6, qu. 2, n. 3.

([82]) For this striking phrase apt for describing the situation in question see F. STUMPFL, *Motiv und Schuld* (1961) 15, quoting St. Paul in Romans 7, 19-20.

save for the authority of their own enlightned conscience. Most of the principles and methods of the theory of argumentation directed to this thinking are time-honorured and call for immediate application everywhere where competent and sincere men are engaged in serious reasoning. There are, however, also parts of the theory requiring more deliberation and further thought ([83]). One might like to argue out with Chaïm Perelman some cardinal points in the area of this theory. But in doing so one would be well guided in heeding the principles and methods of reasoning which he has lucidly and extensively brought to our attention and to which he himself has made important contributions.

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([83]) At this point it is appropriate to quote Perelman saying: «Je me demande si des efforts s'étendant à tout le champ des sciences humaines ne devraient pas être l'objet de travaux d'équipes, d'équipes de gens qui se donnent la main, qui s'aident, qui s'épaulent, qui se critiquent; je ne crois pas que cela puisse être mené par un seul homme». See *Bulletin* cited *supra* n. 17, at 34.