

THE LAW STRUCTURE OF PEACE*

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Peace cannot be invoked. Peace must be built. It is not enough to have the atmosphere of peace. We must have the structures of peace. Of these, none is more important than the law structure.

What are the building blocks of this law structure? There is no mystery about them; they are the same as the familiar parts of any legal system worthy of the name. These are four:

1. A body of law that is accessible, up-to-date, and capable of deciding the disputes that cause tension in the world as it is today.

2. Machinery to apply that law—machinery which also is accessible, up-to-date, and adapted to settling the kind of disputes that today's world produces.

3. Acceptance of that body of law and the machinery by the persons affected—and here we must remind ourselves that most people of the world do not regard the present international law and court as *their* law and *their* court.

4. Compliance with the decisions of international tribunals once they are rendered.

A remark I frequently hear is this: "I think this international rule of law idea is the most wonderful thing I ever heard of, and I'm all for it. But just exactly what is it?"

A lot of this vagueness would disappear if we would simply keep stressing the fact that the job is methodically to create these four component parts of the structure through the sustained and detailed efforts of thousands of lawyers and others around the world. It is only in fairy tales that structures are built with the touch of a magic wand. If we are to build the law structure of peace, we are going to have to get out in the hot sun and work. The amount of just plain hard work involved is staggering. But if enough people work at it hard and enthusiastically, the job can be done.

Let us look at the work that must be done to create the four components of a legal order on an international level.

I. THE BODY OF LAW

The task divides itself into two parts: making existing law accessible; and going beyond existing law to create a kind of law that will be usable by, and acceptable to, not just Western Christendom but the ninety nations that now must be reckoned with.

As to accessibility: we face at once a stark axiom. Non-accessible

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law is non-existent law. Philosophers may debate whether there is really a sound when a tree crashes in a wilderness and the sound is not heard by any living creature. But lawyers know that, for all practical purposes, there is really no law when the law cannot be found and therefore is never heard by any judge. The objective is clear enough: the materials and evidences of international law should be published, annotated, indexed, and cross-referenced to the same extent as domestic materials. But where is the Shepard's Citator of international laws? the key-number system? the regional reporter system? the annotated statutes? the Federal Register? the L.R.A. and A.L.R. and C.J. and A.J. and W. & P. and U.S.C.A. and N.C.C.A.? not to mention the endless list of loose-leaf publications that keep lawyers poor, publishers prosperous, and secretaries frantic.

I purposely start with this example because it is perhaps the most mundane and unglamorous of all. This piece of work may seem a far cry from prophetic visions of a world that lives under law—and yet how can a world live under law until it can first find out what the law is?

Here is a task in which universities, bar associations, publishers and governments can join. Since a task of such magnitude must be spread over years, the best approach may be to begin with areas of law where accessibility of law would now have the most to contribute to relieving of tensions. A good example is the need to compile and annotate all the law bearing on international rivers, so that authoritative guidance will be at hand to aid in the settlement of the many festering disputes on rights in international waters.

But even if all existing international law were accessible, this would only be a beginning. International law must be adapted to today's world both as to content, and as to universality of acceptance.

As to both needs, great promise may lie in the "general principles" clause of the Statute of the International Court. This Statute lists as one of the major sources of international law "the general principles of law recognized by civilized nations." Think of the vast treasures of legal principle to which this clause invites us. The clause tells us that, if we look at the internal legal principles of the world's various systems, and find a common thread of principle, that thread becomes elevated to the status of binding international law.

For an example of how this approach can enrich the content of world law and adapt it to contemporary needs, let me cite the first project we undertook at the Duke Law School's World Rule of Law Center.

I suppose the idea of this project may have had its origin in an interview I had with the late Premier of Iraq, Nuri As-Said. I was no sooner inside the door than Nuri barked: "I want some jamming equipment." I muttered something about Americans believing in free communication, but he snorted and repeated, "I want jamming equipment. I've got to jam Nasser. Let me tell you why. A few weeks ago Cairo broadcast a news report that I, Nuri, with my own hands, had murdered four Moslem holy men in the holy temple itself. What happened? Rioting, bloodshed, killing all over the place. I need that jamming equipment."

He never got it. But one could not help reflecting: if this is to be a world of law, is this kind of thing legal? Isn't international use of words to cause serious harm generally illegal? Isn't incitement to murder in itself an offense under the general principles of civilized nations? Is the offense any less because it is international — or because it is electronic, and therefore superficially novel?

We are hoping, through this project, to find in international law (including "general principles" law) some contributions toward a legal solution of this modern problem. To the extent we find present law deficient, we hope to draw and offer a voluntary code of ethics for international broadcasting.

Let me give just one more example of how the "general principles" approach can help lay the legal foundations for peace: our newest project at the Center, called "Sovereignty Under the Law."

It is all too easy to assume that, in this age of aggressive nationalism, each sovereign of the world's ninety nations is considered by his legal system to be the only source of law and therefore above the law. If this were so, obviously the chance for acceptance of a concept of real supra-national law would be slim indeed.

However, if we look at the deepest well-springs of legal tradition in all parts of the world we find almost universal agreement that the sovereign is not above the law—he is under the law. This is not surprising when it is remembered that most legal systems have religious origins. In a Moslem country, for example, no temporal sovereign could say, "I am above the Law of Islam."

The most familiar illustration is an Old Testament story which we all know, but whose legal significance we may never have appreciated: the story of King Ahab and Naboth's Vineyard, in I *Kings* 21.

All King Ahab wanted, you will recall, was to acquire a nearby vineyard belonging to Naboth. Ahab was King in Israel. Naboth was just a plain citizen. Ahab was quite reasonable—he was even willing to pay for the vineyard. But Naboth invoked the Jewish Law of Inheri-

tance, which was above both King and commoner. "The Lord forbid it me, that I should give the inheritance of my fathers unto thee," said Naboth. What did Ahab say? Did he say, "I'm the sovereign around here. I make the laws." He did not.

"He laid him down upon his bed, and turned away his face, and would eat no bread."

At this point entered Jezebel. In one scornful phrase, Jezebel summed up the attitude of all those before and since who have thought that the sovereign was above the law:

"Dost thou now govern the kingdom of Israel?"

Jezebel was what you might call an early type of legal positivist. And we all know what happened to Jezebel. The searing wrath of Jehovah, the appalling punishments visited upon one who would defy the law of Israel, leave no doubt where this particular legal tradition stands on the question of sovereignty under the law.

Our own tradition, of course, is epitomized in the historic colloquy between James I and Lord Coke. The King accused Coke of saying that the King was under the law, "which it were treason to affirm." Coke, in the teeth of this far from subtle threat, stood his ground and said,

"The King ought not to be under any man, but under God and the law."

Now I am quite aware that there is plenty of evidence of a contrary view in some times and places. But to me the interesting fact is that both the *oldest* traditions and the *newest* legal developments are on the side of placing sovereignty under the law. The progressive abandonment of sovereign immunity is one evidence of this, as is the formation of trans-national communities like the European Economic Community. Of great significance also is the appearance in the most modern constitutions, such as those of France, the Netherlands and West Germany, of provisions expressly stating that international law in the form of treaties takes priority over national laws.

What we hope to discover in our project is whether we can show the nations of the world, including the many newer nations, that on the strength of their own deepest legal traditions they can accept without strain or loss of national pride a legal obligation higher and broader than their own local jurisprudence.

In the same way, the body of world law can be enriched and universalized by deliberate jobs of research and sometimes of codification in such areas as the interpretation and termination of treaties, harms to persons and property, protection of private international investment, the law of international rivers, space law, sea law, and the law of Antarc-

tica. Exciting projects in such areas as these are already in progress at such schools as Cornell, Harvard, Columbia, N.Y.U., Michigan, Chicago, S.M.U., Yale, Stanford, and others. One thing is clear; there is plenty of work for everyone.

II. THE MACHINERY OF LAW

The second building block in the law structure of peace is the machinery to administer the law.

The International Court of Justice at The Hague is, in the words of its Statute, the "principal judicial organ" of the United Nations. In fact, it is the only one. Since the present Court plays such a key role in the future of world rule of law, it has become imperative for us all to learn more about it. I believe most lawyers would agree that, by any familiar objective tests, this is a good court. It numbers among its fifteen judges some of the finest international lawyers in the world, such as the famous British authority Sir Hersch Lauterpacht,* and the former Legal Advisor to our State Department, Green Hackworth. The judge from the Soviet Union, Kojevnikov, ranks high among legal scholars in his country. Indeed, he was formerly Dean of the University of Moscow Law School. This is evidence of a high order of sound judgment, not so much that he became a Dean as that he became a former Dean.

The court is hampered by cumbersome procedures and practices—but these are not beyond remedy, and one fertile field of study will be proposals for their revision in the interests of efficiency. The Court's opinions are generally excellent in legal reasoning, scholarship and judicial integrity. The Rule of Law Center has a detailed two-year study of the Court in progress. We have just made an exhaustive check of the opinions and votes of all the judges in the Court's history. There is plenty of evidence, if any was needed, to show that these judges really think and decide as judges—and not as politicians, as some uninformed critics seem to fear they might.

The most direct proof is the fact that judges not infrequently have voted against their own countries when they thought their own country was wrong on the law. Indeed, in the *Asylum* case the *ad hoc* judge appointed to represent Peru in this one case voted against Peru. It might be of passing interest to note that the Soviet judge, Kojevnikov, in the recent *Interhandel* case not only voted in favor of the United States on the key issues in the litigation but wrote a separate statement more strongly in favor of the United States positions than that of the majority and the United States judge.

What is needed, then, is not to displace the present World Court, but to make a thorough study of how it can best be supplemented with

* Ed. Note: Died, May 8, 1960.

a complete world-wide system of regional or lower courts and panels, arbitration tribunals, claims courts for private litigants, and—since there will always be disputes that are political and non-justiciable in character—mediation and conciliation agencies. As matters now stand, it is as if you had to run to the Supreme Court in Washington to litigate every smashed fender or unpaid alimony claim.

Organizing this task will be one of the main concerns of the international conferences of lawyers to be sponsored by the American Bar Association.

III. ACCEPTANCE OF THE LAW

Now, say you have a workable body of law and efficient machinery to apply it—what good is all this if it is not accepted by the parties affected? Our third component, then, must be acceptance of the system.

At once we encounter the unhappy fact that less than half of the members of the United Nations have accepted the obligatory jurisdiction of the World Court and most of these have interposed reservations so severe as to render their acceptance largely illusory. The problem of our own "self-judging" reservation, under which we reserve the right unilaterally to declare a controversy domestic and hence outside the Court's jurisdiction, is by now becoming quite well known. Its repeal has been called for repeatedly by President Eisenhower and other top members of the Executive Branch, by the American Bar Association, and by many state and local bar associations. It is not necessary at this stage to elaborate upon the issues. There is one point, however, the matter of reciprocity, that has never been sufficiently stressed, and which is important because it should convince even those who are impatient with arguments based on legal ideals or world leadership toward peace, and who want to get down to cold-blooded national self-interest.

Such people assume that the function of the self-judging clause is to throw up a wall against possible loss to ourselves as defendants. In fact, the principal effect is to throw up a wall against all possible remedies for ourselves as plaintiffs. Let us remember Robert Frost's well-known lines:

Before I built a wall I'd ask to know
What I was walling in or walling out.

We are not merely walling the other fellow out of court. We are walling ourselves out, whenever we have a valid claim. France learned this lesson the hard way in the *Norwegian Loans Case*. Norway had floated loans payable in gold in France, and later went off the gold standard. France, on behalf of the investors, brought a case against Norway insisting on payment in gold. France had a self-judging clause

like ours. Norway did not. The Court held that, as a matter of reciprocity, Norway could exercise France's claimed reservation and call the transaction domestic. Result: financial loss in cold cash to citizens of France. Cause: a supposedly protective clause interposed by France. Sequel: France last year repealed her self-judging clause. Will we similarly have to subject innocent Americans to severe financial loss before we learn our lesson?

After all, we are the ones who need the protection of law more than any other country. We are the ones with more than 45 billion dollars invested within other countries' boundaries, with the ever-possible danger of damage, confiscation, or discrimination. We are the ones with 500,000 nationals and 700,000 tourists abroad, always in danger of personal injury and property damage. We are the ones with foreign bases, communications installations, transportation facilities, and economic and technical aid projects. The chances of our needing, as plaintiffs, the help of the Court are many times as great as the chances of our appearing as defendant.

Voltaire, in an oblique commentary on the evenhandedness of the law, said, "The law forbids both the rich and the poor to sleep in the park." But the poor man most needs the park, just as we most need the Court. So in both cases, it is the person with the greatest need that would profit most by repeal of the restrictive law.

The depositing of a new good-faith acceptance of the Court's jurisdiction is an important move in the over-all drive toward international rule of law, since it will show the world we mean business when we talk of rule of law. There is a big job of public education to be done here, and it is up to the lawyers to do most of it.

Acceptance of a world legal system may come about in various ways in addition to general acceptance of the World Court's jurisdiction. Indeed, in the case of the Communist countries, the best hope for a beginning may be the possibility of entrusting particular matters to the Court, or a panel of it, or some other tribunal. Suppose, for example, we reach the day when a real disarmament treaty is found desirable by the Soviet Union. Obviously such a treaty must contain a procedure for settling disputes as to its interpretation, since otherwise the treaty would collapse in a welter of misunderstandings and recriminations within a matter of months. For various reasons obvious to lawyers, only a judicial tribunal can ultimately do the dispute-settling job in the time available. Vice President Nixon has proposed in two recent major addresses that all future treaties contain a clause submitting disputes on interpretations to an international court, as we have done in our last sixteen commercial treaties. If we insist on this

clause as a matter of regular policy, we can go a long way toward bringing important areas of potential conflict within the framework of peaceful legal settlement.

IV. COMPLIANCE WITH THE LAW

The fourth component of the law structure of peace is compliance with the decisions of international tribunals once they are rendered.

It is a curious fact that, although many people worry more about this item than any other, in practice it may prove to be the least worrisome of all. The demonstrable fact of history is that, with one or two exceptions, the decisions of international tribunals have always been obeyed. This seems to indicate that, if we can bring nations to the point where they so far accept the body and machinery of the law that they allow a case to go to decision, by that time it becomes unthinkable to flout the judgment after it is rendered. This is a fact of immense significance as we set up our scale of priorities for action. It should help to reassure those people who fear that a world legal system will be ineffectual unless backed by a world army, navy and air force.

If the record of compliance with international decisions is at least as good as that with domestic decisions, and perhaps better, why is it that some critics go about sneering at international law and saying that it is something no one pays any attention to? I think the answer lies in a failure to distinguish between decisions of tribunals and unilateral assertions of legal rights. We allege that Country X has repeatedly broken treaties. We conclude that Country X is lawless and has no respect for international law. But does Country X admit this? Certainly not. She will give you some formula to show that she did not really break the treaty, but merely "interpreted" it. Now, we may be positive we are right. But as long as matters are in this posture, it is impossible to say with impartiality and finality that Country X has broken international law. But let the case go to Court, let the law be applied to the particular facts, and then, when the rights and wrongs have been authoritatively settled, we shall have an unassailable test of the degree of compliance with law.

The record of compliance judged on this basis, then, is one reason why many of us feel that we can and should build up the structure of law without waiting for the day to come, if it ever comes, when some kind of global political authority comparable to national governments will stand behind the decisions of international judicial tribunals. Meanwhile, of course, we should study every possible means of strength-

ening measures short of force to ensure compliance, including public opinion, multilateral treaties, and diplomatic and economic sanctions.

I realize that even the specific job of building the law structure of peace may seem to be a task of almost insuperable difficulty. But, difficult or not, we must try. Rousseau, in his book on education called *Emile*, wrote:

The best way to teach Emile not to lean out of the window is to let him fall out. Unfortunately, the defect of this system is that the pupil may not survive to profit by his experience.

The world has been learning about international relations for centuries by a process of periodically falling out the window. The injuries have been severe, but never quite fatal. But we all know that one more fall will be our last. We must profit by our experience, for we will not be given another chance.

There is one factor that was never present before. The shadow of the H-bomb is over us all. Perhaps the mutual realization of capacity for mutual annihilation will telescope history and enable us to achieve a degree of progress in decades that in other times might have taken centuries.

I would like to close with a Brer Rabbit story on this theme of doing the apparently impossible. The old man was telling the little boy about the time Brer Rabbit climbed a tree. The little boy objected, "But Uncle Remus, you know rabbits can't climb trees." "Yeh, I know that," said Uncle Remus, "but Brer Fox was right behind Brer Rabbit, and Brer Rabbit was just obleeged to climb that tree."

So we too, in the presence of appalling danger, may do the apparently impossible, and build the law structure of peace which many of us believe is now the last, best hope of earth.