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The Rule of Law in World Affairs

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THE RULE OF LAW IN WORLD AFFAIRS

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I.

Shortly before his death, Pope John XXIII issued the historic encyclical letter, *Pacem In Terris*, in which he said:

> [I]t is with deep sorrow that We note the enormous stocks of armaments that have been and still are being made. . . . [P]eople live in constant fear lest the storm that every moment threatens should break upon them with dreadful violence. And with good reason, for the arms of war are ready at hand. . . . Justice, then, right reason and humanity urgently demand that the arms race should cease; that the stockpiles which exist in various countries should be reduced equally and simultaneously by the parties concerned; that nuclear weapons should be banned; and that a general agreement should eventually be reached about progressive disarmament and an effective method of control. . . . [T]he public authority of the world community . . . must have as its fundamental objective the recognition, respect, safeguarding, and promotion of the rights of the human person. . . .[1]

The front page news indicates how far we are from attaining the goals expressed in *Pacem In Terris*. We all profess, however, to talk in terms of peace.

Yet I suspect that some in this country are talking about a Pax Americana. Certain it is that many in Russia and Peking who speak about it are talking about a Russian or a Chinese peace, as the case may be. It is to the credit of the legal profession and political science that men of wider vision have emerged who think of the Rule of Law in world affairs in terms of a *consensus* that crosses ideological lines and provides means of settlement of disputes, big and small, between the great powers as well as those with lesser stature.

The Americans we should honor include Grenville Clark of the New York Bar and Louis B. Sohn of Harvard; Robert M. Hutchins; Arthur Larsen of Duke University; Charles S. Rhyne who gathered the great support of the American Bar Association to this project; Earl Warren, the Chief Justice of the United States; Henry R. Luce of Time and Life Magazines; the late Senator Estes Kefauver; Senator Wayne Morse of Oregon; Ambassador George F. Kennan; and many others,

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[1] PACEM IN TERRIS, ENCYCLICAL OF POPE JOHN XXIII, 38, 39, 47 (Paulist Press 1963).

including distinguished lawyers and jurists from those parts of America that lie both north and south of us.

There are, of course, lawyers, jurists, and public leaders in all lands on all the continents who have the same basic approach. One has only to thumb through WORLD PEACE THROUGH LAW,[2] the publication containing work of the Athens World Conference, to realize what a wide basis of support the Rule of Law has. And the Communist lands must not be left out of the accounting, though, putting Yugoslavia to one side, lawyers and jurists from those nations are less conspicuous and less articulate.

We owe a debt also to the scientists of the East and West who, by first meeting in Pugwash, Nova Scotia, in July 1957, started the pillars of the bridge of understanding that has been slowly under construction between the two regimes. This original Pugwash conference and the twelve subsequent ones "have helped both sides to understand that the other side has legitimate security requirements. . . . They have helped to explore compromise solutions in deadlocked controversies on disarmament controls."[3] They have helped put propaganda to one side and make a nuclear test ban, and disarmament in general, reducible to more realistic terms. They now may offer "an early opportunity for involving the Chinese in disarmament discussions."[4]

Dialogue between nations is, of course, that start toward a consensus on a rule of law, whether that law be in the form of a treaty, an agreement to arbitrate, or submission of disputes to the International Court of Justice.

The Western world, I believe, is closer to a consensus in this regard than is the Communist world. The reasons for this are numerous and varied. Some of them have to do with national history; some, perhaps, with ideology. But one does not have to look long to find significant proposals from the Communist side. One instance is the proposal made January 1, 1964, by Khrushchev that an international agreement be worked out renouncing the use of force for the solution of territorial disputes or questions of frontiers, that is to say, "an undertaking to settle all territorial disputes exclusively by peaceful means, such as negotiation, mediation, conciliatory procedure, and also other peaceful means at the choice of the parties concerned in accordance with the Charter of the United Nations."[5]

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[2] WORLD PEACE THROUGH LAW—THE ATHENS WORLD CONFERENCE (1964).
[3] Rabinowitch, *About Pugwash,* Bull. Atom. Sci., April, 1965, p. 10.
[4] *Id.* at 11.
[5] N. Y. Times, Jan. 4, 1964, p. 2, col. 8.

This proposal was heralded in the Western world as a piece of propaganda, though none can be sure that it was. It was such a significant proposal that instead of rejecting it out of hand, those who really believe in the Rule of Law should eagerly propose its adoption. It might indeed be the beginning of an important bridge between East and West—a bridge leading to alternatives other than an awful confrontation in this nuclear age.

We Americans have enjoyed a history of security and success that has made us conscious of our strength and perhaps has given us a sense of superiority. On the other hand, Russia has repeatedly suffered massacre and destruction by invaders; and those experiences have made its people difficult to deal with by our standards. Yet by their standards "the illusion of American omnipotence"—to use Denis Brogan's phrase—has made us also difficult.

II.

But times and attitudes change. The United Nations, which in 1945 was a Western-oriented institution of 51 nations, is now 115 strong, half of its seats being held by the nations of Africa and Asia. It has had notable achievements.

Its *legislative* functions have been marked by the outlawing of aggressive war and a rather steadfast adherence to that principled policy.

Its *executive* functions have been distinguished by an outstanding record of achievements of the office of Secretary General.

Its *administrative* functions have been heroic, as only those who have traveled the wastelands of the earth know. There—and only there—can one see the critical contributions that the United Nations is making to solutions of the problems of the underdeveloped nations.

Its *judicial* functions have been badly crippled by our own Connally Amendment[6] which other countries copied. The crippling effect is in that part of the *proviso* which excludes from the jurisdiction of the International Court of Justice "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America."[7]

As Senator Morse said in the debate on the Connally Amendment, ". . . the rule of law cannot be established if the various states reserve to themselves the right to decide what the law is."[8] And he added, "It is, in effect, a political veto on questions of a judicial character . . . .

[6] 61 Stat. 1218 (1947). [7] *Ibid.* [8] 92 CONG. REC. 10684 (1946).

It therefore involves the question of our moral leadership in the world . . . ."[9]

Under the principle of reciprocity which the International Court of Justice enforces, the "political veto" works both ways: a nation that does not accept compulsory jurisdiction can, when sued, refuse to submit; a state which that nation wants to sue can claim reciprocal protection by invoking the plaintiff nation's reservation, even though it has made no such reservation itself.[10]

The International Court of Justice, which should be one of the busiest tribunals in the world in light of the mounting problems among nations, is only nominally active, as the following statistics show:

	Judgments Rendered	*Advisory Opinions*	*Cases on Docket*
1960	2	1	4
1961	1	–	4
1962	1	1	3
1963	1	–	2

Hans W. Baade, in his review of the PROSPECTS OF INTERNATIONAL ADJUDICATION by C. Wilfred Jenks, summarized the reluctance of governments to depend on adjudication of disputes:

> Governments—that is to say ministries—understand the political arts: they are not at home with the legal arts which they leave to specialists. They infinitely prefer a forum in which the outcome depends on—or at any rate can in large measure be influenced by—their special skills in political debate, persuasion, and manoeuvre, and in which, to some extent at least, the rules can be framed as the affair goes on; rather than a tribunal obliged by its nature to discount—or to try and discount—debating points and other trimmings and *imponderabilia,* and to decide in cold blood on the basis of an already established set of principles and rules, of which it is the guardian. Moreover, an affair or complaint before a political forum can be kept going almost indefinitely, or can be re-opened—and, as is well known, there are items which make or have made their appearance year by year before the United Nations with the regularity of clockwork. But, sooner or later, just as even the weariest river winds somewhere safe to sea, a solution is arrived at; and in the meantime the participants—or some of them at least—derive various satisfactions from the contest, and possibly also in other directions advantages from the pressures engendered: whereas the decision of an international tribunal in the same matter would be relativly swift, unpalatable to at least one side and, above all, final and without appeal.[11]

[9] *Ibid.* And see John, *International Tribunals: Past, Present and Future,* 46 A.B.A.J. 23, 25 (1960).
[10] See Case of Certain Norwegian Loans [1957] I.C.J. Rep. 9.
[11] 13 KAN. L. REV. 442, 449 (1965).

So the world has a long way to go if it is to forego fist-shaking, movement of troops, and political intrigue for the solution of major problems by adjudication. The nuclear age, however, leaves us no other alternative.

We should be willing to lead the way in making acceptance of the Court unconditional. That would mark the beginning of a new co-operative society at the world level.

The Court is an honored institution. The Statute of the Court[12] has safeguards designed to insure the independence of the judges. They are not mere nominees of the governments of their countries. They are nominated by national groups of jurists.[13] No national group may nominate more than four persons, and of those four not more than two shall be of its nationality.[14] From this list the General Assembly and the Security Council proceed independently to elect the judges.[15] Those who obtain an absolute majority of votes both in the General Assembly and in the Security Council are elected.[16]

No member of the Court may exercise any political or administrative function or engage in any other occupation of a professional nature.[17] Nor may he act as agent, counsel, or advocate in any case, nor take part in any decision in which he has previously participated as agent or advocate or as member of any other court or commission.[18]

The fact that a judge is of the same nationality as one of the parties does not result in his disqualification.[19] Indeed, if the membership of the Court includes no judge of the nationality of one or more of the parties, the party who wants national representation has a right to select an *ad hoc* judge.[20]

These latter provisions have often been criticized. But in this stage of development of the world community, it probably would be impossible to get a consensus that would disqualify a judge of the nationality of one or more of the parties.

> . . . the notion of "national arbitrators" is deeply rooted in the practice of international arbitration, and indeed the facility to appoint them is probably a *sine qua non* for the success of the whole idea. The important thing for ensuring third-party judgment is not that national arbitrators or judges should disappear, but that the balance in the tribunal

[12] CHARTER OF THE UNITED NATIONS, STATUTE AND RULES OF COURT 37 (2d ed. 1947).

[13] Art. 4. [all arts. relating to the International Court of Justice may be found in CHARTER OF THE UNITED NATIONS, STATUTE AND RULES OF COURT (2d ed. 1947).]

[14] Art. 5.

[15] Art. 8.

[16] Art. 10.

[17] Art. 16.

[18] Art. 17.

[19] Art. 31.

[20] *Ibid.*

> should be held by neutral judges. This is the conception which has been incorporated in the Statute, for in practice the decision is not likely to be influenced by the views of the judges having the nationality of the parties who, in the nature of things, tend to cancel each other out.[21]

One guarantee of impartiality exists in the principle that, while ordinarily the President of the Court can by Article 55 of the Statute break a tie, he is denied that right when his state is a party, since the Rules of Court provide that he must "abstain from exercising his functions as President in respect of that case."[22] He then hands over his duties to the Vice-President or to the next senior qualified judge.[23]

Instances can be produced where members of the Court took a favorable attitude towards the contentions and interests of their own states or of aligned states. Yet even judges from nations in the Communist bloc do not produce votes that have a corresponding solidarity. Some regular judges have decided against their countries in important cases, although the *ad hoc* judges "display a clear tendency to find in favour of their countries. . . ."[24]

When the Court in 1962 rendered its famous advisory opinion concerning the constitutionality of the assessments necessary to sustain U.N. military action,[25] the division in the Court was not entirely along the Russian-French political line. There were other judges, *viz.*, judges representing Argentina and Peru whose countries had not taken the position of Russia and France on the constitutionality of the assessments, who also took the position that an assessment to be valid had to be authorized by the Security Council, not by the General Assembly.

The Court is a human institution, and no human institution is perfect. Overall, the regular judges of the Court have evinced a high degree of responsibility to the world community which appointed them, and have a good record of objectivity. Surely the Court has shown itself worthy of the confidence of those nations which have accepted its jurisdiction without reservation.

III.

If we did not have the United Nations, we would have to create it. For it is indispensible as a meeting place and as a clearing house for

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[21] ROSENNE, THE WORLD COURT 64 (1962).
[22] U.N. Yearbook, 238, art. 13 (1950-1951).
[23] ROSENNE, *op. cit. supra* note 21, at 63.
[24] *Id.* at 65.
[25] Certain Expenses of the United Nations [1962] I.C.J. Rep. 151.

critical international business. No Western Club, no Communist-bloc Club, no Afro-Asian Club could take its place, as any special interest group has too parochial a view for world problems. It represents contradictory forces and when the Peking regime is admitted, as it must be, those stresses will increase. Accommodation between these contradictory forces is necessary if we are to avoid the nuclear holocaust.

The Charter of the United Nations seeks to substitute peaceful procedures for the use of force. As Benjamin V. Cohen stated in his recent David Niles Memorial Lecture:

> The surrender of the right of states to use force was not intended to leave states without any effective means of securing a redress of their grievances. A state which resorts to force to redress its grievances without first invoking the processes of the United Nations violates the Charter. But a state which refuses to consider the serious grievance of a sister state and refuses to agree to any procedure for peaceful settlement also violates the law of the Charter. Force is proscribed as a means of settlement but members must be willing to negotiate and submit their disputes for settlement under some reasonable procedure. While the primary purpose of the United Nations must be to maintain peace, peace cannot be maintained without some minimum redress of genuine grievances. This two-fold law of the Charter constitutes the heart of the Charter. The law of the Charter provides the minimum requirements necessary to enable members to work together to outlaw the use of force as a means of settling international disputes and to provide procedures for the peaceful settlement of disputes which threaten the peace.[26]

The United Nations, however, cannot be counted as the cure-all. Other ways and means of accommodation must also be found. We must seek a wide range of solutions for our clashes and conflicts.

The years 1963 and 1964 produced four landmarks in the effort to substitute a modicum of law for the arms race and the risk of war.

The treaty power was used to produce the nuclear ban agreement.[27]

The executive agreement was used to establish the so-called "hot line" between the Kremlin and the White House.[28]

The United States and Soviet Russia indicated they would prevent the spread of the armaments race to outer space. These pronouncements were followed by a Resolution of the General Assembly of the United Nations calling upon all nations not to station in outer space

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[26] David Niles Memorial Lecture given by Benjamin V. Cohen, Hebrew University of Jerusalem, April 27, 1965.

[27] 14 U.S.T. & O.I.A. 1313 (1963).

[28] 13 U.S.T. & O.I.A. 825 (1963).

"any objects carrying nuclear weapons or other kinds of weapons of mass destruction."[29]

The President on April 20, 1964, announced, simultaneously with the Chairman of the Council of Ministers of Soviet Russia, a cutback in the productions of weapons-grade fissionable material.[30]

A critic could show how feeble by domestic standards these international safeguards are. Yet fragile as they may be, they mark important beginnings; they are precedents; and they continue the mosaic in international law that has been building for centuries. They are suggestive of a host of measures suitable for the 1965 International Cooperation Year, proclaimed by the General Assembly in 1963 and by President Johnson October 2, 1964.

Work is cut out for the international lawyer the world over; and, whatever the level, it may be as important as work at the summit. Take for example, the regional problems. Asia is primarily a source of raw materials on which the affluent societies still feed. The growing Asian demand is for their own factories and plants through which their vast resources can be processed and manufactured. The needs of Asia are as great as those of Europe, if not greater, when it comes to the common defense, the common market, and the promotion of its peculiar regional needs. The overpowering presence of the Peking regime accents the need for common action on common problems. Those problems are not soluble by the Rudyard Kiplings, but by the world community or by powers representative of it. The Final Declaration of the Geneva Conference of 1954—to which unhappily we did not agree—is a start, but only that. For the frame of reference of the problems of Southeast Asia is as broad as those of the common markets, the underdeveloped nations, and the common defense. Reflection on the magnitude of the task makes the effort seem herculean at this stage. It will, indeed, engage the attention of a generation of international lawyers if we are spared the nuclear holocaust.

I commend especially to American lawyers our own regional problems. The Organization of American States is in many respects embryonic. It does not even have a hemispheric court. Certainly one should be created. What jurisdiction should it have? What about indirect aggression—hostile propaganda, fifth column activity, infiltration of

[29] *Question of general and complete disarmament*, U.N. Gen. Ass. Off. Rec. 8th Sess., Res. No. 1884, Supp. No. 15 at 13 (A/5515) (1963).

[30] See Fisher, *Arms Control & Disarmament in International Law*, 50 VA. L. REV. 1200, 1205 (1964).

armed bands, exertion of economic and political pressures? Are legal controls over these activities practical? On October 21, 1964, the Secretary General, Dr. Jose A. Mora, presented to the Council nine proposals for strengthening the OAS. One proposal was for increased emphasis on human rights. The OAS has a *Declaration of the Rights and Duties of Man* that covers a wide range of civil rights. The OAS has an Inter-American Commission on Human Rights to administer that Declaration.[31] But its functions are educational and advisory.[32] At Punta Del Este in 1962 it was resolved that the powers of the Inter-American Commission on Human Rights be broadened and strengthened so that there may be a "collective defense of human rights" with "international legal protection" of them. Should it follow more closely the European example and have a Commission and a Court with adjudicatory powers?[33]

One other important OAS idea being discussed concerns the overthrow of elected governments by military coups. The Dominican Republic has been free of that scourge for only eight years in its 500-year history. Juan Bosch, with a people's mandate and a democratic program, was tolerated by the army less than a year. How can democratic institutions ever take root unless there is some stability for their growth? Should the OAS have the machinery to come to the rescue of a deposed democratic government that was elected by the people?

IV.

We face in the world today a situation which has sometimes been called "an unstable balance of terror."[34] Many think that the chances of avoiding nuclear disaster are slim. Certainly it cannot be done by unilateral action. A consensus is needed. What kind of consensus? We never would be parties to a consensus of surrender. Any consensus must be one of mutual accommodation; and that is true whatever ideological group is involved. On the other hand it usually cannot mean a consensus of only a bare majority of each of the contending peoples. For the issues that face mankind can be easily inflamed by racial, religious, and ideological forces that change a bare majority into a minority

[31] See Note, 59 AM. J. INT'L L. 335 (1965).
[32] Art. 9.
[33] See Robertson, *The European Court of Human Rights*, 9 AM. J. COMP. L. 1, 16-19 (1960).
[34] St. Laurent, *The Rule of Law Applied Between Nations*, 4 CAN. B. J. 216, 222 (1961).

overnight on special issues. The consensus on the important questions must be reflected by large majorities—as large as those we require for ratifying a treaty or amending the Constitution. The growing risk of the nuclear holocaust and the growing dependence one on the other for raw materials and for manufactured goods can help produce that consensus on a wide range of subjects.

A consensus that makes the prevention of war a basic tenet of survival will have difficulty. The war system is still part of our thinking; and it is deeply engrained in Communist ideology. The New York Times News Service reported April 18, 1965, that a music lover in Peking had "subjected himself to serious self-criticism" and had found that western music had caused his class viewpoint to become "blurred":

> After enjoying Beethoven's Ninth Symphony many times, I began to have strange illusions about the idea of "universal love," which was praised in the choral section of the symphony, he declared, and even began to think of a world permanently rid of war.

The problem starts with a consensus that provides the ground rules for avoidance of military clashes at the nuclear level. Those ground rules obviously come first; but they are the mere start of the problem. From that point on we must move toward finding area by area—problem by problem—practical means for resolving conflicts without the use of the ultimate force. This means a continuous interchange of views with the Soviet bloc, the Chinese bloc, and with all other groups in the world. It means endless conferences and seminars and monumental discussions and reports. It probably means replacing one group of worn-out negotiators with another. But I believe the inventive genius of scholars in the West and of scholars both inside and outside the Communist bloc is so great that a consensus can be found. As Ernest Cuneo has stated, the conventional ideas of sovereignty no longer fit our needs; the present problem is "not one of static coexistence, but one of joint dynamic coevolution."[35]

Nation-states are necessary in the evolutionary scheme. They are to a people what an integrated personality is to the individual. But the classical self-contained nation-state is obsolete measured by the political needs of the world.

There can, in the long run, be no salvation from nuclear ruin unless the clash of opposed forces is avoided. That can happen only by a consensus that produces disarmament and establishes alternative

[35] CUNEO, SCIENCE AND HISTORY 226 (1963).

methods at the regional and international level for the solution of controversies. The new world community, like the new regional communities, will need police forces. It will need its executive, legislative, administrative, and judicial arms of government. The task of our generation is to educate the peoples of the earth concerning the needs of those communities and the instruments for their management. We know that remarkable results, including the means of "peacefully settling" disputes, follow an "acceptance of common identity."[36]

Those who support the tradition of the free society have, I think, a special role to play in promoting regimes of common identity. We can create a powerful moral force in the world by using, to the fullest extent, existing institutions to settle such disputes as we have with each other. If there are no institutions adequate to that end, we should be the first to propose the invention of new ones and to give them our support.

Overall we have failed to exploit the great opportunities afforded by the United Nations. As Benjamin V. Cohen states in his David Niles Memorial Lecture:

> During the last decade or so, states have with disturbing frequency resorted to force or the threat of force without feeling even a sense of obligation of reporting their action in advance or even subsequently to the United Nations. One need only mention Russia in the case of Hungary, India in the case of Goa, and the United States in significant aspects of the Cuban and South Viet Nam situations. I mention these instances not to single out a few states but to indicate the generality of the non-observance.[37]

We know from our own experience that the difference between the Communist world and the free world is not the difference between black and white. We know that great changes both in theories and in practices have taken place. We know that there is a wide spectrum in Communist ideology, extending today from Peking on the extreme left to Belgrade on the right. We know that antagonistic ideologies "not reconcilable by logic" do evolve in the direction of consensus under the necessities of the nuclear age, under cultural exchanges, and under the necessities of trade and commerce.[38] It is this actuality of change that makes the prospects for a Rule of Law in world affairs brighter than most dared to hope but a short time ago.

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[36] *Id.* at 29.

[37] David Niles Memorial Lecture given by Benjamin V. Cohen, Hebrew University of Jerusalem, April 27, 1965.

[38] COHEN, THE UNITED NATIONS 71 (1961).

In February 1965 the Center for the Study of Democratic Institutions held a Convocation on *Pacem In Terris* in which participants from many nations and from differing blocs of nations read papers or expressed views. One of the participants was Ambassador George F. Kennan, one time United States emissary to Russia and Yugoslavia. He concluded his paper with an eloquent plea

> for something resembling a new act of faith in the ultimate humanity and sobriety of the people on the other side; and I would like to address this plea to our communist contemporaries as well as to ourselves. History reveals that the penalties for over-cynicism in the estimation of the motives of others can be no smaller, on occasions, than the penalties for naivety. In the case at hand, I suspect they may be even greater. For in the predication of only the worst motives on the adversary's part there lies, today, no hope at all: only a continued exacerbation of mutual tensions and the indefinite proliferation of nuclear weaponry. Our sole hope lies in the possibility that the adversary, too, has learned something from the sterility of past conflict; that he, too, sees—if only through the dim lens of ideological prejudice, suspicion and accumulated resentment—the identity of fate that binds us all; that some reliance can be placed, in the adjustment of mutual differences, on his readiness to abstain, voluntarily and in self-interest, from the wildest and most senseless acts of physical destruction.

This point of view represents, I think, the wisdom in the famous dictum of Mr. Justice Holmes that "universal distrust creates universal incompetence."[39]

[39] Graham v. United States, 231 U.S. 474, 480 (1913).