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NEXT STEPS TO EXTEND THE RULE OF LAW

*by Stanley D. Metzger**

It may be somewhat ironic to talk about the ways and means of extending the rule of law internationally when it seems fairly clear from the history of the last fifteen years, as well as from that of earlier years, that a substantial number of important countries find the existing rules of international law to be unduly confining. Nevertheless, since our subject seems to assume that existing rules need extension as well as application, we must, perforce, get on with the show.

There are probably few things which are more difficult to accomplish than to meaningfully define abstract conceptions like "Law." Most efforts to define law have foundered simply because the mind finds it difficult to translate such a term meaningfully apart from particular areas of concreteness, and what one is talking about when one uses the term "law" will necessarily have to be translated differently, depending upon the particular area of human behavior, with all of its particularized problems, which is the subject of discussion.

In consequence, in order to discuss meaningfully the "rule of law" in international terms, much less to talk of "next steps" to achieve such a regime in the broad field of international relations, it is desirable if not essential to have some view of the nature of these international relations and the forces which are at work in shaping them.

We live in an era in which nationalism is a dominant political force, in which new nations are emerging from former colonial status, in which economically underdeveloped peoples are striving as never before to achieve increased material and non-material well-being. This era has witnessed the exercise of energies to achieve increased well-being primarily through the social unit which has come to be known as "the nation." In such a social unit, relatively homogeneous groups, so far as language, culture, traditions and economic and political organizations are concerned, have been for some period of time experimenting with the means which they have at hand to achieve a better life than they have known in the past. Since this is an endless task, it may be expected that this experimentation will continue for a very long time, and that the primary social unit through which this will be done will continue to be "the nation." This experimentation may include new forms of social and perhaps political organization in order to remedy what they consider to be unsatisfactory states of affairs, either national or international, in order to achieve that economic development and social progress which the peoples of the nations think are necessary. The largest number of these nations will seek to achieve these objectives while retaining that essential freedom and independence which they rightly consider to be so essential.

The forces of nationalism have thus long tended, and will continue to tend, to generate doctrines proclaiming that the only restraint upon a nation's freedom of action is self-restraint, with the role of legal restraint restricted to

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the obligation to honor voluntary agreements. And the same forces of nationalism have and will continue to urge extreme caution upon a nation which is considering such agreements, lest these agreements materially trammel the freedom of action of the nation in experimenting on the widest scale in an effort to secure increased well-being.

On the other hand, as a consequence in modern times primarily of the industrial revolution and its aftermath, there have grown forces which recognize the increasing interdependence of nations and peoples in the modern world. Recognizing that what one country may do in the exercise of its own freedom of action may adversely affect others, and this in turn may bring in its train retaliation and conflict with wide and terrible results, these forces tend to generate ideas calling for world federations or other instrumentalities which involve wide-scale cessions of national decision-making to international bodies, as well as other open-ended restrictions on a nation's freedom of action.

The central problem of international relations, and therefore of the role of law in such relations, is to achieve a peaceful accommodation between the forces of independence and nationalism on the one hand, and the forces of interdependence on the other, so that there may be as harmonious a blending of internal and external energies as feasible in order to achieve increased well-being.

If this is the realistic framework of international relations and law in the world as we see it, it seems clear that it imposes serious conditions upon the application, the creation, and the extension of order and law among nations.

In the first place, it means that law-application and law-creation will be overwhelmingly the product of voluntary agreements among nations. This is not to say that there are no non-consensual restraints, legal and otherwise, upon nations. There are. Conscience-shocking behavior by a nation, even toward its own nationals, has been subjected to legal and other restraints, however imperfectly, for some time. Outside pressures, which are formally interdicted by the doctrine of territorial and personal supremacy of a state, have ranged from intervention in behalf of Christians persecuted in Turkey to United States expressions of concern to Russia over Russia's condoning pogroms against its Jewish citizens, and to the American and British governments' public deploring of South Africa's shocking behavior toward its Negro subjects. These departures in practice from the formal doctrine of state supremacy rest upon a widely-shared opinion and practice that when a State "renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible." The United Nations Charter provisions enjoining upon nations the duty to promote respect for, and observance of human rights and fundamental freedoms reflects this widely-shared opinion. Of course, the UN Charter was not the source of this opinion. The source, in modern times, was the Natural Rights philosophy. And, in turn, this philosophy of "self-evident truths," "unalienable rights," assigning to governments only "just powers" which were derived from the "consent of the governed," was nothing new.

Jefferson, in answer to the charge that the Declaration he drafted was "not original," took pains to inform Richard Lee that he had considered his task to be:

. . . not to find new principles, or new arguments never before thought of, but to place before mankind the common sense of the subject, in terms so plain as to command their assent. . . . [Far from] aiming at originality of principles or sentiments, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind. . . . All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc.

More important, as Becker pointed out, ". . . where Jefferson got his ideas is hardly so much a question as where he could have got away from them." They had unfolded through the ages and were contained in the moral insights of the saints and sages which his society celebrated.

The specific application of the concept of "conscience-shocking" behavior by nations can no more be catalogued once and for all than can the content of "due process of law" in our own constitutional system. As the Supreme Court said some 12 years ago: "It is the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits of the essentials of fundamental rights."

The judgments of the Supreme Court in the racial restrictive covenant and school segregation cases and of the International Tribunal at Nuremberg illustrate the growth of law in this area of human activity. The activities of the South African Government in recent years may well be the subject of a similar judgment in the future.

Thus, there have been and will continue to be nonconsensual external standards which limit a nation's freedom of action. Whether formulated in terms of "Natural Law," or in a philosophy of "Natural Rights," or, as by the abolitionists Channing and Thoreau, in an appeal to the "higher law" in the name of "the sacred and inalienable rights of all men," or on moral convictions that there are "some generalities that still glitter" without religious supports, there will remain the standard of "the conscience of mankind" to which to repair so long as man retains his humanity. No theories of international law, no otherwise perceptive and useful guides to international politics can be satisfactory to the extent that they fail to accommodate "the growing subjection of governmental action to the moral judgment." Only to the extent that they do, can they meet the test of "an idealism without illusions and a realism without cynicism," which is the ultimate requirement not only of an emancipated intelligence but of a sane world.

By the same token, however, the most important and practical legal restraints which will affect day-by-day relations among nations in the modern world will continue to be those which are the result of specific agreements concerning specified conduct arrived at through bilateral or multilateral nego-

tiations. No theory of international law, no otherwise practical guide to international politics which fails to accord overwhelmingly dominant weight to this fact of life, can pass the test of being in accord with reality.

Even countries which recognize judicial review only restrain the will of the people as expressed by their legislatures' enactments where such enactments are clearly unreasonable, and not even in all such cases. As indicated, this area of unreasonableness cannot be delimited or catalogued in advance. And restraint in its delineation and application is as important as is its utilization. This is because it is both necessary and desirable that there be a wide area of choice in creating, applying, and experimenting with attempted solutions of economic, social, and political problems. To equate "unreasonable" with a disagreement as to wisdom is itself unreasonable in a relatively democratic system where legislators are broadly responsible to an electorate.

Consequently, a very wide range of governmental measures with respect to internal relationships properly falls within that area of choice which is not and should not be subjected to restraint except by an exercise of the will of the people's representatives themselves. In the international field this area of uninhibited choice on the part of a nation is and should remain even wider. "Customary" and treaty law, particularly the latter, have been and will continue to be the overwhelmingly major sources of international legal restraints.

The complexities and constant shifts of interests and their adjustments, particularly in the international economic and political fields, are such that neither the gradual accretive process of customary law nor the even more generalized restraints of mankind's conscience, are as suitable as the treaty law method in creating and administering meaningful legal standards — standards which are sufficiently immediate and concrete to be of substantial assistance in affecting a nation's behavior in those aspects of conduct which are of immediate interest to other nations.

In view of the immense variety of local cultures, customs, human and material resources, and systems of politics and economics of the hundred-odd nations now extant, it is apparent that only the most obviously obnoxious kind of domestic conduct, such as "apartheid," can be the subject of intervention through nonconsensual external restraint because it is shocking to mankind's conscience. And only a limited number of prohibitions against conduct outside a nation's borders, such as that against seizure of vessels on the high seas in peacetime, can acquire sufficient acquiescence over a sufficient period of time to gain status as customary law. Territorial discriminations as outmoded, in the eyes of some, as restrictions by a country or a subdivision thereof against an alien's owning land, remain so widespread that no customary international law has developed or is likely to develop which interdicts such domestic laws and practices. Other discriminations, such as prohibiting aliens from engaging in various business and industrial activities, which are also widespread, cannot even be said to have attained the status of being considered "outmoded," much less "conscience shocking."

Yet it is "lawmaking" — obligatory restraints upon a nation's freedom to maintain such restrictions — in precisely these areas of concrete behavior

which are of immediate interest to countries in the modern world. The only practical lawmaking way to deal with that large area of nonpathological behavior, which nevertheless injures the interests or prospects of others, is through the treaty law method.

Secondly, the very desire of nations to be able to experiment broadly in an effort to be responsive to the needs and aspirations of their peoples for constantly increasing well-being serves as an important limitation upon their willingness to make international commitments which curtail their freedom of action. It is simply a fact of life that at the present time and for a long time to come countries will not make open-ended commitments in many areas where commitments are possible, and will not make meaningful commitments at all in still other wide areas of activity, but rather will continue to act in the future as they have in the past. They will make commitments on particular subjects which are measurable in their impact when on balance they expect to gain rather than lose from so doing, taking care to retain maximum freedom of action to escape from the commitments when the balance shifts.

Thus, in addition to being unprepared to make commitments regarding alien land-ownership or alien ownership of "sensitive" industries such as air transport or public utilities, many underdeveloped countries are even unwilling to commit themselves to permit alien acquisition of ordinary industrial or commercial enterprises. In our friendship, commerce, and navigation treaties with Ethiopia and Iran, for example, there is no provision granting such a right, because those countries insist on "screening" particular investments case by case. Again, a large number of Latin-American countries have for three-quarters of a century refused to make extensive commitments protecting private foreign investment, even though most treat such investments quite well in practice. These relatively poor countries desire to retain full freedom of action to nationalize property in the interest of the welfare of their people, as they see it, and to pay as little as possible for such property if and when they do nationalize it. In consequence, they have evolved the "Calvo Doctrine," named after its originator, an Argentine Foreign Minister of the 19th century. According to this doctrine, foreign investment becomes domesticated upon entry, is entitled only to equal treatment with local investment if expropriated, and is without standing to invoke the protection of the country from whence it came. Having evolved, for obvious reasons, a doctrine which treats expropriation and compensation of private foreign investment as internal matters, they are unwilling to make international commitments inconsistent with this conception.

Many other countries, including the United States, do not share these views and have sought to convince the poorer countries to depart from them. Unfortunately, however, our efforts over seventy-five years have not been successful, and existing circumstances appear to offer even less prospect that they will be successful in the future. Any talk of ambitious international law codes for the protection of private foreign investment therefore appears to be quite hopeless. The very countries whose commitments are desired have made it perfectly clear that they simply will not so engage themselves.

The United States takes the same position on immigration. We do not

make quantitative international commitments on immigration. We follow our own statutory enactments as they exist from time to time but refuse to agree to take X number from Y country. So long as immigration policy remains a domestic battleground, we will simply not engage ourselves internationally.

In other areas, where commitments are possible, care will be taken to see to it that they are not open-ended. Where a careful assessment of particular subjects, such as economic development of underdeveloped countries, leads countries to believe that the subscription of a stated sum of money to an international institution, over whose decisions they possess no veto power, is sensible, they will subscribe the sum. They will not, however, subscribe an unstated sum to such an institution while binding themselves to furnish amounts which the institution calls for; *i.e.*, no "blank checks" will be handed over.

Where some form of economic integration, such as that involved in the European Common Market, appears advantageous, it will be spelled out in all possible detail in the treaty. Where flexibility is necessary, discretion will be subjected to control by councils of ministers of participating countries in order to take account of important domestic interests which may be affected.

Again, countries will continue to agree, as they have in the past, to reduce or not to raise an existing customs duty. They will, however, demand an "escape clause" permitting them to restore the former duty or to raise the former duty if imports increase so as to cause serious injury to a domestic industry. They may also continue to insist upon the right to raise such duties in other special circumstances. Likewise, they will agree to a regime of non-discrimination in wide areas of trade and commerce, but they will insist upon a variety of exceptions, including a "national security" exception. This is even more true in the political or security areas of a nation's life.

In consequence, even in those areas where commitments are made, countries are unprepared to cede open-ended jurisdiction, whether executive, legislative, or judicial, to the will of an entity other than themselves. It is highly unlikely that this will change in the foreseeable future.

In the state of the world in which we live, it would appear sensible not to deplore countries' reluctance to make what appears to them to be disadvantageous commitments, or to react to this fact with grand projects utterly at variance with this state of affairs, but rather to understand with some sympathy this condition and accept it as the realistic framework within which progress toward a saner world can be achieved, with one major exception — that freedom of action does not include freedom to use or threaten force.

In the present state of uneven political, economic, and social development among countries and within every country, the ability of relatively homogeneous groups to exercise sovereignty without trammelling commitments in wide areas of activity — their ability to experiment in social, economic, and political terms in the interest of securing a fuller and more satisfying life for themselves — should not be viewed as an unmitigated evil but rather understood as a powerful and often beneficent producer of greater welfare. Since economic and political commitments can act as restraints upon the ability to make necessary changes, they can curtail the freedom to experiment with new

social, economic, and political forms to replace others which have been tried and found inadequate. Accordingly, while commitments are possible and desirable in those areas of activity where ways are well settled and which are either at the periphery of basic political, economic, or social forces, or appear to be common to almost any arrangement of such forces, there should not be an attempt to press them into service in the more sensitive areas of activity, lest they complicate and burden the peaceful channels of change — lest they be viewed, as they would be, as efforts to freeze what may be considered an unsatisfactory status quo, either domestic or international. This is the view, for example, of the important newly emerging and underdeveloped nations of the world, and it is entitled to understanding and respect. In fact, there is no known satisfactory way to impress such commitments into service, and the effort to do so would be self-defeating.

If, then, the idea of law creation through open-ended jurisdiction of courts or world legislatures is simply unreal, if the creation of doctrine not based on a problem-by-problem solution of international difficulties is a non-starter in the race, does this mean there are no “next steps”? Hardly.

The economic development of underdeveloped nations is a case in point. If there is any common ground among public officials and students of the problem, it is that there are two requisites for progressive economic development in a free society: (1) greater and more skillful mobilization and use of domestic resources within a country; and (2) greater and more skillful mobilization and use of foreign resources for economic development purposes.

All sorts of techniques have been used in an effort to meet these requirements, and many more will undoubtedly be tried during the next centuries in continuing efforts to achieve development. The current Pakistani five-year plan, which has as its difficult object the raising of the per capita annual income of Pakistanis from \$50 to \$55, illustrates the almost limitless dimensions of the problem.

From the point of view of both underdeveloped and developed countries, the necessity to be able to use the widest variety of techniques to accomplish development is apparent, since development itself is in the interest of both. This may involve extensive and intensive regulatory measures which affect existing foreign-owned enterprises, large inputs of government funds, as well as the attraction of private capital for particular purposes. It will also involve basic internal social changes in many countries. The use of a wide variety of techniques to accomplish this end is both necessary and inevitable. So long as this is done without compromising the essential freedom and independence of the country, it is in the long term interest of both the country concerned and the free world.

International cooperative action to achieve these goals is necessary and desirable. The World Bank, the International Development Association, the Inter-American Bank, and the United Nations Special Fund, are examples of such action. More capital, more international planning, more techniques are needed. These institutions will undoubtedly need to be supplemented in the years to come. Greater use of local savings, private foreign capital, do-

mestic governmental skills and foreign skills will be made, in a bewildering assortment of methods which will defy clear statement or categorization.

There is another important aspect of the desirability of avoiding "law-creation" through efforts to negotiate commitments which are not anchored to specific areas of new cooperative undertakings. If anything has been demonstrated in recent years, it is the futility of frowning upon unseemly conduct without attempting to do anything about its cause. For many years, countries frowned upon exchange controls exercised by a country when its balance of payments had so deteriorated that it was essential for it to conserve limited exchange for the purpose of purchasing essential imports. Such controls operate, of course, to reduce trade in articles deemed to be relatively unessential, and thus in turn reduce the exchange revenues of the former exporting country, thereby reducing standards of living in both the former importing and exporting countries. But all of the frowning in the world, unaccompanied by anything substantial to assist the control imposing country, cannot affect matters beneficially. It was seen clearly during World War II that if anything was to be done about exchange controls which are harmful to the growth of international trade, it needed to be done by attacking its causes, i.e., disequilibrium in the balance of payments.

The International Monetary Fund is such a meaningful effort. While it frowns upon such controls over current international payments, it does not outlaw them. Rather, it furnishes substantial financial assistance to countries in temporary balance-of-payments difficulties in order to enable them to work themselves out of the condition which caused the control to be imposed.

Here again, it may be expected that further evolution in monetary cooperation may be expected. This will probably be in the direction of furnishing additional supports for expanded trade.

In another area of international relations; that of war and peace, there is a great difference between the Kellogg Treaty, outlawing war as an "instrument of national policy" with nothing more, and a political institution such as the United Nations. The flexibility of United Nations mechanisms and action as applied to specific disputes, aimed at removing causes of tensions and pathological behavior, although insufficiently availed of on a continuing basis, is the obverse of a discretely legal approach to the handling of serious problems in the sense of seeking agreement on "doctrine" unhinged to substance.

It is in this area, moreover, that the exception, above noted, to the desirable experimental freedom of action of nations should and does operate, however imperfectly. For the freedom to use or threaten force, unless restrained by external standards operating as pervasively as possible, will create devastation, reprisal, and the all too familiar revanchist sentiments which frustrate, not fulfill, the hopes and aspirations of people for a better life. The judgment that freedom to attempt to secure desired results through force, which was not unlawful at least until the Kellogg Pact, costs too much to warrant continued protection, had its foundation in thousands of years of destruction and privation. Even here, however, the application of restraint by the United Nations, where possible, must be on a problem basis, taking due account of

provocations and other complicating circumstances which are almost always present.

Accordingly, it is not only inevitable but right that substantive international problems flowing from poverty, ignorance, submission, animosity, and the like should be met by attacking them in help-giving substantive ways, with legal standards of behavior built in, and with let-outs where necessary. These problems cannot and thus should not be met with abstractions disembodied from the particular attack upon the particular problem.

A peaceful and developing international community can realistically be built only upon a problem-by-problem attack, with all the differences in treatment which will ensue, upon realms of activities which nations consider may best be solved through international effort. This effort, which will, in degree, result in some curtailment of their freedom of action, they will insist must include appropriate safeguards for regaining such freedom of action if things turn out unexpectedly. Moreover, such curtailment of freedom of action as is involved will be welcomed only if it is ancillary to a cooperative, energy-provoking activity which they consider to be in the interest of their peoples. At the same time, increasing welfare of peoples, which is a condition of peace and justice, must come primarily from the fruits of that experimentation which sovereign nations can best engage in, with such outside support as can be mustered from more fortunate countries which understand that their own interests lie in furnishing it. Knowing only some of the important questions, and few of the answers, this seems to be the sensible way to proceed.