

THE EXPEDIENT THINGS

Address by

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Clothes may not make the man, but by their garb some professions have traditionally been known. Thus the clergy are "men of the cloth", and members of the legal profession are "men (or women) of the robe". Distinguished members of the English Bar may "take silk". When the Permanent Court of International Justice was about to inaugurate its existence at The Hague in 1922, at least one member thought that the judges on a World Court should have robes of scarlet and ermine, more resplendent than those draping the figures on any merely national bench. Perhaps it was a prudent recollection of the maxim that "Fine feathers don't make fine birds" which actually established the costume still worn by Members of the International Court of Justice -- a black robe like those used in our university celebrations, but in the case of the Court, with the addition of a white lace jabot or bib.

So I am a man of the robe, but were I rather a man of the cloth, I would preach from a text. The text would be from Paul's first Epistle to the Corinthians where he wrote: "All things are lawful unto me, but all things are not expedient."

Given my own frame of reference, I must try to interpret this rather striking assertion, not as one entitled to declare the meaning of Holy Writ, but merely as a jurist. Nor shall I pray in aid various translations in versions later than the King James'.

Paul's assertion is at first puzzling to a lawyer, but one would not have it reversed to read: "All things are expedient unto me but not all things are lawful."

Which is the higher order of guidance: expediency or lawfulness?

The question goes to the heart of the problem of international order -- of peace among nations. Is there law to which sovereign states are subordinate, or may they always do that which at any given moment seems expedient?

Law builds from precedent to precedent. With age, it gains in reputation and value like a fine Bordeaux. Expediency must be determined by the decision-maker of the moment, often beset by novel strains and stresses or by the anxieties which crises may induce. But law is not an inflexible mold the shape of which may not fit the conditions of the present. The Medes and Persians might boast that their law never changed but the Law of today has overtaken them and passed them by.

It was my privilege in 1958 to deliver here in your Law School, the Thomas M. Cooley Lectures. I used as a label "The Use of International Law" because I wanted to answer the question so often posed by the sceptics and self-styled realists: "Is international law of any use at all?" I tried to show that international law is of use although it is not omnipotent any more than the law of these United States or any one of them -- law which, unhappily, is violated somewhere in this land every hour and every minute of the day and night.

No, we can not read St. Paul literally as if he were saying that he, like the sovereign State of some men's imaginings, was above the law. He was no Don Quixote.

It is said that the Devil can cite Scripture for his purpose: and I do not seek a Satanic role, but even if one reads my assumed text literally, one finds the clear advice: "Even though I am allowed to do it, it may not be to my advantage." In such a reading, action is subjected to a double test -- legality and expediency.

In post mortems of the so-called "missile crisis" in Cuba and of the courageously successful decisions of President Kennedy, as well as in

legalistic vivisections of the current policy toward Vietnam, one can read the arguments in favor of legality and in favor of expediency interpreted to mean that which is to the national advantage. (I may be permitted to recall that one version of the Epistle to the Corinthians renders "expedient" as "for my good" and another as "profitable".)

As a nation, we put a high value on law-abidingness. It is true, as Elihu Root suggested, that international law is not like a Dresden teacup which, once broken, is irretrievably ruined. But every violation or evasion of international law, especially by a Great Power, weakens the structure of the law. Some still say -- as once it could well be said -- that international law is the protection of the weak against the strong. That was the faith of the Government of the United States in our national infancy. The American statesman of the end of the eighteenth century need not yield one jot or tittle of quality to the American statesmen of this twentieth century, but the former knew far more about international law and paid greater deference to it.

Today, considerations of prestige and influence impose upon some Great Powers inhibitions which deter the exercise of naked power. The use of the

Big Stick policy is seen to be disadvantageous in the long run; it is inexpedient. It is a stupid statesman who contents himself with saying "Because I can, I will."

Much of the actual machinery of foreign-policy-making, is devoted to background. The decision-maker is not an actor reciting lines which others have written -- although he may indeed play that role later in public explanation of what has been decided. But the decision itself is made against a background of policy papers, intelligence reports, and invoked precedents. (It is a curiosity of current usage that "intelligence" is now commonly associated with something secret --C.I.A.-- and indeed one is sometimes hard put to it to find in government the operation of intelligence in its normal meaning.) To prepare the way for hoped-for public acceptance, there may be "background conferences" for the Press. Sooner or later, there is the public explanation, which, in the words of our national anthem "half conceals, half discloses." Such public explanation, perhaps at a university ceremony where the speaker is garbed in a freshly won academic robe and hood, seeks to throw up defenses against anticipated forensic opposition. The emphasis is likely to be on the present, since the long past may bore, and the dim future may

frighten, the audience. It will be at a later stage or on a different level that one may draw freely on the support of history, preferably by quoting Thucydides. The defense must of course demonstrate the wisdom of the decision: the policy chosen is advantageous; it serves the national interest; it contributes to world peace; it is expedient. No faltering syllables will plead that it is no matter if the action be unlawful. It is highly desirable to be able to give assurance that the action taken or to be taken is in conformity with our treaties and with general international practice and law.

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It is usually not difficult to prove the truth of the prophet's assertion that "There is nothing new under the sun". It can even be shown that there are historic precedents for the inverse ratio of the length of men's hair and of women's skirts. One is apt to hear it asserted that the "cold war" lends a new dimension to international relations. Yet when the power of an expansionist Islam after the tenth century began to diminish in comparison with the power of Christendom, Don Juan Manuel anticipated a long transitional period of coexistence which he called la guerra fria. Plus ça change, plus c'est la même chose. But is it the same thing? Goethe told his friend Eckerman that "Man is not born to solve the problems of the Universe.."

Today we might insist that Man is born to do precisely that. Many Jasons embark on the glorious quest for the golden fleece. The cosmonauts in Gemini are but the present generation of the intellectual descendants of the argonauts in Argo. They see the difficulties as being material, products of the material world. Yet surely one of the greatest problems of the universe is the elimination of "man's inhumanity to man." "Is there any other solution to the problem of international neighborliness and peace? In our contemporary concept of the nature and scope of legal science, this is a problem whose solution is to be sought by those trained in the true discipline of law.

Some of the so-called political analysts write plausibly but are apparently incapable of that cold, clear legal dissection of factors which is part of the stock in trade of the skilled lawyer. A competent international lawyer never overlooks the political, economic, psychological, or other "non-legal" factors; the political analyst often ignores even the legal factor.

Given the nature of man's daily experience, we can say -- with a deferential bow to the shadows -- the life of the law is complexity. Why

blink the fact? Why deny the obvious and thus remove the zest which complexity stimulates in the searcher for truth? Why should social scientists say that the natural sciences, the "exact sciences", -- perhaps astrophysics for example - have a monopoly of complexity? They have not. Indeed they deal with an ordered universe while the law of the land or the law of the international community deals with the disorderly unpredictability of the human spirit.

In speaking of "the law", I speak of it in its entire human scope without limits of national frontiers or of legal systems or of artificial classifications into "private" and "public" or "civil" and "criminal" or otherwise. I speak of it as being at least transnational.

The very complexity of the law coupled with a generous dose of public indifference, creates a major obstacle to the solution of the problem of peace which has its own additional complexities. This is bound to be true because the solution is not to be found in a test tube in the laboratory or even in an electronic computer. No solution can be certified correct by any governmental fiat or by any resolution of the United Nations. A proposed solution must pass the test of public acceptance on a very wide

because only in such acceptance can it have reality.

Just last month we in the United States were told that Vietnam was the greatest problem facing the people of this country but it was not an issue in the elections except for a few scattered contests. Peace is always the principal problem; people rarely make it an issue.

Some forty years ago there functioned in the United States a National World Court Committee. The Committee's objective was to induce the Senate to consent to participation by the United States in the World Court, then officially named the Permanent Court of International Justice. That Court was the predecessor of the present International Court of Justice. The World Court of that era was not part of the League of Nations but it was connected with the League. The Senate had refused to agree to American membership in what was called Woodrow Wilson's League. Geneva was regarded as a source of infection against which a strict quarantine must be maintained. I worked for the National World Court Committee which continued its efforts for some ten years. Presidents Harding, Coolidge, Hoover, and Franklin Roosevelt favored the Committee's objective. The objective was not attained. Some of the best minds wrote learned arguments in favor of joining ^{the} World

Court. Speakers proclaimed its value from platforms all across the country; they explained all the technical details. The opponents carried public opinion by avoiding the complexities. They hit upon a slogan: "If you want your boy to fight in another European War, join the World Court!" Scholarly experts and some statesmen refuted the slogan's implication in articles and pamphlets which few indeed of the electorate ever read. Senators knew there was not much heat in the endorsements of the Presidents. They knew the truth of Elihu Root's observation that a militant minority will punish where a complacent majority will not protect. The United States did not join that World Court but "the boys" did fight in another World War.

The tide turned. In 1945, the United Nations was created in San Francisco with the United States as a leading advocate. The present International Court of Justice was established by the same Charter as the "principal judicial organ of the United Nations". The United States -- acting through the Senate -- then again led the procession but this time in emasculating the Court's jurisdictional powers by adopting what is known as a "self-judging reservation." This reservation, known as the Connally Amendment, claims the right of the United States to block the jurisdiction of the Court in any case

merely by asserting that the matter involved is, in the view of the United States, a domestic matter. There is once more a national committee composed of leading citizens of both parties and from all parts of the United States. Its name is "Committee for Effective Use of the International Court by Repealing the Self-Judging Reservation." This Committee has not yet been able to generate the heat necessary to soften the iron opposition of the Senators who are afraid to subject the United States to international adjudication. There is not enough heat even to rouse to activity the sincere but mild proponents. Few are ready to make this apparently remote objective an actual political issue. Over the years, the Administration has always sung the same song of legislative priorities: "Of course we believe in the international rule of law. We want to strengthen the World Court. But Senators X, Y, and Z are against it and we must not risk antagonizing them until we have their votes for the tax bills, or the deficiency appropriation, or for the confirmation of a judge." Long-range measures to promote international peace through the rule of law are not issues that determine votes or command priority.

Meanwhile, however, there has been progress in the development of

the usable body of international law. Another United Nations organ, the International Law Commission, marches steadily ahead along newly paved roads of codification. The process is being studied by UNITAR, the new United Nations Institute for Training and Research, and by a panel of the American Society of International Law. The professional associations of international lawyers, both national and international, have attained wider support. There is a somewhat more popular and better advertised movement for world peace through world law. Just as Alexander Hamilton was arguing a point of international law in the New York Courts 182 years ago, so leaders of the bar are today arguing in our federal courts what rules of international law apply to cases in which some foreign government has nationalized the property of American citizens. Every year an increasing number of lawyers are graduating from our law schools with some knowledge of international law. (The old provincialism still lingers in the unreadiness of bar examiners to include international law as one of the subjects on bar examinations.)

Why then, do the nations submit so few cases to the International Court of Justice? You may say it is because that Court handed down an unpopular decision in the South West Africa case. But this decision cannot be the

reason since the lack of cases has been characteristic of years before that case was decided. The world has little marked nor long remembered some three dozen other cases on which the World Court has pronounced since it began to function twenty years ago. Many of these cases have been of great importance to the litigant states. All of them have been important -- even though small -- contributions to the gradual development of the international rule of law. But they did not stir deep passions in or touch the interests of a worldwide circle. Decisions of international courts are usually but pebbles which scarcely cause a ripple in an ocean of troubles.

Those who are indifferent to law and justice can be stirred to their vitals by the expedient things. Every one is an expert on expediency. Every decision-maker on the political fronts, determines what things are expedient. The adjudicator -- the judge -- owes his loyalty to the law and not to expediency. The decisions of the international judge will be criticized but historical experience teaches that they will almost invariably be accepted. States are reluctant litigants, but once having agreed to submit a case to adjudication, they are not scoff-laws.

It would be unfair to the skilled lawyers in State Departments and Foreign Offices to overlook their role; I myself once had a small share in

such tasks. The officer who advocates the use of the World Court on the basis of long-range principles, will ask the legal advisers whether a certain dispute with Graustark or Ruritania might well be submitted to the International Court of Justice. The lawyers will be called upon to state the pros and cons: if we submit the case to the Court, will the Government of Graustark (or Ruritania) consider our act to be a sign of hostility? The legal advisers must probably reply "International litigation is not generally regarded as a friendly act." "If we submit the case to the Court, will we win?" the officer next asks. It is here that the political decision-maker will long for the proverbial one-armed lawyer -- a lawyer who will not say "On the one hand we have a sound case and the Court should decide for us, but, on the other hand, the defendant might persuade the Court that his objections are sound." Moreover, in the United States, the legal adviser is bound to warn that if we try to submit the case against the wishes of the other government, that government has merely to invoke against us our self-judging reservation and thereby oust the jurisdiction of the Court.

Perhaps the decision-maker will seek to quantify the alternatives and have them scored in a computer. But at this point, with whatever help

he has secured, the decision-maker will decide what is expedient. Is it expedient to instruct the officials to continue negotiations through written notes as usual, thus avoiding a confrontation? Or is it expedient to add another brick to the structure of international adjudication without which the rule of law between nations cannot be established?

When will it be said on highest governmental authority: "To lose a certain case involving a legal dispute with State X would merely be paying a small premium for a certain amount of insurance of the international rule of law. As we do unto others, so will it be done unto us." A distant goal has never been reached by refusing to take the first step. No matter that the insurance policy is full of fine print excepting this and that risk; we cannot expect to buy an absolute guarantee, at any price.

We have not yet succeeded in establishing the international rule of law as a pathway to peace. I say "we" because it is the concern of all of us. We are all architects or artisans charged with the building of the international legal order. Why can deny his or her responsibility?

Because we have not yet succeeded, must we say that we have failed?

No, lack of success is not failure. You may be halted on a road but still be on your way. The journey is worth the effort. The expedient thing is to press forward.