INTRODUCTION

BY RAMSEY CLARK

For over two hundred years now We the People of these United States have acted on the assumption that the rule of law is essential to insure domestic Tranquility. Indeed, our forbears, in common with peoples living in politically organized societies, generally have shared that assumption for some few millenniums in varying degree and differing perspective. The common experience has suggested to most for thousands of years that personal safety depends on the enforcement of principles designed to protect individuals from force employed by others.

As I write these lines in New York, I am satisfied that nearly all who live here absolutely believe their lives, their fortunes, their sacred honor depend on the New York Police Department, the New York Criminal Courts, the District Attorney and the Drug Enforcement Agency. Indeed a large part of existing popular dissatisfaction is with the assumed failure of the institutions to effectively protect society. New Yorkers believe the rule of law and its effective enforcement is essential to their safety in their homes and neighborhoods. They would be terrified at the prospect of a lawless society.

Experience is as clear for at least as long that international tranquility depends on the enforcement of an international rule of

law. Thomas Aquinas wrote centuries after and centuries before legions of others stated the same idea that, "War is inevitable among sovereign nations not governed by positive law." War and lesser forms of international violence and coercion have been the dominant experience of nearly every generation in nearly every place on the planet through recorded history.

In these last generations the technology of war, the expanding capacity for mass destruction, has become so horrific that assured peace is no mere amenity but necessary for moral, mental, economic and physical survival.

The need for international law and enforcement is as urgent for the world community to prevent omnicide as local law and police are to a family whose home is surrounded by a mob bent on arson and murder.

And in the face of this inescapable fact, the whole environment reeking with the growing man-made risk of self destruction, the public overwhelmingly yawns, shrugs, or blinks at the suggestion of world law as a means to peace. Lawyers themselves consider the subject too exotic, if not embarrassing, to contemplate.

Newspapers, magazines, television, radio, conversations in buses, boardrooms, benches, beds, bars, automobiles, churches, coffee shops and courtrooms create a constant cacophony for domestic law and order. At the same time, a U.S. Court of Appeals in 1989 addresses the argument that international law is part of the supreme Law of the Land as "fanciful," "idiosyncratic," "far fetched." Most courts decline to face the argument at all.

Courts and lawyers, intellectually self-confined to domestic quarters, simply ignore the uncontestable fact that international law is woven into the fabric of American law. Article VI of the Constitution of the United States includes treaties as the supreme Law of the Land. Common law processes absorb customary international law into the corpus juris. Political necessity itself, if Grotius is right that "it is this care to preserve society which is the source of all law," incorporates international law into U.S. law. Still we are relegated to a condition of anarchy in that very area of human affairs where the threat to life is greatest, relegated by powers purporting to function under and exist for the rule of law: courts, legislatures, government executives, lawyers.

That the American people acquiesce, if they do not support this

rejection of international law, exposes a failure of democratic institutions. Surely a knowledgeable people guiding their own destiny through democratic processes based on principles of law would wrest power from such autocratic governance as a preliminary act toward self-preservation.

Unwilling to assert outright that there is no international public law binding the United States, federal courts often invoke the "political question" doctrine which holds courts not competent and finds the political branches are delegated authority by the Constitution over activity involving foreign relations. This is tantamount to recognition of the absence of law in such areas, or at least an absence of law which can be enforced against the political branches by courts. Such a doctrine places the executive above the law when it acts in the foreign policy area even if the result is ordered assassination of foreign leaders, invasion of foreign countries, or military raids against them without authority of domestic or international law, or treaty, or declaration.

The very idea that Congress can at its whim alter, amend, repeal, or ignore any international law, is a declaration of independence from the world community and a warning the U.S. will not be bound by any international rule not to its liking.

Little wonder then that few lawyers are willing to spend much time, or thought, on international law. However important it may be, or be said to be, in action it is near impotent. It may be a helpful political argument. It may reinforce world opinion outraged by despicable acts. But it has little power to fulfill its promise, independent of the will and force of the nation players involved in a given controversy.

While nations sometimes abide by decisions of the International Court of Justice, U.S. rejection of its jurisdiction in the Nicaragua claims case shows it is largely a matter of choice. The European Court at Strasbourg is a highly hopeful opportunity for enforcement of international human rights principles within member nations. In contrast the western hemisphere court at San Jose in a region reeling with human rights violations lacks the participation of the superpower in the hemisphere, the United States, a history of inaction and little present chance to enforce any disputed decision.

Few national courts have considered enforcing international

principles against their own governments. The history of litigation in United States courts seeking enforcement of international public law principles against our government is spotty and ambiguous. It contains huge voids because claims are not asserted in spite of terrible injuries from a sense of futility. The law may be inconclusive, but few lawyers are willing to mount serious, full-scale lawsuits in the face of such bleak prospects.

An illustration of the difficulties with suits against the U.S. based largely on international law involves claims arising from the U.S. bombing of Libya in April 1986. A lawsuit for hundreds of civilian victims, killed and injured, was brought in federal district court. It alleged the bombing was an attempt to assassinate the foreign leader and randomly kill civilians to terrorize the people into overthrowing their government. The claims were based upon international law, U.S. constitutional and statutory law, the law of armed conflict and U.S. criminal law. Motions to dismiss on behalf of the U.S., the U.K. and the chain of command from President Reagan to the pilots of the offending aircraft were filed. The court, accepting the allegations of the complaint as true, dismissed the claims on the basis of sovereign immunity ignoring all arguments based on international law. The Court added "the case offered no hope whatsoever of success, and plaintiffs' attorneys surely knew it."

The U.S. and U.K. both sought sanctions for the filing of the case. The issues are on appeal. Meanwhile Iraq paid families of U.S. servicemen killed and injured in the bombing of the U.S.S. Stark, only a few compared to the civilians killed and injured by U.S. bombing in Libya, 36 million dollars in damages. Power prevails.

As a consequence, in the very field of most urgent need and greatest importance, positive international law development is largely dormant.

Fortunately, a few lawyers, barely a handful, refuse to be outfaced by irrational things. No one among them is more committed, or perseveres in pursuit of peace through international law more ardently than Francis Boyle. This new book recognizes in its title the tension, if not hostility between, international law and U.S. foreign policy, questioning the meaning of this tension for the future.

The book is a testament to his vision, his energy, his scholarship, his intellectual rigor and imagination and his courage in a lonely righteous pursuit of principles opposed overwhelmingly by economic power, government and legal peers in his own country. He perseveres no matter what the personal consequences. If it is not the customary treatise, or volume of cases and materials lawyers are accustomed to, the fault is not with Francis Boyle, but with the body of law itself.

It is impossible to present international law as followed by American foreign policymakers as an articulate, coherent, comprehensive set of principles and procedures, because it is none of these things. International law in the abstract offers a slender foundation for the establishment of world law. What it offers is thoroughly politicized, then savaged by lawless, discretionary policymaking. Enforceability of international rules against the United States is not even contemplated by the foreign policy establishment.

Professor Boyle addresses the subject of international law teaching literature early in his book. It is a sympathetic and thoughtful review, but he quickly finds literature inadequate to the purpose because the teaching materials rarely engage the facts of existing and developing crises in international relations. It is this observation that determines the direction of his book. He then delves directly into a series of the most intransigent, complex and dangerous international problems and situations: terrorism, the Middle East, the State of Palestine, military violence by the U.S. against Libya, the chemical and biological warfare build-up, Star Wars. He treats other issues like the Reagan administration's Siberian pipeline sanctions and its policies toward Nicaragua in passing.

His complaint against existing teaching literature in international law, because it rarely addresses the facts of unresolved legal disputes, could be made against most law teaching materials. But there is a difference. In every other field of law, we can identify the institution with the power to ultimately decide the questions of laws and in most there is a large body of binding precedents. The court, the congress, or legislature, the rule-making body, regulatory commission, council, or board, the hearing officer will decide the next case. A reader can observe how related questions

have been decided. From precedents one can predict how a question will be resolved. It is possible therefore to aggregate cases and materials that enable a person to understand how a system works and to predict what a court or another authority will do in the next case. Because this is not true in international law, Professor Boyle is right in his criticism. Teaching literature in the international law field is helpful as history, but it leaves a lawyer without a forum and only a suggestion of what the rule of law ought to be.

For those who believe that law is what the courts say it is, the problem with international public law should be clear. For most questions, there is no court to say what the law is. There is no substantial body of international case law creating patterns of principles that will guide future decision making and no court with the power to enforce its order.

Indeed, U.S. law very nearly says that international public law is what the political branches, primarily the executive, say it is. Since policymakers decide such questions on self-interest, as they see it, rather than general principles of positive law governing the conduct of nations and their international relations, international law as the processing of principle has little role in predicting what nations will agree the law requires, or what they will do.

This absence of judicial authority and a comprehensive body of law leads Professor Boyle into a lengthy, fruitful and recurring dialogue, often adversarial, with great thinkers of the past. We hear the voices of Thucydides, Machiavelli, Hobbes, Locke, Rousseau, Bentham, Marx. For most lawyers, this would seem irrelevant to legal analysis, poor taste, perhaps boring, but most offensively, meddling with the integrity of delivered law, akin to making law.

There is a second dialogue woven into the text, echoing off the voices from the past, and clarifying the issues and their resolution.

This dialogue is with contemporary scholars, often teachers of Professor Boyle, including Hans Morgenthau, Lon Fuller, H.L.A. Hart, Roger Fisher, Louis Sohn, David Mitrany and others. The respect, personal affection, yet critical acumen with which Professor Boyle treats their works, characterize the intellectual independence that distinguishes his work. He dares to think anew.

The volume is a gold mine of citation to and analysis of the existing documents, charters, conventions, treaties, principles, cases and materials dealing with public international law. If their presentation seems unorganized, it only reflects the reality. The materials are unorganized. To present them otherwise is contrived and misleading. Because of his method which might be called a case in progress method, the elements of international law are used as they become relevant to a crisis.

Some readers may think Professor Boyle is a partisan. He is, for peace through international law. Because he chooses to deal with existing international crises and problems, he must establish a factual record for his analysis. In conventional law teaching literature, the facts are found in opinions of courts and other documents. In the process of stating facts for his study, Professor Boyle makes findings and assumptions of fact generally against the more powerful interest in the dispute. It is that abuse of power to which he applies international law to achieve a peaceful resolution.

Since the crises and problems with which he deals are often highly emotional, with American policymaking opinion highly partisan, Professor Boyle seems to take sides. From a law teaching standpoint, this should not matter. The application of principles of international law to specific situations provides the legal training needed. But, in fact, Professor Boyle's fact finding will prove overwhelmingly accurate in hindsight. He is simply identifying the conduct that gives rise to the invocation of international law.

He investigates his chosen issues as lawyers with actual cases do. He goes to the Middle East, he views the bombing of Tripoli, he travels, examines, confers endlessly to understand what is happening and how international law can help. If it seems a strange way to present law, it is because international public law does not adequately find concrete application any other way.

An idealist, who passionately believes in the possibility, indeed the necessity of international law, Francis Boyle works tirelessly to make it a reality.

We should learn from his labors and give thanks.

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