

A NEW WORLD ORDER—THE AMERICAN LAWYER'S ROLE

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I

It should need no argument that we of the legal profession have a vital and perhaps decisive part to play in shaping the new world organization which is to come out of this war; and that with the opportunity goes a corresponding responsibility.

Normally and traditionally, the members of our profession are regarded as something more than advisers and advocates in private matters. Especially in times of crisis we are looked to for counsel and leadership on great issues. Let the names of Hamilton, Jay and Marshall, of Webster and Lincoln, and, in our day, of Root, Hughes, Stimson and Hull, bear witness.

I am thinking, however, not so much of those very few American lawyers for whom official position or personal prestige provides a hearing by all our people. I am thinking rather of the combined influence of the tens of thousands of the rest of us. It is we—all of us—who can rightly be expected to have views on the nature and form of the "general international organization . . . for the maintenance of international peace and security" pledged by the Moscow Declaration of November 1, 1943.

We can be modest without depreciating our tremendous influence. It is we lawyers who have more opportunity than almost any other group or profession to express ourselves on this vast problem—in the legislatures, in print, on the air waves, in our own meetings and in conversation.

If the lawyers of America really educate themselves on the problem of world order, so as to have mature and enlightened views, it is within reach to accomplish a result which "realists" now dismiss as impossible and for which future centuries will not cease to praise this era. But, correspondingly, if we fail to take the trouble to read deeply and think hard, or if our views are too much set in old grooves and too much controlled by old concepts of "sovereignty"

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and the like, the world may lose again the chance now offered to establish firmly the rule of law throughout the world.

There is, of course, nothing new in thus stressing our responsibility. An editorial in the May, 1944, issue of the American Bar Association Journal deals with the importance for the lawyer of "trying to help and inform American public opinion in support of a practicable plan for the post-war cooperation of the nations to maintain peace and the rule of law." But what I have to say is by way of emphasis. I wish to express my belief that the study and exposition of world organization now stand at the very top of the public or quasi-public functions of the American lawyer; that they should have with us a "first priority."

For several reasons this is true. It is so because twenty-five years ago we miserably failed to devise an effective world organization and because the lawyers of the country shared in and partially caused that failure. It is so, also, because we cannot afford to, we must not, fail again,—at least not through lack of trying to the limit of our capacity. That much, at least, we owe to our descendants.

We need, above all, imagination and a creative spirit, capable of a great leap forward in the organization of a world now truly to be made one by modern invention. We need a spirit and a wisdom at least equal to that of the founders who in 1787 not only had the vision of this nation, but also the practical skill to find the formulas that made it possible. Our next President and Secretary of State will, in all probability, both be lawyers, whoever is elected. Will they have this vision and this skill? Will our Congress, of which more than a majority are lawyers, have these qualities? More important even than these officials, will the main body of the practicing profession "help and inform" public opinion with knowledge, with insight and with foresight? If a few years hence these questions can be answered affirmatively we shall probably have succeeded; if negatively we shall almost certainly have failed.

II

What are the most crucial of the problems upon the solution of which the setting up of an effective and workable world order will depend?

I suggest that the two most vital and difficult questions closely interrelated, are: First, What shall be the powers of the world organization? and, Second, What shall be the plan or system of representation in the organs exercising those powers?

These were also the most important and the hardest questions in the convention of 1787. What powers should be given to the general or federal authority? By whom should these powers be exercised; and, in particular, what should be the plan of representation in the legislative department?

We all know with what consummate skill and foresight those problems were solved in our own Constitution. Only such powers as were strictly necessary or appropriate to the formation of a national government were conferred upon the new authority. But the convention did not shrink, despite many doubts and fears, from including the minimum powers required; and they were conferred in such form of words as to be adaptable to new conditions in a changing world.

A yet more thorny question was the companion problem of representation in the Congress. The device whereby each State was assured equality in the Senate while differences in population were to be reflected in the House of Representatives, was a unique product of the needs of the moment. That solution was not, perhaps, to be justified by logic; yet it has proved durable under the tests of use and time.

By this reference, I am far from suggesting that the problem of setting up an efficient world organization is at all similar in detail to that of the establishment of our Federal Union. We were then setting up the government of a new *nation* intended to function and to be governed as a unit in numerous aspects. In no such sense or with such extensive powers, will it be wise or practicable (in the present state of world maturity) to launch a world organization. Nevertheless, if it is to be *effective* in the maintenance of peace, the "general international organization" must have some *definite* and *substantial* powers to make decisions binding upon the member countries in matters of war and peace. On this premise, it follows that careful provision must be made for the composition of the World Assembly or Congress or Council whereby those powers may be employed. Accord-

ingly, the planners of any effective world organization cannot dodge these two crucial questions. They must decide in substance and *frame in words* what the powers should be; and they must likewise formulate a definite plan of representation and method of selection for those who are to exercise the powers, whatever they are.

There are two reasons why I believe American lawyers can make their greatest contribution to the cause of world peace by centering their attention upon these key questions of powers and representation. It is because they are not only the most vital but also the most difficult and those upon which American opinion may be most sensitive. If *these* questions are solved, all other factors—such as the composition and command of international armed forces and the nature and functions of such executive agencies as may be needed—would, I believe, yield to patient counsel. But if the member countries cannot agree upon well defined powers of an effective nature that they are willing to yield, and upon the terms in respect of representation upon which these powers are to be granted, it seems clear that no world authority really adequate to maintain peace, will arise in our time.

At the outbreak of war in September, 1939, I tried to educate myself on the subject of world organization and after some months of study had the temerity to produce a plan in the shape of a proposed constitution for a Federation of Peoples¹.

It was then that I was impressed with the farseeing wisdom of Immanuel Kant, who in 1795 laid down the principle that world peace can only be secured by a great federation of peoples armed with adequate authority.² It was then also that I so clearly perceived the determining importance of the question of the precise powers to be accorded the international authority and of the related question of representation in the World Congress or Assembly. I undertook to propose concrete formulas for these problems,

1. "A Memorandum with regard to a new effort to organize peace and containing a proposal for a 'Federation of Free Peoples' in the form of a draft (with explanatory notes) of a Constitution for the proposed Federation" by Grenville Clark, privately printed, January, 1940.
2. "Eternal Peace, a Philosophical Essay" contained in "Eternal Peace and other International Essays". (World Peace Foundation, Boston, 1914.)

which, with modifications, in the light of the great events of the past four years, I would put forward for consideration today.

In respect of powers, I conceive that they should be narrowly limited to such as are *directly* and *plainly* connected with the maintenance of peace; but that within that limit, the indispensable powers should be firmly granted. The proposed constitutional provision, therefore, would give definite authority to a legislative and controlling organ of the Federation, by *majority vote* of the members of a unicameral World Congress, "to provide for the common defense of the member countries" by economic sanctions and also by military measures, when deemed necessary.³ The Congress would also have power to "appoint or prescribe the manner of appointment" of the Supreme Court of the world organization, the Court to have authority to make "final and binding" adjudication of *all* unsettled disputes between member countries.

It was and is my conception that these two powers—to enforce peace by sanctions and to constitute a Court with compulsory jurisdiction and with the function of binding decision—represent the irreducible minimum of authority with which a world organization can possibly be effective for the maintenance of peace.

There is no question that these proposed powers would not only limit but eliminate that part of the "sovereignty" of the member countries concerned with external relations. The granted powers would not, indeed, touch at all the *internal* sovereignty of the members. Home rule would continue as before to a fuller extent than with our States after the adoption of our Constitution. But the most traditional and essential attribute of *external* sovereignty would be gone, namely, the right of the independent state to go to war or

3. The text of a clause authorizing economic and military sanctions might be as follows: "The Congress (of the World Federation) shall have power: To provide for the common defense of the member countries of the Federation and for that purpose (a) to prescribe economic sanctions to be imposed by all members of the Federation; (b) to prescribe military measures to be undertaken by them, with power to maintain military (including naval and air) forces either in peace or war and to prescribe the contributions to be made thereto by the respective members of the Federation and to appoint and remove the commanders-in-chief of such forces, provided that in calling for such contributions of armed forces the Congress shall take into account both the populations and industrial resources of the respective member countries."

to refrain from military action upon its own sole decision and at its own pleasure. When, by majority vote of a World Congress, a nation may be forbidden to make war under any circumstances, subject to being declared an enemy of all the federated nations if it flouts this mandate, and if, on the other hand, it can be summoned to join in concerted military measures, even if its representatives voted to the contrary, it is useless to deny that a most essential attribute of sovereignty, as understood for centuries, would be gone.⁴

The question, however, is not whether sovereignty, in its normal sense, would be impaired, but whether the required modification of sovereignty is, instead of a misfortune, a beneficent step which mankind has at last had the intelligence to take.

It ought also to be recognized without further hesitation that majority rule in a world organization is just as much of the essence as in a local or national authority. The lack of it was a fatal defect in the League of Nations, in which any important and prompt action to prevent aggression was precluded by the requirement of unanimity except in relatively unimportant matters.⁵ Hamstrung with this impossible handicap, the wonder is not that the League proved impotent to prevent major war. In retrospect the wonder is that anyone could have expected it even to give pause to a determined aggressor.

But the very facts that the irreducible powers of an *effective* world authority would transgress national "rights" long held to be inviolable and would need to be exercisable by majority vote, make it the more vital that the scheme of representation in the World Congress be well-balanced and fair. For if this problem is not well solved, the powers will either not be conferred at all or the functioning of the world authority would break down upon its first severe test.

In suggesting a formula for this delicate problem of representation, I believe that if, instead of a bi-cameral World Congress or Assembly, a single body is created upon a carefully balanced plan, and with provision for a minimum and

4. See "The Geography of the Peace" by the late Prof. N. J. Spykman (Harcourt, Brace & Co., 1944), where (p. 3) the "sovereign state" is described as "a unit which recognizes no superior authority in the conduct of its relations with other states."

5. See Article V of the Covenant of the League of Nations.

maximum representation, there will be more likelihood of harmonious agreement.

Out of many possible formulas, I venture to suggest the following as feasible and fair:

Let it be provided that representatives shall be apportioned among the member countries upon the following basis: For the first fourteen millions of population, one representative for each two millions (or major fraction thereof), and, in respect of population over fourteen millions, one representative for every five millions (or major fraction thereof), with these important provisos: (1) that the "Big Four" shall each have fifty representatives; the British Commonwealth and Empire (including India) and Russia, with their autonomous units, being treated each as one country with the right to apportion the fifty representatives as they themselves determine; (2) that any member country with over two millions of population shall have not less than three representatives; (3) that any member country, no matter how small its population, shall have one member.

It seems that each of the "Big Four" should be content with equal representation. Of the British Commonwealth and Empire, Mr. Churchill said in the House of Commons on May 24, 1944: "Taking everything into consideration, including men and money in the war effort and expanse of territory, we can claim to be the equals of these great powers [Russia and the United States] but not, in my view, superior." Russia, although exceeding the United States in population and probably in natural resources, is now far inferior in industrial power, and should be satisfied. China, with three times the population of the United States, could nevertheless hardly claim at present equal resources or strength, and would doubtless be very ready to be represented on a basis of full equality with the three other controlling Powers. As to the United States, we would have, in proportion to population, a larger representation than any of the other three,—somewhat larger with relation to Russia, and three or four times larger as compared with the four hundred and fifty millions of Chinese and the five hundred and fifty millions of the British Commonwealth and Empire. In view of our tremendous economic and financial strength, we should most certainly have full equality. But could we reasonably expect more?

It is of interest to observe how the formula would apply to other colonial Powers which govern populations much

greater than their own. Of such, the outstanding cases are France and The Netherlands. Assuming that France (with 40 million people) regains her colonial empire with a non-European population of about seventy millions, the formula would give France (and her colonies) twenty-six representatives. The Netherlands, with nine million people, and with a non-European population of about seventy millions, would have twenty representatives. It may seem novel to give so much weight in the formula to populations heretofore thought of as "colonial" or "native"; but the time has come when it is wise and necessary to accord representation in respect of the great populations governed by the colonial Powers.

It will be noted that the formula is intended to take into account the existence of member countries as established and often highly developed political entities, as well as the factor of population; and to achieve a balance between the two factors. Therefore in respect of population alone it gives the small countries a somewhat disproportionate representation, although not to the same extent as with the smaller States in our Congress. To illustrate: Norway (with less than three million population) would, nevertheless, have three representatives; while Czechoslovakia (with fifteen millions) would have seven and Yugoslavia (with sixteen millions) also seven.

Assuming that the World Congress were composed of representatives of all the United Nations and France, it would, on this formula, be a body of three hundred and fifty-four. The World Congress would then represent nearly eighteen hundred million people or 81 per cent of the world's population. A table is submitted showing the apportionment of the three hundred and fifty-four representatives.⁷

7. The above formula would work out as follows assuming representation in the World Congress of all the United Nations as of June 12, 1944, and France. (While commonly thought of as one of the United Nations France is not included in the official list by our Department of State.)

<i>Country</i>	<i>Population (approximate)</i>	<i>Representatives</i>
British Commonwealth & Empire (including United Kingdom, Australia, Canada, India, New Zealand, Union of S. Africa, Newfoundland and the colonies)	557,000,000	50
China	457,000,000	50
Russia (U. S. S. R.)	193,000,000	50
United States (including territories and possessions without the Philippines)	138,000,000	50
Total for the "Big Four"	1,345,000,000	200

(footnote continued next page)

It is true that, by virtue of their two hundred votes, the "Big Four" would dominate and control the world through such a Congress just as effectively as by means of the "world controlling council" to comprise only "the greatest states," mentioned by Mr. Churchill in his recent speech.⁶ There would, however, be the great and vital difference that *all* the countries of the world desirous of sharing in the organization of world peace could do so on a *basis of full par-*

Country	Population (approximate)	Representatives
France (40 million European, 70 non-European)	110,000,000	26
The Netherlands (9 million European, 70 non-European)	79,000,000	20
Brazil	41,300,000	12
Poland	35,000,000	11
Belgium (8.3 million European, 14 non-European)	22,300,000	9
Mexico	19,900,000	8
Yugoslavia	16,300,000	7
Philippines Commonwealth	16,000,000	7
Czechoslovakia	15,300,000	7
Ethiopia (Abyssinia)	12,100,000	6
Iran (Persia)	12,000,000	6
Colombia	9,500,000	5
Greece	7,200,000	4
Iraq	4,500,000	3
Cuba	4,400,000	3
Bolivia	3,400,000	3
Guatemala	3,300,000	3
Haiti	3,000,000	3
Norway	2,900,000	3
El Salvador	1,900,000	1
Dominican Republic	1,800,000	1
Liberia	1,500,000	1
Nicaragua	1,400,000	1
Honduras	1,100,000	1
Costa Rica	700,000	1
Panama	600,000	1
Luxembourg	300,000	1
Total for 27 other United Nations and France	426,700,000	154
Grand total for 31 member countries	1,771,700,000	354

Besides the United Nations and France there are 33 other countries, usually recognized as states, with a combined population of about 408,000,000. Thus the total estimated world population is 2,180,000,000, and the representatives of the United Nations and France in a World Congress would represent almost exactly 81 per cent of all the people of the world.

If and when Germany and Japan (each with an assumed population of 80,000,000 and each with 20 representatives) were admitted the membership of the Congress would be 394, representing almost 90 per cent of the world population.

In order of population the more important of the remaining 31 countries are Italy, Spain, Turkey, Portugal, Egypt, Rumania, Argentina, Hungary, Peru, Chile, Switzerland, Denmark and Finland. Many of these countries would presumably be ready to adhere under the proposed plan of representation.

6. Speech in the House of Commons, May 24, 1944.

ticipation and with the *right* to take their parts. Only thus will an enduring foundation be laid for world organization.

Such a plan combines the practical reality of the dominating position of the "Big Four" for years to come with the advantages—in fact the necessity—of permitting the whole world to share fully and fairly in the maintenance of world order. Let us not deceive ourselves into the belief that any super-power directorate can be a substitute for a united, organized and sustained effort of *all* the peoples—great and small—to establish the reign of law in the world.

Naturally I do not offer my suggestion as necessarily the best possible. But I venture the hope that the suggestion of this formula may stimulate the formulation of other solutions in concrete terms. For we do not now need further general expressions of our desire for world order. What we need is to grapple with the specific and difficult problems in respect of the form of the world organization, which until solved will render futile all our desires, however passionately felt or eloquently expressed.

III

What are the prospects for a truly effective world organization? And in what definite ways can American lawyers best contribute to the desired end?

It must be admitted that the *present* prospects are not wholly favorable. A tendency towards cynicism under the name of "realism" seems for the moment to be prevalent.⁸

The traditionalism and lack of faith shown by many do indeed present formidable obstacles. Can we have confidence that other forces will sweep these aside? I believe that there is ground for hope that this will occur.

8. An eminent historian doubts whether the new world order will after all hold much of anything new and looks forward to a continuance, in large measure, of the old processes of "power politics." ("How New Will the Better World Be" by Carl L. Becker, 1944). An able editor declares that nothing more can be expected in the next decade than an association of national governments. He writes: "That was the basis of the League of Nations and that is as far as we can go this time—at least as a beginning." (Edwin L. James, N. Y. Times, May 21, 1944). A distinguished professor shows convincingly that world government is a necessary condition of peace and must come some time, but despairs of an early result. He writes that "prolonging the truce is the only objective we can fully realize in our lifetime," although he is confident that in a longer future—"within five hundred years"—the organization of peace can be achieved. ("How to Think About War and Peace" by Mortimer J. Adler, 1944). See, however, the opinion of another famous professor, that international government with strong powers "is more nearly within the field of practical politics than many people suppose." ("The Future of Pacifism" by Bertrand Russell in *The American Scholar*, Winter 1943-44).

No one denies that not only the full participation but the leadership of the United States is essential to the creation of a world authority that will really prevent major wars. The critical role of the United States being assumed, it seems that two main factors will determine our course. Firstly: To what extent will we be chastened by this war and be forced, so to speak, to throw off old ideas of "sovereignty"? Secondly: How strong and inspired will be the leadership of our public opinion?

On the first question I am aware that there are some who believe that we will not be sufficiently touched by this war to acquire a real will to act effectively for world order. But for several reasons I believe that this view will be swept away by the impact of events.

For one thing this war is likely, I believe, to impose a more severe strain upon the United States than many of our people have been led to suppose. In view of the promising start of the Anglo-American invasion we can have great hopes. But no one is wise enough to foresee whether Germany will collapse in 1944 or whether a considerably longer struggle in Europe lies ahead. Even if the best hopes as to German surrender are realized it is likely that at least five years from Pearl Harbor will have elapsed, before the last shot is fired against Japan. As the war goes on the chief burden of the struggle, borne successively by the Chinese, the British and the Russians, will more and more fall upon us. It is almost inconceivable, indeed, that our proportionate loss of life will approach that of these other peoples, especially in the case of Russia. But we will, nevertheless, realize anew that war takes many of our choicest and best men, leaving the nation poorer in greater measure than the mere number of lives lost would indicate. Moreover the education and family life of millions of our young people will have been interrupted, in many cases for years on end. Finally we will realize before the war ends that after it we shall have on our hands two foiled and bitter enemies, as vengeful and vindictive as ever existed. Can it be otherwise if we go through to our objectives,—on the one hand the "unconditional surrender" of Germany and, on the other, the "stripping" of Japan of all her territorial acquisitions since 1895? It will be like having two rattlesnakes in one's bedroom which will need to be watch-

ed with an eagle eye and a heavy club for a long while to come.

On the whole, therefore, we can reasonably expect a state of mind, even in the United States, that will be receptive to the undertaking of the responsibilities and the making of the concessions that are necessary to an effective world authority. The question will be rather to explain to the people just what those obligations are and why they are essential as the price of world order. It is this task of exposition that will fall so largely on our legal profession.

What then are the particular points upon which our lawyers are best qualified to advise the American people? We can, I believe, do four vital things.

We can preach the truth not only that world order must be ultimately backed by force, but that this force must be *promptly available*. We lawyers know this to be true of the maintenance of order in a city or a nation. Is not the evidence now conclusive that it is true also in the field of world order?

We can explain the incompatibility between insistence on "sovereignty" and the maintenance of peace. We lawyers know that if the individual asserted sovereignty in the way that nations have asserted it for centuries, domestic order would be impossible. We can tell the people that a nation can no more claim to be a law unto itself than can an individual, if violence is to be averted; that we cannot have it both ways and that the penalty for the retention of sovereignty, in the common and traditional sense, is recurrent war.

We can emphasize the old maxim that "he who wills not the means wills not the end"; that world order means some measure of world government and an acceptance by the United States of the rule of the majority in certain aspects of our relation with the rest of the world.

Finally we can participate specifically in the launching and evolution of the world authority. We can do so by helping, through close discussion, to frame the terms in respect of powers and representation that we believe would be at once efficient and fair; and then by helping to defend and improve the world authority in its first critical years.

These are great tasks. Never has our legal profession had a greater responsibility and never a more inspiring opportunity.