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THE COMMON-LAW APPROACH TO INTERNATIONAL LAW

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THERE ARE AT PRESENT two mighty forces working in the world in contrary directions. One force is working toward international anarchy, the other toward international order. This is so because the ideologies at the back of them are diametrically opposed to each other. One ideology holds that there can be no law above the state, for the ultimate source of all law is the will of the state. This is the logical position of juridical positivism, which defines law exclusively in terms of the command of a political superior, and flatly denies the natural law as an essential element of a legal system. In the absence, therefore, of a world-state, there cannot be international law. The state as the absolute sovereign is a law to itself.

Modern juridical positivism had its origin in the works of Thomas Hobbes, and came to be enshrined in the writings of the so-called analytical school of jurisprudence, from Austin to Holland. In his well-known textbook of Jurisprudence, Holland wrote:

> Convenient therefore as is on many accounts the phrase "International Law," to express those rules of conduct in accordance with which, either in consequence of their express consent, or in pursuance of the usage of the civilised world, nations are expected to act, it is impossible to regard these rules as being in reality anything more than the moral code of nations.[1]

It is a curious phenomenon in the history of legal thought that England, the home of the common law, should also have been the birthplace of juridical positivism, whose approach to international law is the very antipode to the common-law approach. The common law is too deeply rooted in Christian humanism to be blighted altogether by the deathly winds of positivism and materialism. Even in the field of legal philosophy

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[1] HOLLAND, JURISPRUDENCE 131-32 (11th ed. 1910).

there has arisen in England a strong reaction against the positivist denial of the law of nations. But of this later.

What I want to bring out just now is that in the present century the Leviathan has found its paradise in the totalitarian states. It is a significant fact that the platform of atheistic communism is *international* in its designs of world revolution, but at the same time it is extremely nationalistic when it comes to the question of limiting by law the arbitrary powers of the Leviathan. Thus, this ideology stands, on the one hand, for unlimited power of control inside the state, and on the other hand for absolute freedom from legal control outside the state. It adopts a thorough-going collectivism in the national sphere, and a thorough-going individualism in the international sphere. Lawlessness is the connecting thread between the two. The state has taken the place of God, and the will of the dominant class has taken the place of law. Man as such is completely lost sight of. The group is all, the human person nothing.

What the Russian representative said concerning the "Universal Declaration of Human Rights" at the final meeting of the General Assembly of the United Nations on December 10, 1948, epitomizes this ideology:

> It was an entirely false theory that the principle of national sovereignty was a reactionary and outdated idea, and that the repudiation of that principle was an essential condition of international co-operation. The draft declaration of human rights appeared to endorse that reactionary view directed against national sovereignty and was therefore entirely inconsistent with the principles of the United Nations.[2]

In these words the Leviathan showed its teeth and claws. The Leviathan will always refuse to be tamed by the laws. Relying upon its own strength, it feels at home only in the sea of lawlessness. It simply cannot recognize the rights of man without compromising its assumed unlimited sovereignty.

The other ideology, which is still in formation but is growing stronger every day, places humanity above the state, and derives the law of nations, not from the will of the state, but from the moral dignity and rational nature of man. It stands for a government of limited powers and for a balanced federalism within the nation, a federalism which is the natural preparation for a global federalism. It does not repudiate sovereignty, but conceives of it as ethical in foundation, pluralistic in distribution, relative to the purpose of the common good, and circumscribed within the limits of law and reason.[3] It holds that the sovereignty of the state is subordinate to the sovereignty of law and the reign of reason, and that the existence of the state can only be made secure and meaningful in a just and stable international order, just as the personality of the individual human being can only be fully realized within the framework of a well organized society. It does not idolize the state, for it views the state as *sub Deo et sub lege;* and for this very reason it does not find it necessary to look forward to a stateless society. In one word, there is only one true sovereignty, the sovereignty of law; all other forms of sovereignty are derived from the law and are relative to it.

Although this ideology is not so clear-cut

[2] U.N. GEN. ASS. OFF. REC. 3rd Sess., 923-24 (1948). Quoted in LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 403 n. 37 (1950).

[3] For a more detailed elaboration of this problem, see WU, CASES AND MATERIALS ON JURISPRUDENCE 182-84 (1958).

and ruthless as the other, yet there is no question that an overwhelming majority of nations belong to this group.[4]

The unprecedented tension in the world situation has been brought about by the fact that while science has transformed the world into a neighborhood, the gospel of hate has made all neighborliness impossible. A neighborhood without neighborliness—this, in sum, is the agony of our age.

In his excellent little treatise on *The Law of Nations,* J. L. Brierly of Oxford has made a most candid observation which every student of international law of today should take to heart. After pointing out how the rapid technological developments in industry and transport have brought about a close interdependence of states, Brierly proceeds to say:

> This growing modern interdependence of states makes the problem of developing international law more urgent, but unfortunately it does not necessarily make it easier. When the ideological differences between states are as deep as they are today, the frequent and public contacts between states which follow from the provision of institutions for encouraging their collaboration may have exactly the opposite effect. Such institutions, as Soviet Russia has made only too clear, offer a convenient sounding-board for virulent and continuous invective, and may therefore only serve to aggravate an already dangerous situation. When states do not even share in a common desire to work together, it might be better that for the time being they should cease to go through the motions of co-operation.[5]

What Can the Common Law Contribute to International Law?

What, then, shall we do, and what *can* we do? Shall we change our premises and compromise our principles in order to pacify the atheistic materialists? That would, of course, be morally wrong; but aside from this, such a course would be stupid even from a pragmatic point of view. In the present situation, I sincerely believe that appeasement is the surest way to war, while preparedness for self-defence and for the defence of right and justice is the surest way to peace. In fact, our very preparedness to support the Rule of Law with all our might may induce others to change their hearts.

But this preparedness, necessary as it is, is only a condition to more positive contributions to the establishment of international order. One of the most important things that we can do is to leaven the law of nations with the spirit of the common law. There are many reasons why I think

[4] Take, for instance, the words of Dr. T. V. Soong, Head of the Chinese Delegation, addressing the United Nations Conference in San Francisco in 1945: "If there is any message that my country . . . wishes to give to this Conference, it is that we are prepared . . . to yield if necessary a part of our sovereignty to the new international organization in the interest of collective security." Quoted in LIN YUTANG, ON THE WISDOM OF AMERICA 428 (1950). At present, there is among American lawyers a salutary movement of "World Peace Through Law." The institution of the *Law Day* is symptomatic of the same tendency, widely supported by public opinion. To take a random instance, Victoria Advocate, May 1, 1959 said: "The United States is now working for universal acceptance of law as the only way to settle disputes between nations. These aims are important enough to justify a partial surrender of national sovereignty. They may be ultimately attained by strengthening the authority of the United Nations." See also JESSUP, A MODERN LAW OF NATIONS 41 (1948), where the author states that "sovereignty in its old connotations of ultimate freedom of national will unrestricted by law is not consistent with the principles of community interest or interdependence and of the status of the individual as a subject of international law."

[5] BRIERLY, THE LAW OF NATIONS 91 (4th ed. 1949).

so highly of the common law. In the first place, the common law, being cradled in Christian humanism, respects man as man. The *American Bar Association Journal* has, not so long ago, emphatically declared in an editorial, "Now, as never before, it is our duty to show to the world that the common law regards man as having the dignity of a being made in the image of his Maker rather than the status of a brick in the hands of a human architect of a social structure."[6] This is the fundamental starting point of the common law, which marks it off clearly from the legal systems of any totalitarian states. I submit this is the only sound foundation for international law. A right conception of the relation between man and state is the *sine qua non* of a stable world order.

In the second place, as the common law has for the most part been hammered out on the anvil of litigation by lawyers and judges, who must give their considered reasons in their arguments and decisions, it is but natural that instead of appealing to will and power, the common law has acquired the habit of appealing to reason and reasonableness. This has kept the common law in constant contact with the natural law, which consists of precepts of natural reason.

In the third place, the common law is a dynamic system of law. One of its operative principles is: "When the reason for a law ceases, so ceases the law." Another more positive principle is that when the reason for a law expands, so does the law. This principle has not been articulated, but I have drawn the formula from a study of many modern cases.

In the fourth place, the common law, having absorbed the spirit of equity, has grown more and more conscious of itself as the handmaid of justice. The words of Lord Penzance are representative of the true tradition of the common law: "The picture of law triumphant and justice prostrate is not, I am aware, without admirers. To me it is a very sorry spectacle. The spirit of justice does not reside in formalities, or words, nor is the triumph of its administration to be found in successfully picking a way between the pitfalls of technicality. After all, the law is, or ought to be, the handmaid of justice, and inflexibility, which is the most becoming robe of the latter, often serves to render the former grotesque."[7]

In the fifth place, the common law is an open system. Being itself unwritten law, born from the womb of time through the judicial process, the common law easily recognizes international law for its kith and kin. For instance, in the interesting case of *New Jersey v. Delaware,* involving the doctrine of the Thalweg, Justice Cardozo wrote:

> International law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests its jural quality. The gradual consolidation of opinions and habits has been doing its silent work.[8]

Lastly, the common law not only induces a law-abidingness in its people, but is itself a law-abiding system. It conceives of the international law as having an objective existence entitled to be recognized in its own right. There is no iron curtain separat-

[6] 42 A.B.A.J. 248 (1956).

[7] Combe v. Edwards, 3 P.D. 103, 142 (1878).

[8] New Jersey v. Delaware, 291 U. S. 361, 383-84 (1934).

ing the common law of a country from the common law of the nations.

As early as 1735, Lord Chancellor Talbot, in *Barbuit's Case,* declared: "The law of nations in its fullest extent is and forms part of the law of England."[9] Lord Mansfield expressed the common-law attitude when he said as Solicitor General, that the law of nations "is founded on justice, equity, convenience, and the reason of the thing, and confirmed by long usage."[10] Sir William Scott, later Lord Stowell, who may be called the Father of Modern Prize Law, spoke to the same effect: "The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations: but the law itself has no locality. . . . If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question: a question regarding one of the most important rights of belligerent nations relating to neutrals."[11] True, the interpretation of the universal law is inevitably colored more or less by the modes and habits of thinking characteristic of the nation of which the judge happens to be a member; but this is only a psychological tendency against which we must counteract as far as possible. It is one thing to say that we cannot rid ourselves entirely of subjectivity; it is quite another thing to make a deliberate choice of subjective voluntarism. It is one thing to concede that our understanding of the objective referent may be erroneous; it is quite another to say that therefore there is no objective referent.

It is indeed remarkable that even after the rise of juridical positivism, which refused to consider anything as law which is not the will of a political superior, the common-law tradition has remained intact from its pernicious influence. In *The Paquette Habana,* for instance, the Supreme Court of the United States, *per* Justice Gray, said:

> By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.[12]

Now, it is plain that this rule of international law did not owe its existence to the will of any political superior, for the simple reason that there was, and is, none such. The world has not yet become a State, but no court, whether national or international, has ever denied the existence of a law which governs the relations between the states.[13] There are treaties, of course; but what makes treaties binding is the law, and what makes the law binding is reason, for, as Lord Coke expressed it, "Reason is the soul of law."[14] The very principle *pacta . . . sunt observanda* is a principle of law and reason, not derived from any pact or the will of any state.

[9] CASES IN EQUITY DURING THE TIME OF LORD CHANCELLOR TALBOT 287 (1735).

[10] HOLLIDAY, LIFE OF WILLIAM, EARL OF MANSFIELD 428 (1797).

[11] The Maria, 1 C.Rob. 340, 350 (1798).

[12] The Paquette Habana, 175 U. S. 677, 686 (1900).

[13] This is true at least of the common-law countries and other nations outside of the totalitarian states. What Chief Justice Waite said in United States v. Arjona, 120 U.S. 479 (1887), is characteristic of the common-law attitude: "But if the United States can require this of another [to penalize the counterfeiting of U. S. currency], that other may require it of them, because international obligations are of necessity reciprocal in their nature. The right, if it exists at all, is given by the law of nations, and what is law for one is, under the same circumstances, law for the other." *Id.* at 487.

[14] COKE, LITTLETON, Epilogue.

The Unity of the Conception of Law

If reason is the life of the common law, why should it not be the life of international law? If the "reasonable man" is the hero of the common law, what prevents us from making the "reasonable nation" the hero of international law? If, to further the ends of justice, the common law has not hesitated to pierce the veil of corporate entity, why cannot international law for weighty reasons pierce the magical scales of the Leviathan so as to protect the rights of men? If the corporation is a juristic person existing by virtue of the municipal law, why should we not say that the state is a juristic person existing by virtue of international law?

A sound philosophy of law is general in its scope of validity. It must be built upon true humanism. One of the Founding Fathers of this Republic, James Wilson, gave expression to this humanism when with Socratic irony he pointed out, in *Chisolm v. Georgia,* "[H]ow true it is that states and governments were made for man; and at the same time how true it is that his creatures and servants have first deceived, next vilified, and at last oppressed their master and maker."[15] For him, the difference between man and state is the difference between end and means. "Man, fearfully . . . made, is the workmanship of his all perfect Creator. A State, useful and valuable as the contrivance is, is the . . . contrivance of man, and from his native dignity derives all its acquired importance."[16] I am aware that this noble principle has had many setbacks even in this great democracy. But that does not effect its intrinsic value or its vital force. The Founding Fathers were far-sighted. If later generations have failed to live up to their ideals, this proves nothing against them and the future generations are sure to move to the measure of their thought.[17]

The humanism of the common law is not a Godless humanism. It is a Christian humanism, which bases the dignity of man on the existence of the immortal soul made in the image of God.

In the present world crisis, many people are becoming pessimistic and cynical. Yet, as I read the signs of the times, our age is not without hope. To mention but one of them, the revival in the Western nations of the natural-law philosophy is a sure sign that the tides have turned from the lowest ebb and begun to flow again. As is well known, international law was founded upon natural law. The works of men like Suarez, Vittoria, Grotius, and Pufendorf, to mention the most influential, were saturated with natural-law principles and ideas. Our return to the natural-law philosophy, enriched by a deeper knowledge of the human psychology and accumulated experience, may very well herald a new period of growth of international law.

It is encouraging to see that contemporary legal philosophers in England have reacted strongly against juridical positivism. Commenting upon Holland's negative remark about international law, which we have quoted already, Sir Arthur Goodhart has brought out the irony of his position:

> It is difficult to believe that the author of this statement was the Chichele Professor of

[15] 2 U. S. (2 Dall.) 419, 455 (1793).

[16] *Ibid.*

[17] As Mr. John B. Gest has observed, "Truly it can be said that the hope for order within the nation and in the world is through the restoration of our traditional political and legal philosophy that men are endowed by their Creator with certain inalienable rights and that to secure these rights governments are instituted. . . ." *Natural Law and Positivism,* 22 PENN. B.A.J. 270, 277 (1951).

> International Law in the University of Oxford, and President of the Institute de Droit International. It must be rare, indeed, to find a professor who alleges that the subject which he purports to teach does not exist. Holland was forced to reach this conclusion because, being an Austinian, he defined law as a command.[18]

Similarly, J. L. Brierly has been quite outspoken in favor of the natural-law philosophy as against juridical positivism. "If we are to explain why any kind of law is binding," he writes, "we cannot avoid some such assumption as that which the Middle Ages made, and which Greece and Rome had made before them, when they spoke of natural law."[19] This conclusion has been arrived at by Brierly and many other contemporary jurists as a result of a deeper analysis of juridical realities than the so-called "analytical school" was able to offer. It seems to me that the trouble with the "analytical" jurists does not lie in their being too analytical, but rather in their being not analytical enough.

Let us analyze, for instance, the sources of the modern law of nations.[20] Article 38 of the Statute of the International Court of Justice lays down three principal sources of law: (1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (2) international custom, as evidence of a general practice accepted as law; and (3) the general principles of law recognized by civilized nations. In addition to these, it further recognizes two "subsidiary means for the determination of law," namely, judicial decisions and the teachings of the most highly qualified publicists of the various nations.

This authoritative statement of the sources of international law is significant in more senses than one. In the first place, it confirms the view that the existence of international law is quite independent of the existence of a world state. In the second place, it recognizes the objective existence of a law transcendental to any particular state and binding upon it as such. In the third place, by recognizing "general principles of the law" as a source by which the Court shall draw the appropriate norms for deciding the cases submitted to it, it facilitates the future development of international law. As Brierly sees it, although it "introduces no novelty into the system, for the 'general principles of law' are the source to which international courts have instinctively and properly referred to in the past," yet "its inclusion is important as a rejection of the positivist doctrine, according to which international law consists solely of rules to which states have given their consent."[21] Brierly further sees in this provision "an authoritative recognition of a dynamic element in international law, and of the creative function of the courts which administer it."[22]

This is a typical common-law view of international law. In fact, even in national tribunals of the common-law countries, international law has always been treated as authoritative in its own right, and the doctrine of incorporation which regards international law as part of the municipal law has served as a method of implementing and

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[18] GOODHART, ENGLISH LAW AND THE MORAL LAW 66-67 (1953).

[19] BRIERLY, *op. cit. supra* note 5, at 57.

[20] See BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953).

[21] BRIERLY, *op. cit. supra* note 5, at 64.

[22] *Ibid.*

effectuating the fundamental principle. Professor Edwin D. Dickinson has traced the influence of the changing concepts of law on this doctrine through the centuries.[23] When natural-law philosophy prevailed, international law was incorporated in the common law as a matter of course. In the nineteenth century, when juridical positivism became the order of the day, the common law managed to preserve the sound kernel of the doctrine of incorporation by introducing the fiction of implied consent, so as to save the face of the prevailing theory deriving the binding force of international law from the consent of the nation. For the common law is a past master in the art of satisfying the demands of natural justice by means of accommodating concepts and fictions born of artificial or juristic reasoning. As Professor Dickinson has so shrewdly observed, in reality the reference to the nation's consent, whether implied or expressed, does not "state one of the doctrine's essential elements."[24] It merely pays a lip service to "the prevailing positivist theory which founds international law upon consent. When the positivist theory has been supplanted by another theory, the reference to consent may disappear. As it is actually applied therefore the Anglo-American doctrine of incorporation is fundamentally sound."[25]

It is my sincere belief that if the lawyers of the common-law countries would take more interest in the questions of international law, and cultivate it with the spirit and methods of the common law, they will be able to make great contributions toward the establishment of the Rule of Law in the international community. I have such faith in the common law that some of my friends have teased me by hinting that I had perhaps taken an old lady for a young girl. But a great authority on the natural law, Dr. Heinrich Rommen, in reviewing my *Fountain of Justice,*[26] has defended my love for the common law in eloquent words, which should convince the reasonable man. Here is what Dr. Rommen has written: "He shows a genuine love for the Anglo-American common law — so much so that some critics might contend that he is blind to some of its shortcomings. This reviewer, who partakes of this love for the same reasons as does Dr. Wu, agrees that the conservatism of the common law and the fact that it was judge-made *jus* enabled it to preserve its natural law inspiration, despite a prevailing positivism in the general climate of culture and in jurisprudence." When a German jurist endorses the love of a Chinese for the common law, one may be sure that the common law must be something of a universal attraction.

The beauty of the common law is that while it is extremely conservative when the immutable principles of justice and equity are concerned, it can be extremely flexible and elastic, and infinitely resourceful, in devising the ways and means of effectuating those principles. Occasionally, it is true, you will come across judges who seem to confuse ends and means, either taking means for the end, or taking ends for the means.

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[23] See Dickinson, *Changing Concepts and the Doctrine of Incorporation,* 26 AM. J. INT'L L. 239-60 (1932); *The Law of Nations as Part of the National Law of the United States,* 101 U. PA. L. REV. 26-56 (1952), 792-883 (1953).

[24] As quoted in BRIERLY, *op. cit. supra* note 5, at 84.

[25] *Ibid.* See also Brown, *The Natural Law as the Moral Basis of International Justice,* 8 LOYOLA L. REV. 59-68 (1955-56).

[26] Rommen, Book Review, 44 GEO. L. J. 539 (1956).

When one regards means as the end, it is a symptom that his intellectual arteries have hardened and his decisions are likely to be as prickly as a hedgehog. When one regards an end as mere means, his intelligence may be extremely subtle, but you sometimes would wonder whether he has any fixed principles. His opinions may be as spineless as the jelly fish. However, such freaks are not too many. On the whole, a robust sense of justice and an open-minded realism have combined to keep a majority of judges to the main tradition of the common law.

The common law has never succumbed to the "will theory" of law. The common law has regarded reason as its essence with the "reasonable man" as its hero. This basic insight about the nature of law is the only possible foundation upon which international law can be erected.

In conclusion, let me say that just as the Roman law served as the midwife and nurse of international law in its infancy, so the common law should act as its pedagogue and guardian in the process of its development and growth.

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