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# Law and the Idea of Mankind\*

*Harry W. Jones*

“**A** DECENT RESPECT for the opinions of mankind.” The author is Thomas Jefferson, the date 1776, the quoted text the opening sentence of the Declaration of Independence. When the American anticolonialist revolutionaries undertook to state the philosophy underlying their rebellion against the British Crown, they wanted men everywhere to understand their motives and their goals. The idea of *mankind* is elusive and almost overpowering, but it is heartening to recall that the idea was familiar currency to Jefferson and his associates and was expressed in their and our great declaration of principle.

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Today the need for all peoples and nations to assume a *mankind perspective* is imperative for the immediate survival of that species called Man. I address myself to the subject, “Law and the Idea of Mankind,” with a deep sense of inadequacy for it. For more than thirty years I have studied the idea of law, yet my understanding of it is still imprecise and incomplete. Now I have undertaken, far too rashly, to reflect on the relation of law to an even greater idea, mankind, and, indeed, the survival of mankind. This is no occasion to repeat pious affirmations, of the sort heard too often nowadays, that an ideal law of nations exists somewhere in the sky and that we and the other great powers have but to recognize it, proclaim our allegiance to its mandates, and all the troubles that beset mankind will disappear into the air. The struggle between traditionally Western-oriented international law and the Soviet-Marxian theory of international jurisprudence highlights the fact that such pious affirmations have to date been ineffectual. This brief introduction is an effort to familiarize the reader with the concept of a *mankind perspective*. While often pessimistic, my discussion will be as serious and candid as I can make it. For the idea of mankind, indeed the survival of

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that idea and of mankind itself, is inseparably linked to the idea of law.

We take our tone from a great philosopher's great book, *The Future of Mankind* by Karl Jaspers:

The political condition, the rational ethos, in which abolition of the atom bomb would be possible requires all political decisions to be examined and ranked as to importance in the light of the extremity of doom. This extremity must not be obscured for one moment. It should help us prevent selfish, indolent and wishful obfuscation. Even seemingly trivial decisions are to be weighed in the balance of extremity.<sup>1</sup>

And so, "in the extremity of doom," let us consider what we expect law to do for mankind and the survival of mankind and what special significance, if any, has the "idea of mankind" for law and legal philosophy?

Let us begin by considering the idea of mankind, as defined by the Committee for the Study of Mankind. "Today," so reads the Committee's manifesto, "mankind for the first time is emerging as a communicating and potentially cooperating society . . . . We propose to study human society as a whole and to stimulate the rethinking of concepts and values in terms of the future of that society." Is this a "new way of thinking" about law, as about anthropology, science, philosophy, history, and education? I suggest that it is new, in at least two ways. First, and manifestly, the mankind idea challenges the idea of national sovereignty, the central concept of traditional international law and the taken-for-granted assumption underlying both the public law and the private law of every existing legal system. A true mankind perspective would view the common good of mankind, not the established rules of nation-to-nation behavior, as the basic norm of a world legal order.

The idea of mankind is new for law in another respect — its greater inclusiveness. Legal philosophies, even the most aspiring ones, display a certain inevitable parochialism, the product of their social contexts and conditions. The utilitarian legal theories of Hume, Bentham, and Austin assert a kind of universality, but the objectives and social values they embody reflect the unique history of England and the rare qualities of the exceptional British character. American constitutional theories are similarly the products of American social contexts and conditions. Even the most far-reaching of Western political and ethical theories, the natural law philoso-

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<sup>1</sup> 232 (Ashton transl. 1961) (originally published under the title, *DIE ATOMBOMBE UND DIE ZUKUNFT DES MENSCHEN* (1958)).

phy of St. Thomas Aquinas, cannot escape a certain parochialism when it descends to concrete problems and details. For the "common human nature" on which natural law theory builds in the construction of its universal propositions is more congenial to Western ideas of man's destiny than to those embodied in the theologies and social theories of India, Africa, and the Middle East.

A mankind perspective is the best safeguard against parochialism in legal thinking, against our dangerous tendency to think that the American way — or the English or the French way — is the only true way of law, and that all others are misguided, primitive, or worse. And there is no jurisprudential parochialism that quite equals the Marxian version, according to which objective law is but deception and fraud and the legal ideas of other lands mere expressions of capitalist oppression. No one is more pessimistic than I about an ultimate reconciliation of the communist and noncommunist worlds, but their respective ideas about law and "the rule of law" might be made less jarring in their impact on each other by a resolute mutual determination to view the problems of international order in mankind perspective.

I offer two flatly dogmatic propositions concerning the affirmation that mankind is a "potentially cooperating" society: first, that this cooperating society will stay forever in the shadowland of "potentially" unless it is structured, governed, and ordered by law; second, that the accomplishment of a law-ordered society of mankind will require acts of legal construction bolder and more imaginative than any ever before undertaken by men of law. The legal systems of even the great nations of the world are but small-scale models for the planning of a rule of law for mankind. But they are all we have.

One of the most dangerous illusions of our time is that international law, the body of historical and logical doctrine developed over centuries of experience with the relations of states to each other, is a complete and definitive statement of principles that, once affirmed, will solve every problem of the twentieth century world. No international lawyer of competence makes that claim. A great international lawyer is forever moderate in the claims he makes for his discipline, always the first to warn that we cannot find, in international law doctrine, prefabricated and certain answers to such crisis problems as the Vietnam conflict, the recent Czechoslovakia affair, or the Nigerian civil war. An international lawyer works with the doctrines and precedents of traditional international law, uses these sources as tools of analysis and instruments of argument. But he

knows that law is not something that "can be worked out like mathematics from some general axioms of conduct."<sup>2</sup> Law is not an autonomous technology; the operation of a legal order, national or international, is inseparably tied to the political dimensions and ethical conceptions of its time and constituency. Law and policy are interwoven and inextricable. It is absurd to look to some abstraction, misnamed "law," as capable of performing a miracle that will, at once, make bad men good and rescue mankind from the most perilous predicament in its history.

A law for mankind is not something to be "found" or deduced from pre-existing precepts. It will have to be made, fashioned, by responsible men working in a great tradition. Account must be taken of all we know about the conduct of men and particularly about possible ways in which to make group behavior less wayward and irresponsible than it is in a state of nature. For in human communities, whether they be tribes along an African river or great industrial societies like our own, the whole is likely to be something different — and usually something worse — than the sum of the parts. A man in a mob is incomparably harder to control by law than he, the same man, is in his individual behavior at work or at home. So it is, but to a far greater degree, when millions of individuals are banded together in a "sovereign" civil society. It is a tragedy of our time that nationalism has become a compelling slogan again, that the charismatic leaders of the emergent countries of Africa and Asia are nationalists and rarely libertarians. In the perspective of mankind, nationalism, regionalism, and emotional patriotism are forces working against the possibility of an international rule of law.

I have of course been describing not mankind law but international law. This is a painful concession, but one that must be made if we are not to go off into sheer wishful thinking. No one could feel more strongly than I that the rights of man are far more important than the rights of nations. Some day, I devoutly hope, the rights of individual men will be fixed and guaranteed by a higher political authority than the nation in which each happens to reside. In the long pull, interstate law becomes citizen law, as the Constitution of the United States became in large part when the 14th amendment was added after the Civil War, but in today's world situation we can not count on having the long pull. The balance of terror, by

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<sup>2</sup> O. HOLMES, *The Path of the Law* (1897), in COLLECTED LEGAL PAPERS 167, 180 (1920).

a miracle, may preserve a precarious coexistence of nations for a few decades, but hardly for longer than that. In the time we have, drastic acts of creative construction must be performed on international law, for it is all there is to go on. We relinquish, for the time, the long-held dream of a law of mankind and settle for something short of that, a law of *nationkind*. International law is not mankind law, but international law may, if men are patient and generous — and lucky — secure mankind's survival.

Theoretically, an effective rule of law might be imposed by force of conquest, a modern Pax Romana, as would occur if any one of today's great powers were to overcome the others in open war or terrify them into surrender and acquiescence. This is most unlikely, since the destructive power unleashed in a third world war would cripple winner and losers alike. What, then, is the prospect for world legal order by assent, by accepted *consensus* among the nations of the world or, at least, among the great powers? What would the minimum ingredients of any such consensus have to be? The answer seems plain enough. Assent to an international rule of law will become possible whenever the peoples of the world, or their governors, are brought to the conviction that law of almost any content is better than no law at all; that any settlement of a dispute is better than international violence; that, in the long run, any nation — every nation — is better off accepting an ordered system of international adjudication, arbitration, and negotiation than reserving the "sovereign" right to assert its claims by power and intimidation.

When an individual or a nation assents to an ordered legal system, he or it must take the bad with the good, must be prepared to bear inevitable disappointments with equanimity. No nation will ever win all its international lawsuits, prevail in its every arbitration, or succeed in its every negotiation. Those who participate in the operations of a practical legal order must anticipate that they will never get everything to which they believe themselves entitled. They must be prepared to be cheerful about a .500 batting average, even to accept a majority of decisions adverse to national interest. The central consensus of which I am speaking is, above all, a consensus that *someone* must decide and that the decision shall be final. In an international legal order, there will be proper occasions for criticism of decisions, for vigorous assertions of national interest, but the decision must be accepted by the loser as binding upon it. In international adjudication, there is no room for a theory of national re-

sistance, no place for what John Locke called "the appeal to history."

Here, of course, is the hard point, harder for Americans perhaps than for Scandinavians, Brazilians, even Englishmen. We find it harder to renounce the idea of self-help; we believe ourselves strong enough to look after our own interests, and so we may be. Would we make the essential concession that important American interests are to be judged, and with finality, by some supranational authority? Let us try a case or two. Suppose that a proposal were made to submit today's Vietnam conflict to a panel of five or fifteen judges or arbitrators chosen from neutral countries. Would we agree to be *bound* by any such decision? Can you conceive of the uproar in the Congress of the United States if such a proposal were seriously entertained by the President or the State Department? Yet a world rule of law is inconceivable if only the lesser powers are to be bound by it, or if decisional processes are restricted to minor and technical matters and true trouble cases reserved for self-judgment and self-help. If we would have an effective international rule of law, it is precisely the trouble cases, those which might lead to war, to which orderly processes of legal settlement must extend.

We need to be on constant guard against soft-mindedness in our discussions of the role of law in international relations, and Ambassador George Kennan has been a particularly useful devil's advocate in this connection. Kennan rejects the notion that "law" or "the rule of law" is the skeleton key to international order. He is scathing in his condemnation of what he calls the "legalistic approach" to international relations and states his central thesis in flat and uncompromising terms:

History has shown that the will and the capacity of individual peoples to contribute to their world environment is constantly changing. . . . The function of a system of international relationships is not to inhibit this process of change by imposing a legal strait jacket upon it but rather to facilitate it; to ease its transitions, to temper the asperities to which it often leads, to isolate and moderate the conflicts to which it gives rise, and to see that these conflicts do not assume forms too unsettling for international life in general. . . . For this, law is too abstract, too inflexible, too hard to adjust to the demands of the unpredictable and the unexpected.<sup>3</sup>

I agree cordially with Mr. Kennan's statement of the functions of an international order. My difference with him is simply that I have a very different view of what law is and what it is capable of.

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<sup>3</sup> G. KENNAN, *AMERICAN DIPLOMACY, 1900-1950*, at 96 (Mentor ed. 1952).

If law were inescapably "abstract," "inflexible," and incapable of adjustment to "the demands of the unpredictable and the unexpected," I would share Mr. Kennan's conviction that law can not avail mankind at this critical point in its history. True enough, law is often spoken of as if it were characterized by the cited attributes of inflexibility and abstraction. Lawyers, even international lawyers, contribute to this strait jacket image of law by their undue claims for abstract principle and for the universality of what are, at most, law's working hypotheses. But the law men live by, the law that might provide a structure of order for a community of nations, is something far less formal — less majestic, certainly, and incomparably more pragmatic — than the idealized doctrine of Blackstone's dreams and Mr. Kennan's fears.

For centuries, legal philosophers have sought for the areas of agreement, the shared values, that underlie all legal systems. The natural law writers, particularly, have brought idealism and inspiration to the gray deliberations of workaday jurisprudence by their ceaseless quest for a set of universal principles of justice, applicable everywhere and at all times. Perhaps you will remember Aristotle's fine analogy, his idea of a natural justice that is "unchangeable and has everywhere the same force, as fire burns both here and in Persia." Is this, then, the way to begin in fashioning a law for mankind, or *nationkind* — by searching for principles of international morality that might be common to citizens and their leaders in the United States, the Soviet Union, India, Greece, Indonesia, West Germany, Red China? The idea of mankind places the stress on similarities from man to man, rather than on differences. Does it follow, as many dedicated and learned men have thought, that we should try to locate an area of agreement and take it as our starting point in moving toward a law for mankind?

The objection, manifestly, is that the need for law arises not when men agree but when they disagree. Men do not go to law, or nations to war, over the refinements of their accord, but precisely when their interests, demands, and aspirations come into conflict. Kant perceived this when he took the inevitability of social conflict as the central clue to understanding the special task of law in society. In our own time, Roscoe Pound has interpreted legal institutions — legislatures, commissions, courts — as, above all, agencies for the balancing or weighing of conflicting social interests. In this analysis, even constitutional adjudication is far less the formal application of abstract constitutional principles than the responsible

weighing of the competing demands — employers *versus* employees, farmers *versus* city dwellers, national security *versus* freedom of expression — that arise in any dynamic society. The late Judge Learned Hand stressed this interest-resolution function of law and government when he defined “democracy” as “a political contrivance by which the group conflicts inevitable in all society . . . find a relatively harmless outlet in the give and take of legislative compromise . . . .”<sup>4</sup> And what of law itself? Hand answers with un-sentimental candor and firmness: “the law is no more than the formal expression of that tolerable compromise that we call justice, without which the rule of the tooth and claw must prevail.”<sup>5</sup>

Have we not now isolated precisely what we want the law of nations to do for mankind? No legal system has ever approached perfect consistency and flawless justness; in the extremity of doom we can hardly wait two to three centuries for a conceivable perfection of international law. Progress in an imperfect world must always be toward an achievable goal. Let us fix our sights on an international legal order in which, to paraphrase Judge Hand’s words, the national conflicts inevitable in world society can find a relatively harmless outlet in the give and take of international adjudication. Perhaps you will quarrel here at the words, “relatively harmless.” What if an international court or an international arbitration decides adversely to some basic economic or social interest of the United States? Is it then only relatively harmless? The hard and simple answer must be that any adjudication adverse to a nation’s interest is but *relatively* harmless if appraised in relation to the adversities of atomic war. For the rule of the tooth and claw has taken on a new horror in the post-Einstein era, a horror beyond Gettysburg and the Marne, incomparable in terror even to Stalin-grad, Lidice, and Hiroshima.

Is the contemporary balance of terror stable enough to afford the time needed to forge today’s poor materials into an enduring law for mankind? Although I cannot prove it — and, indeed, find it difficult to state sensible grounds for believing it — I have a certain stubborn faith that there will be time, that the way of law will triumph, step by step, compromise by compromise, decision by decision, until a community of nations has been achieved, and then a truer community of mankind. I have thought often of a prophetic passage in the works of America’s great pessimist and greater judge,

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<sup>4</sup> L. HAND, *THE SPIRIT OF LIBERTY* 204 (3d ed. 1960).

<sup>5</sup> *Id.* at 87.

Oliver Wendell Holmes, Jr. Here are his words, written on the eve of World War I, when it seemed to men of reason, as it seems to most of us now, that the dark curtain might be going down on the drama of mankind:

I do not pin my dreams for the future to my country or even to my race. . . . I think it not improbable that man, like the grub that prepares a chamber for the winged thing it never has seen but is to be — that man may have cosmic destinies that he does not understand. And so beyond the vision of battling races and an impoverished earth I catch a dreaming glimpse of peace.<sup>6</sup>

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<sup>6</sup> COLLECTED LEGAL PAPERS 296-97 (1920).