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THE FUNDAMENTAL RIGHTS OF MAN AS THE BASIS FOR  
~~A RESTORATION OF INTERNATIONAL LAW~~

BY

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THE FUNDAMENTAL RIGHTS OF MAN AS THE BASIS  
FOR A RESTORATION OF INTERNATIONAL LAW

I.

If it is true that no war has ever caused so much material and moral damage as the last one, it is also true that none has ever contained such strikingly clear lessons for humanity. The task of drawing the appropriate conclusions in the sphere of Law rests with this Institute. In so doing, it will be carrying out the primary function assigned to it in its Statutes, that of "endeavouring to formulate general principles of the science such as will satisfy the legal conscience of the civilized world" (1).

What does this "legal conscience of the civilized world" look for today? Undoubtedly something more than the technical improvement of rules whose formal validity only too frequently contrasts with their disregard in practice. Something more, too, than the proliferation of organizations and proceedings which can only have a beneficial effect in so far as they are supported and animated by a spirit of international solidarity.

Twenty-five years of experience have shown us human values relentlessly sacrificed to political values, and loyalty to the national unit cultivated as the supreme virtue. The former "raison d'Etat" amounted merely to the rulers' decisions; contemporary State morality obscurely, but passionately, unites a whole nation in the quest for power.

Intelligent people in every country are aware of the impending danger. They look for salvation to a new spiritual inspiration. Nothing is more striking than the solidarity which has arisen in this respect between men far removed from each other in intellectual training, national traditions or social prejudices, but who are today combining in the defence of an imperilled civilization.

II.

The Preamble to the San Francisco Charter records the determination of the United Nations to "re-affirm faith in fundamental human rights, in the dignity and worth of the human person". This passage is inserted between that in which the United Nations declare their determination to "save succeeding generations from the scourge of war", and that in which they declare themselves resolved "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". The fact that these clauses are placed so close together is significant, for the ideas they express are closely interrelated.

This is shown, doctrinally, by the whole evolution of international law and - politically - with cruel emphasis by experience of totalitarian regimes and the horrors of the second world war.

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(1) Statutes of the Institute, Art. I.

1. The idea that the human person is the justification and final end of all law (territorial or international) established by the will of men we regard as intimately bound up throughout history with the development of natural and international law.

The close connection between human rights and natural law is emphasized by the support which doctrines of natural law, stimulated by Christianity, have constantly given to the recognition of certain fundamental human rights - rights which are held to be inalienable and indefeasible and protected by their own final nature against the inroads of the State. Conversely, it is from consolidation of these rights by humanity's gradual awareness of them that natural law has drawn its essential elements, those which have enabled it throughout the centuries to exert lasting influence on internal laws and institutions and on international law (1).

It is mainly in regard to the status and treatment accorded to foreigners that the doctrine of human rights, connected with natural law, is most closely related to the development of international law. Through the progressive extension of peregrine law on the one hand and of jus gentium on the other, Roman law granted to aliens prerogatives the guarantee of which was independent of the rights of citizenship. As, in the course of her conquests, Rome came more and more into contact with alien peoples, the concept of a universal law founded not on territorial law but on a rational acknowledgment of requirements common to all mankind, took gradual root. Resting as it does on ratio naturalis, jus gentium provides a certain common fund for all civilised legislation; it applies to those who have no definite citizenship; it is the law of man, the "necessary" law, ill-defined no doubt, with vague and variable outline, but a law which, strongly buttressed by natural law, will invariably protect the individual against arbitrary action of Authority.

The Renaissance and the Reformation gave it new impetus. The pluralist regime of national States which displaced the mediaeval order called for the constitution of an international law for which, in the last analysis, the common weal of man is the sole doctrinal basis. At all events, this era marked the beginning of the fundamental conflict between human rights and pursuit of the political ends of the State, between the liberal or functional and the wholly political conception of Authority. The former subordinates Authority to human ends, the latter sacrifices those ends to the quest for power.

The defence of human rights, too frequently frustrated in the international sphere by disciplines increasing with the steady rise of nationalism, appears in humanitarian endeavour; in international conventions for the protection of religious freedom and humanitarian or cultural conventions; in the so-called minorities treaties; and in international labour legislation.

More profound and powerful, however, was the current of

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(1) For this reciprocal effect of the doctrine of fundamental human rights and natural law on one another see LAUTERPACHT, An International Bill of the Rights of Man, Part 1.

opinion that in the national sphere was to set up, on a basis of respect for the "natural inalienable and sacred rights of man", the liberal idea of the State and, through the promulgation of the famous American and French Declarations, to be given final expression in the constitutions of the nineteenth century. Under the terms "public liberties" or "public rights" the rights of man are enshrined in those constitutions in clauses set beyond the reach of the legislator himself. At the same time the concept of the human person as "the end of all public institutions" (Sieyes) becomes there the great restraining influence on Authority. "It raises up the individual not against the State but to a level with the State" (1); it brings about that just balance which prevents Authority from degenerating into an instrument of tyranny at home and into an engine of aggression and conquest abroad.

2. The battle which has today been joined over the issue of human freedoms is intimately connected with the establishment of an international order. A State which respects such an order is one which, in its relations with its own citizens, can call itself a "State founded on right"; one which, acknowledging the existence of human ends which transcend it, consents, out of respect for these ends, to restrict its own powers. It was in this spirit that the Institute of International Law stated at the beginning of its Declaration on the International Rights of Man (New York 1929) "that the juridical conscience of the civilised world demands the acknowledgment of the rights of the individual which are beyond the reach of State action" (2).

It is a pure delusion to expect a better international order to emerge simply and solely as the result of the establishment of direct relations between States, since the State, as the historical centre of national exclusivism, must, by its very nature, constantly seek to strengthen its own power and the unlimited extension of sovereignty. The establishment of an international order presupposes certain psychological and necessarily human conditions (3). But it is first of all in the national field and within the State that their foundations be laid, since even today the vast majority of men are still incapable of becoming directly conscious of the demands of international life. It is from inside the State that the personalist inspiration will exercise its power-restraining influence on international relations. The key to the problem therefore lies above all in the relations between man and the State, in an adjustment of the behaviour of the individual towards the body politic and in the intellectual and institutional counter-weights which in truly democratic countries preserve the State from those deviations which arise from the pursuit of power for its own sake. This is what makes the present crisis in international relations a crisis of spirit and of the structure of society itself, and prohibits us in future

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(1) Léon Blum "L'Etat moderne"; Encyclopédie Française, Chap.IV.- "Freedom", says Royer-Collard, "is resistance".

(2) Annuaire, 1929, Vol. II, page 298.

(3) c.f. Preamble to the Constitution establishing UNESCO (16 November 1945): "that since wars begin in the minds of men it is in the minds of men that the defences of peace must be constructed ..."

from isolating relations between States from those which arise within the State between the individual and the constituted authority.

This indissoluble connexion between human liberties and the creation of an international order founded upon law, has been thrown into tragic relief during the last twenty-five years. The totalitarian ideologies based on a perverted morality made every effort to sanctify the enslavement of human personality to the Nation State's ideal of power. In absolute contradiction to that "rule of law" which in countries with liberal traditions safeguards individual rights against arbitrary action by the State, National-Socialist law was marked by the removal from the constitutional statutes of all mention of these fundamental rights (Grundrecht) of man which are beyond the reach of political decisions by governments.

By its complete control over the individual and by the psychological tensions it spreads from people to people, the totalitarian State presents the political phenomenon exalted to the highest degree of intensity. In it a perverted mysticism conceals the collective appetites for domination beneath formulas of individual renunciation. Propensity to imperialist expansion is its principle of action and rule of life. All its disciplines finally converge on war; it is the born enemy of international organization.

### III.

While there can be no doubt that the future of international law and world peace largely depend on the respect shown by States for fundamental human rights, the question naturally arises whether this personalist viewpoint has any chance of making itself felt in the face of triumphant nationalisms and a social structure that in every country impels men to sacrifice daily more and more their liberty and personal responsibilities to an ideal of security guaranteed by the State. Is man still capable of thinking and acting otherwise than as the national of a State? Is the individual really ready to sacrifice something of his well-being in order to retain his freedom?

Discussion of the far-reaching problems raised by those questions does not come within the scope of this report. We will confine ourselves to remarking:

- (1) that in all epochs of history desire for security from external aggression has been the decisive factor in the distribution and form of political power; that in the face of new methods of wholesale destruction the national and sovereign State as it emerged at the end of the Middle Ages is no longer an adequate organism of security; that growing awareness of this new fact by the masses may induce them to seek external security in a new distribution of power better adapted to the requirements of international organization,
- (2) that the sovereign State is no longer capable of guaranteeing by its own means the welfare of its nationals; that economic nationalism and autarchy, inspired much more by political aims than by concern

for the prosperity of individuals, have everywhere aided and abetted power politics and have been one of the causes of the Second World War; and that when adopted on a national scale planned economy is incompatible with the growing interdependence of peoples from the point of view of the movement of persons and goods.

The national and sovereign State is neither the final expression nor the supreme form of the political and social evolution of peoples.

#### IV.

Some final observations to make our intention clear and justify the form of the Declaration submitted for adoption by the Institute.

1. In making human values the final meeting point of all law and constituting them an autonomous province beyond the reach of political action by the State, the proposed Declaration has in view the regeneration of international law on a moral and legal basis acceptable to all civilized States. Put in this way the problem assumes an absolutely fundamental character, clearly distinguishing it from the questions raised by international protection of human rights, recognition of the individual as the subject of international law or access of individuals to international courts.

The Declaration therefore takes the form not of a preliminary draft for an international convention but of a declaration of principles, designed to throw into relief those spiritual values which are at the same time most essential and most seriously threatened. However desirable the conclusion of a general convention regarding the international protection of human rights may appear, it is clear that such a convention would only be effectively applied among States already converted to the ideas incorporated in the proposed Declaration. We consider it preferable moreover to keep the expression of principles so fundamental in character distinct from their embodiment in a conventional form, that is constantly open to criticism from some side or other.

2. Nothing in this Declaration conduces to denying the State the amount of control and legitimate intervention demanded today by our keener sense of social justice, technical progress and the urgent need for certain unremunerative courses of action. The personalist view-point has nothing in common with old-fashioned individualism, based as it is on the false postulate of a natural harmony of interests. Fundamental as they are in the field of values moreover, individual rights are far from exhausting all the demands of human progress.

3. Though the Declaration tends to show that in the field of values it is no longer possible to isolate relations between States from the relations set up between individuals and those in power within the State, one must not on that account reject technical forms in use, such as the distinction between international law and territorial law. Any technique, by the very fact that its purpose is to put the law into effect and make it work, is associated with the structure of the powers that ensure

its effective application and sanction it. The technique of international law remains bound up with the existing forms of the distribution of power between nations.

#### DRAFT DECLARATION

The Institute of International Law,

CONSIDERING that on the morrow of events which have shaken the very foundations of a civilization traditionally founded on respect for human values, it is supremely important to reaffirm ~~certain~~ principles which reflect rather more closely the present demands of the juridical conscience of civilized peoples;

NOTING that the regimes which enslaved and debased human beings sought, by thus subordinating man completely to their own political ends, to engage in acts of aggression and conquest, and that it is essential to prevent their recurrence for all time;

RECALLING that members of the United Nations have undertaken the task of achieving "international co-operation.... in promoting and encouraging respect for human rights and for fundamental freedoms" (Article I, paragraph 3 of the United Nations Charter and Article 55, sub-paragraph (c));

MAKES the following declaration:

#### I.

Recognition and respect of the inherent rights of human beings, which the State should serve but not enslave, are closely bound up with the development of international law.

#### II.

Such recognition and respect are at the root of any functional concept of authority, which derives its justification from its ability to achieve the individual and social ends of man. Dissemination of this fundamental concept among the public will serve to moderate authority: it will keep the State within its proper function by safeguarding it against the tendency of those in power to abuse their authority.

#### III.

An effective system of international law is inseparably bound up with respect for the individual within the State. In the international sphere the moderating functional concept of authority is clouded by the stubbornly held tradition which regards the Sovereign State, the organ of security and instrument of authority, as the supreme embodiment of law and order.

#### IV.

It is insufficient, whether internationally or nationally, to affirm respect for the rights of the individual unless proper guarantees and checks are provided to ensure their being effective.

V.

The Institute considers acceptance and dissemination of the ideas contained in the present declaration essential to the observance of international law and to its technical development.