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“Deliver us from social evil”[†]

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a fundamental reconceiving of international society. The first and most important step in meeting the challenge of international constitutionalism is to remake our international legal worldview, to begin to articulate the eventual structure of a universal legal system, the legal system of all legal systems.

- *International constitutional law*: the principles of the international constitution, fundamental rights, international legal persons, international law-making processes, the relationship between international law and national law, the relationship between national legal systems.
- *International public law*: the powers of international legal persons, the powers of international institutions, international public order law (international security).
- *International administrative law*: controlling the exercise of powers delegated by international law.
- *International economic law*: (*inter alia*) international commercial law, international environmental law, international intellectual property law, international competition law, international securities law.
- *International transnational law*: the international dimension of national legal systems.
- *International criminal law*: national jurisdiction over foreign offences, extradition, international criminal prevention and detection systems, jurisdiction over offences under international law.

2.60 International social reality has overtaken international social philosophy. The Vattelien mind-world is withering away under the impact of the new international social reality. The reconstruction of the metaphysical basis of international law is now well advanced. The deconstruction of the false consciousness of politicians, public officials and international lawyers is only just beginning.

III. Deliver us from social evil. International criminal law and moral order

2.61 To believe that we do anything from a free decree of the mind is to dream with our eyes open. Such was Spinoza's way of denying what he believed to be a false idea of moral freedom, and his way of affirming

another idea of freedom, namely, the overcoming, through the power of the mind, of the decrees of the body. Since mind and body are, for Spinoza, merely two ways of conceiving of humanity's participation in the natural order of the universe, acting immorally and acting morally are merely two aspects of being human. We do good and we do evil because that is our nature.

2.62 The intellectual response to the problem of evil was taken further by the idealist-empiricist Kant and by the philosopher-biologist Freud. For the one, the solution to the problem is to be found in the transcending of the autonomous self by the idea of the universal self. For the other, the solution lies in the capacity of the self (the *ego*) to take power over its internal other (the *id*) by means of a transcendental form of the self (the *super-ego*).

2.63 Other self-examining human minds have suggested that moral freedom is an illusion, or that the search for a rational foundation for morality is illusory, or else they have disposed of the philosophical problem by reformulating it as an empirical problem, a social problem, or a linguistic problem. The mind that is haunted by its knowledge of good and evil reflects on its own knowledge and is able to convince itself that there is no problem or no answer or no possibility of an answer. The fact of human evil is apparently beyond human self-redeeming. We accept the non-human redemption offered by religion, or else we must simply accept the fact of evil, as we accept the facts of sickness and natural disaster. We know the good and we do evil. Why? We do not know.

2.64 The mind of society is more robust than the mind of the philosopher. Society's philosophy is social action. Social practice overcomes the hesitations of the self-contemplating mind. *Evil. Sin. Crime.* Society produces its own idea of *evil* as it condemns *sin* and punishes *crime*. And society's ideas are idea-forces, to borrow Fouill e's concept, ideas with the power to control human lives. The redeeming of evil becomes an aspect of the functioning of social systems. But, if society is to be the judge of evil, who is to be the judge of society? In the light of our experience of the long and tempestuous twentieth century, it is this question which has become the crux of a new form of the problem of evil.

2.65 We do evil socially. We judge evil socially. But what, in Spinoza's terms, is the place of society's decrees in the order of nature? How, in Kant's terms, can society find heteronomy within its autonomous self?

Where, in Freud's terms, can society find a self-controlling other within its idea of its self? In terms of the philosophies of all times and all places which have recognised the problem of evil, how can we explain the fact that societies, and not merely individual human beings, know the good and do evil? How can human beings who have disempowered themselves intellectually in the face of the problem of evil take power over the power of society to do evil and to judge evil? To believe that society does anything from a free decree of the mind is to dream with our eyes open. To believe that society's mind has an authority which we do not accord to the mind of the philosopher is to prepare the way for a form of human self-dehumanising, as the future of the human species becomes nothing other than a by-product of the social systems that it has created, social systems to which we accord a moral omnipotence if we believe that we cannot transcend them by the power of mind.

2.66 When the evil in question is said to be a *crime against humanity*, and the judging of that evil is by, or on behalf of, *international society*, the society of all societies, then the problem of social evil has reached its limiting case, the ultimate challenge of human self-knowing, self-judging, self-transcending and self-redeeming. And, at that level, the attempt to criminalise social evil raises three particularly painful problems.

2.67 (1) As Beccaria and Bentham suggested, a criminal sanction is itself a counter-crime, the doing of intentional violence to a human being. To justify the imposition of a criminal sanction requires a theory which reconciles very many things, practical and moral and psychological. Criminal law is no better than the theory which justifies it. And a justificatory theory of the criminal law is no better than the theory which justifies that theory. In other words, the social repression of the form of evil which is socially identified as crime is inseparable from the justification of the society which organises that repression. Except in a theocracy or a tyranny, the justificatory theory of criminal law in a given society is the object of social struggle. As international society develops its own system of criminal justice, how will it find its justificatory theory, the theory which justifies its judgement of evil and the theory which justifies its power to judge, unless through the arbitrary imposition of a theory by those with exceptional international social power, or else by the fortuitous application of the theory of a national criminal justice system which chooses to act as the agent of international society?

2.68 Criminal justice is a form of injustice. For Aristotle, legal equality is the great gift of law to the polity. In the criminal law, however, it takes on a sinister artificiality. Its artificiality is in its decontextualising. The offender and the offensive event are abstracted from the rest of the personal situation of the offender, and from the rest of the social situation of the event. The law even abstracts the person and the event from their participation in the natural world, imposing its own ideas of motivation and causation. When criminal law is applied internationally, or nationally in the name of international society, then the injustice of decontextualising is at its extreme. Each subordinate society – state or nation or people – is a unique product of a unique history. International society is full of disparities in every aspect of social development – spiritual, intellectual, moral, legal, political, economic. Artificial equality before the criminal law of an international society which still is a Many, and not yet a Many-in-One, is a limiting case of injustice.

2.69 Criminal justice is the admission of a failure in the socialising of society-members. It was in the philosophy of ancient China that it was first noticed that the cause of crime is the criminal law. If there were no criminal law, there would be no crime. In the absence of the idea of crime, anti-social behaviour might be regarded as an instance of social or personal failure, a human disaster, or else it might be reproved as sin, subject to any number of diffuse social and psychic sanctions. To criminalise a human being is a denial of love, of the possibility of the redeeming power of love. In love, I am the other, and the other is part of me. The murderer and the torturer, and those who procure murder and torture in the public interest, are me and part of me. *That art thou*, to borrow the formula of the Upanishads. The true *telos* of the criminal law is not deterrence or retribution, as generally supposed, but exclusion. It is a system of exclusion from the affective bonds of the social family and the human family. The *telos* of society, on the other hand, is the offer of affective inclusion. A society which seeks to increase inclusion to the maximum has the possibility of reducing crime to a minimum.

2.70 The introduction of international criminal jurisdiction into the present state of international society is a crude extrapolation of the most primitive, the least efficient, and the most morally dubious of systems for socialising human beings, namely, the criminal law. International criminal law might follow, but cannot precede, the establishing of the

idea of the international rule of law, including international administrative law, to control directly the abuse of power and the anti-social behaviour of governments and public officials. And the establishing of the international rule of law will follow, but cannot precede, the coming-to-consciousness of the idea of human sociality, the species-consciousness of the human species.

2.71 (2) Corrective justice, in Aristotle's conception of it, is remedial justice, a remaking of the past. The legal remedy cures in the present a defect in the past. The effort to introduce the notion of international criminal justice into international society is one aspect of a remarkable *fin-de-siècle* (if not *fin-de-millénaire*) phenomenon, a cultural movement which we may call *corrective history*. Corrective history does not seek merely to tell the story of the past in a new way, which is the perennial task of historiography. It seeks to *redeem the past by remedying past injustice*. Rather as the psychoanalyst assists the patient to recover a personal past, so the historian now is called upon to recover a social past, to assist in a process of collective confession and, if need be, penitence. As St Augustine, in his *Confessions*, sought 'to wind round and round in my present memory the spirals of my errors', so whole societies are being constrained to frame an 'accusation of oneself' and to weep 'the tears of confession'.

2.72 Augustine, in his remarkable proto-Freudian self-analysis, said that 'man is a great depth' and that 'there is in man an area which not even the spirit of man knows of'. And yet historians, when they act as the confessors of societies, are required to throw light into the depths of the public mind of society, with a methodological and forensic assurance which no one now would bring to the exploring of the private mind. Francis Bacon said that 'the government of the soul in moving the body is inward and profound'. No less obscure is the government of society by many souls. Those who share responsibility for social evil and those who bear the greatest responsibility for the greatest social evils committed in the public interest – colonial oppression, slavery, genocide, methodical terror, war – are two-souls-in-one: a private mind moved, perhaps, by tender family-feelings or a scrupulous religious sensibility, and a public mind systematically integrated with the public mind of society, with the distinct drives and desires of society's mind, and its distinct ideas of rationality and morality. The mind of government has reasons which the reasoning mind does not know.

2.73 A possible social function of history-writing is to teach us about ourselves. 'In history a great volume is unrolled for our instruction, drawing the materials of future wisdom from the past errors and infirmities of mankind.'¹⁴ Quite another thing is to suppose that we can *take responsibility* for the past. We cannot take responsibility for what we did not do, nor for what was done in the past by, or on behalf of, the society to which we now belong. We can feel shame, as human beings and as beneficiaries. We can feel pity, anger and disgust. We can take responsibility for correcting the continuing consequences of the past. We can resolve to do better in the future. More cannot be expected of us. The past is beyond redemption.

2.74 The past is beyond resurrection. The arrow of human time cannot be reversed. The past cannot be re-enacted or relived. The dead, murdered in the public interest, cannot be reborn. The tortured cannot be un-tortured. The disappeared cannot be made to reappear. We cannot avoid forming a judgement of the public interest of other societies and other times by reference to our own ideas of the public interest. We cannot suspend our moral sense. But to enact the process of judgement using conventional legal process, using corrective history to achieve retrospective corrective justice, is social evil added to social evil. It is injustice masquerading as justice.

2.75 There is pathetic irony in the fact that the retrospective application of corrective justice involves a betrayal of those who are the victims of past social evil. Corrective justice, as its name implies, in some sense corrects an evil. To some degree, the perpetrator is absolved. A price is paid. Suffering is compensated. Feeble old men and their seedy subordinates shuffle into the court-room, shrunken figures bearing no physical relationship to the physical scale of the suffering for which they are responsible. The half-theatrical, half-religious rituals of the law are performed. Due process. Verdict and sentence. History has been corrected. The causes and the effects of extreme social evil remain, its human price, but our moral outrage is clouded by the charade of judicial retribution.¹⁵

¹⁴ E. Burke, *Reflections on the Revolution in France* (1790) (London, Dent (Everyman's Library); 1910), p. 137.

¹⁵ 'The ordinary actors and instruments in great public evils are kings, priests, national assemblies, judges, and captains. You would not cure the evil by resolving that there should be no more monarchs, nor ministers of state, nor of the gospel; no interpreters of law; no

2.76 (3) The most painful irony is that the introduction of criminal justice into international society will have the incidental effect of seeming to legitimate the social evil that it does not condemn. It will catch in the net of its legalism only a minute proportion of the social evil which fills the human world. The false innocence of legal impunity will encourage the evil-doers in their arrogance. And, when public interest permits of no other course of action, governments and public officials will continue to do social evil. They cannot do otherwise. To do evil is to do good, if that is their professional duty, as they understand their duty. Their self-justifying will increase in sophistication, as the challenges to their self-justifying become more sophisticated. Legalism breeds legalism. Legalism does not, and cannot, redeem.

2.77 The disorder of an evil social order can only be overcome by a higher moral order. Evil is to the human world what entropy is to the physical world. Human order, moral and social, is a perpetual negating of disorder. The actual is made better only by the power of negation which is present in our knowledge of the good. Our tragic sense of human life reveals our sense of its other potentiality. Our moral awareness – the *synderesis* of medieval philosophy, Schopenhauer's *bessere Erkenntnis* – allows us to will a better world in forming the idea of a better world. Our *voluntas* includes a *voluntas*, to borrow a word from José Ortega y Gasset, our power to exempt ourselves from the General Will, to overcome the omnipotence of society's public mind, to transcend the apparent necessity of the actual.

2.78 The governments of states, acting in relation to each other, are at an infantile stage of moral development. The most optimistic view of the rush to introduce international criminal justice, ostensibly with the support of governments, is that it is a sign of a new maturing of the moral sense of the public mind. The fact that it has led governments, like the seven-year-old children studied by Piaget, to adopt, for the time being, an inappropriate form of social ordering may be less significant, in the long run, than the fact that they have exposed themselves to the possibility of a maturer moral consciousness, to an understanding, centuries overdue, that moral heteronomy is indivisible.

general officers; no public councils . . . Wise men will apply their remedies to vices, not to names; to the causes of evil which are permanent, not to the occasional organs by which they act, and the transitory modes in which they appear.' *Ibid.*, p. 138.

2.79 There is only one moral order, for human individuals and human societies.¹⁶ The power of the self-controlling mind may overcome also the apparent necessity of the decrees of society. Social evil is also evil.¹⁷

¹⁶ 'Thus we recognise that, in our most secret motives, we are dependent upon the *rule of the will of all*, and there arises in the community of all thinking beings a *moral unity*, and a systematic constitution according to purely spiritual laws.' I. Kant, *Dreams of a Spirit-Seer Illustrated by Dreams of Metaphysics* (1766) (tr. E. Goerwitz; London, Swan Sonnenschein; 1900), p. 64 (emphasis in original).

¹⁷ We already have an eloquent example of an effort to assert a higher moral order, above and beyond the criminal law, in relation to gross social evil. South Africa's Promotion of National Unity and Reconciliation Act 1995, establishing a Truth and Reconciliation Commission, might be seen as a model *mutatis mutandis* for the moralising of international society, and for the forging of a new international moral consciousness in the face of seemingly invincible large-scale social evil. Section 3 of the Act provides as follows.

'3. (1) The objectives of the Commission shall be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past by – (a) establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date, including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings; (b) facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act; (c) establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them; (d) compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission contemplated in paragraphs (a), (b) and (c), and which contains recommendations of measures to prevent the future violations of human rights.'