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THE STATE, COMMUNISM, AND INTERNATIONAL LAW*

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"It [the world struggle now taking place] is not a struggle merely of economic theories, or of forms of government, or of military power. The issue is the true nature of man."

"It is, therefore, a struggle which goes to the roots of the human spirit, and its shadow falls across the long sweep of man's destiny."

—President Dwight D. Eisenhower, *State of the Union Message* (1955).

THE THESIS

A Communist-controlled society is not a State under International Law. Lest the reader reject this statement without reading further, on the grounds that should it be accepted it would wreck the United Nations and lend support to preventive war, let me say immediately that I do not believe these are necessary or proper inferences. I will deal with what I think are proper inferences after I have established the statement as fact by marshalling the evidence in support of it. However, even should a fact carry only foreboding, it must be faced. National survival, as individual sanity, demands that we plot our actions on a mental map that shows us the world as it is, not as we would prefer it to be.

THE PROOF

PART I: REASON WHY THESIS HAS NOT BEEN GENERALLY ACCEPTED HERETOFORE

A. OUR EXCLUSIVELY EMPIRICAL SOCIAL SCIENCES

Even before I present the evidence in support of the initial statement, however, perhaps I should answer a question that immediately presents itself: "If a Communist-controlled society is not a State under International Law, why hasn't this fact been generally recognized?" One reason is a critical deficiency in our modern social sciences. They are empirical only. Empirical social disciplines can record

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the presence or absence of that cooperation that is the difference between society and chaos. But being able to distinguish between life and death does not make a physician. Our social sciences by their basic premises and method—as I will show—can not explore the question of *why* men cooperate or do not cooperate. Yet this is exactly what we must know to deal intelligently with Communism, because Communism, being revolutionary, destroys cooperation and creates it in a new mode. The roots of the exclusive empiricism of our social sciences go deep into the seedbed of modern science and philosophy. It is necessary to trace them in order to understand our own understanding of our times.

With Aristotle, politics was concerned with questions of being, and of value, as well as of action. Ontology, axiology, and praxiology were linked. Aristotle's Politics is but one half of a single treatise of which his Ethics is the other half.¹ Ethics was the study of how the *summum bonum* could be achieved through personal action. Politics was the study of how it could be achieved through group action. The *summum bonum* was knowledge of and action in accordance with the highest truth about man's nature and the universe. All disciplines and all human action were tied together in one root of rational truth. Politics was the study of the implications of that rational truth for the relations between men with respect to their natural resources and with respect to their own persons, and of appropriate group action to establish those relations and maintain them. Politics was normative: it stated what action ought to be taken. And, because it rested on reason, politics could never have been thought an autonomous science unconcerned with morality and ethics, and with physical and biological knowledge of man and nature.

But modern philosophy appeared to make the connection between the true in nature, the good, and the actual in society only an illusion. Modern philosophy seemed to require that praxiology be considered autonomous, not linked with ontology and axiology.

Locke, Berkeley, and Hume, the philosophical fathers of positivism, had been unable to account for the causal necessity obtaining in mathematics and the new physics of Galileo and Newton. Immanuel Kant accounted for it by endowing the human mind with certain fixed frames (forms of sensibility and categories of the understanding) through which it perceived and into which it fitted the data of the senses. He put the necessity in the knowing mind, not in the matter known.

But, as Kant pursued the study of how we know, which is epistemology, he realized that even as he contemplated the "starry heavens

1. Smith, *Introduction to THE NICHOMACHEAN ETHICS OF ARISTOTLE* vii (Everyman's Library ed. 1947).

above," he also was aware of the "moral law within." Morality was meaningless for Kant without free human choice. Therefore, he presupposed man to be a free moral agent, not subject in the realm of morality to any antecedent cause requiring a necessary effect. As, by his own premises, all knowledge of physical matter was characterized by precisely this causal necessity, Kant could hold this view of moral freedom only by severing morality and ethics from all connection with empirical scientific knowledge.² He made that bold stroke, and the dichotomy has stood until our own time. Without this vital connection, the rational methods of science cannot reach to a study of the proper ends of action, but only to a study of action itself. The study of politics must be factual only, not normative. Without the link to objective knowledge, morality and ethics become disciplines apart, expounding the implications of arbitrary preferences.

Methodology added its bit to the illusion, arising from epistemology, that praxiology, the study of actions, is autonomous. The scientific method of the day was that of Newton's mechanics. It was applied to social facts. This method required that the entities of its system obey conservation laws, *i.e.*, remain constant through time, the same as the molecules and atoms of physical science. Men are not such entities if you take them in their role of rational, moral beings. Thoughts and values change, and differ from man to man. This would make men not interchangeable, and any one man not constant through time. Consequently, our modern social disciplines sought to eliminate all consideration of what a man is and what he thinks good, and to build an objective science on the observed actions of men. Political science took political power, not the individual human being, as its basic entity. "In both disciplines [political science and sociology] political power seems to be accepted as an ontological datum, a natural fact, and the role of political theory is to see to it that political power behaves with relative decency."³

The fault of our modern social disciplines is not that they are empirical, but that they can take account of *nothing but* the empirical. They have been useful in many limited contexts, not because ontological and axiological factors are irrelevant as exclusive empiricism assumes, but because these factors happen to be constant in many situations. A sociological study in a typical Midwestern small town is not likely to be falsified by changing conceptions of the good and the true. But an international revolutionary movement is another matter. This is a situation where men differ in their conceptions of man's nature, and of justice among men. If these differences are not irrelevant,

2. NORTHROP, *THE MEETING OF EAST AND WEST* c. 5 (1946).

3. Neumann, *The Concept of Political Freedom*, 53 *COL. L. REV.* 901 (1954).

as the premises and method of our modern social disciplines assume them to be, then we must hold these disciplines inadequate for the problem at hand.

B. THE MATTER HAS NOT BEEN SQUARELY AT ISSUE IN INTERNATIONAL LAW

Another reason why it has not been generally recognized that a Communist-controlled society is not a State under International Law is that traditional doctrines of recognition, taken in the light of the prevailing exclusively empirical view of social questions, do not place the matter squarely at issue. Communism is revolutionary. Under traditional doctrines of recognition, only the existence of a new *government* is in question when Communism comes to power, not the question of the existence of a new *State*. And what are the tests to determine whether recognition should be granted a new government? Charles G. Fenwick tells us:

Stability in respect to the control of the government over the major part of the territory of the state and willingness to accept and abide by the rules of international law—such have been the two conditions laid down by the international lawyers in treatise after treatise. . . .⁴

In the same *American Journal of International Law* editorial comment, "The Recognition of the Communist Government of China," Dr. Fenwick complains that, in discussing the matter, laymen do not "make the distinction between China as a state and the Communist Government of China."⁵ But even the treatises of the international lawyers (if one reads in the cracks where an older tradition shows through the modern surface of exclusive empiricism) reveal that in this instance the layman's instinct may be more correct than the expert's doctrines.

When "State" is defined only by its empirical manifestations a Communist-controlled society fits the definition. A State, in modern International Law treatises, is said to consist of (1) a people, (2) a fixed territory, (3) a government, (4) which is sovereign. But even in modern treatises indications appear that perhaps a State, in International Law, is something more than just empirical manifestations. Oppenheim, in explaining the four conditions for the existence of a State, says:

A people is an aggregate of individuals of both sexes who live together as a *community* in spite of the fact that they may belong to different races or creeds, or be of different colour. [And, in his

4. Fenwick, *The Recognition of the Communist Government of China*, 47 *AM. J. INT'L L.* 658 (1953).

5. *Ibid.*

definition of government, a government is] . . . one or more persons who are the *representatives* of the people, and rule according to the *law of the land*.⁶ [*Italics added.*]

Again, with respect to the definition of law, we meet with the word "community." Laying down the essential conditions of the existence of law, Oppenheim says, "There must, first, be a community."⁷

A body of people, and a territory under the effective control of a power group that calls itself a government are empirical manifestations of the existence of a State. When we turn from these to questions of "community," "representation," and "law," which begin to suggest something of agreement on fundamental matters and of judgments about right and wrong, can we say that Communist-controlled societies are States? Can we say that an aggregate of individuals is still living together as a community when a small minority lays down relations for the common effort that are so hateful to the majority they can scarcely be kept under control by informers, false propaganda, mass executions, mass deportations, slave labor, and the army itself? Are the men who exercise this control under label of government the representatives of their victims? Does it really make no difference whether men work together because they will or because others drive them before the lash? August 9, 1954, a Congressional committee reported testimony by King Michael on how the Communists dealt with Rumanians who cheered their King in front of the Palace on St. Michael's day. King Michael said:

They arrested as many people as they could: old people, grown-ups, and children. The children were placed in various prison cells where they were molested or assaulted all night by special gangs of ill and infected people. The next morning these children were sent back to their parents with a piece of paper round their neck explaining that they had been assaulted by a syphilitic some time during the night, and what would happen in the future if these demonstrations continued.⁸

Are the Rumanians today living as a community under a representative government? In the summer of 1942 Churchill said to Stalin, "Tell me, have the stresses of this war been as bad to you personally as carrying through the policy of the Collective Farms?" At that time the German army was deep in the southern-plains bread basket of Russia, threatening Stalingrad and the Caucasian mountain passes beyond which lay Russia's only dependable oil supply. Stalin replied, "Oh, no, the Collective Farm policy was a terrible struggle."⁹ And the struggle goes on. Is there community in Russia? Is the "law of the

6. 1 OPPENHEIM, INTERNATIONAL LAW 114 (7th ed., Lauterpacht, 1948).

7. 1 *id.* at 10.

8. H.R. REP. No. 2550, 83d Cong., 2d Sess. 15 (1954) (Second Interim Report of the Select Committee on Communist Aggression).

9. CHURCHILL, THE HINGE OF FATE 498 (1950).

land" anything the Communists proclaim, or is there a line beyond which force stands naked and is recognized as tyranny?

Dr. Fenwick suggests that such internal conditions negative the existence of the first condition for recognition of a new government, namely, internal stability of the regime.¹⁰ I believe the matter goes deeper, and is a question of the true meaning of "State" in International Law. Accordingly, I move on to a full discussion of that question.

PART II: *THE NATURE OF A STATE UNDER INTERNATIONAL LAW*

A. NATURAL LAW A TRUE GUIDE; BELIEF AN ELEMENT OF COMMUNITY

International Law was born before exclusive empiricism captured the social disciplines. Grotius, who preceded Kant by nearly a century and a half, was the father of International Law and of modern natural law. Natural law holds that a common belief, not just a common pattern of action however induced, is essential to community. Exclusive empiricists have ridiculed natural law as a bootless urchin. It was not, and is not. Natural law is, most simply, the concept that what a people believe to be true about the nature of man and the universe is the proper criterion for deciding what is just in the relations between men in society.

Political science, in fact, did not avoid making an assumption about the nature of man by taking political power, rather than individual human beings, as its basic entity. Although man's acts are said to be the subject of study, and not man himself, the actor is inseparably in the act, and when uniformity in the acts is assumed (as it must be for conservation laws to hold) an implicit assumption is also made that the actor is incapable of interfering with that uniformity. In power politics, in economic statistics, in sociological studies, men are assumed to be interchangeable entities—just numbers. In congressional investigations and security hearings we too often witness the assumption that a man's environment of twenty years ago has unchangeably molded him—that he is not capable of reconsidering, repenting, and reforming. Therefore, once gone astray forever damned.

Thus, our social disciplines, by trying to avoid the unavoidable, have in fact accepted an assumption about man's nature that is antithetical to democracy. There is no logical justification for democracy if the reason of men can not overleap environment and perceive truth common to all, and if men are not self-moved, by the moral sense of duty, to work toward the good society that reason has envisaged. In our professions of democratic faith, and overwhelmingly in our actions, we guide by moral duty and what we believe to be true. But

¹⁰ Fenwick, *supra* note 4, at 660.

our experts in the disciplines of action—when they do not smuggle in their own morality as a corrective to their “science”—tend to be often at war with what appears to be “common sense” to the government administrator or business executive who has to take the action and stand on it.¹¹ There is a measure of truth in the epithet, “egghead.”

Sir Ernest Barker, in an essay on *The Parliamentary System of Government*, clearly stated the dependency of democracy upon the view that man's behavior is subject to the creative self-direction of reason and moral commitment:

Parliamentary liberty may be a benefit. It may be an old and historic inheritance, as we have sought to suggest. It may be a general and widely diffused system, which ranges from continent to continent, as we have sought to show. But its great and sovereign defense is that it is the duty of man—the duty of political man—the duty of man as a maker and member of organized societies. Man, as a member of an organized society, *must* control his life by his thought and the motion of his mind. Otherwise, he is not a man.¹²

11. Antithetical doctrines have a corrosive effect on mutual confidence, cohesion and cooperation, and therefore threaten the existence of a society. Psychology has tended, until the last ten years especially, to view man as I have stated the modern social disciplines have assumed him to be, namely, not capable of exercising rational control over his behavior. An implication of this view is that an individual who does a socially dangerous act is not morally responsible for that act and should not be punished for it because he acted under compulsions he could not control. Some psychologists still call for all social deviates to be turned over to them for treatment. ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* (1954). But Dr. Karl Menninger reports a joint case study in which, on the same facts, “the lawyers almost to a man took the position that the offender should be *treated* as abnormal, while the psychiatrists took the position that he should be *tried* as if he were normal.” Hall and Menninger, *Book Review*, 38 *IOWA L. REV.* 687, 700 (1953). Our present situation is summed up by Dr. Menninger as a “state of confusion,” whereas

[f]or centuries there was no overlapping of the areas of competence and responsibility. To be felonious was a clearly defined state which was for the lawyer to deal with. To be sick, on the other hand, was an equally definite condition which was for the doctor to handle; ignorance was a problem for the teacher, and sin for the clergyman.

Id. at 698.

Confusion is the first symptom of social multiple sclerosis. When the cultural tradition that the antithetical doctrines attack is less firmly implanted, the paralyzing effect is greater. In the Philippines, the Code Commission has actually submitted to the Philippine Congress for adoption in three successive years a proposed Code of Crimes that states, in Article thirty-four, that repression of crime is “applied for social defense, to forestall social danger, to rehabilitate, cure or educate,” in contrast to the classical theory of punishment only for crime fully committed in violation of a published law. Padilla, *An Appraisal of the Proposed Code of Crimes*, 28 *PHIL. L.J.* 895, 896 (1953). In its report, accompanying the draft code, the Code Commission minimizes almost to extinction the actor's knowledge and free will as elements in criminal responsibility, saying “criminality depends mostly on social factors, environment, education, economic conditions, and the inborn or hereditary character of the criminal himself.” *Ibid.* Significantly, successive rejection of the proposed Code of Crimes was chiefly due to the organized opposition of the Catholic Lawyers' Guild of the Philippines. 13 *THE JURIST* 423 (1953).

12. BARKER, *The Parliamentary System of Government* in *ESSAYS ON GOVERNMENT* 67 (2d ed. 1951).

However, we do not need to rely only on negative evidence or on unsupported assertion to have renewed confidence in natural law. (And of course, I am speaking only of the method of natural law, not of any particular legal norms that have resulted from the use of that method, which, because of new insights, may now be outmoded.) Professor F. S. C. Northrop has reforged the link that was broken by Kant. He has gone back to the problem Kant faced and solved it in a way that again provides epistemological and methodological meaning in philosophy for the aphorism "the true in nature is the good in society."¹³ This is an immeasurable accomplishment.

We also have testimony that a common belief is the basis of community from an eminent sociologist, Pitirim A. Sorokin, who has not swum in the main channel of empiricism. All men are faced with the same problems of living and dying, producing and distributing, administering and serving, ordering and respecting. But men differ in their answers to these problems because they assign different meanings to the empirical data of experience. Accepting the same set of meanings enables men to live and work together to meet their needs as they commonly understand them to be. For this reason, and because meanings are patterned by logic, Sorokin, after a monumental study of all societies known to history, has called the relations between men in society "logico-meaningful."¹⁴

A common belief creates a common focus of valuing and judging without which men would be at cross purposes. But to say this is not to assert that the thing is consciously done. I am using the term "belief" as José Ortega y Gasset defined it in his excellent essay, *Concord and Liberty*:

A belief must be distinguished from an accepted idea, a scientific truth, for instance. Ideas are open to discussion; they convince by virtue of reason; whereas a belief can neither be challenged nor, strictly speaking, defended. While we hold a belief, it constitutes the very reality in which we live and move and have our being.

Beliefs, to be sure, begin as ideas. But in the process of slowly pervading the minds of the multitude they lose the character of ideas and establish themselves as "unquestionable realities."¹⁵

The belief essential to community is not a complete unanimity on all matters, trivial as well as profound. Differences of interest and of outlook do not destroy society if struggle resulting from them is waged within a framework of agreement on more fundamental matters. Ortega's superb example of this fact is Republican Rome's tribunate.

13. NORTHROP, *THE LOGIC OF THE SCIENCES AND THE HUMANITIES* (1947); NORTHROP, *THE MEETING OF EAST AND WEST* (1946).

14. SOROKIN, *SOCIAL AND CULTURAL DYNAMICS* (1937-41).

15. ORTEGA Y GASSET, *CONCORD AND LIBERTY* 19, 20 (Weyl's transl. 1946).

The tribune was a representative only of the plebs, not of the city as a whole. He had an absolute veto.

Like the basilisk, which paralyzed whatever living being came before its eyes, the tribune could with one gesture suspend action of any other magistrate including the consuls. He could freeze the entire state machinery.¹⁶

But, wonder of wonders, the tribunes, for three and a half centuries, used their power only to prevent abuse of plebeian rights. This "sublime irrationality" in the hands of one class was not used as an instrument of class warfare to throw off the directing, ordering, dominance of the patricians, but solely as an instrument by which the plebs could participate in the life of a community in which the patricians alone were believed to have access to the wisdom on which laws, economic policy, and foreign affairs could be based.

Political questions "can be resolved only if agreement prevails in nonpolitical matters, agreement which, in the last instance, concerns the reality of the world."¹⁷ Such a belief the plebeians shared with the patricians:

They believed with living faith in the same picture of the universe and of life in which the patricians believed. They believed in Rome and her destiny with which they felt united for better and for worse. They believed in the proficiency of the ruling class who had fought their battles year after year and won wealth, land, and glory for the commonwealth.¹⁸

How futile to discuss the veto in the United Nations as only a procedural matter.

Ortega cites another example of the belief essential to community, from more recent times:

Each of the European nations lived for centuries in a state of unity because they all believed blindly—all belief is blind—that kings ruled "by the grace of God." To hold such a belief they clearly had to believe in the existence of God. Which meant that they felt they lived not by themselves, alone with their man-made ideas, but in the ceaseless presence of an absolute entity—God—with which they had to reckon. This indeed is belief: to reckon with an inescapable presence. And this is reality: that which must be reckoned with, whether we like it or not. When the peoples of Europe lost the belief, the kings lost the grace, and they were swept away by the gusts of revolution.¹⁹

B. THE BELIEF OF GROTIUS' TIME: THE RATIONAL NATURE OF MAN

Grotius founded International Law upon a conception of the nature of man that was a common belief of all Christians. The conception was originally that of the Stoics, that the universe is characterized by

16. *Id.* at 43.

17. *Id.* at 19, 20.

18. *Id.* at 42.

19. *Id.* at 20.

rational order, and that men were given reason and speech by means of which they can achieve the society necessary to their existence. The persons Grotius quotes are Chrysostom, Marcus Aurelius, and Seneca.²⁰ Christianity, with St. Augustine and then St. Thomas, had accepted essentially the same conception.²¹ This is why the conception was a common belief of all Christians in Grotius' time.

Grotius says law as a rule of action "means nothing else than what is just, and that, too, rather in a negative than in an affirmative sense, that being lawful which is not unjust. Now that is unjust which is in conflict with the nature of society of beings endowed with reason."²² Thus, for Grotius, the whole function of law is to preserve that society necessary to man. Society is itself "the source of law properly so called."²³ The society that Grotius conceived man's nature as requiring was universal society. Therefore, the obligation of every man to all others not to disrupt society is not extinguished by the assumption of special relations with *particular* men to form a state. The continuing obligation of all the members would henceforth lie upon the head of the state who would act in their names. Therefore, the international community, like national communities, was a society of beings endowed with reason.

Grotius defined the State as a "perfect association,"²⁴ and "a complete association of free men, joined together for the enjoyment of rights and for their common interest."²⁵ As Grotius well knew, Cicero had proclaimed the rational origin of political association in very similar terms, and also explained it by man's nature. Cicero wrote:

Well, then, a commonwealth is the property of a people. But a people is not any collection of human beings brought together in any sort of way, but an assemblage of people in large numbers associated in an agreement with respect to justice and a partnership for the common good. The first cause of such an association is not so much the weakness of the individual as a certain social spirit which nature has implanted in man.²⁶

(1) *History of Belief in Rational Nature of Man*

In order to understand fully the nature of a society organized and directed by a belief in the rational nature of man it is necessary to go,

20. 2 GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 11 n.1,2, and 12 n.1 (Carnegie Endowment ed. 1925).

21. All that is asserted is that an element of the Church's view of man was the one derived from Greek science and philosophy and that the Church, therefore, preserved this view as belief into Grotius' time. A complete statement of the Church's view of man would, of course, have to include the doctrine of original sin, which is, perhaps, "the distinction between Greek idealistic humanism and Christian humanism." BRUNNER, *THE SCANDAL OF CHRISTIANITY* 59 (1951).

22. 2 GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 34 (Carnegie Endowment ed. 1925).

23. 2 *id.* at 12.

24. 2 *id.* at 102.

25. 2 *id.* at 44.

26. I CICERO, *DE RE PUBLICA* xxv (Keyes' transl. 1928).

in some detail, into the nature of Roman society before and after the Stoic idea had become a belief. Only by so doing can we understand fully the original conception of "State" in International Law. At the same time we will see the full measure of difference a change of belief makes in the structure of a society.

(a) SOCIETY BEFORE BELIEF IN RATIONAL NATURE OF MAN

Before Greek science and philosophy, the Aryan-speaking ancestors of the Greeks and Romans believed that social and physical events were ruled by the gods. The only way to know, to foresee, to plan, was to consult the gods and act accordingly. Only a few men could consult the gods. Because these men were the only avenues to knowing, they were law givers, war leaders, and economic managers for the majority of men who, without access to the gods, would be without law, hope, or the means of survival.²⁷ This is why the plebs believed in the "proficiency of the ruling class." The plebs could know what actions hurt their immediate interests. But, not having access to the gods, they could not foresee what would further their interests. Therefore, they could participate in government only negatively, through the veto of the tribunes, not positively, by legislating. The structure of Roman society to the time of the Empire was determined by this belief that all things were in the hands of the gods. Ortega points out Cicero's statement that everything accomplished by the great Romans of the Republic was not equal in importance to "the initial feat of Romulus, who established 'those two excellent foundations of our commonwealth, the auspices and the senate.'"²⁸ Of course! The auspices was the means by which the gods were consulted. The senators were the patricians who, as heads of families and clans, had the right to consult the gods. Rome, as the Greek city-states, had been formed by leagues of family religion-organized clans and tribes.

(b) BIRTH OF BELIEF IN RATIONAL NATURE OF MAN

The Greeks discovered a new way of knowing the world and man. Their scientific spirit sought the general and the immutable in order better to understand and control the particular and the transitory. By rising above accumulation of facts to general principles and relations, in terms of which those facts could be meaningfully explained and previously unknown facts predicted, the Greeks discovered man's wonderful capacity to escape the bounds of experience and *know* his world more deeply and more fully than he apprehends it. They discovered, in Professor Northrop's terminology, "concept by postulation" knowledge.

27. The sources for the account here and following of the social background, origin, and social impact of Stoic thought are collected in note 33 *infra*.

28. ORTEGA Y GASSET, *CONCORD AND LIBERTY* 21 (1946).

Using this scientific method of thought upon the observed facts then available, the Greeks remade their conceptions of man and his world. That they were on the right track is attested by the fact that we consider them the founders of our science. The names of Plato and Aristotle, of course, are predominant in any account of this Promethean task, especially with respect to the consequent revision of thought about those facets of man's activity that we call political and social.

Both Plato and Aristotle applied the knowledge yielded by their particular systems of thought to the political facets of man's activity, but in both instances the application, fundamentally, was to these activities of man as he functioned *within* political groups, not to the problem of creating political organization where none existed.²⁹

The Stoics did not take the State as something given, and reconcile what they could discover about its nature with their knowledge about man and his world. Instead, they took what Plato, Aristotle, and other Greek scientists told them about man and the world, and on the basis of that knowledge decided what a state *ought* to be. They held that there is one rational order in the world (Plato's Logos). They believed that man has a "sociableness," which is the necessity to enter into a division of labor in society to survive, and that in order to accomplish this, man was given reason and speech. *All* men are rational animals, who can know the rational order of the universe and therefore the proper ways for them to behave. There is one true Law (the Logos) and all men can know it. *Every man is exactly alike in this respect—his rationality.*

Being able to know the true, universal, omnipotent Law, men need not subordinate themselves to some "god-inspired" man in order to know their environment and to adjust to it successfully. Patricians are no longer necessary to survival. Now all men are able to know what justice requires in every relation of life and intercourse. There is no difference between men based on who their ancestors were. Polity results from the free association of equal, rational beings.

(c) THE NEW KIND OF RELATIONS BETWEEN MEN

If society is accomplished by reason and speech, the link between men is one of ideas. The social impact of Stoic thought, which resulted from the method of knowing of Greek science,³⁰ had this consequence: The link between men became a link of "concept by postulation" ideas, rather than of "concept by intuition" ideas. Concepts by intuition denote objects which are immediately apprehended. The

29. For a fuller discussion on this point, see Dorsey, *A Porch from Which To View World Organization* in *FOUNDATIONS OF WORLD ORGANIZATION: A POLITICAL AND CULTURAL APPRAISAL* 359, 362, 363 (Bryson, Finkelstein, Lasswell, and MacIver ed. 1952).

30. *Ibid.*

name for an object receives its content from immediate apprehension and the name remains constant, *i.e.*, it denotes the result of that apprehension in whatever proposition or system of propositions it appears. When one is using concept by postulation knowledge, the name of anything receives its content, not directly from experience, but from the other terms in the deductively formulated system of propositions in which it appears. "Man" in a legal prescription, consequently, is no longer some neighbor or fellow citizen, but is the kind of creature defined in the system of concept by postulation knowledge, according to which the society is organized.

Let me illustrate the difference. D. G. Lyon once wrote an article to refute those who said that in contrast to the perfect logical structure of Roman law, all previous law codes had no logical order but were just a collection of particular rules.³¹ He proceeded to show that Hammurabi's Code (*c.* 21st century B.C.) had a logical structure. But what he did not realize was that it was the logical structure of the natural object (*i.e.*, the common sense object of experience) in its natural history context. For instance, all the laws relating to oxen were grouped together under a section of laws concerned with farming. They included prescriptions on seizure of oxen for debt, annual rates of hire of oxen, damage to oxen, and on what should be done when an ox killed a man. Lyon considered this grouping most logical because the ox was the principal farm animal of the Babylonians. It was, of course, logical. But it was logical for concept by intuition organization of a society. By contrast, the Institutes of Justinian begin with a definition of justice and jurisprudence, then proceed to: definitions of the kinds of laws; definitions of persons who are subject to the law and of various relations that can exist between them; division and classification of things; definition and classification of relations of persons to things; transmission of rights with respect to things from one person to another; *obligationes ex contractu* (obligations assumed by contract); *obligationes ex delictu* (obligations the law imposes upon a man because of some wrong he has committed, such as theft or injurious damage); and *actiones* (actions a person can institute to make effective the rights given him above). Note that Hammurabi's laws on oxen would fall into three different places, even in this list of only the major classifications of Roman law: seizure for debt under *actiones*; annual rates of hire under *obligationes ex contractu*; and damage to oxen and an ox killing a man under *obligationes ex delictu*.

The change to a concept by postulation link between men had far-reaching effect. Men were not particular flesh and blood creatures, but identical logical conceptions, possessing certain specific rights and ob-

31. Lyon, *The Structure of the Hammurabi Code*, 25 J. AM. ORIENTAL SOC'Y 248 (1904).

ligations towards others in certain defined transactions. Lands or goods were no longer physical objects but possessed the characteristics specified in a deductively formulated, logically related body of legal propositions.

In matters of commerce and trade the actual articles themselves, or symbols literally representing them, were no longer manipulated as formerly they were, but men did business by manipulating concepts. Take the transaction *antichresis*, the forerunner of the modern mortgage. Mr. Black had land and needed money. Mr. White had money that he wanted to work for him. The land was literally exchanged for the money for a period of years. Black moved off the land. White had full use of it. White turned over his money to Black, who could pay it back at the expiration of a certain period and move back on his land. Where the actual physical articles could not be exchanged, various symbols represented literally the articles, and were manipulated according to exact rituals. If the ritual was faulty in any small detail, the exchange was not accomplished, and the transaction was not completed. That was the nature of Roman law until the influence of concept by postulation knowledge began to be felt. Then Roman law recognized certain "formless juristic acts" as completing transactions, and the intention of the parties was decisive rather than the exactness of the ritual. This is in accord with the new conception that relations between men in society are created by the rational faculty of those men themselves, their expressed intentions—rather than being laid down ritualistically by the gods speaking through oracles and priests.

Rudolph Sohm has said:

The whole future course of development [of Roman law] was virtually involved in this recognition. Thus the end of the Republic marks the commencement of the process by which the local law of the city of Rome was gradually converted into what Roman law was destined, at a future time, to be, *viz.*, a general law for the civilized world.³²

No longer were transactions carried out between men *qua* men, but between "buyer" and "seller," "pledgor" and "pledgee," "mortgagor" and "mortgagee," etc., all of whom had definite, specific rights and obligations set down in the laws. No longer did laws begin, as did Hammurabi's, "Any man who. . ." Instead, man, in any particular statute, did not refer to the common sense creature we know in everyday experience, but to precisely the kind of creature—and no other—defined by the whole body of hierarchically ordered, logically related, body of propositions specifying the relations between creatures of such and such a nature living in a world of such and such characteristics, all as determined by the postulational knowledge of Greek science and

32. SOHM, *THE INSTITUTES* 69 (3d ed. 1907).

worked out in its normative consequences by the art of deducing, arranging, and proving propositions.³³

The change to a concept by postulation link between men made possible a much more complex, far-flung community. Men are conceptual entities. Things are conceptual entities. And, for the first time, purely conceptual legal entities can be formed, such as the corporation, so important to modern economic organization. These made possible the linking of large numbers of persons in a common enterprise in which only the enterprise itself is a legal person, and the individuals have certain limited liabilities and rights. Justice is not in the hands of particular men's gods, but in the hands of judges trained in jurisprudence and sworn to uphold the impersonal, universal law, before which all men are equal.

(d) THE NEW STRUCTURE OF LAW

For centuries Roman law had been only "a series of legal rules," with no more logical structure than the Code of Hammurabi. Stoicism made its impact on the intellectuals of Rome and thirty years later, around 100 B.C., Q. Mucius Scaevola, a Stoic, wrote an eighteen volume treatise in which Roman law suddenly began to present the logical structure that caused Édouard Cuq to assert that "the Romans have fixed for all time the categories of juristic thought."³⁴ For the first time Roman law was

set forth in systematic order, i.e., arranged and classified according to the nature of the subjects dealt with . . . [Scaevola] was the first to determine, in clear outline, the nature of the legal institutions (will, legacy, guardianship, partnership, sale, hiring, etc.), and their various kinds (*genera*).³⁵

33. The foregoing account of Stoic thought and its impact appeared (substantially) as part of my paper for the Eleventh Conference on Science, Philosophy and Religion, that became c. 33 of FOUNDATIONS OF WORLD ORGANIZATION: A POLITICAL AND CULTURAL APPRAISAL (Bryson, Finkelstein, Lasswell, and MacIver ed. 1952). It is based on the following: ARISTOTLE POLITICS (Barker's transl. 1946); ARISTOTLE, NICOMACHEAN ETHICS bk. 5 (Chase's transl. 1947); ARNOLD, ROMAN STOICISM (1911); CICERO, DE LEGIBUS (Keyes' transl. 1928); CICERO, DE RE PUBLICA (Keyes' transl. 1928); DECLAREUIL, ROME THE LAW-GIVER (1926); FUSTEL DE COULANGES, THE ANCIENT CITY (7th ed. 1889); GREENIDGE, A HANDBOOK OF GREEK CONSTITUTIONAL HISTORY (1889); MILHAUD, LECONS SUR LES ORIGINS DE LA SCIENCE GRECQUE (1893); 1 MOMMSEN, HISTORY OF ROME (Dickson's transl. 1900); NASMITH, OUTLINE OF ROMAN HISTORY (1890); NILSSON, GREEK PIETY (Rose's transl. 1948); NORTHROP, THE LOGIC OF THE SCIENCES AND THE HUMANITIES (1947); PLATO, REPUBLIC (3d ed. 1921); ROSTOVITZ, HISTORY OF THE ANCIENT WORLD (2d ed. 1930); THE CIVIL LAW (Scott's transl. 1932); SOHM, THE INSTITUTES (3d ed. 1907); 1 VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE (1920); 2 VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE (1922); 1 WESTRUP, INTRODUCTION TO EARLY ROMAN LAW (1944); 2 WESTRUP, INTRODUCTION TO EARLY ROMAN LAW (1934); 3 WESTRUP, INTRODUCTION TO EARLY ROMAN LAW (1939); Northrop, *The Mathematical Background and Content of Greek Philosophy* in PHILOSOPHICAL ESSAYS FOR ALFRED NORTH WHITEHEAD (1936). See Dorsey, *Two Objective Bases for a World-Wide Legal Order in Ideological Differences and World Order* 442 (Northrop ed. 1949).

34. 1 CUQ, LES INSTITUTIONS JURIDIQUES DES ROMAINS xxiv (1904).

35. SOHM, *op. cit. supra* note 33, at 91.

Jurisprudence was born. There was suddenly a science of law where none existed before. Sohm indicates the difference in these words:

A scientific exposition, for example, would never run as follows: If a thing has been delivered to you under a contract of sale, you have the right to keep it, and a third party into whose possession it comes is bound to hand it over to you. [This is the kind of language you will find in Hammurabi's Code.] The scientific exposition would be in this fashion. First, ownership is a right, unlimited in its contents, to exercise control over a thing. Thus we get the conception of ownership. Secondly, ownership can be acquired by *traditio*, *occupatio*, *usucapio*, &c. (each of these terms being defined). Thus in place of a series of legal rules we have a number of abstract conceptions. . . .³⁶

I have attempted to establish elsewhere that the Greek way of knowing, with its implications for social organizations made explicit by Stoicism, was responsible for the startling, and immensely important, change in Roman law.³⁷ This source of change is not discernible to modern sociology because it lies outside its premises. Eugen Ehrlich, one of the greatest of sociological jurists, was fully aware of "[t]he enormous revaluation of all human life at the end of the Republic and in Imperial times. . . ."³⁸ But Ehrlich, though he gave years of study to the matter, was unable to determine the source of the change. He claimed for himself

the credit of having shown in my *Beiträge zur Theorie der Rechtsquellen* that Roman juristic science has created its material independently of any other source of law. The main root of the Roman law is the *proprium ius civile*, i.e., the juristic law which the jurists themselves have created. . . . Although in form an interpretation of the Twelve Tables, this *ius civile* was an absolutely independent creation of the Roman jurists.³⁹

Ehrlich expressed intention to publish a second volume in which he would examine information he hoped would furnish the answer to the question where the jurists got their material for remaking the Roman law. He never fulfilled the intention, though he lived for a number of years after expressing it.

(e) NEW STRUCTURE OF SOCIETY; NEW CONTENT OF LAW

Stoicism influenced Roman society directly as instruction in the home, foreshadowing a "theory of education," training the young, regulating the daily life of adults.⁴⁰ Thus, new conceptions of social justice were implanted, and the law was changed indirectly. If all human beings are rational, women are the equal of men, and individuals are discrete entities possessing rights and obligations apart

36. SOHM, *op. cit. supra* note 33, at 32, 33.

37. Dorsey, *supra* note 33.

38. EHRlich, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 261 (Moll's transl. 1936).

39. *Ibid.*

40. ARNOLD, *op. cit. supra* note 33, at c. 12-15.

from status in family and clan. Through the flexible formulary procedure of the late Republic daughters and cognates as well as sons and agnates were allowed to inherit property. Indeed, until the notion of individuality arising out of Greek thought began to make itself felt, there was no conception of private property. Property belonged to the family. And the family was not a community of living persons only but a continuity between past, present and future family heads, or *paterfamilii*. Family is the living personality of the first house-father, his vital force, which has found immortality in the continuity of the generations of his descendants. His eldest son receives it through the blood and alone has a right to carry on the family religion. He is the living generation's link with the gods.⁴¹ "Now mankind . . . are immortal, because they leave children's children behind them, and partake of immortality in the unity of generation."⁴²

It was to the family so understood—continuing through the generations of descendants—that property belonged. The eldest son, upon becoming *paterfamilias*, did not inherit the property. He inherited the right to act with respect to the property owned by the continuing family. He could not refuse the inheritance even if all he received were heavy debts. The *paterfamilias* could not make a will that would leave the property to persons outside the family. But this was gradually broken through. Wills were allowed. The son could refuse inheritance. And, as mentioned above, daughters—who previously had always been subordinated to some male because males alone inherited the right to consult the gods and therefore were the only ones who could act wisely and justly—were allowed to inherit.

Not only did Stoic thought enter Roman society directly and Roman law indirectly, but also the reverse was occurring, and perhaps to an even larger extent. It was a social revolution unrivaled until our own time. C. H. McIlwain, speaking of the change at this period—through formulary procedure—of property law, says:

It was nothing less than a gradual and silent social revolution, if we consider that a similar transformation was going on in every branch of law—the law of marriage, of family relations, of testamentary succession, of contracts, and, in fact, of all human relations.

There is probably no other social revolution in recorded history so important, so complete, so continuous over so long a period, as this evolution traceable step by step in the sources of Roman private law.⁴³

41. See authorities cited in note 33 *supra*. I have put some of my research on these matters, in comparison with early Chinese society, into mimeograph form and have used it in St. Louis and Taipei, Taiwan, China. Professor Northrop has used it at New Haven, Connecticut, but it is not published in generally available form.

42. PLATO, LAWS bk. IV, 721 (Jowett's transl. 1892).

43. MCLWAIN, CONSTITUTIONALISM, ANCIENT AND MODERN 54 (1940).

In so thorough a revolution we would expect of Rome, especially, that change would be forced *by* law as well as *upon* law. For it was Cicero who said:

[T]he citizen who compels all men, by the authority of magistrates and the penalties imposed by law, to follow rules of whose validity philosophers find it hard to convince even a few by their admonitions, must be considered superior even to the teachers who enunciate these principles. For what speech of theirs is excellent enough to be preferred to a State well provided with law and custom?⁴⁴

I have already mentioned the Stoic, Q. Mucius Scaevola, who is recognized as the founder of Roman law. Ehrlich says Roman juristic science "created its material independently of any other source of law."⁴⁵ Of fourteen lawyers whom Herbert Jolowicz lists⁴⁶ as laying the foundation for and developing the Roman science of jurisprudence under the Republic, Arnold names eleven as men who were Stoics or were strongly influenced by Stoicism. Of the remaining three, one was the father of a Stoic, and of another Jolowicz says nothing is known. After Scaevola, the most prominent of these was the Stoic, S. Sulpicius Rufus, a contemporary and intimate friend of Cicero, who was acknowledged as the head of his profession and who compiled 180 books on law. The highest point of Roman jurisprudence was in the reigns of the Antonines, of whom Marcus Aurelius was, of course, a noted Stoic.⁴⁷

(2) *Rational Nature of Man as Basis of State Shown in Assumption of a Distinguished Modern History of the State*

But for the weight of argument required to press a new focus upon the mind's eye, I could have eliminated the above excursus on Stoic thought and its impact on Roman law, and been content to cite the opening paragraph of Professor McIlwain's *The Growth of Political Thought in the West*. Here is a book that attempts, as Professor McIlwain tells us in his preface,

to set forth in moderate compass and with the greatest possible clearness the *development* of our ideas about the state and about government, beginning with the fifth-century B.C. in Greece and extending as far as the end of the middle ages.⁴⁸

In his long and excellent first paragraph McIlwain states the fundamental questions, the answers to which will complete the volume. In that paragraph, one fundamental matter does not appear as question but as assumption. That is the rational nature of man:

44. CICERO, *DE RE PUBLICA* bk. IV, ii (Keyes' transl. 1928).

45. See note 38 *supra*.

46. JOLOWICZ, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 90, 91 (2d ed. 1952).

47. See Dorsey, *Two Objective Bases for a World-Wide Legal Order in IDEOLOGICAL DIFFERENCES AND WORLD ORDER* 442, 463 (Northrop ed. 1949).

48. McILWAIN, *THE GROWTH OF POLITICAL THOUGHT IN THE WEST* v. (1932).

Dominion if it is to be justified at all must be "a condition of rational nature" as Wycliffe defined it, and in reason permanent government must have a justification sufficient to explain the historical fact of its continuous existence among rational beings. . . . [W]here does "rational nature" require that the dominant power be lodged; . . . how does this "rational nature" prescribe that this power shall be exercised, wherever lodged?"

(3) *Origin of the Conception of Rational Thought*

The rational nature of man is, indeed, an essential assumption in the political thought culminating in the modern State. But this assumption had its own origin and development. Not until men turned their thoughts from the question, "What do the gods require?" to the questions "What is the world?" and "What is man?" could the idea of the innate dignity and worth of the individual human being begin to be conceived. Not until answers to these questions began to have effect in changing the daily lives of the people could that idea grow into a belief and be accepted as unquestioned reality, "the one and only power that checks and disciplines man from within."⁵⁰

Louis Gernet, in a semantic study of the moral and juridical thought of Greece, very interestingly notes the coincidence of the very notion of reason itself with the emergence of the mode of thought we call scientific:

Through the words which have interested us, we have seen worked out some of the fundamental notions under which humanity still lives, the *abstract notions of delict, of the person as subject to laws, of individual responsibility*; and it is from the same movement that we have seen emerge the *rational thought* and have seen asserted the *idea of the individual*. For the conditions which here dominate the development of moral thought and the reflection of men and of society on themselves are also those, for one part, which command the birth of scientific thought and reflection on the external world . . . the *notion of "injustice" tends to become positive at the same time that the first natural philosophers propose a true object of knowledge*; the moment of transition marks itself in the first cosmologies of the philosophers. . . .⁵¹ [Italics added.]

C. THE MODERN STATE: A COMMUNITY FORMED AND DIRECTED BY REASON

Thus, we see that at the beginning of the modern era, the conception of State was a community formed and directed by reason. In the universal state of Christendom, and in the absolute monarchies of a later period, that which reason required was pronounced by God's

49. *Id.* at 1, 2.

50. ORTEGA Y GASSET, *CONCORD AND LIBERTY* 20 (1946).

51. GERNET, *RECHERCHES SUR LE DEVELOPPEMENT DE LA PENSEE JURIDIQUE ET MORALE EN GRECE* 432, 433 (1917). The passage quoted is my translation.

vicars on earth.- The universal order was revealed only to a few, who, by the grace of God, would teach the many what reason required by ruling over them. The common man was as dependent upon the expert as he had been in the old days when truth was conceived to be written in the mind of the heathen gods. Polity was a province of theology.

But the modern State is founded not only upon a universal, rational order, but upon a reading of that order by the reason of common men. McIlwain points out that sovereignty, "in its only correct and modern meaning is *legislative* sovereignty . . ." and that legislation is not the medieval *finding* of a precept that is binding because in accord with universal reason, but is the *making* of a rule that is binding because of the authority of the social organ men have created for this purpose.⁵² Grotius himself was the father of modern natural law, as well as the father of modern international law:

What we have been saying [about the nature of man and society] would have a degree of validity if we should concede that which cannot be conceded without utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him.⁵³

The same precedence of rational investigation of nature over theology as the basis of polity is expressed in the opening sentence of our Declaration of Independence:

When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them. . . .

D. TOTAL DIFFERENCE BETWEEN STATES AND COMMUNITIES NOT DIRECTED BY REASON HAS ALWAYS BEEN RECOGNIZED IN INTERNATIONAL LAW

It is, I trust, now clear that a State, in its original meaning in International Law, was not any aggregate of people, working together in any way to utilize the resources of a fixed territory, and living under the effective control of any kind of independent government. In the European, Christian international community, a State was a community of people working together in, and living under an independent government organized in, an atmosphere of belief in the rational nature of man. The communities in our own stream of Western civilization that were organized according to the earlier belief that men were dependent upon the gods we call City-States in order to distinguish them from States. Islamic and Far Eastern communities were not accepted as States in International Law until they became "civilized."

52. McILWAIN, THE GROWTH OF POLITICAL THOUGHT IN THE WEST 390 (1932).

53. 2 GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 13 (Carnegie Endowment ed. 1925).

This is an ego-centric (or should I say civilo-centric?) way of saying that these communities were not States and could not be accepted in a law-governed community of States until they changed their laws to reflect an organization of Society based on reason rather than, as we assumed, on irrational religious mysticism—or some other derogatory characterization, always preceded by “irrational.” Until the relations between men in these societies were determined by laws copied from Western codes, men from “civilized” nations would not accept such obviously “unjust” and “barbaric” social norms as applying to them. Therefore, extraterritoriality was considered necessary.

These societies were organized and directed by beliefs concerning “the reality of the world” that were radically different from ours.⁵⁴ They had radically different pictures “of the universe and of life.” Thinking itself was different with them and appeared to us to be not “logical.”⁵⁵ Leaving aside the assumptions of inferiority obvious in the terms by which the distinction was expressed, the distinction between these societies and States was perfectly correct.

My point is that a difference of equal magnitude, a difference of kind, a difference on ultimate matters, now exists between States and Communist-controlled societies. Having examined the original conception of State in International Law, let us proceed to an examination of the nature of a Communist-controlled society.

PART III: THE NATURE OF A COMMUNIST-CONTROLLED SOCIETY

A. HISTORY AS THE CRITERION OF THE GOOD SOCIETY; THE GERMANS, THE COMMUNISTS

The belief that is the basis of community, or society (for in the sense relevant here both mean a working-together group), amounts to an answer to the question, “What is the basis of human cooperation and united action?” Among the Aryan ancestors of the Greeks and Romans, the answer was “common gods.” The origin of this answer is beyond our view in antiquity. The answer of Western civilization, until the advent of Hegel and Marx, was “reason.” The origin of that answer was in natural philosophy. However, in the great reappraisal that followed the Renaissance and the Reformation this source could not be looked to because of the estrangement, discussed above,⁵⁶ that was taking place between natural philosophy and the social disciplines.

54. Dorsey, *Constitutions in Depth*, 4 J. OF SOCIAL SCIENCE 1 (1953) (Published by the College of Law, National Taiwan University, Taipei, Taiwan, China.).

55. Dorsey, *Two Objective Bases for a World-Wide Legal Order* in IDEOLOGICAL DIFFERENCES AND WORLD ORDER 442, 452 (Northrop ed. 1949).

56. See p. 2 *et seq. supra*.

Of the disciplines dealing with human action none was broad enough in scope but history.

History's answer to such a question must be factual only. So long as the answer is suitably vague and is used only to produce a benign and superior attitude in its votives, no active injury is done. Toynbee's "challenge and response" has not been taken up by Utopians and has not been known to result in the death or imprisonment of anyone. But when history's factual answer is used normatively, heads fall testament to a law of survival—that error means death. With Hegel, history was the dialectical unfolding of the creative human spirit. But, by the necessity of uniformity arising out of Kant's categories and forms, the creative human spirit had to be that of a "transcendental ego." His answer to the root question regarding community was, in effect, "unity and cooperation result from the environment of group mind." I shall not here attempt to discuss the tragic social effects of this answer. No better analysis of Germany's turning away from the common Western-civilization traditions of natural law and humanism could be found than the one Ernst Troeltsch made after World War I.⁵⁷

Marx and Engels, on the basis of another interpretation of history, answered; in effect, "unity and cooperation result from economic class environment." This answer has been given political life as the directing idea of communism. According to this answer, reason cannot over-leap circumstance because consciousness is controlled by economic class environment. It is not that dialectically unfolding history will accomplish all, and men need not plan the future or work to make it happen. But it is a matter of where one is to look for reliable knowledge on the basis of which to plan. Life is possible only if men work together and if they guide their actions by a true understanding of the environment in which they struggle to survive. If truth is written in the minds of the gods, community, to succeed, must be organized and directed according to the will of the gods, and that will must be sought in the only way it can be learned—through the men and the ceremonies by which access to the gods is attained. If truth is written in reason (a rational order in the universe), it can be read by rational creatures, and if all men are rational, all men can participate in planning and directing the common life in community—the many need not participate only by accepting and obeying. But if truth is written in history it must be read in history and the common good requires that the many be dependent upon the few who know what history requires. With the Germans it was the mystics who could read the will of the *Volk*. With the Communists it is those who, by revolutionary experience and dialectical awareness, are at the van where they can see the

57. Troeltsch, *The Ideas of National Law and Humanity* in GIERKE, *WORLD POLITICS IN NATURAL LAW AND THE THEORY OF SOCIETY* 201 (Barker's transl. 1950).

next stage of history through the chinks in decaying capitalism. What the ordinary worker believes to be the good society must be rejected and denied for his own good, because, since his consciousness is controlled by economic class environment, his opinions will not be reliable until he has lived under the material conditions of the good society, *i.e.*, the classless society. Until that time his "reason" will be a snare and a delusion.

In assessing the difference between a Communist society and non-Communist societies, our exclusively empirical social disciplines have again misled us. If the political structure, the economic structure, the social structure, of a Communist society are compared with those of Western democracies, the full measure of difference is missed. Even the catalogue of atrocities that is compiled from a study of how these structures operate in practice do not awaken us to the full difference because the new in society always carries a price in human suffering. The full importance of difference is not in structure or function, but in *origin* of structure and function. "They want socialism. Well, so do some of the countries of Western Europe. They are not so different after all. We can deal with them." But Communists want socialism not because the reason of the people has reached the answer that socialism will be a better society for them, and the people have selected their representatives to say this in national councils and to act for them in nationalizing industry. The Communists want socialism because history says it is the next and final stage, the denouement of class struggle, and it is the duty of those in the van to impose it upon the exploited workers—by force, or falsehoods, as may be necessary—in order to save them, even from themselves.

Should the Utopian stage ever be reached, Communist society would be a community where everyone participated in planning and directing the common effort. Short of that—and, if we are right about man's nature, it can never happen—the role of the common man is only to accept and obey. He can, in nothing, plan and direct. By brute force, terror, informers, propaganda, by control of food, clothing, shelter, opportunity and respect, by youth training, the history-directed community discourages any show of independent judgment by the common citizen. By using the same instruments as carrots instead of sticks, and by mass rallies, one-slate elections, decoration of military or workers' heroes, cell meetings, study groups, the history-directed community secures acceptance of, and whips up enthusiasm for, the decisions of the controlling few.

Such communities, and the governments they set up, are atavistic. They deny, implicitly, everything that Western civilization has learned, because they have turned from the way of knowing that has structured and sustained the communities of Western civilization.

"What is man?" has become a mockery. Man as man has no worth. To have worth, man must be Aryan, a party member, or a laborer. "I love my fellow men, *except . . .*" is the great self-evident lie of our times.

Communities organized and directed by reason differ among themselves. But this is because rational beings may reach different answers, particularly when their experience differs. Thus, differences of structure, and of function, may occur among them. But the difference between all reason-directed communities, and Communist-controlled societies is a matter not of the answer, but of the method by which an answer is arrived at. It is a difference of the criterion of truth, and of justice. The Communist revolution was not a revolution *within the tradition of Western civilization*, such as the English, the American, and the French. These were the working out, by force, of the basic belief that the State is an association of rational beings, "joined together for the enjoyment of rights and for their common interest." These revolutions put planning and directing, on the basis of what reason requires, in the hands of the people—taking it from the hands of the few, who were no longer accepted as chosen of God. These revolutions severely tried community in those nations. But, at least, the criterion of truth remained unchanged.

B. THE EFFECT ON THE LIFE OF THE ORDINARY MAN

Let us briefly compare the situation of the ordinary man passing under a new sovereignty in Grotius' time with his situation upon coming under Communist domination in the present world. Residents of territory passing from the domain of one prince to another were absolved from their old allegiance and required to swear allegiance to the new sovereign and lord of that territory. But their ultimate allegiance was to the same God. Passing from the domain of a Catholic prince to that of a Protestant prince entailed changes in *how* to worship God and learn His will. These were serious matters, as the history of massacres, persecutions, emigrations, and wars will show. But at least the question of *whether* to worship, or *what* God to worship was not involved. Today, coming under Communist domination means active government opposition to all allegiance to God, and is, therefore, a matter of the soul.

Under this prince or that, the man who made his living from the land most likely found his economic world unchanged. The work he did, the duties he owed to others, the rights he had against them, the way he harvested and sold his crops, the share of the harvest that was his, all these would be the same. His life was hard. It would stay hard. But it would stay. He would not be rooted up from the soil and sent into a factory, a mine, or a road building crew.

In the guild towns, where manufacture and commerce were challenging agriculture as a source of wealth, production and trade would go on as before. The laws governing commerce, like the law of the sea, were not the blessing of any one prince but a code among communities where experience was common and intercourse necessary.

Whether in town or country, men who passed under a new sovereign still knew the next day how to go about earning food, clothing and shelter for their families. There was no extensive disruption and readjustment in the means and mode of existence. Today, coming under Communist domination means complete economic transformation, and is, therefore, a matter of the body.

In the Europe of Grotius' time there was always a master or a guild, a lord or a prince, depending upon the scale of the community affected, to make decisions that affected the general welfare. Passing under a different prince might have no effect whatsoever upon town and county decisions. National decisions would be made by a different prince but princes were all pretty much alike anyway. Education, in monasteries or universities, would be unaffected. Today, coming under Communist domination means subordination of all thought and coordination of all decisions at every level of community with central party directives, and is, therefore, a matter of the mind.

When International Law was being formulated, passing under a different sovereign was a matter of public importance but of very little personal importance. In the present world the change, if it is a change to a Communist government, touches every citizen in every fiber and cell of his being—in body, mind, and soul. The price of admission to a "people's democratic republic," as to the Kingdom of Heaven, is to be born anew.

C. THE EFFECT ON LEGAL CONCEPTIONS

The change from reason to history as the basis of organizing and directing community life is the most radical revolution in Western civilization in two thousand years. It is difficult to assess the magnitude of contemporary change. The change in Roman society caused by the advent of Stoic thought is two thousand years behind us, and we can better comprehend its completeness—the way in which society revolved in every aspect of valuing, judging, and acting. This change I have sketched above⁵⁸ in the change in Roman private law—the place McIlwain suggests it can best be traced. Law is the hallmark of a society of equal, rational beings. Rome was the first attempt to build such a society, and, therefore, the Romans invented the "categories of juristic thought." It was supposed by Édouard Cuq, and it was a

58. See pp. 9-18.

general supposition, that legal institutions, such as will, legacy, contract, describing relationships between men in a society of rational beings, would always be needed. Therefore, Cuj remarked that "the Romans have fixed for all time the categories of juristic thought."⁵⁹ Perhaps the best measure of the depth, and completeness of the Communist revolution is that in a Communist society there is a need to reject old categories of juristic thought and create new ones. Contract is the instrument by which rational beings plan and direct the production and distribution of goods. Since the planning and directing is to be shared by many, some delineation must be made of areas of authority. Control of property (ownership, lease, agency) serves this function. Each man plans and directs with respect to that property he controls. Therefore, Roman law, quite logically, proceeds from a definition of persons, to a definition and classification of things, then to definition and classification of relations of persons to things, the ways in which rights with respect to things may be transmitted from one person to another, and only then to contract, or the way in which persons agree to exchange things.

Practically all the legal conceptions of the person, of corporations and other associations, of the various kinds of property, of ownership, trust, lease, agency, sale, mortgage, gift, inheritance, and contract are unnecessary or subject to radical change in a society where all planning and directing is done by a few history gazers. All property must be kept under their control. This is essential—the benchmark. This eliminates the need for, or makes inapt, conceptions of various modes of private control over property, the ways such control is transmitted, and contracting with respect to such property. Communists are just becoming fully aware that their revolution requires completely new legal conceptions to describe the relationships of responsibility in a socialist society. As late as 1948 Professor A. V. Venediktov, in his *Socialist State Property*, expressed the view that means of production when in the control of a state enterprise were the property of the collective of workers in that enterprise as well as the property of the state as a whole. His book received the Stalin prize and was accepted at the time as the most learned and authoritative text.⁶⁰ It was likewise generally accepted that the transfer of products from one state enterprise to another was a purchase and sale relationship. These conceptions were inconsistent with the benchmark of Communist socialism because the former would give groups of persons, if not individuals, the control requisite to planning and directing, and the latter describes a relationship as having arisen by

59. See note 34 *supra*.

60. 5 SOVIET STUDIES 215 (1953).

the will of a small group of individuals, rather than by the will of the state as a whole.

In early 1953, in *Voprosy Filosofii*, the foremost Soviet philosophical journal, the demand was made that these errors be corrected. The article rejected Professor Venediktov's view of socialist state property, saying that such a conception

weakens the principle of one-man management and leads to the incorrect conclusion that ownership and management of state property belong not to the state itself in the person of its responsible authorized representatives, but to the collective of workers and employees, which is wholly incorrect both from the theoretical and the practical point of view.⁶¹

The article takes to task the authors of the textbook on civil law for expressing the same view, and then sets the criterion:

In order to overcome this confusion, it is necessary to have as a starting point the absolutely clear indications given by Stalin in his reply to Comrade Notkin that 'the owner of the means of production—the state—in transferring these to a given enterprise in no way abandons its right of property to the means of production, but, on the contrary, retains it in full', that 'directors of enterprises, having received the means of producing from the state, not only do not become their owners, but are, on the contrary, confirmed as authorized representatives of the Soviet state for the purpose of utilizing the means of production in accordance with the plans laid down by the state' (J. Stalin, *Economic Problems of Socialism in the USSR*).⁶²

The *Voprosy Filosofii* article goes on to attack the sale-and-purchase conception and to prod Soviet jurists for new conceptions:

Incorrect [too] is the traditional view which considers the supply of the means of production by one state enterprise to another sale-and-purchase relationships. Comrade Stalin says perfectly clearly that the state does not sell the means of production, but distributes them among its enterprises. It is obvious that contracts concerning supplies from one socialist organization to another are fundamentally different from purchase and sale contracts, and Soviet jurists must probe more deeply into the specific nature of this question by casting off outmoded dogmas and principles.

Many formulae and conceptions of legal sciences do not correspond to socialist relationships, but reflect the influence of bourgeois jurisprudence. . . . [And, as to the Roman origin of the conceptions] [i]t is doubtful whether legal science really needs such an enormous number of Latin words. . . .⁶³

D. THE EFFECT ON LOGIC

Not only is the source of truth different with the Communists than with Western-civilization States, but also the very process of thinking

61. 5 *id.* at 217.

62. 5 *id.* at 218.

63. 5 *id.* at 217, 218.

itself is conceived differently by them. A universal, immutable, rational order means that we postulate the existence of certain eternal objects and of fixed, everlasting relations between them. This is the basis of our understanding of reality. All thinking proceeds from this basis by chains of inference. The process, and the study of it, are known as logic.⁶⁴ Christian theology and natural law alike find their origins in this assumption and their content by this process. The content and structure of particular systems of law, and the network of relations in a society, are likewise derived by the same process of thinking—as I have sketched above with respect to Roman society and law.⁶⁵ The Communists assert that the relations between objects or things in the real world are not fixed and everlasting, but change with the dialectic process of history. They assert that the only reason why non-Communists think of reality as characterized by fixed order is that the consciousness of the ordinary person—one who has not learned to think dialectically—reflects the order of things obtaining at one historical moment, in a particular society, and in a particular class. “Dialectical thinking” avoids this error by seeing reality as a living, changing process, instead of static, lifeless. Thus, they believe, Communist logic sees reality in its fullness, and “bourgeois” logic sees reality only as a flash photo. Bourgeois government, then, falsifies and seeks to deny reality by attempting to keep society forever in that static state.⁶⁶ (What is to be expected from negotiation with men who conceive truth and thought itself differently than we do?)

This conception of thinking, as the conception of the source of truth, is part of the total error of autonomous praxiology. The error is in treating social facts as autonomous instead of as resulting from men acting as they did *because they believed it right to act in that way—because they held certain things to be true*. In the main stream of Western civilization, only the perfect society, the City of God, has fixed relations. All actual societies have imperfect relations, resulting from the imperfect reason of human beings, and subject to change as men’s reason discovers new truth. Social reality is constantly changing. Only the reality of nature is conceived as fixed. What man *is*, what the universe *is*, remains the same—though our understanding of it, and thus the knowledge available to us on the basis of which to act, changes. What is good, and what ought to be done, likewise are fixed once and for all, in the sense that we postulate the existence of eternal goodness and eternal justice as well as the existence of eternal truth. But our conceptions of what is good and what is right change as our knowledge of the nature of man and the universe changes

64. Space does not permit this generalization to be modified by a consideration of inductive and mathematical logic.

65. See pp. 9-18.

66. Campbell, *The Soviet Concept of Logic*, 3 SOVIET STUDIES 278 (1952).

because they derive from that knowledge. It is this method of derivation that F. S. C. Northrop has restored to philosophy—reforging the link that was broken by Kant.⁶⁷

PART IV: *THE COMMUNIST-CONTROLLED SOCIETY AND RECENT DEVELOPMENTS IN INTERNATIONAL LAW*

Professor Northrop's work is all important because it restores the epistemological and methodological foundation of the natural law tradition of Western civilization. Without the restoration of that foundation we would have no standing to judge the history-directed communities. We would ourselves be dependent upon autonomous praxiology in all social questions. The Communist organization of a community based upon control and coercion of the many by the few is equally a fact with the Western democratic organization of communities based upon the self-control of their affairs by rational beings through elected representatives. Exclusively empirical disciplines can take account of beliefs, but only in an empirical way. Thus, even if they should consider the question of beliefs, autonomous social disciplines would simply tell us that it is a fact that some communities are organized on the basis of a belief in dialectical history as the criterion of truth, and some are organized on the basis of a belief in reason as the criterion of truth, others on various theologies. As long as our own thought and judgment on social questions are restricted to autonomous praxiology we can not say one organization of society, or one belief, is better or more right than another. All have equal standing as social facts.

It is only when we guide by inferences from *natural* facts that we can choose between social facts on the basis of anything other than subjective preference. We ask ourselves the question, "What is man?" Our answer is that he is a rational creature living in a world characterized by universal rational order and needing society. We observe two social facts, communities organized and directed by reason, and communities organized and directed by history. We can say the former is good because the inference from the rational nature of man is that he will be living in accordance with his nature in communities organized and directed by reason. We can say that the latter is bad because it denies and over-rides the judgments of rational beings. These valuations are not whimsical but are based upon fact. The judgments are objectively right if the fact about man's nature is true. The methods of science are appropriate for determining whether or not man is a rational being, and whether or not reality is characterized by an immutable rational order, or whether, as the Communists claim,

67. NORTHROP, *THE MEETING OF EAST AND WEST* (1946); NORTHROP, *THE LOGIC OF THE SCIENCES AND THE HUMANITIES* (1947).

the relations between *natural and* social phenomena are constantly changing with the dialectic of history.⁶⁸ (This is the ultimate root of the Communist attack upon the Christian religion which represents the universe as characterized by a God-created immutable order.)

Thus, it will be seen that International Law was from the beginning clearly normative, not only with respect to relations between States, but also *with respect to what kind of community would be accepted as a subject of International Law and a member of the international community.* International Law was not a law between groups of men associated among themselves in any way whatever, but was a law among men who believed themselves rational creatures and who were organized in communities directed by reason. International Law *must be normative* with respect to the entities of the international community because International Law is concerned with distributive justice (as well as commutative justice). The second book of Grotius' *De Jure Belli ac Pacis*, which comprises slightly more than half of the whole work, is concerned with distributive justice. The first of the three books is concerned with establishing that, because no international institutions existed to which a State could appeal for recognition and protection of its rights, a State's use of war to protect its rights was consonant with the law of a society of rational beings—natural law. The second book then, quite logically, is concerned with determining what the rights of States are, or distributive justice. He deals with original and derivative acquisition of rights over things and persons. The last book deals with what is permissible in war, or, in effect, international commutative justice.

In the second book, Grotius was generalizing from the Roman law conceptions of property ownership. While the rights of States are not strictly property rights, they resemble property rights in the sense of control. International Law in its distributive justice aspect delimits the areas where the authority of each State will be accepted by the other States. This distributive function must be normative or it would be self-contradictory. It would be a negation of law to say that the authority of any State shall extend to any persons and things to whom it can be made to extend by any means whatsoever. This is why the conception of State in International Law must be normative. The conception of State is the criterion for a considerable part of international distributive justice.

International Law still holds war to be proper for self-protection, as Grotius held, but we have lately sought to provide international institutions for the prosecution or protection of national rights as an equivalent of the domestic law suit. But, if international relations are not to spill over these institutions into unlimited violence, as in

68. Campbell, *supra* note 66, at 281-283.

Grotius' time they spilled over limited violence into unlimited violence, it is equally imperative today that there be, among all States capable of plunging the world into armed conflict, general agreement upon the rights of States. The basis of agreement underlying traditional International Law was the conception that men are rational beings who form working-together groups on the basis of an "agreement with respect to justice and a partnership for the common good." The necessary inferences from the fact of the rational nature of man were the general rules of International Law. The necessary inference deriving from the fact that such men created society by common agreement, namely, that promises must be kept, was the basis for rules of International Law arising out of treaty and pact.

But International Law has changed from a law for the community of Christian, European nations, their cultural offspring, and nations willing to conform to the norms of that community. It is in the process of becoming a law for a community of nations of diverse beliefs. That the process is painful and far from complete needs no proof. We are in a formative period quite similar to that of Grotius' time when the universal State of Christendom had ruptured. In a very real sense the inflamed pieces were still a single community as we see today by noticing the areas where regional pacts are possible. Grotius prescribed the formula for reducing the irritation and restoring life-giving connections of peaceful intercourse among the newly independent States.

Three hundred years later a world ordered by these modern European States through cultural influence, colonies, mandates, concessions, industrial advantage, and superior armies and navies, has become disordered by a growing respect for cultural diversity, the end of colonies and concessions, and the explosive German and Communist cultural digressions. In our ruptured world when we speak of international community what do we conceive to be its entities? If we call them States—as we do, out of convenience—what do we now mean by State? We can not mean a "community formed and directed by reason" without contradicting recent events. But there is an assumption of International Law, one step deeper, that remains valid in a world of diverse beliefs.

When men form a community according to a belief in the rational nature of man, as described above, there is involved, in the logical sense, not only the assumption that men are rational creatures, but also the assumption that men form a community *on the basis of a belief about the nature of man and the universe*. This part of the logical foundation of International Law remains. As a ground norm of International Law it would mean that a State is not solely a community of belief in *reason*, but any community of belief. It strains

credibility to speak of communities in which men do not believe in reason, but a review of the discussion of logic and of the origin of our conception of rational thought will show that what we mean by reason is very much a part of our own belief.

The conception of a State as a community of belief (bearing in mind that "belief" is used in Ortega's sense of a picture of life and the universe that has seeped into the consciousness of a people until it has ceased to be an idea and has become, to them, unquestionable reality) accords with the widely accepted view that one people's truth is another people's error and that if International Law is to exist at all in a world of diverse beliefs it must be impartial as to such beliefs.

This conception of State can accommodate within the international community, for instance, Islamic countries such as Pakistan whose constitution is being worked out on the principle, among others, that Pakistan shall be a State,

[w]herein the Muslims shall be enabled to order their lives in the individual and collective spheres in accord with the teachings and requirements of Islam as set out in the Holy Quran and the Sunna. . . .⁶⁹

All the communities of the Near and Far East that were once excluded from the international community can be included in it, on grounds of full equality, under the definition of State as a community of belief, instead of as a community of rational beings. *But a Communist-controlled society is still not a State.*

A Communist-controlled society is not a State conceived as a community of rational beings because the Communist criterion of truth is not reason but history, and its logic differs accordingly. But neither is a Communist-controlled society a community of belief even though it is formed and directed by a belief. This is so because the Communist belief, the Communist picture of the universe and life, gives Communists license, nay commissions them, to capture the working people of the world and hold them against their will until the material conditions of the Good Society according to Communist belief have been created, at which time, supposedly, their eyes will be opened and they will thank their captors for dragooning them into paradise. The Communist party and all voluntary adherents to a Communist society constitute a community of belief. In fact, it would be hard to find a more clear-cut example of an idea becoming "unquestionable reality" for a group of men and their building a society in accordance with it. But the Communist belief requires the believers to bring under their control non-believers. Thus, Communism is inimical to an international community and International Law based on diversity of belief.

69. From the Objectives Resolution, quoted in Khan, *Pakistan's Place in Asia*, 6 INT'L J. 266 (1951).

Communism is not a plan for organizing one or a few out of many entities in an international community. It is a plan for organizing the population of the earth, not on the basis of what peoples believe, but on the basis of what Communists believe.

INFERENCES

Nationality has come territorially unstuck. This is the primary inference that I believe should be drawn from the foregoing.

In the Christian, European Family of Nations the natural delimitation of national authority was territorial. Modern States had been recently formed by a combination of feudal and ecclesiastical law. The ecclesiastical law carried into the modern world the conceptions of the universality of law and the equality of men of Roman law and Christian theology. James Bryce has said:

Rome is the only city to which it has been given to rule the whole of the civilized world, once as a temporal, once as a spiritual power. In both phases she welded the diverse and incongruous elements into a united body, whose elements, even when they had again been disjoined, retained traces of their former origin. And on both occasions it was largely through law that she worked, the ecclesiastical law of her later period being an efflux of the civil law of her earlier.⁷⁰

But ecclesiastical law, though an "efflux" of earlier Roman law, did not attempt to cover the whole range of man's activities. The Church did not work out a system of land law or of status. On the other hand, feudal law did not develop a theory of justice, equity, or crime. In some fields, such as family law, succession, contract, corporation, the two systems of law met "in conflict and in compromise."⁷¹ As Vinogradoff put it, "Feudal law has too narrow and Canon too wide a basis: one starts from the estate and the other from mankind."⁷² Feudal law was personal and local. The Roman tradition was of law valid for all men in every place. The law of modern States is a synthesis. It asserts a universal validity, but only as to a limited geographical area. All men within that area are subject to it.

In the adjustment between nations, rules of International Law were worked out defining the circumstances under which transit or residence within a State's territory would be permitted without surrendering primary allegiance to the home State, and defining the extent of subjection to the law of the territorial State. The absolute nature of a State's authority over its territory was recognized in the State's right under International Law to refuse entry or to expel.

The convenient territorial delimitation of national authority was

70. BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* 592 (Oxford 1901).

71. 1 VINOGRADOFF, *op. cit. supra* note 33, at 159.

72. *Ibid.*

possible among States sharing the same belief, the same picture of life and the universe. No matter to which State, in such a Family of Nations, a man found himself owing allegiance, he could make his living in what would seem to him an honorable way, he would find himself among persons who held the same things sacred, the same acts just, noble, or base. National boundaries did not mark limits of belief, but limits of language, race, past conquest, natural ecological or geological divisions. Even among the nations having community of belief in the rational nature of man a modification in absolute national authority was thought necessary when differences among nationals approached the totalness of a difference in belief. In the seventeenth century and during the past century we have seen many instances of treaties containing guarantees in protection of religious or racial minorities, and providing for plebiscites or giving residents an option to emigrate.

When the difference was the total one of belief, territorial delimitation of national authority never was the rule of International Law. Extraterritoriality is the proof of that fact.

Belief has always been present in the International Law conception of State, along with the empirical factors of a people, territory, and a sovereign government in effective control. When the international community was one of common belief, instead of diverse beliefs, there was no need to raise the matter of belief in delimiting national authority. Therefore inquiry could be limited to the question of effective control, in respect to revolution and rebellion, and a proper treaty of cession or an act of annexation in matters of conquest. It could be assumed that when these criteria were met the authority of the national government was legitimate under International Law for all the persons found within the territory of that nation. But, I submit we must conclude from the previous discussion, it has always been the fact of community of belief among the persons within that territory that has caused the use of organized violence against persons found therein to be characterized by International Law as an application of the internal law of a State rather than brigandage and unlawful war.

Is community of belief still a factor in the International Law conception of State? I have produced historical evidence that community of belief (of a particular belief) was a factor in the conception of State of traditional International Law. I have shown that logically this element of the basis of International Law remains to us in a world characterized by diverse beliefs. But viable international community and effective International Law are impossible without voluntary agreement among at least all those States too powerful to be coerced by the rest of the international community. Community of belief as the basis of the International Law conception of State would

appear to be acceptable to the peoples outside the stream of Western civilization who have come into the Family of Nations in recent years because it gives equal dignity and protection to their own beliefs. Furthermore, Western ideas of social justice are relied upon by Asians and Africans who are ending colonialism. Perhaps some consultation should be undertaken.

Communist cooperation is obtainable on no world program except organization of all the peoples of the earth according to the Communist belief. Therefore the question is not what basis of international community and law Communists will voluntarily accept, but rather, what course of action will oblige the Communists to give up world revolution and accept a place in an international community under law. International Law based on community of belief would be as just for Communists as for the adherents of any other belief. But it would accord Communist-controlled societies the rights and privileges of States only to the extent they qualify as States under the conception of community of belief, and no more.

We have thought it only a "moral" judgment to say that Red China is not entitled to be recognized as a State under International Law. In fact, our hardheaded "realists" have been most wrong when they have bottomed their arguments on what to them was unescapable fact, namely, that "there is a Red China, we can't ignore that," or "like it or not Soviet Russia is a fact." Social facts, yes, but not entitled to be accepted and allowed to continue to exist as facts by the other members of the international community. To change social facts that do not accord with legal norms is the business of law. That we should ever have thought it necessary to accept and live with such social facts as Communist-controlled societies, and that we should have thought a contrary opinion to be founded only in irrelevant morality and not in International Law, is a measure of the extent to which we ourselves have been blinded by the autonomous praxiology that, in fuller application, has produced the Stygian belief of Communism. We can not accept that belief. We can see the error by which it arose. On the other hand, our own premise—community of belief as the basis of the State—requires that the persons who do hold the Communist belief have a right to live by it. If defined territorially, "Red China," "Communist Poland," or "Soviet Russia," are not States but social abattoirs. But to the extent of the Communist party members, plus voluntary adherents, they are States—States which presently the other members of the international community are allowing to commit unhampered aggression upon nearly one-fourth of mankind.

Nine hundred million persons are presently under the control of Communist regimes. The Communist party itself claims fewer than

thirty million members throughout the world.⁷³ Give them ten voluntary adherents to every party member and the remaining five hundred and seventy million persons is nearly one-fourth the population of earth. What quicker way to erase the Communist threat to international community than to reduce Communist manpower to the point where they would be obliged to accept the protection of International Law? In fact, it is principally the protection they are presently deriving from International Law interpreted territorially that enables them to retain their hold on their victims. Misinformation is constantly pumped into them, millions are shot, intimidated, shipped to slave labor camps, and International Law has held all this legal on the ground of the immunity of a sovereign State from interference between a government and its people *plus a territorial interpretation of State*.

In feudal society, land was a median term in any relation between men:

The lord had rights in his man as well as in his land; the man had rights in the land as well as in himself. A landless man was an anomaly; a holding of land naked of labor, a concept to which the manorial mind could hardly rise.⁷⁴

Our term for land ownership, "fee," is of the same root as "feud," and "fief," and expresses the fusion of land and allegiance. Allegiance was not terminable by the person who owed it because it was a part of property. The property owner could terminate his ownership, but unless he did so the property—and the allegiance—belonged to himself and his heirs forever. Necessarily allegiance was conceived as perpetual.

We count feudalism as history. Should, then, International Law continue to accept a feudal conception of national allegiance? We say we have moved from status to contract. Relations between men are rooted not in the soil, but in the rational mind that knows, deliberates, and assents. Allegiance is rooted in the less conscious, but none the less mental, process of belief and adherence. Why is not allegiance extinguishable by the mind that creates it?

The Manila Pact was hailed as an innovation in that it contemplates action of the signatories with respect to internal affairs of a nation. Is it not, rather, recognition of the fact that aggression can no longer be defined solely in territorial terms but must first be defined in terms of belief? And that, in turn, is a recognition of the fact that obedience to command and allegiance to common purpose—nationality—can no longer be defined solely in territorial terms when a difference in belief

73. According to a Moscow survey reported in *The New York Times*, July 4, 1954, p. 7, col. 2.

74. HAMILTON, *THE PATTERN OF COMPETITION* 13 (1940).

exists between persons inhabiting the same territory. Territorial definition of nationality is still valid wherever the people of a territory share a common belief. It is still valid in territory containing persons of different beliefs that are tolerant of each other's beliefs, because no one is prevented from living in accordance with his own belief. But a territorial definition of nationality is no longer valid in any territory where Communists control the government because they conceive the purpose of government to be the pressing of every man, woman and child into the proletarian womb from whence they shall (supposedly) one day be born anew in a classless Utopia.

Territorially-defined nationality has come unstuck. When we are desperately pressed we read that lesson in the logic of events. The Manila Pact is an instance. Our insistence upon voluntary repatriation as a condition of armistice in Korea is another instance. Faced with the reality of having to turn men over to a regime that is forcing upon the Chinese people an order of society that denies everything they have held good and true, we insisted upon their right to choose.

Having read twice from the logic of experience, need we wait to be battered further? Can we not at least proclaim that perpetual allegiance is incompatible with an International Law based on community of belief and declare that whenever a change of government entails a change in belief every person within the territory of that State has the right of emigration? Oppenheim calls the right of emigration a "moral right which would fittingly find a place in any international recognition of the Rights of Man."⁷⁵ If International Law is now based on community of belief is not the right of emigration a rule of law, not just of morality?

This, after all, is the one issue that divides the Communist world from the free world, and that justifies the non-Communist nations' characterization of themselves as "free," namely, that in free nations men live by what they believe, in Communist-controlled societies men live by what the Communists believe. What would happen if the free nations would undertake to resettle and care for every man, woman and child who wants to emigrate from Communist-controlled societies, and gave them every aid, through underground organizations, to escape the barbed wire and the armed guards? Money spent to restore these persons to life in freedom would reduce the Communist power to threaten peaceful international community and would eventually permit a reduction in our expenditures for weapons of mass death. Some of the increased productivity derived from the development of peaceful uses of atomic power might be channelled into a tremendous resettlement program.

75. 1 OPPENHEIM, *op. cit. supra* note 6, at 590, 591.

Any mass emigration from Communist-controlled societies would burden the natural resources of the free nations and raise the issue whether these emigrants were entitled to a share of the natural resources of the nations of which they were once a part. Of course this raises problems that in advance appear to be insoluble and that are distasteful for being strange. But, with the power drawn out of the Communist threat, the problems we would face would be within our power to solve. Our hopes for a peaceful international community under law would not dangle on the end of a Kremlin communique.

I do not believe that general acceptance of the thesis proposed here would endanger the United Nations. It would not be creating a difference or making a rift where none existed. It would simply be recognizing a basic antagonism that has been present all the time. The Communists have been fully aware of it. They always distinguish between "bourgeois States," and "proletarian States"—at least for analytical purposes, not for strategic and propaganda purposes. It is impossible either to reach agreement with or to defend against an antagonist who is not clearly understood. I would suggest the inference would not be proper that we should withdraw from the United Nations. It is still useful for the extremely important but limited purposes for which it was useful before. Perhaps more persons would realize that the United Nations is not in all respects an institution, *i.e.*, a social tool for accomplishing agreed-upon goals. To a considerable extent the United Nations is a hope, and a forum, not an institution.

I trust it is clear that an inference that preventive war is justified would not be proper. In the first place, Communists themselves have a right to live by their own belief. In the second place, preventive war has been discussed in terms of using nuclear weapons against centers of production and destroying Russia's power to make war, on the ground that war is inevitable. This, again, is the mistake of treating Communists and their victims as comprising a State. Force is a medium of the Communist revolutionary challenge to international community. Defenders of that community would certainly be justified in using force also. But the only appropriate force is the selective, limited violence of revolutionary tactics that will help the victims to sever the grasp of their Communist masters. Making war in territorial terms would drive the victims, in self-defense, into the Communist embrace.

I do not pretend to know all the inferences that should be drawn from the thesis I have proposed and adduced evidence to prove. Many implications will become clear only when specific problems are rejudged in the light of the priority of belief over territory as the basis

of national allegiance. I do insist that if an international community of free, independent nations is to survive the onslaught of Communist revolution, the free nations must learn to know themselves and the enemy and must begin to drive by the logic of their convictions, instead of being driven by the logic of experience.