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The Common Law Tradition

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torture provision was pulled out and put into a separate article along with protection against arbitrary detention, which is article 37.

Article 40 contains the remainder of the juvenile justice provisions, and you might be interested to know that article 39 is an article on rehabilitation that is couched in terms of physical and psychological recovery and social reintegration. The history behind that is that the Soviet Union said that rehabilitation, in their country, meant rehabilitation for crimes that you had not committed but you had been accused of committing. You were put back into society as a normal person and this was therefore rehabilitation.

KAZUO SUMI:* My question is indirectly connected to the Convention. There are so many gray areas concerning the Genocide Convention and the Torture Convention, especially in regard to ethnocide. I would like to define ethnocide as a dislocation of indigenous people from their homeland, destruction of their way of life, and denial of their culture and language. Throughout the world, for example in Brazil and Bangladesh, so many minority people suffer. For instance, the ILO Convention No. 107 mandates that the traditional community rights of indigenous people must be respected. But in the name of economic development, those traditional rights have always been violated. Of the 27 countries that have ratified this Convention, most are developing countries. I would like to know whether any discussion is occurring in the United States concerning this issue.

Professor WEISSBRODT: The Convention No. 107 is now in the process of being redrafted, and so it is probably inappropriate for the United States to consider ratifying the previous version. At the same time, when Mr. Dalton gets to Geneva, he will be involved in the process of drafting a declaration on indigenous rights which probably represents the U.N.'s efforts to deal with the problems you have discussed.

JOHN A. DETZNER**
Reporter

THE CHALLENGE OF UNIVERSALITY

The panel was convened by its Chair, John Noyes,*** acting in the absence of Mark Janis,† at 10:30 a.m., on April 8, 1989. Professor Noyes presented the remarks of Professor Janis.

THE COMMON LAW TRADITION

by Mark W. Janis

The challenge of universality confronts us all. It is a moral challenge of the first order, posing the perennial and elemental issues of personal freedom, human dignity and the brotherhood of man as the basis of the rule of law. It is for us to accept or decline it. Dangers there unquestionably are, but even greater danger lies in narrowing our horizon, and the prospective rewards of boldness and initiative are great. Let us at all times be steadfast in the right, clear-headed in distinguishing right from wrong, and vigilant in the protection of our own security and

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freedom from attack or subversion, but let us approach the great task of conciliation among nations in the spirit of Elihu Root, with courage, with generosity and with magnanimity, remembering always that "magnanimity in politics" is not seldom the "truest wisdom" and that the leadership of freedom and little minds "go ill together."¹

The challenge of universality and the part that international lawyers could play in "the great task of conciliation among nations" were Wilfred Jenks' themes some 30 years ago on April 30, 1959, in Washington at the 53rd Annual Meeting of the American Society of International Law. Today we gather to reflect on the challenge of universality and the role of international lawyers and we employ Jenks' remarks as our mutual focus. How well do Jenks' observations and conclusions stand up today? The world has changed or has it? Let me begin the discussion with some remarks as a common lawyer educated in both England and America.

Jenks spoke at a conference organized by the Society's President, Professor Myres McDougal, a conference denominated "Diverse Systems of World Public Order Today." But Jenks' talk had no language of a social scientific kind, no mention of a "process of authoritative decision." Nor did Jenks borrow much from continental-style or Soviet-style or any-other-foreign-style legal tradition, however much he believed other traditions ought to be taken into account. Rather Jenks' remarks were meant to be common-sensical albeit from a common law point of view. But common sense may not be universally shared. How much in Jenks' speech remains helpful today?

Jenks saw his mandate as "an invitation to explore . . . in the spirit of the common law some of the major problems which confront us in the endeavor to make international law a bulwark of human dignity and of human freedom." It is hard to tell if Jenks' adoption of "the spirit of the common law" was a necessary part of his invitation. On the one hand, Jenks was the well-known author of the treatise, *The Common Law of Mankind*. Other conference speakers did speak about specific legal traditions. On the other hand, Jenks was one of three dinner speakers all of whom had topics quite generally phrased: "The Challenge of Universality," "From Diversity to Unity: International Law in a Bipolar World," and "Perspectives for an International Law of Human Dignity." In any case, Jenks' common law approach figures plainly in his talk. Let us focus on the part where he acknowledged that he was borrowing from the common law tradition.

Jenks explicitly identified seven "essentials of the common law tradition" that he believed were the "key" to modernizing international law in "the vastly changed world which confronts us in the second half of the twentieth century." First was "the fundamental postulate of the rule of law." Second was "the acceptance of third-party judgment." Third was "the concept that the right of self-defense must be exercised within the law." Fourth and fifth were "the principles of good faith as the foundation of the law of contract and of responsibility for injury at the foundation of the law of tort." Sixth was "the belief that the state was made for man and not man for the state." And seventh was envisaging "the law as a living growth which develops from precedent to precedent to meet practical needs as they emerge in a changing world."

These seven common law essentials might be analyzed in various ways. We could ask (1) if they truly were or are *the* essentials of the common law, (2) if one or another essential was or is peculiar to the common law or was or is in fact shared with other legal traditions, (3) if any of them were or are already part of international law with-

¹Jenks, *The Challenge of Universality*, 53 ASIL Proc. 85, 98 (1959).

out any need for borrowing from the common law, and (4) whether they even in principle ought to have been or ought now to be part of international law. I will, however, remark on Jenks' seven essentials in only one and yet a different way: to what extent does each Jenksian essential seem to be an ordinary assertion nowadays made by common lawyers dealing with international law?

The Rule of Law. This remains, I think, a characteristic assertion of common lawyers. Accustomed as we are to societies where the rule of law is a dominant cultural feature, we common lawyers are likely to transpose our domestic legal routine and perceptions to the international stage. However, common lawyers looking at international relations do seem increasingly ready to distinguish between the international rule of law economically and the international rule of law politically. On the one hand, international commercial and financial transactions are booming and so too is the international legal framework for economic transactions. A significant part of the international economic legal structure—a mix of private and public law and process—has been fashioned by the common lawyers and we remain adept at and enthusiastic about the game we have so largely designed. On the other hand, common lawyers are probably less likely today than 30 years ago to expect that there is or will be an international rule of law politically. Expectations for the United Nations, for example, are much lower now than they were in Jenks' day. On an upbeat note, it may be that the easing of East-West tensions will lead to greater use of and expectations for the international rule of law politically, e.g., use of and expectations for the International Court of Justice. I doubt, though, that the strides made politically can hope to keep up with the economic advances.

Third-Party Judgment. Once again, reality and expectations are generally down politically, but are up economically. Politically, one need only mention the position of Iran in the *Diplomatic and Consular Staff* case and that of the United States in the *Military and Paramilitary Activities* case to underline the disappointment. Economically, though, the development of international dispute-settlement procedures over these last 30 years has been dramatic. As good an example as any is the development of international commercial arbitration.

The Right of Self-Defense. Despite his position at the International Labor Organization, Jenks was probably more concerned with the political than the economic side of international law and his third essential was thoroughly political. I am afraid that with respect to the relationship between law and belligerency, Jenks would likely be more discouraged than not. The record of the last 30 years, including the wars in Vietnam, Afghanistan, and all those in the Middle East, Africa, and Central America, does not demonstrate a particularly optimistic conclusion about self-defense "within the law." It is not that legal language has not been employed in the all too many wars of these three decades, but that the language of international law usually has been used by way of diplomatic *ex post facto* justification rather than as part of a process of setting actual self-restraining limits on the international behavior of states.

Good Faith and the Law of Contract, and Responsibility for Injury. Here again, the economic/political distinction is vital: more and more law and legal process in terms of international economic relations, but little gain and perhaps some loss in terms of international political relations. Economically, one might note, *inter alia*, the emerging internationalization of commercial law, securities law, environmental law. But politically there seems to be no particular legalization of the relations among states, which remain more or less subject to diplomatic not legal formulations.

Civil Liberties. Here there have been radical developments. English participation in an increasingly assertive system of European human rights law and American human