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A MODERN LAW OF NATIONS

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THE title of Professor Jessup's book implies a criticism of the existing, or "traditional" law of nations. That law is not, apparently, modern. What the author means can be gleaned from his first paragraph. The existing principles, institutions and procedures intended to govern the conduct of states and usually referred to as "international law," are not adequate to meet the conscious needs of today's world. Those needs find their sharpest expression in a widespread demand for a more reliable world order, one more capable of resolving peaceably conflicts between states, more capable of resisting the forces which periodically tear the fragmentary and weak existing order in shreds, and more productive of security for the individual in the legitimate pursuit of his interests.

Professor Jessup well knows that many changes in the "international system" will have to be made if such a world order is to be realized. Among the necessary changes he notes the establishment of truly legislative, judicial and executive organs to define, interpret and enforce a collective will taking precedence over the wills of sovereign states. But, making a somewhat artificial distinction between law and organization, a distinction to which, by the way, he is unable to adhere consistently, he chooses as the subject of this small and persuasive book "the nature of the body of law which is to be laid down, applied and enforced." The field so defined is, however, still too broad for treatment in one small volume. From it the author selects as the focus of his study two necessary changes in theory and practice. The first is rejection of the still dominant doctrine, with all its negative practical consequences, that international law is a law only between states. In its place must be established a doctrine and practice recognizing the individual human being as a subject of that law with direct rights and duties under it. The second change is establishment of the principle that every state has a legal interest in the observance of international law, so that at least the more serious violations, though not directly and

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materially touching some states, would nevertheless give them a legal right to take action vindicating the law.

These two developments would inevitably have broad and vivifying ramifications. Professor Jessup has followed some of them out in detail, and the student of international law will be stimulated to speculate on others. In this study the two changes are shown operating and producing their results principally within the framework of the United Nations, for, as already hinted, the author could only show the advantages to be gained from his amendments in the traditional system by drawing heavily upon the present activities and inherent potentialities of international organization. Few readers, even though they may have opened this book in a spirit of scepticism, can fail to be impressed by the case so made out, and by the value of an essay concentrating on the two selected points.

In effect, as the author himself observes, the sovereignty of the state, in all its traditional and theoretical absolute sense, goes by the board. Even in so dear an interest as control of its own nationals, the state must defer to the collective will of the organized community of nations. Professor Jessup, indeed, entertains no doubt that the Charter of the United Nations has already removed the relation between the state and its nationals from the area of "exclusively domestic jurisdiction." And the clear recognition that when they take action to check or to punish a serious infringement of international law which does not happen to wound them directly, states are not committing an illegal "intervention," but exercising a legal right, at once provides a firm theoretical basis for law-enforcement by individual or community action. To soften the blow to the religion of "non-intervention" (a blow which becomes peculiarly shattering with the withdrawal of the rights of nationals from the realm of exclusive domestic jurisdiction) the action of law enforcement is in Professor Jessup's system channeled through the United Nations.

I have said "a firm *theoretical* basis." Even that would be useful, if only because it would clear away the artificial fog of juristic argument which does so much to keep international law a non-operative academic system of mere thought. But in a world where great concentrations of power, manipulated by governments jealous of their autonomy, confront a multitude of weak and divided states, and where ideas as to the nature and function of law differ so widely, is community law enforcement, in any but the haphazard way of traditional war, a practical possibility?

This is not the problem which Professor Jessup set himself. And

yet, does it not suggest a more fundamental condition of a "modern law of nations" than either the recognition of the individual as a person in international law or the recognition of a community interest in the enforcement of that law? If by modernization Professor Jessup means, as I think he does, a closer approach on the international plane to the efficiency of law within the state, both of the features that he advocates would be found in the law of nations. But they would be there as consequences of another, deeper change in the thought and conduct of men.

It is, I think, illusory to separate law from the mechanism and efficiency of enforcement. Law is essentially a complex of rules, organs and procedures. It cannot have a measure of adequacy or efficiency greater than the sense of community, greater than the measure of agreement on common values and objectives outweighing particular interests, or greater, in our modern world, than the organized strength of the community available for its enforcement. Custom, superstition and religion operate less powerfully than they did in primitive communities. They are particularly weak in the relations of states.

In my view, therefore, the final question to be asked by the jurist advocating improvements in the law of nations is not—"What will be best for humanity?" That question he must and will ask. But the answer to it will not necessarily form the content of his recommendation. That will be determined by his answer to the final question—"What approach to these bests is there a reasonable chance of realizing in the society of nations as it is now or as it is likely to be for the next generation or two?"

To answer this final question, the jurist must turn his attention long and searchingly to the nature of the "society" or "community" or "family" of nations. He must indeed begin by rejecting the assumption constantly made in the literature of international law that there is a "society" or "community" of nations and by determining, from a study of the conduct and relations of states, to what extent there may usefully be said to exist any elements of society or community on the international or world plane.

One result of such a study will be a truer judgment of the comparative strength of forces making for world community and those which maintain or even intensify the irresponsible sovereign autonomy of the state. Upon this truer judgment may follow greater sagacity in the tactics of progress.

There have been some recent essays in a new approach to the law of nations, starting from a consideration of the motives and forces

actually operating in the relations of states, rather than from a speculative system of juridico-moral principles. Usually they have been marked by the extravagant negation so characteristic of rebellion. Some of them vilify the traditional science of international law as a conscious instrument of the ambitions of states or special-interest groups. Others strip law of all its normative force and make it merely the habit of the market-place. They not merely discount, as they should, the influence of ideals and *a priori* reasoning; they deny it.

It is, of course, totally unnecessary to repudiate the past in order to justify new departures. We can use the classics of international law not only for their record of practice, but even for their abstractly idealistic solutions of human problems. But I think the time has come when they should cease to be the mainstay of instruction in this subject. And what I have to say here is intended to apply in full to the "case method" which substitutes for revered treatises those other classics, the decisions of revered national judges. These treasures again form part of the record of practice, and many of them are models of pragmatic wisdom. But it is difficult to see why the long pages of noble fantasy by which decisions are justified should be kept before the student as authoritative expositions of the nature, scope and principles of international law. Quite apart from the difficulty of detachment for national judges when national interests conflict with those of other states, it is worth remembering that the society of states and its law is almost bound to be a minor preoccupation of those who qualify for the bench of our higher courts.

The first academic contribution to a "modern law of nations" should, therefore, be a modernization of the theory, teaching and literature of the subject. This, I suggest, may begin with a study of the state, its objectives, its methods, the kind of stimuli which determine its initiatives and the kind of restraints which in actual practice limit its action. From this the transition is easy to a study of the extent to which this grouping can and does combine with others of its kind in the definition and prosecution of common interests, that is to say, to the reality or otherwise of a society of states. The same inquiry will reveal the possibility and potentialities of a world society of individuals transcending state boundaries, either as an alternative or as a supplement to a society in which states are the member-units.

Such a study will be necessarily historical, for it will not be possible to discover patterns of conduct without going far behind the present behavior of governments. But the student will not be greatly concerned to determine whether or in what degree these patterns consti-

tute law in the sense in which law exists and operates in national societies. He will, on the other hand, be much concerned with the regularity with which the patterns are followed, and with the ways in which they are altered to meet new circumstances. He will also be intent on discovering how to increase the regularity of observance and the smooth rationality of change, with constant and due regard to the nature of the entities and interests with which he is dealing. In all this, the least of his anxieties will be lest he break the bounds of legal science and invade the realm of the historian, the political scientist, psychologist or sociologist. For the enterprise on which he is engaged is a quest for a more reliable world order, and while there is plenty of room here for legal science in the strictly observational and analytical sense, the main burden of the task is legislative. And good legislation calls for the co-ordinated use of all the social sciences.