A MODERN LAW OF NATIONS

— AN INTRODUCTION —

BY

PHILIP C. JESSUP

THE MACMILLAN COMPANY

NEW YORK · 1948

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First Printing.

PRINTED IN THE UNITED STATES OF AMERICA

TO

L. K. J.

PREFACE

As will be more fully explained in the introductory chapter of this volume, the author believes it urgent that international lawyers should begin the systematic re-examination of the traditional body of international law. The General Assembly of the United Nations has begun its task of initiating studies and making recommendations for the purpose of "encouraging the progressive development of international law and its codification" as required by Article 13 of the Charter. It is not, therefore, the moment for delaying the first steps. Statesmen may find themselves under the necessity of devoting their energies primarily to the drafting of treaties for the control of major weapons of destruction and of war itself. There is a humbler task for the scholar in exploring some of the underlying bases upon which a modern law of nations may be built. International lawyers in the past have performed such tasks, as through the continuous studies of the Institut de Droit International, whose preparatory work was, for example, essential to successful drafting of the great treaties agreed upon at the Hague Peace Conferences of 1899 and 1907. Sir Cecil Hurst, in his presidential address before the Grotius Society in 1946, made an effective plea for unofficial scientific studies as the soundest approach to the present task of developing international law.

This work is offered for the consideration and criticism of those interested in the development of a modern law of nations. It is a bare introduction to some aspects of the subject. Much of the existing body of international law is omitted from the present re-examination, and much of the important field of international organization or administration is left to one side. Those principles and rules of international law have been included which seemed to offer the most fruitful fields for testing the hypotheses upon which the work proceeds.

The author could not have attempted even this fragmentary approach had he not had the benefit of the skilled collaboration of Professor Leo Gross and Professor Kurt Wilk. Much of the basic research was carried on by them under considerable pressure of time.

Acknowledgment is also made to Mr. Almeric Christian of the Columbia University School of Law for checking citations and verifying points of law, and to Mr. Marvin Wilson of the Columbia University Department of Public Law and Government for painstaking work in final verifications and preparation of the manuscript for the printer.

Use has been made of some fragmentary previous writings of the author's to which references are made in footnotes in the interest of brevity. The *American Journal of International Law* and the *Political Science Quarterly* have kindly accorded permission to incorporate here portions of articles which have appeared in their pages. The substance of several chapters has appeared in the form of articles, but changes have been made in incorporating them here. Chapter II corresponds to an article in the *Michigan Law Review* for February 1947; Chapter VI to one in the *Columbia Law Review* for December 1946; Chapter VII to one in the *American Journal of International Law* for April 1947; and Chapter VIII to one in *Foreign Affairs* for October 1946.

The author has made extensive use of Hyde's *International Law Chiefly as Interpreted and Applied by the United States* and of Lauterpacht's editions of Oppenheim's *International Law* as reflecting the existing law. He wishes also to acknowledge his debt to Judge Manley O. Hudson, not only for his books and articles, which have been a constant source of reference, but also for the results of those remarkable co-operative enterprises which owe their inspiration and accomplishment to him—the volumes of the Harvard Research in International Law and the International Law of the Future.

The work has been carried through under a grant from the Columbia University Council for Research in the Social Sciences, for which grateful acknowledgment is made.

PHILIP C. JESSUP

New York, March 1947

NOTE ON ABBREVIATIONS

IN GENERAL, the abbreviations used are those given in *A Uniform System of Citation: Form of Citation and Abbreviations* (sixth edition, 1939), published by the Harvard Law Review Association.

Two works cited constantly are indicated merely by the name of the author: "Hyde" refers to Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2d ed., 1945); "Oppenheim" refers to Lauterpacht's editions of his standard work on International Law—the fifth edition of Volume I (1935) and the sixth edition of Volume II (1940).

The publications of the United States Department of State are cited as "Dept. of State." The four volumes of "Treaties, Conventions, International Acts, Protocols, and Agreements between The United States of America and Other Powers" are all cited as Malloy, *Treaties*. The "Papers Relating to the Foreign Relations of the United States" are cited as *For. Rel. U.S.* "League" refers to the League of Nations, "UN" to the United Nations, and "UNIO" to the United Nations Information Organizations. "P.C.I.J." stands for the Permanent Court of International Justice.

For the word "Law" in a title, the abbreviation "L." is used, and for "International Law," "Int. L." The American Society of International Law is written "Am. Soc. Int. L."; its Journal, *Am. J. Int. L.;* and its Proceedings, *Proc.* Among other journals, reviews, and annual publications, the following may be noted:

Col. L. Rev.—*Columbia Law Review*
Pol. Sci. Q.—*Political Science Quarterly*
Am. Pol. Sci. Rev.—*American Political Science Review*
Brit. Y. B. Int. L.—*British Year Book of International Law*
Ann. Dig.—Annual Digest (and Reports) of Public International Law Cases.

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CHAPTER I

INTRODUCTION

THERE IS MORE AGREEMENT today than at any earlier period on the need for some change in the traditional international system of a community of sovereign states. Unlimited sovereignty is no longer automatically accepted as the most prized possession or even as a desirable attribute of states. The postwar revulsion against war and against an international system in which war is not only possible but tolerated is stronger as our most recent experience with war is more frightful. The potentialities of atomic warfare give more widespread support to the effort to exercise greater ingenuity, to achieve more success, in the science of politics. It is natural that some minds seek a complete change through the immediate creation of a world government. Others would prefer to build more slowly through the medium of what is generally called international organization or administration, now typified by the United Nations. One point of agreement may be found in all plans and proposals, whether they come from statesmen or from laymen, from experts or from novices. That common point is the necessity for an adequate international law. This feeling is naturally the more pronounced in countries devoted to the slogan that government should be of laws and not of men. International lawyers and laymen alike admit or assert defects in the present system of international law. Some deny that any such system even has an existence. Leaving that argument momentarily aside, it may be conceded that there is at this time both need and opportunity for the development of a modern law of nations.

No system of law springs into existence full-panoplied. All legal systems from the most primitive to the most advanced have their backgrounds and roots in the society which they govern. It is therefore not enough for the future of the international society to say that we must have a rule governing the use of atomic bombs and other weapons of mass destruction. It is not enough merely to have a law

making war illegal. Such rules, even if backed by an adequate form of organization or government, would fail to create a well-ordered international society, the existence of which is a prerequisite to the successful functioning of any legal system. If there be no adequate body of law governing the solution of the conflicts which are inherent in any human relations, frictions and tensions will develop to a point which will bring about breaches of the primary rules about weapons and wars; even in the most highly developed societies, underlying inequities and resulting strains produce riots, revolutions, and civil wars.

It is the purpose of this book to explore some of the possible bases for a modern law of nations. The exploration proceeds upon the basis of an examination of the way in which peoples and nations have attempted, however inadequately, in the past to govern their interrelationships. It proceeds upon the assumption that progress must and can be made in the social sciences to come abreast of the new advances in the physical sciences. Two points in particular are singled out as keystones of a revised international legal order. The first is the point that international law, like national law, must be directly applicable to the individual. It must not continue to be remote from him, as is the traditional international law, which is considered to be applicable to states alone and not to individuals. The second point is that there must be basic recognition of the interest which the whole international society has in the observance of its law. Breaches of the law must no longer be considered the concern of only the state directly and primarily affected. There must be something equivalent to the national concept of criminal law, in which the community as such brings its combined power to bear upon the violator of those parts of the law which are necessary to the preservation of the public peace.

Sovereignty, in its meaning of an absolute, uncontrolled state will, ultimately free to resort to the final arbitrament of war, is the quicksand upon which the foundations of traditional international law are built. Until the world achieves some form of international government in which a collective will takes precedence over the individual will of the sovereign state, the ultimate function of law, which is the elimination of force for the solution of human conflicts, will not be fulfilled. There must be organs empowered to lay down rules (a legislature); there must be judicial organs to interpret and apply those

rules (a judiciary); and there must be organs with power to compel compliance with the rules (a police force). These organizational developments must take place, and if this volume does not concern itself primarily with the solution of such problems, this is not because of any doubt concerning their importance. This work is dedicated to the solution of another problem: granted that the necessary organization is perfected, what is to be the nature of the body of law which is to be laid down, applied, and enforced?

Law is indeed a human necessity. The current spate of writing about the need for world government avows the need for law. The Romans put it tersely—*ubi societas ibi ius*. The Charter of the United Nations recognizes the fact. It is asserted in the roundly phrased orations of heads of state and of foreign ministers [1] and in the crusading columns of the *New Yorker* magazine. Opinions will continue to differ enormously about the type of world government or world organization demanded by an atomic age the exact potentialities of which are too vast to be kept in the common consciousness. There is as much disagreement about the means for achieving the desired end and about the tempo of the progress which is practicable. There are advocates of more government and of less government in human affairs, but only the most detached philosophic minds contemplate the utopia of anarchy, that perfection of the human spirit in which no rules and no controls are necessary to enable human beings to live together in peace and harmony. Law must govern world relationships if they are to be peaceful, whether those relationships continue to be organized on the present order of sovereign states, whether there is to be a world confederation, or whether there is to be one unitary world state. The differences of opinion lie far more in the necessary agencies and methods of enforcement of law than in the actual rules to govern human conduct.

There is no such dichotomy as one writer suggests between law and diplomacy.[2] They are not mutually exclusive procedures. To be sure, both procedures may be abused; the lawyer may become legalistic, the diplomat may become Machiavellian. But the successful practicing attorney is as much a negotiator as a citer of precedents,

[1] Cf. Jessup, "International Law in the Post-War World," *Am. Soc. Int. L., Proc.* (1942), 46.

[2] Morgenthau, "Diplomacy," 55 *Yale L.J.* (1946), 1067.

whether he be dealing with a corporate reorganization, a divorce suit, or the protection of national interests abroad.

As in arguments about many other matters, differences of opinion about law are frequently found to rest upon definitions. X may use the word "law" to include moral law, religious law, and rules of social intercourse, as well as the statutes enacted by a legislature, while Y may be using the same word to include only the last category. In legal literature there is voluminous debate about the proper definition. There are still devotees of the simple Austinian concept based upon uncomplicated observation of the most usual manifestations of law—rules laid down by a superior power (legislature), enforced by a superior power (police). There are more modern concepts which have been evolved largely as the result of consideration of the Anglo-American system of the development of common law through court decisions. Thus it is said that law is a prophecy of the action of agencies of society; it is "the law" that I must not steal or break my contract, in the sense that if I do the forbidden thing, agents of society—policemen or courts and their marshals—will arrest me or seize and sell my goods to pay a determined amount of damages.

There is a tendency to assume that there is such a thing as one correct definition for any one word or concept. In the physical sciences, in mathematics, this was generally thought to be true. Water was always H_2O and 2 plus 2 equaled 4. But even in the physical sciences such old fundamentals as Newtonian physics and Euclidean geometry have had to yield their sacrosanct character in the light of such ideas as relativity and the retesting of basic assumptions against a broader field of observation. Frederick S. Dunn pointed out fifteen years ago that the time had come for a similar challenge of underlying assumptions in international law and relations.[3] In the social sciences surely an old Chinese proverb is much to the point: "It is always well to have in the background of one's mind a multiplicity of definitions covering the subject at hand to prevent oneself from accepting the most obvious." A definition is useful only to the extent to which it records an accurate observation, whether of natural phenomena, literary usage, or social conduct. "Law and obedience to law," wrote Judge Cardozo, "are facts confirmed every day to us all in our experience of life. If the result of a definition is to make them seem to be illusions, so much the worse for the definition; we must enlarge it till it is broad enough to answer realities." [4]

[3] Dunn, *The Protection of Nationals* (1932), 7.

International law, or the law of nations, is a term which has been used for over three hundred years to record certain observations of the conduct of human beings grouped together in what we call states. There is a vast literature on the subject, and courts have examined that literature and based decisions upon it. The works of the writers, the United States Supreme Court has said, "are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." [5] The debate about the propriety of using the word "law" in the term "international law" is as old as the term. Much of that debate is fruitless because it rests upon the undeclared differences in underlying definition. If to X the word "law" cannot properly be applied to any rules behind which there is not a sanction or power of enforcement by an overall authority, then X is correct in denying that international law is "law." Although the Supreme Court of the United States asserted in *Virginia* v. *West Virginia* [6] the power to enforce its judgments against one of the states of the Union, federal force has never been used for such a purpose. If it were used against a resisting state, it would be difficult to distinguish the situation from rebellion or civil war. Under Article 94 of the Charter of the United Nations, the Security Council could direct the use of force against a state which failed to perform the obligations incumbent on it under a judgment rendered by the International Court of Justice; such a situation would resemble international war or civil war within the United Nations. The vindication of "rights"—i.e., legal rights under international law—has frequently throughout modern history been advanced as the justification for resort to war. It is clearly a kind of enforcement very different from that of the ordinary police action: it is power against power, North against South, United Nations against Axis. One side is "right" and the other side is "wrong," and these are not merely moral judgments, but also

[4] Cardozo, *The Nature of the Judicial Process* (1928), 127.

[5] The Paquete Habana, 175 *U.S.* 677, 700 (1900).

[6] 246 *U.S.* 565 (1918). See Rosenberg, "Brutum Fulmen: A Precedent for a World Court," 25 *Col. L. Rev.* (1925), 783, 794; Freeman and Paullin, *Coercion of States: In Federal Unions* (1943).

reflections of conviction that certain rules, certain standards of conduct, have been violated.

The significant question to ask about international law is whether the use of that term is in accordance with an accurate observation and study of the conduct of states in the world community. Superficially, the negative reply comes easily. Wars, breaches of treaties, oppression of the weak by the strong, are the headlines of the daily press and of the history textbooks. The superficial observer has not noted the steady observance of such treaties as that under which letters are carried all over the world at rates fixed by the Universal Postal Union. He ignores the fact that there is scarcely an instance in two hundred years in which an ambassador has been subjected to suit in courts of the country where he is stationed. The recording of the observation of this last fact is stated in legal terms by saying that under international law an ambassador has diplomatic immunities. The superficial observer has not read the hundreds of decisions handed down by international courts called Mixed Claims Commissions, which have awarded money damages duly paid by the defendant states. Perhaps he has not even read the sixty-odd decisions and opinions of the Permanent Court of International Justice or noted the subsequent history of the observance of those pronouncements as recorded for example in the writings of Judge Manley O. Hudson.[7] He may be unfamiliar with the extent to which international law has been incorporated in national law and has thus secured an enforcement agency through the ordinary governmental machinery of the national states. Perhaps he forgets that the Constitution of the United States gives Congress the power to "define and punish . . . Offences against the Law of Nations" and that the Supreme Court has sustained the constitutionality of the exercise of that power by determining that the duty to prevent the counterfeiting of foreign currency is a duty imposed upon the United States by international law.[8] He may not be familiar with such classic statements as that of Mr. Justice Gray: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented

[7] E.g. *The Permanent Court of International Justice 1920–1942* (1943); *World Court Reports* (2 vols., 1934, 1935).

[8] *United States* v. *Arjona*, 120 *U.S.* 479 (1887).

for their determination." [9] He may not have examined the counterparts of these United States positions in the constitutions and judicial decisions of the courts of other countries.[10] Always he will come back, with his own definition of law in mind, to the undeniable fact that international law has been unable in the past to check resort to war because the international society lacks its own overall police force. As in our own individual relations, it is the instances of lawless conduct and of violence that dominate the memory. We are accustomed to think that the United States is a community governed by law, but violence and the failure of government controls in labor relations are "facts confirmed every day to us all in our experience of life." Indeed, the parallelisms between labor relations within states and international relations among states are striking. It is said that it was experience with labor problems that led William Jennings Bryan as Secretary of State to negotiate a series of treaties providing for "cooling-off periods" and fact-finding commissions.[11] If such devices have not succeeded in eliminating international conflicts, this is not surprising in view of their comparable inadequacy within the framework of a highly developed national legal system.

Those who have taken the pains to become familiar with the way in which governments behave in their relations with other governments reach no such discouraging conclusions as those which obsess the minds of the headline-readers. One of the wisest and most experienced of them all, John Bassett Moore, has recorded his observation that on the whole international law is as well observed as national law.[12] The Director of the Yale Institute of International Studies has recently remarked that those "who make light of treaty commitments in general seem to ignore the fact that the vast majority of such engagements are continuously, honestly, and regularly observed even under adverse conditions and at considerable inconvenience to the parties." [13] It is not without significance that foreign offices throughout the world have, and have had through the course of at least two centuries, staffs of legal advisers, most of whose time is devoted to

[9] The Paquete Habana, 175 *U.S.* 677, 700 (1900).

[10] See Masters, *International Law in National Courts* (1932).

[11] Scott, "Remarks," *Am. Soc. Int. L., Proc.* (1929), 172.

[12] Moore, *International Law and Some Current Illusions* (1924), 300.

[13] Brodie (ed.), *The Absolute Weapon: Atomic Power and World Order*, (1946), 8.

problems of international law. When a controversy develops between two governments (a controversy of the ordinary day-to-day type) the legal adviser either drafts or has a hand in drafting the correspondence. If one skims such diplomatic correspondence written over the course of many decades, one is bound to be struck by the frequency, the habitual frequency, with which governments support and defend their international actions by appeal to legal arguments, arguments based on international law.[14] It is immaterial for the purposes of this discussion whether such legal arguments are hypocritical or are contradicted by subsequent conduct. The fact remains that they reflect the basic human conviction of the necessity of law and bear witness to the evolution through the years of a body of customary and treaty international law, invoked by governments and applied by courts. The record proves that there is a "law habit" in international relations. It is not immaterial to add that the instances in which judgments of international tribunals have been flouted are so rare that the headline-reader may well place them in the man-bites-dog category.

It is true, as Hall said in a passage quoted with approval by the Judicial Committee of the Privy Council in 1934, that "Looking back over the last couple of centuries, we see international law at the close of each fifty years in a more solid position than that which it occupied at the beginning of the period. Progressively it has taken firmer hold, it has extended its sphere of operation, it has ceased to trouble itself about trivial formalities, it has more and more dared to grapple in detail with the fundamental facts in the relations of States." [15]

Among the defects of the existing international legal system, two have been mentioned as the basis of this study. They stand out as obstacles to progress. The first is the fundamental tenet of traditional international law that it is a law only between states, not between individuals or between individuals and states. The individual has been one stage removed from the application of international law, the legal jargon being that he is not a "subject" of the law but only an

[14] Jessup, "The Reality of International Law," 18 *Foreign Affairs* (1940), 244.

[15] Viscount Sankey, L. C., In Re Piracy Jure Gentium [1934], *A.C.* 586, 592, citing the preface to the third edition of Hall, *International Law* (1889).

"object." International law affects him only through the medium of the state. Perhaps the most striking example of the weight of the dead hand of this juridical concept is to be found in that branch of international law known as the Responsibility of States for Injuries to Aliens, or the Diplomatic Protection of Citizens Abroad.[16] The concepts of alienage and citizenship are based on the notion that the individual has no legal significance from the standpoint of international law save as he is related to one state through the bond of citizenship or nationality and thus stands in relation to other states in the role of alien. The responsibility of the state for injuries to an individual is owed under international law to another state and not to the individual. Thus there is no responsibility if the injured individual is stateless, that is, has no nationality. To explain the legal basis of responsibility to another state, international law for some two centuries has made use of a fiction invented by Vattel to the effect that a state is injured through the injury to its citizen. If this were the true basis of responsibility, the measure of damages to be paid for an injury would vary with the importance of the role played by the injured individual in the life of the state of which he is a citizen. Actually, in the hundreds of claims cases which have been adjudicated by international tribunals, lip service only is paid to the fiction, and decisions are made upon the inescapable realization that it is really John Smith or François Picaud who has been physically injured or whose widow and children have been left destitute. The alleged indirect loss to the state is forgotten until the final judgment is expressed in terms of an obligation of the defendant state to pay a sum of money to the claimant state, the usually unexpressed assumption being that the latter will pay the money over to the proper individuals. Many tortuous bits of judicial reasoning would have been eliminated if it were agreed that the individual himself is protected by the rule of law.

There is a considerable literature on the question whether this fundamental basis of the traditional law as a law between states only, is juridically and philosophically sound.[17] It is frequently asserted that the principle is not an absolute one, since it admits of exceptions, notably in the case of piracy, where the pirate is said to be *hostis*

[16] This topic is explored in detail in Chap. V.

[17] See Chap. II.

humani generis, punishable by any state that apprehends him. The trials of war criminals have elicited learned discussions along the same lines. It is not intended here to continue such debates concerning the existing law. It is rather the purpose to take as a hypothesis the general acceptance of the thesis that internaional law *does* apply directly to the individual, that it does or can bind him as well as states directly, and in the light of that hypothesis to re-examine the existing law as it has developed through the centuries to see what changes, what modifications would need to be made to fit the law to the new basis. Much of the current discussion of world government concerns itself with this problem of the direct application of international law to the individual, but the nature of the changes which such a concept would need to work in international relations does not appear to have been fully explored.

A second characteristic of the traditional international legal system requires the same kind of thorough re-examination. As already noted, international law resembles tort law rather than criminal law in the national legal system. The significance of this comparison is that under the traditional international legal system, a breach of international law is considered to be a matter which concerns only the state whose rights are directly infringed; and no other state, nor the community of states, is entitled to remonstrate or object or take action. "No nation," said Judge Story, "has a right to infringe the law of nations, so as thereby to produce an injury to any other nation. But if it does, this is understood to be an injury, not against all nations, which all are bound or permitted to redress; but which concerns alone the nation injured." [18] In contrasting international and national law Elihu Root remarked that we "are all familiar with the distinction in the municipal law of all civilized countries, between private and public rights and the remedies for the protection or enforcement of them. Ordinary injuries and breaches of contract are redressed only at the instance of the injured person, and other persons are not deemed entitled to interfere. It is no concern of theirs. On the other hand, certain flagrant wrongs the prevalence of which would threaten the order and security of the community are deemed to be everybody's business . . . [robbery or assault]. Every citizen is deemed to be injured by the breach of the law because the law is

[18] La Jeune Eugénie, Fed. Case No. 15,551 (C.C., D. Mass. 1822).

his protection, and if the law be violated with impunity, his protection will disappear. . . . Up to this time breaches of international law have been treated as we treat wrongs under civil procedure, as if they concerned nobody except the particular nation upon which the injury was inflicted and the nation inflicting it. There has been no general recognition of the right of other nations to object. . . . If the law of nations is to be binding, if the decisions of tribunals charged with the application of that law to international controversies are to be respected, there must be a change in theory, and violations of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilized nation to have the law maintained and a legal injury to every nation." [19]

Article 11 of the Covenant of the League of Nations was hailed as marking an innovation in this respect by declaring: "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League. . . ." Some have hailed the Briand-Kellogg Pact as another step in the same direction. The American Republics at the Lima Conference of 1938 recorded their conviction that "Each State is interested in the preservation of world order under law, in peace with justice, and in the social and economic welfare of mankind." [20] The philosophy underlying the Charter of the United Nations clearly embraces the notion of the community interest in matters affecting international peace. For example, under Article 34, "The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute. . . ." Article 35 empowers any Member of the United Nations to bring to the attention of the Security Council or of the General Assembly any such dispute or situation. This is sound political principle governing the operations of the international organization. Yet the traditional legal foundations of unilateralism remain largely unshaken. The Charter provisions may be applicable to what Root called "flagrant wrongs" where the danger to peace is apparent. It is not clear that international

[19] Root, "The Outlook for International Law," *Am. Soc. Int. L., Proc.* (1915), 7–9.

[20] *Report of the Delegation of the United States of America to the Eighth International Conference of American States*, Dept. of State Pub. 1624 (1941), 191.

law yet embodies the principle that because the law is the protection of all states, all are interested in any breach or weakening of that law. How far should such a principle extend? [21] Are there some breaches of international law that should still be the concern only of the state immediately injured? According to Article 62 of the Statute of the International Court of Justice, a state may request from the Court permission to intervene in any case if it considers that "it has an interest of a legal nature which may be affected by the decision in the case." Has a state such a legal interest, for example, in the vindication of the law of diplomatic immunities? Presumably there will always be breaches of law that do not involve the general community interest, just as the trespass of my neighbor's cow concerns me alone and is to be remedied by my individual lawsuit, without the intervention of third parties and without the community processes of arrest and criminal prosecution. The definition of "matters which are essentially within the domestic jurisdiction of any state," which are reserved under Article 2 of the Charter, is a cognate problem.

In some instances the acceptance of the concept of community interest would be comparable, as Root contemplated, to substituting for the present tort basis of international law a basis more comparable to that of criminal law, in which the community takes cognizance of law violations. In other instances, however, the change would be a shift in the direction of more extended governmental functions of an organized international community, as would be true if processes of collective recognition should be substituted for the present unilateral action.

It is the purpose of this volume to examine traditional international law in an attempt to suggest to what portions of a developed international legal system the concept of community interest might well apply. For this purpose again, the discussion will proceed on the hypothesis that a new principle is accepted, in this instance the principle of community interest in the prevention of breaches of international law.

Implicit in the adoption of the two hypotheses upon which this work is based is the questioning of the archfiction of international law—absolute state sovereignty. "Sovereignty is essentially a concept

[21] Cf. Postulate 4, *The International Law of the Future*, Carnegie Endowment for International Peace (1944), 32.

of completeness. It is also a legal creation, and as such, is a paradox, if not an absolute impossibility, for if a state is a sovereign in the complete sense, it knows no law and therefore abolishes, at the moment of its creation, the jural creator which gave it being."[22] "Legal fiction," says Morris Cohen, "is the mask that progress must wear to pass the faithful but blear-eyed watchers of our ancient legal treasures. But though legal fictions are useful in thus mitigating or absorbing the shock of innovation, they work havoc in the form of intellectual confusion." [23] The establishment of the United Nations presents an opportunity for innovations. The development of the organization of the international community suggests the ultimate possibility of substituting some kind of joint sovereignty, the supremacy of the common will, for the old single state sovereignty. The official proposals of the United States with reference to the international control of atomic energy rests on an altered attitude toward the fiction of sovereignty. Mr. Baruch, in his presentation of these proposals to the United Nations Commission, declared that the peoples of the democracies "are unwilling to be fobbed off by mouthings about narrow sovereignty . . ." [24] But in the same Commission the Soviet representative declared that the "principle of sovereignty is one of the cornerstones on which the United Nations structure is built; if this were touched the whole existence and future of the United Nations would be threatened." [25] The path to progress may be long and thorny; this book does not seek to catalogue the obstacles or to hazard guesses on how soon they may be surmounted.

The two hypotheses taken as the basis of the present re-examination of international law would involve an alteration of the traditional notion of sovereignty. They do not exhaust the needs or possibilities of the situation, and their preliminary development here is advanced with no claim to completeness or exclusiveness. If they constitute an introduction to a much larger task, they will serve the purpose for which they are designed. Article 13 of the Charter of the United Nations imposes upon the General Assembly the duty to

[22] Jessup, *op. cit.*, *supra* note 1, p. 49.
[23] Cohen, *Law and the Social Order* (1933), 126.
[24] UN Atomic Energy Commission, *Official Records, No. 1* (June 14, 1946), 6.
[25] *The International Control of Atomic Energy: Growth of a Policy*, Dept. of State Pub. 2702 (1946), 219.

"initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification." There are abundant opportunities for fruitful work in discharge of this obligation.[26] Such development can best proceed by utilizing the experience of the past centuries, reviewed in the light of new concepts. As Chief Justice Stone pointed out, "the problem . . . of jurisprudence in the modern world is the reconciliation of the demands . . . that law shall at once have continuity with the past and adaptability to the present and the future." [27] Ignorance of the progress already achieved in the development of international law over the past three centuries and blindness to the still primitive character of the international legal system are equally inimical to the further progress which must be made if all civilization is not to go the way of Hiroshima and Nagasaki.

[26] See Eagleton, "International Law and the Charter of the United Nations," 39 *Am. J. Int. L.* (1945), 751; Jessup, *Development of International Law by the United Nations*, ibid., 754.

[27] Stone, "The Common Law in the United States," 50 *Harv. L. Rev.* (1936), 4, 11.

CHAPTER II

THE SUBJECTS OF A MODERN LAW OF NATIONS

INTERNATIONAL LAW is generally defined or described as law applicable to relations between states. States are said to be the subjects of international law and individuals only its "objects." Treatises on international law accordingly usually proceed at the very outset to examine the nature and essential characteristics of the fictitious jural person known as the state.

But there has welled up through the years a growing opposition to this traditional concept. Numerous writers have attacked the dogma from a variety of approaches. Duguit, Krabbe, Kelsen, and others have impugned the philosophical and juridical basis of the concept.[1] Georges Scelle has called the traditional view "une vue fausse, une abstraction anthropomorphique, historiquement responsable du caractère fictif et de la paralysie de la science traditionelle du droit des gens." [2] The record of progress toward the goal of acknowledging the international legal position of the individual has been traced by many jurists.[3] Politis has graphically said: "Formerly

[1] Duguit, 1 *Traité de droit constitutionnel* (3rd ed. 1927), 713; Krabbe "L'Idée moderne de l'état," 13 *Hague recueil des cours* (1926), Vol. III, 514; *The Modern Idea of the State* (1922); Kelsen, *General Theory of Law and the State* (1945).

[2] Scelle, "Règles générales du droit de la paix," 46 *Hague recueil des cours* (1933), Vol. IV, 343. Cf. Dunn, "The International Rights of Individuals," *Am. Soc. Int. L., Proc.* (1941), 14, 16.

[3] Cf. e.g. Segal, *L'Individu en droit international positif* (1932); Politis, *The New Aspects of International Law* (1928); Le Fur, "Le Développement historique du droit international," 41 *Hague recueil des cours* (1932), Vol. III, 505; Ténékidès, *L'Individu dans l'ordre juridique international* (1933); Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), 73 ff., 305. See also Garner, "Le Développement et les tendances récentes du droit international," 35 *Hague recueil des cours* (1931), Vol. I, esp. 695 n. 1; Aufricht, "Personality in International Law," 37 *Am. Pol. Sci. Rev.* (1943), 217 ff.; Pintor, "Les Sujets du droit international autres que les états," 41 *Hague recueil des cours* (1932), Vol. III.

the sovereign State was an iron cage for its citizens from which they were obliged to communicate with the outside world, in a legal sense, through very close-set bars. Yielding to the logic of events, the bars are beginning to open. The cage is becoming shaky and will finally collapse. Men will then be able to hold free and untrammelled communication with each other across their respective frontiers." [4]

Since this discussion starts with the hypothesis that a change in the old fundamental doctrine has been accepted and proceeds from that point to consider certain modifications in the traditional body of international law which would be desirable or necessary if individuals as well as states were considered subjects of the law of nations, there is no occasion here to continue the debate as to whether under existing international law individuals are subjects of the law or only its "destinataires." [5] Those who will may consider some of the observations here as *lex lata*, while others will deal with them as made *de lege ferenda*. It remains true, as Sir John Fischer Williams has said, that it "is obvious that international relations are not limited to relations between states." [6] The function of international law is to provide a legal basis for the orderly management of international relations. The traditional nature of that law was keyed to the actualities of past centuries in which international relations were interstate relations. The actualities have changed; the law is changing.[7] The conclusion may be that states remain the organs for conducting even those international relations which involve individuals, and it may also be true, as the same able writer has said, that when "the world is more fully organized politically . . . the disappearance of the State as we know it will mean that international law will either be wholly absorbed into a general body of law or will preserve a separate existence only as a

[4] Politis, *op. cit., supra* note 3, p. 31.

[5] Cf. Spiropoulos, *Traité théorique et pratique de droit international public* (1933), 42 ff.

[6] Williams, *Aspects of Modern International Law* (1939), 18.

[7] "The existence of rules of international law governing relations between states and foreign individuals is not inconceivable, but their existence has not been proved, and, if it should be proved the contents of the rules will necessarily differ from those rules which concern relations between sovereigns." Feilchenfeld, *Public Debts and State Succession* (1931), 582. As indicated above, this discussion assumes the proof by way of hypothesis and proceeds to consider the content of the international law of the future.

branch of a general system." [8] But one may also agree with him that de Madariaga's insistence that we want to supplant *international* law by "world law, or to use a fine Roman expression, *jus gentium, le droit des gens*, the law of the World Commonwealth," involves merely a superficial change of name.[9] The term "Modern Law of Nations" has been used here nevertheless to suggest the point that the acceptance of the hypothesis on which this discussion proceeds involves a break with the past.

For the purposes of this context, therefore, international law or the law of nations must be defined as law applicable to states in their mutual relations and to individuals in their relations with states.[10] International law may also, under this hypothesis, be applicable to certain interrelationships of individuals themselves, where such interrelationships involve matters of international concern. So long, however, as the international community is composed of states, it is only through an exercise of their will, as expressed through treaty or agreement or as laid down by an international authority deriving its power from states, that a rule of law becomes binding upon an individual.[11] When there is created some kind of international constituent assembly or world parliament representative of the people of the world and having authority to legislate, it will then be possible to assert that international law derives authority from a source external to the states. This would be true even though states might well have been the original creators of such a representative legislature. The inescapable fact is that the world is today organized on the basis of the coexistence of states, and that fundamental changes will take place only through state action, whether affirmative or negative.[12]

[8] Williams, *Chapter on Current International Law and the League of Nations* (1929), 19, 20. Cf. Schucking, *The International Union of the Hague Conferences* (1918), 147, 150.

[9] Williams, *op. cit., supra* note 6, pp. 18, 20, and cf. his *Chapter on Current International Law and the League of Nations*, 7, note 2.

[10] Cf. Spiropoulos, *op. cit., supra* note 5, p. 43.

[11] Cf. Borchard, "The Access of Individuals to International Courts," 24 *Am. Soc. Int. L.* (1930), 359. Many writers distinguish the individual as a subject of international law from the individual as a creator of norms; cf. e.g. Rundstein, "L'Arbitrage international en matière privée," 23 *Hague recueil des cours* (1928), Vol. III, 331; Strupp, "Les Règles générales du droit de la paix," 47 *ibid.* (1934), Vol. I, 263; Akzin, *Problèmes fondamentaux du droit international public* (1929), 125 ff.

[12] 1 Hyde, sec. 11A–C, 38 ff.

The only possible alternative would be revolution on a world scale which would circumvent the existing system of states as national revolutions have circumvented pre-existing constitutional or governmental law and procedure. It is true to say that states themselves operate by virtue of the will of individuals and that the individual is thus the ultimate source of authority. Yet so firmly rooted is the international state system that we are accustomed to think in terms of the state itself as the ultimate authority and sole actor.

There is no novelty in the suggestion that states may delegate the exercise of some of their customary attributes. The classic case is that of the European Commission of the Danube established under the Treaty of Paris of March 30, 1856. The Commission was given legislative, administrative, and judicial powers.[13] The Central Commission for the Navigation of the Rhine established under Article 109 of the Final Act of Vienna of 1815 had comparable powers.[14] The regulations of these commissions were directly applicable to individuals, and individual infractions of the rules were directly cognizable by the Commissions. Thus the international bodies dealt directly with individuals in the same manner in which national bodies customarily deal with them. The same remark may be made in regard to those exceptional cases in which individuals have been given by treaty the right to appear before international tribunals.[15] The notable cases are those of the Central American Court of Justice established in 1907, the Mixed Arbitral Tribunals established by the peace treaties at the end of World War I, and the Arbitral Tribunal for dealing with the rights of minorities in Upper Silesia under the Geneva Convention of 1922 between Poland and Germany. In such cases the international tribunal acted directly upon the claim of an individual and the judgment ran in favor of the individual. It is not yet clear to what extent the powers delegated to the organs of the United Nations will be

[13] See Ténékidès, *L'Individu dans l'ordre juridique international* (1933), 84; Hostie, "Examen de quelques règles du droit international dans le domaine des communications et du transit," 40 *Hague recueil des cours* (1932), Vol. II, 488 ff.; Chamberlain, *The Regime of International Rivers: Danube and Rhine* (1923), c. 3, p. 47. See also *P.C.I.J.* Ser. B, No. 14, Adv. Op. on Jurisdiction of European Commission.

[14] Hostie, *loc. cit.*, note 13.

[15] The question of individuals as beneficiaries of treaty provisions is discussed in Chap. VI.

exercised directly upon the individual. The measures of enforcement ordered by the Security Council may be directly applicable to individuals.[16] The development of the Trusteeship Council and the Commission on Human Rights may produce similar situations. Current proposals for the establishment of a United Nations Atomic Energy Commission may well lead to the creation, by special treaty to which states will be parties, of a rule-making authority which will enact rules directly binding on individuals. Thus it may become a rule of international law that no state shall use atomic bombs; it may also become a rule of international law that no state *or individual* shall without international license manufacture, possess, or traffic in atomic bombs or fissionable materials.[17]

States may agree to separate the legislative function from the law-enforcing function so far as international agencies are concerned. Enforcement may be left to national authorities as is customary under treaties for the protection of fisheries, the control of the slave trade, and the traffic in narcotics. The degree of delegation does not affect the principle. Just as a national legislature may delegate certain regulatory authority and powers to an administrative commission or officer, so the community of states may delegate to an international authority. Although one may in both cases trace the authority back to its original source, the individual will deal with the immediate and not the remote source and will regard the former as the origin of his rights and duties.[18]

In using the term "individual" in connection with the hypothesis here under discussion, it should be understood that various types of groups or associations of individuals are included. International law, particularly in claims cases, is accustomed to dealing with corporations as "citizens" or "nationals" of states in the same way in which it deals with natural persons. So long as national law creates these

[16] But the national state may be the intermediary through which measures are brought home to the individual; cf. Eagleton, "The Individual and International Law," *Am. Soc. Int. L., Proc.* (1946), 22, 24, citing Public Law 264, 79th Cong. 1st Sess., 59 Stat. 619 (1945) on enforcement of United Nations measures by the President.

[17] See the recommendations of the report of the Atomic Energy Commission to the Security Council, contemplating the definition of international crimes in connection with the use of atomic weapons and the punishment of both persons and nations, 15 Dept. of State *Bulletin* (1946), 1090.

[18] Cf. Balladore Palliere, *Diritto internazionale pubblico* (1937), 286.

juristic persons, international law must deal with them as individuals.[19] Accordingly, under the hypothesis, corporations or partnerships may also be subjects of international law. In this instance, however, the fiction of the juristic person introduces new complications in the international field, since a corporation may be created under the law of State A, may have its principal place of business in State B, may have directors who are nationals of State C and stockholders who are nationals of State D.[20] Problems resulting from such situations will be further considered in Chapter IV.

Special mention should be made of the problem created by the growing tendency of the state to assume and to discharge functions which in the formative period of international law were normally considered to be the function of private interests.[21] Where the state, for example, sets up a government corporation to manage a fleet of merchant vessels or to operate a government monopoly in matches or tobacco, international law has tended toward the acceptance of a rule which would distinguish the corporation from the state. The development has taken place especially in connection with the law of sovereign immunity before the courts of another state; such immunity is denied to government corporations in the jurisprudence of many countries.[22] Even where no governmental corporation is interposed, the sovereign character of the state has not been recognized by some courts when the state acts as a private trader.[23] In a socialized state it would seem to be distinctly to the advantage of the state to separate

[19] "Every system of law that has attained a certain stage of development seems compelled by the ever-increasing complexity of human affairs to add to the number of persons provided for it by the natural world, to create persons who are not men." Pollock and Maitland, I, *History of English Law* (1st ed.), 469, quoted by Fischer Williams in "The Legal Character of the Bank of International Settlements," 24 *Am. J. Int. L.* (1930), 665, 666.

[20] See Timberg, "Corporate Fictions: Logical, Social, and International Implications," 46 *Col. L. Rev.* (1946), 533, 572.

[21] See Friedmann, "The Growth of State Control over the Individual, and Its Effect upon the Rules of International State Responsibility," 19 *Brit. Y. B. Int. L.* (1938), 118.

[22] "Harvard Research in International Law, Draft Convention on Competence of Courts in Regard to Foreign States," Art. 12 and Comment, 26 *Am. J. Int. L. Supp.* (1932), 641.

[23] See *ibid.*, Art. 11 and Comment, 597 ff. and cf. the changing view of the Supreme Court of the United States as reflected in Republic of Mexico *v.* Hoffman, 324 *U.S.* 30 (1945).

its political character from its business functions in order that economic relations may be carried on without the frictions and prestige considerations which may be involved if the business is handled on a political level. Perhaps the Soviet corporations fulfill this function.[24] It has been found useful, for example, for European railway administrations, both public and private, to arrange their affairs through the Union of International Transport by Rail, before whose arbitral tribunal no distinction is made between the governmental and the private administration.[25] The formation of international corporate bodies in finance, such as the International Bank for Reconstruction and Development and the International Monetary Fund, in the development of atomic energy, as in the proposed United Nations Atomic Energy Commission, and in other fields, may serve in international economic relations to reduce the number of instances in which private individual and public governmental interests have clashed on the international level.[26] There is a corresponding possibility that all clashes of interest would be raised at once to the level of national interests with ensuing complications in international relations. The recognition of the international legal personality of corporate or other bodies, whether private, governmental, or intergovernmental, would tend to bring their interrelationships under normal international legal controls, exercised by appropriate international organizations and procedures which would need to be established.

Since statehood is not here an essential criterion for a subject of international law, there ceases to be any difficulty about the legal

[24] See Hazard, "Soviet Government Corporations" (1943), 41 *Mich. L. Rev.* 850. Cf. the view expressed by Lord Maugham in The Cristina, 54 *Times Law Reports* 512 (1938), 32 *Am. J. Int. L.*, 825, 848 (1938): "The Soviet Republic has apparently adopted the admirable practice of owning its merchant ships through limited companies, and does not claim—even if it could, which for my part I should doubt—any immunity whatever in relation to such ships."

[25] See Hudson and Sohn, "Fifty Years of Arbitration in the Union of International Transport by Rail," 37 *Am. J. Int. L.*, 600 (1943).

[26] See Timberg, *op. cit., supra* note 20, 556: "Communication of the Delegation of the United States to the Secretary-General of the United Nations (Sept. 24, 1946)," 15 Dept. of State *Bulletin* 659; Finer, "The T.V.A., Lessons for International Application" (1944), *I.L.O. Studies and Reports*, Ser. B. No. 37; Schmitthoff, "The International Corporation," 30 *Transactions of the Grotius Society* (1945), 165. It is interesting to note that fifteen governments have agreed to organize a "Caribbean Tourist Development Association" which is to be a Delaware corporation; 15 Dept. of State *Bulletin* (1946), 735.