

## FRANCIS J. NICHOLSON\*

LAW AND SOCIETY. BY L. C. GREEN. Dobbs Ferry, (NY): Oceana Publications, Inc., 1977, reprint Leyden: A. W. Sijthoff, 1975, 502 pp. \$31.50.

DECLARATIONS ON PRINCIPLES: A QUEST FOR UNIVERSAL PEACE. EDITED BY ROBERT AKKERMAN, PETER VAN KRIEKEN AND CHARLES PANNENBORG. Leyden: A. W. Sijthoff, 1977, 403 pp. \$46.00.

The volume by L. C. Green, University Professor at the University of Alberta, focuses on the interplay of law and society, specifically, on some of the sociological problems which arise when the law is confronted with the complexities of modern life. The book is based on articles and lectures which Professor Green had authored over a period of some twenty years before their publication here. He identifies the underlying theme connecting his essays as the extent to which the law operates functionally in responding to the needs of the society it is called upon to serve.

Any study of the role of law in society must consider its relationship to the morality or mores of that society. Given the fact that any given society or community is constantly changing in its ideas and expectations, it is clear, as Professor Green points out, that there cannot be one concept of law which is good for all men, in all places, at all times. Nor can there be one everlasting view of morality. It is difficult at times to decide whether the law is leading morality or whether morality is leading the law. It is certain, however, that law which lags too far behind current morality becomes obsolete. Professor Green cites the fundamental revolution in societal attitudes towards human rights as a principal legacy of the interrelation of law and morals. The condemnation of South Africa's apartheid policy by United Nations resolutions and covenants illustrates that law is a reflection of the beliefs and needs of national States and the world community.

"International Law is that thing which the evil ignore and the righteous refuse to enforce." (Leon Uris, *Exodus*). With this description from a character in Uris' novel, Professor Green begins his answer to the old question: Is international law law? Many critics of international law take as their starting point John Austin's definition of law, that laws or rules properly so-called, are a species of commands which oblige persons.<sup>1</sup>

---

\*Francis J. Nicholson, S.J., is Professor of Law at Boston College Law School; A.B. 1942, M.A. 1947, Boston College; LL.B. 1949, LL.M. 1951, Georgetown University; S.T.L. 1954, Weston College; LL.M. 1956, S.J.D. 1963, Harvard University.

1. J. AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 98 (4th ed. 1873).

Certainly international law does not fit Austin's "command theory" of the law. No one can deny that the veto power in the United Nations Security Council and the lack of jurisdiction in the International Court of Justice have severely limited the effectiveness of the United Nations in the world community. Professor Green accepts the criticisms of the Austinian positivists but he correctly points out that the everyday routine of international political and economic relations would be impossible without international law. The rules of international law are recognized and accepted as indispensable for the orderly conduct of international life. There can be little doubt, therefore, that international law qualifies as valid law.

Professor Green considers the problem of the individual in international law. In classical, positivistic international law the individual was regarded as an object of international law, that is, he enjoyed no rights and had no duties. Moreover, a nation's treatment of its own nationals, no matter how heinous, was of no concern to international law. Professor Green traces the recent, slow development of the view that the individual possesses personality in international law, through the practice of humanitarian intervention, the Genocide Convention<sup>2</sup> and the United Nations Covenants on Human Rights.<sup>3</sup> The Austinian concept of absolute State sovereignty still impedes full recognition of the individual's standing in international law. It can be said, however, that international law, *de lege ferenda*, now recognizes the rights of the individual.

Professor Green elaborates his concern for the status of the individual under the broader rubric of human rights and the general principles of law. The law of State responsibility towards aliens, with its international minimum standard, reflects the general principles recognized by civilized nations. The general principles have come from the classical *jus gentium* with its origin in natural law principles. The interest in human rights since World War II attests to the revival of the natural law as a source of international law rules. The influence of natural law is clear in this excerpt from Judge Tanaka's dissenting opinion in the 1966 Judgment of the International Court of Justice in the *South West Africa Case*:<sup>4</sup>

The principle of the protection of human rights is derived from the concept of man as a *person* and his relationship with society which cannot be separated from universal human nature. The existence of human rights does not depend on the will of a State; neither internally on its laws or on any other legislative measure, nor internationally on treaty or custom, in which the express or tacit will of a

---

2. [1951] 78 U.N.T.S. 277.

3. 21 U.N. GAOR, Supp. (No. 16) 49-60, U.N. Doc. A/6316 (1966).

4. [1966] I.C.J. 6.

State constitutes the essential element . . . . If a law exists independently of the will of the States and, accordingly, cannot be abolished or modified even by its constitution, because it is deeply rooted in the conscience of mankind and of any reasonable man, it may be called "natural law" in contrast to "positive law."<sup>5</sup>

Despite this recent and welcome concern for human rights, Professor Green correctly concludes that the best hope for the present for real progress in this area lies in regional organizations like the Council of Europe. In such groups we find the community of outlook and goals which will subordinate the State to the needs of the individual person.

Another problem related to the concern for human rights is that of the law of war and its impact on the soldier in field. The bitter experience of the Vietnam War has renewed interest in this troublesome question. Professor Green discusses the idea of responsibility in the light of the My Lai incident and the post-1945 war crimes trials. Despite the formidable obstacle posed by superior orders, the soldier has to disobey when the order is manifestly unlawful or obviously criminal.

One aspect of the interplay of international law and social development, having tremendous influence on the world community, is the effect on the law of nations resulting from the increase in the number of newly independent States. These countries, recently emerged from colonialism, understandably and increasingly resist the international law practiced in the past by their "older brothers." Professor Green sees in this development a grave threat to the rule of law as, indeed, do all internationalists. This self-assertive attitude is not new. It has become commonplace in Latin America, for example, with its national-treatment standard of the Calvo Clause. The new, underdeveloped nations of Asia and Africa have taken a similar tack and we see it reflected in General Assembly resolutions like the Declaration on Permanent Sovereignty over Natural Wealth and Resources.<sup>6</sup> One can understand the irritations of the older, developed States when they see traditional concepts of international law being treated in a cavalier fashion by the underdeveloped States with their majority vote in the Assembly. The older States, however, must recognize and adapt to the legitimate fears and aspirations of their "younger brothers." The new States, on the other hand, must learn to present their views of the law in an objective way, free from the emotional, anti-imperialist rhetoric of recent years. Otherwise, the posture of confrontation will continue between the two groups to the detriment of peace and stability under the rule of law.

The author discusses extensively the right of asylum and extradition in in-

---

5. *Id.* at 297-98.

6. 17 U.N. GAOR (1194th plen. mtg.), U.N. Doc. A/1803 (1962).

ternational law, particularly in the context of aerial hijacking. He evaluates the response of the international community through the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft<sup>7</sup> and the 1971 Montreal Convention to Discourage Acts of Violence against Civil Aviation.<sup>8</sup> He concludes that the approach to the hijacking problem through multinational conventions like those of The Hague and Montreal can be only partially successful because many States will not ratify them. As is obvious, some States still believe that aerial hijacking is a permissible tactic in the struggle for self-determination and national liberation.

The author also raises a fundamental issue of anthropological jurisprudence — the conflict between “civilized” systems of law and the native laws and customs of “primitive” peoples. He examines this problem as it arose through the introduction of the English common law into British colonial territories. This topic would be of particular interest to those investigating the comparative law of the British Commonwealth.

The scholarship evidenced by this book is impressive. Professor Green draws his material from a wide variety of international treaties, the decisions of international and domestic courts, and the classical and modern publicists. There is inevitable overlap and duplication in some of the essays, given the time-frame in which they were originally written, but this repetition is minimal. The author has analyzed the social function of law in relation to some of the important issues facing the international community with honesty, clarity, and competence.

The volume edited by Akkerman, Van Krieken, and Pannenburg is also concerned with the role of international law in the world community. This study, which presents articles by twenty-two authors from many nations, is a tribute to the highly respected Professor Bert Röling, on the occasion of his retirement as professor of international law and peace research at Groningen State University, The Netherlands.

Röling, in addition to his academic career, had been a member of the Military Tribunal in Tokyo, a judge in the Dutch Special Court of Cassation, an official of the Dutch Ministry of Foreign Affairs and a member of the Dutch delegation to the United Nations. During these years Röling became keenly aware of the nature and dangers of our present-day nuclear age. He searched for a new international law which would be consonant with the new sociological structure of the community of nations. His hope was for the evolution, ultimately, of “one world” which would be a community of peace with economic and social justice for all individuals and States.

---

7. [1970] 22 U.S.T. 1641, T.I.A.S. No. 7192.

8. [1971] 24 U.S.T. 565, T.I.A.S. No. 7570.

The articles in this book are found in two general groupings. Part I is entitled "Rules of International Law." Part II is called "Peace Research." The division is intended to correspond with Professor Rölöf's two principal interests: international law in an evolving world society, and war and peace. Several of the papers raise the problem of conflict caused by the increase in the number of Third World nations, the same problem which concerned Green in his volume. The confrontation between the developed and the developing nations has been very marked in the General Assembly of the United Nations. The "have-not" States, with their superior voting power in adopting resolutions, have helped to rid the world of the vestiges of colonialism and racism. The General Assembly, however, has not had much success in helping the developing nations better themselves economically. Conflict must yield to cooperation in the relations between the Big Powers and the nations of the Third World if the latter are to survive and progress.

There is no question that the United Nations Organization and the world community must orient themselves towards conflict avoidance and cooperation rather than towards conflict management and control. Control by the Great Powers is a thing of the past. Progressive development of the international community in a changing world is only possible if there is cooperation under the rule of law. All this requires good faith, the basic premise upon which all international intercourse is based and in which law can be firmly rooted. The lack of good faith or its abuse leads to violation of the law.

The chief obstacle to the rule of law in the international affairs is the persistence of the principle of absolute State sovereignty as the basis of relations between States. The principle of unlimited state authority is staunchly advocated by Thomas Hobbes the English political philosopher. He is generally regarded as the father of totalitarianism because of his rigid sovereignty position, especially as found in his principal work, *Leviathan*. Several of the articles of *Declarations of Principles* examine the Hobbesian views on war and peace, especially with regard to the *ius ad bellum* claims of many of the developing nations, and the impact of these views and claims upon the rule of law.

Article 2(4) of the United Nations Charter provides:

All Members shall refrain in their instrumental relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.

Compliance with Article 2(4) is essential to the acceptance of the principle of legality which the United Nations is attempting to promote. Yet, many of the developing countries claim the right to use armed force to advance "national liberation" movements. Their position is seconded by the nations of the Soviet bloc. The conclusion is expressed by one of the authors that armed struggle for self-determination and independence is legal and does not repre-

sent a surrender of law to power politics. Not all will agree with this conclusion. One can sympathize with the aspirations of the newer States but any attempt to legitimize the use of force in the affairs of nations strengthens the political element in international relations. Any exception from the principle of peaceful settlement of disputes derogates from the rule of law.

Any effort to promote effective rules of international law must show concern for the law of war, the *ius in bello*. Green's book discusses the problem of superior orders and individual responsibility for the soldier in the field. Several papers in the Akkerman, et al., volume argue for more humanitarian law in war. The 1974 session of the Geneva Conference on the Reaffirmation and Development of Humanitarian Law is examined, with its hopes and its disappointments. The Geneva Conference was convened to draft a treaty to supplement the 1949 Geneva Conventions for the protection of war victims. An impasse was reached almost immediately because of a dispute as to the scope of the proposed treaty. Most of the Western powers wanted to restrict the application of the convention to traditional, international war. The Third World and Soviet bloc nations demanded that wars of liberation against colonial oppression be included. In the 1975 session, the latter group's position prevailed and culminated in the passage of Article 1 of Protocol 1 which makes certain that wars of national liberation are to be deemed "international armed conflicts."<sup>9</sup>

The second and smaller part of this *Festschrift* dedicated to Professor Rölöng consists of articles which attempt to link international law with some of the social sciences. The theory is that international law will be better able to meet its goal of a stable and fair world system by drawing from the thought and forms of knowledge of such disciplines sociology, behaviorism and social psychology.

One of the most interesting of the papers examines the use of metaphors and models in the international system. A metaphor is characterized as a very partial and incomplete kind of model. It has value as an instrument of communication, but it can be catastrophic if it is relied upon by governments as a basis for making decisions. The author proposes the "domino theory" as an example of a metaphor having a disastrous impact upon a decision-making process, namely, the formulation of United States policy during the Vietnam War. The lesson to be learned from this misuse of metaphors is to find models or organizational frameworks which have a close correspondence with reality and which can be relied upon by decision-makers in planning for peace in the world.

Two other important contributions discuss the problems of the arms race

---

9. See Comment, *The Application of Prisoner-of-War Status to Guerillas Under the First Protocol Additional to the Geneva Conventions of 1949*, 2 B.C. INT'L & COMP. L.J. 131 (1978).

and disarmament. The arms race is described in terms of a great miscalculation. Competition is the driving force in this race between the United States and the Soviet Union. Statesmen on both sides have become captives of their own propaganda. Having persuaded their peoples that weapon arsenals are necessary and that they must be increased to maintain the "balance of terror," they now find it impossible to turn back. Herein lies the terrible danger to the world. The hope for the international community in this desperate situation is to pursue a policy of arms control and disarmament. This policy, it is argued, cannot succeed unless it becomes part of a wider process of global reform committed to the elimination of poverty, repression and ecological decay.

The *Festschrift* format of the volume makes it difficult to evaluate the essays as a totality. As might be expected, some of the articles evidence more scholarship and substantive merit than others. Overall, however, the book makes a worthwhile contribution to the quest for peace, with its realistic identification of the obstacles to international cooperation and with its elaboration of new approaches to security in the world.

### EDWARD VEITCH\*

FAMILY VIOLENCE: AN INTERNATIONAL AND INTERDISCIPLINARY STUDY. EDITED BY JOHN M. EEKELAAR AND SANFORD N. KATZ. Toronto, Canada: Butterworths, 1978, vii + 722 pp. \$15.95, paper.

This fascinating collection of papers comprise the proceedings of the second International Conference on Family Law held in Montreal, Quebec in June of 1977. John Eekelaar and Sanford Katz are to be congratulated on several counts. First, they firmly but gracefully coerced the contributors to complete their submissions in time for formal publication by July 1978. Second, they not only added a thoughtful preface but also composed concise and accurate summaries of the ideas contained within each of the five parts into which the thirty-five chapters of the volume are divided. Third, Professor Katz provided a draft of his Model Act to Free Children for Permanent Placement which carries with it traditional but essential commentary.

As the title of the book proclaims, this is a joint effort by lawyers, judges, peace officers, physicians and social scientists from many jurisdictions to examine one of the major problems of societies the world over. The very nature of the papers reveals the sources of tension which surface whenever a multidisciplinary undertaking is attempted. For example, some of the anthropological writers seek to find answers to the problems of family violence in

---

\*Edward Veitch is Dean and Professor of Law at the University of New Brunswick School of Law, Fredericton, N.B., Canada; M.A. 1963; LL.B. 1966, Edinburgh, Scotland.