THE PRICE OF INTERNATIONAL JUSTICE. Philip C. Jessup.[1] New York: Columbia University Press, 1971. Pp. ix, 82. $5.95.

This artful and engaging book of the Blaustein Lectures, given at Columbia in 1970, poses a preliminary question: Who wrote it? Professor Jessup, Judge Jessup, or Ambassador Jessup?

We can put Judge Jessup to one side. He scarcely makes an appearance, even in the footnotes, sitting in his stiff Dutch palace, dressed in his stiff continental robes, and pronouncing formal opinions in the Roman style of the Code.

At first, it seems obvious that it is the Ambassador's book. The lectures have the disarming air of worldly and rather resigned after-dinner ruminations—good ruminations, after an excellent, ambassadorial dinner—ruminations altogether appropriate to the classic interval for serious men's talk, while the host and his gentlemen guests are enjoying brandy and cigars, before they rise to join the ladies.

How sad it is, really, the Ambassador seems to be saying, and how unnecessary, that so few international disputes are submitted to the International Court of Justice, to arbitration, or to other accepted judicial methods for resolving international conflicts in peace, and in accordance with the modes of law. Surely, he suggests, with a wave of his brandy glass, the world would be a much better and safer place if the nations used such procedures more often. After all, they worked well in the 19th and early 20th centuries. Even better legal machinery exists today. Why shouldn't they work again? Why *are* we so foolish? Why doesn't the State Department do something to revive and enlarge the custom?

In the end, however, for all its casualness, it is very much Professor Jessup's book. The most frequently repeated rule of diplomacy—*surtout, pas de zèle*—gives his style the mild patina of the chanceries. The argument beneath, however, is closely reasoned, beautifully crafted, and imbued with the Quixotic passion that is the hallmark of academia in its finest moments. Professor Jessup argues:

> Man will never discover peace and a cure for war, as we may reasonably hope that man will discover health through a cure for cancer.
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> Yet each time that international judicial surgery is used to excise from the world's political turbulence even a small irritant in the relations of two countries, the world advances a few inches on the long road to peace. (p. 82).

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1. Former Judge, International Court of Justice; former United States Representative, United Nations Security Council and General Assembly; Hamilton Fish Professor of International Law and Diplomacy, Emeritus, Columbia Law School.

In his first lecture, Professor Jessup sketches the model he wants to see triumphant—the great vision of nations overcoming the obstacles of politics and pride and submitting even serious, important and explosive disputes to international tribunals for final settlement "in accordance with generally accepted principes of international law." Like so many other civilized and rational ideals for human society, this practice gained influence steadily throughout the 19th and early 20th centuries, but has withered since 1919, and especially since 1945.

After all his wanderings among the continentals and the text writers, Professor Jessup falls back on the case method of his youth. In the brief, sharp strokes of a master, he evokes five important cases in which nations were willing to swallow their pride and pay the price of international justice by accepting the adverse decision of a tribunal conscientiously attempting to apply the principles of international law.

He starts, altogether properly, with the remarkable story of the *Alabama* arbitration—a great monument in international law and politics for many reasons. Not the least of those reasons, these days, is that the decision rests on the fundamental principle that states are quite as responsible for the use of force directed against other states by private persons or irregular groups operating from their territories as would be the case if their own forces had been involved. In the controversy over the *Alabama*, the British Government had originally taken the position that the dignity and honor of the nation precluded submission to foreign judges of the question whether the British Government had acted in good faith, and with due diligence, in failing to prevent the armed raider *Alabama* and other Confederate cruisers from slipping out of British ports. In the end, however, the principle of arbitration was accepted, and the arbitration, successfully launched by treaty, determined that Great Britain had indeed violated her duties to the United States under international law, by providing military assistance to revolutionary forces within another state.

The remaining four cases which constitute Professor Jessup's paradigm illustrate less inflamed problems of international law. They all are instances, however, in which governments had to suppress or repress strongly exploited feelings of nationalism and base policy on their larger but less visible interest in the development of a system of peace.

The settlement of the eastern boundary of Alaska by arbitration in 1903 was complicated by the personalities of Theodore Roosevelt and Sir Wilfred Laurier, and by the strong feelings boundary disputes between the United States and Canada have always aroused in both countries. The Rough Rider charged up San Juan Hill several times

before and during the arbitration, and made its outcome precarious, and problematical. But Elihu Root and Lord Alverstone managed to achieve a judicial settlement of the dispute, despite the rage of the two Canadian commissioners, who publicly denounced the award and refused to sign it. Taking note of the uproar a little later, Lord Alverstone responded classically at a London dinner:

> If, when any kind of arbitration is set up they don't want a decision based on the law and the evidence, they must not put a British judge on the commission. (p. 12).

The third case Professor Jessup invokes is the boundary dispute between Cambodia and Thailand, adjudicated by the International Court of Justice in 1959. Significantly, the case was settled on the basis of an earlier treaty between France and Siam—that is, a treaty of the "colonial" era—whose legal authority is supposed to be doubtful, especially in Communist countries and nations of the Third World. Nonetheless, as Professor Jessup points out, the judges of the Court did not divide along political or ideological lines. Similarly, in 1960 the Court settled a fifty year old boundary dispute between Nicaragua and Honduras without revealing East-West or North-South divisions. Finally, Jessup recalls the arbitration between India and Pakistan over the Great Rann of Kutch, after the hostilities of 1965; there the Indian Government, and indeed the Indian courts, accepted the outcome despite the sensitivity of the issues and the passions of the moment.

The second and third lectures document the widespread and perhaps growing refusal of nations to accept the jurisdiction of courts or other tribunals even for disputes over title to remote and unimportant islands and channels, as well as to territory as vital as Gibraltar or the Shatt al-Arab. In this class of situations, Professor Jessup criticizes the Security Council for its regular and systematic failure to use the procedure it employed successfully in the *Corfu Channel* case—*i.e.* to take action under article 36 in recommending the reference of a dispute to the International Court of Justice.[2] Could the deepening tragedy of the Middle East have been avoided if the authority of the General Assembly to determine the fate of mandated territories had been authoritatively declared in 1947, in terms as strong as those used in the *Namibia* decisions?[3] If an adjudication had been obtained firmly establishing the international

2. The Corfu Channel Case, [1949] I.C.J. 4.

3. Legal Consequences for States of the Continued Presence of South Africa in Namibia, [1971] I.C.J. 16.

character of the Strait of Tiran and rights of passage through the Suez Canal?

Why has the United Nations failed so miserably, even in this modest aspect of its responsibility for keeping the peace? "Perhaps," Professor Jessup remarks, "the reason for such inaction is . . . that delegates come to the United Nations not to settle their disputes but to win them." (p. 45). Quoting at length and with approval from a recent speech of Secretary Rogers, Professor Jessup takes hope.

> It is encouraging that the United States seems to have roused from its lethargy in promoting the International Court of Justice .... If this exploration . . . leads to the discovery of even small islands of peace in this turbulent world, the voyage will outrank those of Cortez, Drake, Magellan and Columbus. (p. 49-50).

The phenomenon is much deeper and more difficult to reverse, however, than Professor Jessup indicates. It is the symptom of a grave, perhaps a fatal illness, which cannot be dealt with by superficial measures. No conceivable quantum of virtue, energy and charm on the part of the State Department—however desirable—can have much effect on the trend, unless it is part of a successful effort to stabilize the world political system and enforce the Charter far more strictly. Until nations come to believe that the world is reasonably safe and take the political order for granted, fear cannot be dissipated, nor faith restored.

It has proved impossible even to persuade Canada, Peru, or other nations making extensive claims to fishing jurisdiction to allow the legality of their claims to be tested by the International Court of Justice or any other tribunal. "We cannot submit our ichthyological patrimony to adjudication," patriots proclaim.

As the inhibitions supporting article 2(4) of the Charter have weakened, and the world political system therefore disintegrated, stage by stage, along the path to anarchy, many nations have turned to more and more frenetic nationalism as their only bulwark, psychologically and practically. Their security depends upon

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4. See the debate reviewed in Bowett, *Reprisals Involving Recourse to Armed Force,* 66 AM. J. INT'L L. 1 (1972), modifying his earlier views, and conceding that an acceptance of the legality of "reasonable" reprisals under article 51 is necessary in the absence of the possibility that the Security Council can or will enforce article 2(4). As compared to his earlier book, Mr. Bowett's article comes a long way in accepting the realistic and persuasive basic analysis of Professor McDougal. *See* M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 232-53 (1961).

configurations of forces they cannot control or, in many cases, even influence. They seem to be more and more alone in a world whose nightmares do not disappear at dawn. Absent a United Nations' system for enforcing article 2(4) or strong coalitions determined to achieve the same end through regional defense arrangements, since the Security Council is paralyzed, survival for most nations—however illusory—has come to mean reliance on the full range of measures within the historic concept of an "inherent" right of self-defense—reprisals and all.[4] In such a world—a world of fear and insecurity in which we have no choice but to live—it is no wonder that the nations are less and less willing to entrust important disputes to international tribunals.

In the voice of sweet reason, Professor Jessup shows conclusively that with a little good will and mutual trust, many, perhaps most, of the disputes which inflame international relations and are sometimes the occasions of war could readily be settled by the existing adjudicatory institutions of international law. He is, of course, quite right.

But the political climate of trust and confidence which made the *Alabama* arbitration possible has gone, like Humpty-Dumpty. We have discovered that it is far easier to destroy habits, traditions, and institutions, and the value systems which give them life, than it is to replace them with social organisms of equivalent strength. In the middle of Victoria's reign, when the *Alabama* arbitration took place, all institutions seemed more stable and permanent than any now appear. Despite brave swallows like the Cambodian case and the settlement of the dispute between Nicaragua and Honduras, nations simply do not believe that the I.C.J., or any other conceivable tribunal, would in fact decide highly political cases in an impartial way, on the basis of "generally accepted principles of international law." The poisonous suspicion of political or ideological commitment, even among the judges, is deeply rooted and rooted, alas, in considerable experience.

Can we ever achieve again a political order generally capable of practices like that of the *Alabama* arbitration? That should be the subject of Professor Jessup's next book. It is no reproach to this one that the task was not attempted.

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