

THE PURSUIT OF RIGHTS AND JUSTICE IN INTERNATIONAL LAW BY THE DEVELOPING NATIONS

INTRODUCTION

We live today in an increasingly complex world¹. This is the natural result of the growing inter-dependence of States, and of the vastly increased intercourse between them due to all kinds of inventions that overcome the difficulties of time, space and communication². International law is witnessing a greater impetus to its development than in any previous stage of its history³. The law of nations grew because it served the needs of the society that was developing in the western world⁴. Its course has been irregular. Today, it continues to struggle to adjust⁵ to the constant changes in the international community. Only now are some of the problems involved coming into reasonably clear focus⁶.

Conscious that we are confronted with new problems for which no solution can be found in old nostrums⁷, our survival and welfare must depend upon the capacity of States and powerful groups to demonstrate the courage and imagination necessary to transform the world into a different kind of political structure⁸. The magnitude of the changes which have transformed the world-society in the recent past has had a complex impact on international law. It has been said time and again that the infusion of the notions of conscience, *jus aequum*, good faith, and natural justice, in favour of the less developed countries has meant a progressive dilution of the content of international law⁹.

The issues which present themselves to the student of equity or natural justice in any legal system are especially acute in the field of international law. The attitude of the less developed countries seems to reject, in effect, in connection with certain norms of international law, the positivist¹⁰ theory based exclusively on customs and treaties. On the contrary, they con-

1 C. W. Jenks, *A New World of Law*, London, Longmans, 1971, page 15. "The complex world in which the combined impact of the Fascist reaction, the Nazi terror and Stalinism, the Second World War, social revolution and cultural change in varying degrees almost everywhere, the cold war, decolonization, and conflict and uncertainty in South-East Asia, and Middle East and Africa have tended to shatter established intellectual values."

2 J. G. Starke, *An Introduction to International Law*, 6th Ed., London, Butterworths, page 14.

3 J. G. Starke, *op. cit.*, page 14, see also Charles S. Rhyne, *International Law*, Washington D.C., (C.B. Publishers, 1971) page 47; Ch. Rousseau, *Droit International Public*, tome 1, Sirey, 1971, *Avant-Propos* pages 1 and 2; Wolfgang G. Friedmann, *The Changing Structure of International Law*; London, Stevens, 1964; J. Castaneda, "The Under-Developed Nations and the Development of International Law", 5 *International Organization* 33-49 (1961); McDougal and Reisman, "The Changing Structure of International Law" 65 *Columbia Law Review* 810 (1965); Muskhata, "Les Caractères Généraux du Droit International Contemporain", 69 *Revue Générale de Droit Public* 39-75 (1965).

4 Professor O. Lissitzyn, *International Law Today and Tomorrow*, Dobbs Ferry, Oceana Publications, 1965, page 3.

5 J. E. Johnson, *Foreword to Lissitzyn*, *op. cit.*

6 C. W. Jenks, *op. cit.*, page 102.

7 C. W. Jenks, *op. cit.* page 19.

8 Richard Falk, *Law, Morality and War in the Contemporary World*, page 40.

9 See Julius Stone, *Quest for Survival, The Role of Law and Foreign Policy*, Harvard U. P., 1961, page 88.

10 For example, Hall, *A Treatise on International Law*, 8th Ed. by Higgins (1924); Phillimore, *Commentaries Upon International Law*, 3rd Ed., 4 vols. (1879-89); Westlake, *International Law*, 2 vols. (1904-07).

11 But clearly it is the rationale of "rules" of international law and the application those "rules" to a new set of facts that reveal notable distinctions between "positivists" and "naturalist" legal philosophers. If one would seek to classify a legal writer in these terms, a meaningful test would appear to be to take a particular doctrine of law, e.g., *rebus sic stantibus*, and see whether the rule is derived from a construction of the will of the contracting parties, (as in W. Burckhardt, *La Clausula Rebus Sic Stantibus en Droit International*), or from a construction of events which "objectively" generate a right or duty in this case, a right to renounce a treaty obligation unilater-

spicuously address themselves to the naturalist writers¹¹ that international law was part of a universal moral code.

In specific areas¹², the newly independent States contend that relations among States should of necessity be governed by law. As far as they are concerned, international equity, like almost every man-made quality, requires the balancing of good and evil, the acceptance of some affronts to the ideas of some group, in the interest of some larger gain¹³.

The objectives of the under-developed nations are varied. They include, inter alia, decolonization and the maintenance of independent political and economic systems under guarantees safeguarding full international respect of sovereignty¹⁴. Besides, they want to rid themselves of „burdensome obligations“ resulting from unequal treaties or other sources of law in the establishment of which they played no part. The developing nations desire to participate beneficially in various forms of international co-operation. Their foreign policy seems to be focused on these aspirations. Both in attitude and in approach to international law, and to the politics of international institutions, these traits are clearly apparent.

Oppenheim¹⁵ indicated as far back as 1912 that immeasurable progress is guaranteed to international law since there are eternal moral and economic factors working in its favour. Myres S. McDougal¹⁶ and his influential school go even further in their assertion of the law as a process of decision into which all relevant factors, and not merely technical norms, enter. They suggest that international law is, broadly speaking, the acceptance by States of policies on the basis of enlightened self-interest. This is a significantly different approach to the study of the concept of international law. All this goes to show that the principle „*consuetudo est optimus interpret legum*“ (custom is the best expounder of the law) is in severe danger of erosion.

The developing nations frequently resort to the principle of international equity to temper the calculated rigidities of certain fundamental rules of customary international law. Suffering from inequalities in regard to economic development, the Africans, Asians and Latin Americans want the special circumstances of their position taken into account in the application of the principles of international law to specific situations. The old law satisfied the needs of the earlier international society which Judge Jessup¹⁷ rightly defined as “a selective community with a provincial outlook”. But to that “selective community” the Islamic, much less the Hindu and Buddhist worlds, not to mention the African countries, were not admitted. The concepts and principles of international law that have been formulated by the States are in consequence influenced by the principle of international equity and grounded in the special circumstances of those States; often they run directly contrary to some established rules of law. Equity can only be done if and when it is possible to trace a proper balance¹⁸ between the interests of the parties. In effect, “if the conditions on both sides are regarded as producing an equilibrium, justice is done”¹⁹.

ally, or even a right to consider the treaty null – see C. G. Ténékides, “Le Principe Rebus Sic Stantibus – ses Limites Rationnelles et Sa Récente Evolution”, 41 *Revue Générale de Droit International* 273, esp. 280 (1934).

12 For example in the law of treaties, diplomatic intercourse and immunities, the law of state succession, state responsibility, the law of the sea, the treatment and expulsion of aliens, and problems of plural nationality.

13 See *International Herald Tribune*, Editorial, 6 October 1972, page 6.

14 Dr. Okon Udokang, *The Role of the New States in International Law*, 1971, page 193.

15 L. Oppenheim, *International Law, A Treatise*, London, Longmans Green, 2nd Ed., vol. 1, page 83.

16 Myres S. McDougal, “International Law, Power and Policy; A Contemporary Conception”, *Hague Recueil des Cours*, vol. 82, page 137 (1953); La Forest, *Proceedings, American Society of International Law (ASIL) 1966*, pages 96, 97. See also O. Lissitzyn, *op. cit.* pages 96, 97.

17 P. C. Jessup, *The use of International Law (The Thomas M. Cooley Lectures at the University of Michigan Law School) 1959*, page 20.

18 See Professor Bin Cheng, “Justice and Equity in International Law”, *Current Legal Problems 1955*, London, Stevens, 1956, page 189.

19 As the umpire of the Franco-Venezuelan Mixed Claims Commission (1902) said in the *Friedrich and Co.* case, while discussing the rights and wrongs of the parties.

The last section of this study illustrates how the developing countries have seen the United Nations as a potential law-making institution which may be used legitimately to reshape the world economy by means of law. Whilst the developed countries seem largely to regard that institution as being a political forum, the developing countries have used it to summon formally into being the new international economic order. Under this legal framework they seek redress for their economic grievances.

1. Sovereignty and the Equality of States

The theory that every independent State necessarily possesses the sovereign power to legislate points the way towards showing how law is able to possess this autonomy without recourse to external authority²⁰. Sovereignty is itself a legal concept. Positive law is defined in terms of sovereignty. It is a self-sufficient pattern by which legal validity may be tested and demonstrated, unhampered by extra-legal considerations. Many jurists from Bodin²¹ to Bentham²² adopted this line of thought. Austin²³, a faithful disciple of Bentham, strongly endorsed and proliferated these ideas in his command (or imperative) theory of law and legal positivism. The command theory meant, in effect, that law is what the sovereign commands; and nothing which is not commanded by the sovereign can be law. When faced with the phenomenon of international law, those jurists who argued for the absolute and unfettered character of national sovereignty found themselves in difficulty²⁴. This situation forced Austin to declare that international law was really not law at all but “no more than positive morality”. Those who embraced Hegel’s philosophy²⁵ also rejected the legal validity of international law. They held it to be always subordinate to “reasons of State”²⁶. Legal writers who affirmed the legal status of international law endeavoured to reconcile the subordination of State sovereignty to such a régime as a kind of “auto-limitation” operating by the consent of the various States, which by long tradition had agreed to be bound by the customary rules of international law including the rule that treaties must be observed (*pacta sunt servanda*). The developing nations while accepting the benefit flowing directly from the principle of State sovereignty, avoid responsibility for any burden imposed by international law which may be inconsistent with the exercise of their sovereign powers.

Because of the importance attached to the principle of sovereignty by jurists like Grotius²⁷, Vattel²⁸, Gentili²⁹ et alios, it was evident that any sovereign nation which governed itself under whatever form did so to the exclusion of other external powers. When the less developed countries attained national sovereignty³⁰, they were primarily interested in protecting their sovereignty from the claims of the larger and more highly-industrialized States³¹. The corol-

20 Lord Dennis Lloyd, *The Idea of Law*, Hammandsworth, Penguin, 1964, page 175.

21 Jean Bodin, a French lawyer, writing in the 16th century, was the first important exponent of a general theory of law and sovereignty. See *De Republica*, 1576 (translation by R. Knolles, 1606).

22 Jeremy Bentham, *Introduction to the Principles of Morals and Legislation*, Athlone Press.

23 John Austin, *The Province of Jurisprudence Determined*.

24 Difficulties arose because they felt that if there was such a law (as international law) then it must be on a higher level than national law, and must bind and limit even the sovereigns of the national States subject to it.

25 The followers of Hegel regarded State sovereignty as the highest expression of human law.

26 See D. Lloyd, *op. cit.*

27 H. Grotius, *Mare Liberum*, *op. cit.*, page 11.

28 E. de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle, appliqué à la Conduite et aux Affaires des Nations et de Souverains*. 1758. (*The Classics of International Law*); (translation by C. G. Fenwick, 1916) Book 1, Chapter 1, Section 4.

29 Alberico Gentili, *De Legationibus Libri Tres*. 1585. (translation by G. T. Laing, 1924) pages 14, 15, 18, 52.

30 It was common for sovereignty to be granted in two separate stages. The first of these was the granting of self-government and the second the grant of full independence. In practice, virtually all the attributes of a sovereign State could be exercised once self-government had been granted. But a country cannot be said to be fully sovereign in such instances until independence has finally been granted.

31 Charles Rhyne, *International Law*, page 32, and Professor Fatouros, *Global Perspective in the future of the International Legal Order* (R. Falk and G. Black Eds.), Princeton, 1969, page 340.

lary to the principle of sovereignty is the importance attached to the doctrine of equality of States. The newly independent States see this doctrine as the means for asserting their right to accept or reject any principle of international law. They contend that this right is compatible with the attributes of sovereignty.

The principle of international equity seems to inspire resort to the principles of sovereignty and equality in order to obtain justice and fairness in matters dealing with self-determination, human rights, social justice, sovereign equality, and non-intervention. In 1962, at the Sixth Committee of the General Assembly³², the representative of Madagascar declared that underdeveloped nations –

“like Madagascar, which recently became independent attached particularly great importance to respect for national sovereignty, territorial integrity and independence of States to their sovereign equality and to non-intervention in their domestic affairs”.

Many developing nations have been accused of reversion to greater nationalism. But Fatouros draws a clear distinction between the attitude of the newly independent States and European nationalism³³. In his view,

“While such stress on State sovereignty is rightly to be considered a manifestation of nationalism, an important qualification is necessary in the case of new States; their brand of nationalism differs in significant ways from the 19th century European nationalism to which the term usually refers. Whereas in 19th century Europe, nationalism as the expression of a feeling of national unity came first and the desire, struggle for and attainment of political independence followed, in the new States of Africa and Asia, nationalism as an operative force was born during and through the struggle against the colonial power. It thus has retained the substantial social and economic features that coloured the anti-colonialist resentment at the origin of the struggle.”

Bearing in mind the concept of State sovereignty, the delegation from Ceylon expressed the view that –

“a new international law had emerged, and its purpose was to bring, inter alia, international justice”³⁴.

The principle of State equality is especially important to the Latin-American States. Because of their proximity to the United States, which has wielded important influence over that continent, the Latin-American States have systematically invoked the principle of State equality to protect their social, economic and political interests from the domination of the United States. They expect the principles of sovereignty and equality of States to protect them from the threat of economic domination to which their geographical location has left them vulnerable.

The principle of legal equality has been incorporated in several Latin-American conventions. A good example is found in article 4 of the 1933 Montevideo Convention which spelled out clearly that –³⁵

“States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.”

In other parts of the third world, it would seem that appeals to the rigid principles of national sovereignty and territorial integrity as well as to the natural law doctrine of justice as an objective rule of international law, conceal deepseated economic and political motives. The

32 GAOR, 17th session, 6th Committee, 765th meeting, para 16.

33 Fatouros, *op. cit.* pages 352, 353.

34 GAOR, 18th session, 6th Committee, 805th meeting, para 16.

35 See International Conferences of American States, 1889–1928. First Supplement 1933–40 (Washington, 1940).

facts of everyday life have exercised their influence in this sense. The progress of science and technology has also encouraged a more modern notion of sovereignty.

State sovereignty may be considered a means of expressing in legal terms that a given State is independent in the sense of not being subject to any legal superior. There is equally nothing in legal logic which compels every State to regard its own internal sovereignty as either indivisible or illimitable. Schwarzenberger holds the view that through the insertion of the principle of sovereign equality in a multilateral treaty, the principles of sovereign equality themselves become subject to the *jus aequum* rule and have to be balanced equitably against the obligations to other signatory States³⁶. The principle of sovereignty is thus directly inspiring new norms of behaviour which are based on international equity. Also, the presumption in favour of good faith on the part of the subjects of international law is being strengthened considerably by the rules on sovereignty.

2. Diplomatic Relations

Greek city-States carried on an intensive trade both among themselves and with the outside world. This naturally led to the recognition of mutual obligations which found expression in treaties and contracts. Their diplomatic and consular missions abroad enjoyed extensive privileges. Elaborate formalities were attached to the reception given to the representatives and officers of the missions.

The Romans had city-States similar to those of the Greeks prior to the 3rd century B.C. The independence and equality of other city-States was recognized. Both treaty and diplomatic relations were maintained between the city-States³⁷. When Rome became the dominant power in the western world, her new obligations led her to develop a *jus gentium* (law of nations) which was in fact Roman civil law as applied to foreigners and to relations with the outside world. In terms of history, it appears to have little to do with international relations. Philosophically, of course, it included common legal institutions and rules which were common everywhere. That made it universal.

Some authorities have interpreted it as similar to *jus naturale* (natural law) since it possesses principles which are not universal, but nevertheless are reasonable, just and equitable.

Rhyne³⁸ says that although the *jus gentium* constituted private international law, rather than public international law, it exerted a great influence on the legal thought of the 16th and 17th centuries. This was due to its authority and convenient frame of reference. It helped the development of international law³⁹.

The expansion of the Roman Empire led to greatly increased contacts with foreigners. The principles of the sanctity of international obligations and ambassadorial rights and privileges were maintained. According to Professor Wolfgang Friedmann⁴⁰, the principal pre-occupation of classical international law, as formulated by Grotius et alios, was the formalization,

36 Georg Schwarzenberger, "Equity in International Law", *The Yearbook of World Affairs* 1972, London, Stevens, 1973, page 364.

37 A rudimentary prototype of the organization and relations of political units similar to the new nation-States of the 17th century is discernible. Both the Greeks and the Romans had a highly developed culture and civilization. They considered other nations surrounding them as "barbarians". In addition they were regarded as objects for conquest and rule. Roman law, as influenced by Cicero, was essentially the embodiment of the Greek philosophical concepts of unity and universality. The Aristotelian and Stoic concept of natural law, considered divine and universal, which the empire embodied, went with the expansion of Roman law into Western Europe, was later applied by Christianity with the breakdown of Roman power, and has remained for hundreds of years as a symbol of law and order. See generally, C. Rhyne, *op. cit.* pages 9-16.

38 C. Rhyne *op. cit.* pages 9-16.

39 See Nussbaum, "The Significance of Roman Law in the History of International Law" *Univ. Penn. Law Rev.* 682-87 (1952) also cited by Charles Rhyne.

40 W. G. Friedmann, *The Changing Structure of International Law*, pp. 5, 6.

and the establishment of generally acceptable rules of conduct in international diplomacy. Unlike contemporary international law, classical international law had little or no concern with matters of welfare, or with the economic conditions of nations whose sovereigns entered into mutual diplomatic and legal relations⁴⁰. Relations did not extend beyond the shell of diplomatic intercourse⁴⁰.

Since World War 2, a vast conglomeration of well over one hundred States have attained sovereign independence, and the number continues to increase. The majority of these States are not European. They represent former colonies or vassals of the western world in Latin America, Asia and Africa. Friedmann regards this as the horizontal extension of the membership of the family of nations. A number of jurists, including Rolin⁴¹, Stone and Gros, hold that this has resulted in the dilution the homogeneity of “values and standards derived from the common western European background of the original members”.

(i) The Dilution of State Practices

In the domain of diplomatic intercourse, the opinion expressed by these jurists appears to be fully justified. From the point of view of the developing nations, the *raison d'être* of this bouleversement is to maintain proper balance, fairness and equity. Reciprocity seems to be the basis of diplomatic intercourse⁴².

For many African, Asian and Latin American countries, mutual consent appears to be the accepted basis for the establishment of diplomatic relations and missions between States⁴³. They contend that no nation is under a legal obligation to enter into diplomatic relations with other States. It is accepted that an attribute of a subject⁴⁴ of international law is the capacity to enter into diplomatic relations. The Havana Convention on Diplomatic Officers, 20 February 1928, indicated that a State has a right of legation under international law⁴⁵. According to Sinha, since no nation incurs any legal liability for refusing to send or receive diplomatic representatives, it is difficult to maintain that every country has a right to legation⁴⁶. Certain poor nations have adopted the practice of ad hoc diplomacy. This, in effect, involves the exchange of special missions by States between which there is no regular diplomatic intercourse. In essence it means that the non-existence of permanent diplomatic relations does not necessarily stand in the way of a provisional diplomatic intercourse through the medium of special missions. Many less developed countries recognize the practice whereby two nations which have recently established diplomatic intercourse with each other commence by exchanging ministers, and follow subsequently, as relations developed, by appointing ambassadors⁴⁷.

41 Rolin, Allocation prononcée à l'ouverture de la 50e session de l'International Law Association, Bruxelles, Report, pp. 12, 13.

42 See Harvard Research in International Law, Diplomatic Privileges and Immunities, 26 American Journal of International Law, Supplement 15 (1932).

43 S. P. Sinha, *New Nations and the Law of Nations*, Leyden, Sijthoff, 1967, pp. 104–12.

44 Although international organizations may be considered subjects of international law the right to establish diplomatic relations is not extended to them. Nevertheless by treaty arrangements various immunities and privileges comparable in nature to those extended to diplomat agents are extended to members of such organizations.

45 See M. O. Hudson ed., *International Legislation: A Collection of texts of Multipartite International Instruments of General Interest*, vol. IV (1931) p. 2385; Hackworth, *Digest of International Law*, vol. IV, p. 393.

46 S. P. Sinha, *op. cit.* 105.

47 See the U. N. Conference on Diplomatic Intercourse and Immunities, 2 March – 14 April 1961, Official Records, Vol. I: Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole, p. 7 (1962).

(ii) Mission Property

The principle of inviolability of the mission property is sometimes called into question. The view has been expressed, by certain developing States, that the receiving country's right to expropriate mission premises for the benefit of the public is neither inconsistent, nor incompatible with the doctrine of inviolability. This, of course, excludes any question of forcible entry to the premises⁴⁸. The argument advanced in favour of this attitude is that when a foreign diplomatic mission purchases premises for diplomatic use, it only acquires private property rights. These rights are subject to the right of imperium or eminent domain of the country in whose territory the premises are located. In other words, the sending State does not acquire imperium (sovereignty) but dominium (property rights) in accordance with the laws of acquisition, possession, and ownership in the receiving State. Therefore, if mission property is appropriated, compensation must be paid by the expropriating State. An unresolved problem is whether the compensation should be "full" or merely "fair". Some countries pay⁴⁹ compensation well in advance, others do not. What is not reasonably brought into focus is whether all this is done in the name of justice and equity. If it is, then the first question must be: where does the equitable benefit lie?

The inviolability of archives and documents of the foreign mission is a separate issue. Some developing nations maintain emphatically that such inviolability is unquestionable and absolute. They add that this has no bearing with the doctrine of inviolability of the mission real property. At all material times, the documents of a foreign mission are strictly inviolable⁵⁰. At the Conference on Diplomatic Intercourse and Immunities, the representative from Pakistan said that if a diplomatic document is found in unauthorized hands in his country, and there is good reason to believe that it is in such hands with the positive, or even negative, connivance of the mission concerned, the Government of Pakistan would regard its inviolability as extinguished; for the document, whether or not it still bore visible signs of its origin, would then have ceased to retain its true diplomatic character⁵¹.

A number of new nations adopt the attitude that foreign mission premises, if owned by the sending State, are exempt from taxes. Where, for example, the premises are privately owned but the mission has a leasehold interest, the owner of the property is required to pay taxes on it. In other words, the receiving State indirectly collects taxes from foreign missions on leasehold properties. It goes without saying that the owner who is aware of this condition would normally include any indirect taxes or other impositions in the rent. In the final analysis, the foreign mission pays the tax⁵².

48 The serving of writ, summons, order, or process within such premises is generally forbidden. The consent of the chief of the mission is required before local authorities may enter diplomatic premises. In cases of emergency, such as fire, or of imminent danger of crimes of violence, the sending State's right to prohibit entry to its mission premises is not considered absolute. The local authorities may be allowed to enter the mission's premises in extreme cases without the consent of the head of the mission, or in cases where human life or the security of the receiving State is at peril. The right which the principle of inviolability of premises confers on the sending State is believed to be restricted by overwhelming considerations of national security. Newly independent States are opposed to the use of mission premises for political machinations.

49 See the statements of the representatives of the following countries at the Conference on Diplomatic Intercourse and Immunities: Tunisia, Ghana, Senegal, Indonesia, India, Libya, Malaya, Iran.

50 See statements by the following representatives at the Conference on Diplomatic Intercourse and Immunities: Iraq, Ghana, Thailand, Pakistan.

51 The representative of Pakistan at the Conference on Diplomatic Intercourse and Immunities, *op. cit.* p. 148.

52 In certain cases the foreign mission unilaterally assumes responsibility for dues and taxes under a contract with the landlord of the leased premises.

(iii) Functions of the Mission

In the eyes of the developing nations the functions of a diplomatic mission comprise, inter alia, (i) representation in a foreign country, (ii) the conduct of negotiations with the government of the country where the mission is located, (iii) the protection of the interests of its nationals in the receiving country, (iv) the ascertainment by any legal means of conditions and developments in the receiving State and making reports on these to the sending government, (v) the promotion of friendly relations between the two States, and (vi) the development of cultural, economic and scientific relations⁵³.

Many young nations find it more convenient and agreeable to combine the functions of the consulate and diplomatic mission in the same building instead of running the extra and unnecessary expense of two different locations. In addition to this, a certain number of countries take the view (except, of course, where one of the receiving countries objects) that the representative of a diplomatic mission in one State may also be accredited to one or more other countries⁵⁴. For example, on one occasion the Cameroon ambassador in Bonn also represented his country in the Netherlands and at the United Nations in Geneva. Similarly, the Nigerian ambassador in Cairo was also accredited to most of the other Arab countries. It is also generally accepted that full facilities must be accorded for the proper performance of the mission's functions, namely the free movement of the members of the mission⁵⁵.

(iv) Privileges and Immunities

On the question of sovereign immunity, Lissitzyn⁵⁶ points out that a majority of the Asian-African Legal Consultative Committee favoured the "restrictive" doctrine. This means that a State is not entitled to immunity from suit in the courts of another State with respect to claims arising out of its commercial activities. Only the representative of Indonesia in the committee expressed decided preference for the "absolute" immunity doctrine that is strongly supported by the Soviet Union.

Some less developed countries refuse to accept that the immunity of a diplomat should be based on reciprocity. It is believed that this doctrine is absolute under international law⁵⁷. Nevertheless they concede that reciprocity may apply in the matter of privileges.

The Indian delegation⁵⁸ declared that the granting of certain customary immunities to the diplomatic representatives of other countries was an obligation imposed by international law⁵⁹. The delegate from Thailand expressed the opinion that where privileges and immunities of the diplomatic agents were not accorded, the State so affected may take similar measures by way of retaliation⁶⁰.

53 See the Conference on Diplomatic Intercourse and Immunities, *op. cit.* p. 10.

54 See the comments of the representative of Vietnam in the Conference on Diplomatic Intercourse and Immunities, *op. cit.* p. 82; representative of Burma at the same conference, *op. cit.* p. 84.

55 In time of emergency or time of war, e. g., the Nigerian Civil War, it would be permissible for the receiving State to declare certain parts of the country out of bounds to the members of diplomatic missions.

56 O. Lissitzyn, *International Law Today and Tomorrow*, p. 90. The eminent professor remarked that this view is gaining increasing support in Western Europe and the United States.

57 See, for example, the wide interpretation given to Article 40 of the Vienna Convention on Diplomatic Relations (immunity of diplomatic agent in transit to or from his post) by the English High Court in *Regina v. Guildhall Magistrates' Court, ex parte Jarrett-Thorpe* (1977), *The Times*, 6 October.

58 For example, see the Memorandum of the Indian Government, in the Asian-African Legal Consultative Committee, Report of the Third Session (1960), pp. 18, 36-37.

59 On the other hand, privileges are not considered essential to the performance of diplomatic functions, and are considered a matter of comity.

60 See the representative of Thailand in the 1957 Yearbook of International Law Commission, p. 7.

With regard to the question of accommodation and the acquisition of premises, the representative of Nigeria⁶¹ contended that no obligation should be imposed on the receiving State if and when this matter conflicts with its domestic legislation. Acute shortage of housing may be a good reason for not accepting any such obligation.

(v) Staff of the Mission

A State normally has a free hand in appointing members of its mission staff. Nevertheless, by reason of the special position, training and functions performed by military, naval and air attaches, many newly independent States argue that prior permission is necessary because of their particular responsibilities. Their close links with their country's armed forces is another reason for insisting on prior consent⁶². Certain receiving countries, e.g. France, require that a number of locally recruited staff must be their own nationals. Some less developed nations consider this undesirable. In spite of this reluctance, they see the necessity of making appointments from their own nationals for particular services, namely interpreters, messengers, translators, secretaries and other similar posts.

The right to declare a person to be *persona non grata* is acceptable to new States since they may be able to make such declarations without any explanation for their actions.

The recommendation of the head of a mission to the Foreign Affairs Minister in the newly independent States determines the order of seniority and precedence accorded the diplomatic staff⁶³ of the sending States.

(vi) Communication Facilities

Some developing nations insist that only the customary public communication facilities are made available to diplomatic missions. Permission therefore is of great importance before using any special means of communication. Foreign diplomatic missions enjoy no privileges of any sort in connection with the use of wireless transmitters. Newly independent States maintain that if they were to act otherwise they would be unable to meet their responsibilities under the International Telecommunications Conventions of Atlantic City⁶⁴ (1947) and the Buenos Aires⁶⁵ (1952) as regards the regulation of frequencies.

(vii) Personal Privileges

The principle that the person of a diplomatic agent is inviolable remains totally unchallenged. The agent's residence and property are included in this protection⁶⁶. Immunity from criminal jurisdiction is a privilege enjoyed by all diplomatic agents in a receiving State. Additionally, an agent is exempt from giving evidence as a witness⁶⁷. However, some new nations while

61 The representative of Nigeria at the Conference on Diplomatic Intercourse and Immunities, *op. cit.* p. 133.

62 See the Conference on Diplomatic Intercourse and Immunities, *op. cit.* p. 12.

63 The representative of the Pope is usually accorded precedence on principle. Some newly independent States reserve the liberty to recognize or deny this.

64 See United Nations Treaty Series, vol. 193, p. 188 (1954).

65 International Telecommunication Convention, Buenos Aires, 1952, General Secretariat of the International Telecommunications Union, Geneva, 1953.

66 Conference on Diplomatic Intercourse and Immunities, *op. cit.* p. 165.

67 *Ibid.*, pp. 165-73. See also 1957 Yearbook of International Law Commission, and especially the representatives of Syria at p. 106, Thailand at p. 112, Iran at p. 112, 115, India at p. 111 and the United Arab Republic at p. 168.

accepting that personal privileges should extend to civil and administrative jurisdiction consider an agent answerable (a) in cases of a real action relating to immovable property located in the territory of the receiving State, and (b) in an action relating to succession in which the diplomatic agent is involved, namely as an executor, administrator, heir or legatee.

With respect to the waiver of diplomatic immunity, Sinha⁶⁸ says that certain Asian and African States tend to argue that since the right to immunity is personal to the diplomatic agent, the immunity does not belong to the sending State and the latter cannot itself waive the agent's immunity unless the agent gives his consent. Immunity is attached to the diplomatic function. When a diplomatic agent tacitly or explicitly waives immunity in a civil action, it is because immunity is not necessary for the proper and effective discharge of his function in relation to the subject matter of the civil action.

(viii) The Laws of the Receiving State

The laws of the country of accreditation must be respected by diplomatic agents. This rule directly affects the conduct of the diplomatic mission and its members. Developing States believe that individuals enjoying diplomatic privileges and immunities should not interfere in the internal affairs of the receiving State. The representatives⁶⁹ of Ceylon and Thailand have made it clear that their countries are not well disposed towards any member of a diplomatic mission taking part in "the formulation or execution of the domestic or foreign policies of the receiving State".

The newly independent States have unquestionably brought novelty and colour to erstwhile dull and unnecessarily conservative rules of diplomatic practice. In doing so, however, they have displayed a remarkable degree of inconsistency. While accepting the obligation that the sending State must be granted premises from which diplomatic functions should be performed, some maintain that this obligation may not be imposed on the host country "especially where there is an acute problem of accommodation". The subtle methods of collecting taxes, indirectly of course, in the case of leasehold properties are not particularly commendable. In order to achieve a proper balance of interests, the principle of sovereignty may be invoked by a newly independent State to expropriate diplomatic premises on the pretext of overriding public interest.

Within a relatively short period of time the newly independent nations have mastered the technicalities of diplomatic relations which the western world had evolved and practised for centuries. The favourable or preferential treatment given to diplomatic agents has been limited to sensible proportions. A critical observer, however, might say that the less developed countries have moved too far too quickly in effecting changes in matters not previously open to them. Nevertheless in so doing they have, surprisingly, displayed a suspicion of an inferiority complex.

68 S. P. Sinha, *op. cit.* p. 111. He further comments that many newly independent States believe that diplomatic agents should be exempt from the social security legislation of the receiving State, as well as from taxation, customs duties, and inspection. Personal privileges and immunities are not considered applicable to staff other than the diplomatic staff.

69 Representative of Ceylon, A/C.6/SR 571 (30 October 1958); representative of Thailand, 1957 Yearbook of International Law Commission, p. 145.

3. The Principles of State Responsibility

This branch of international law depends very largely on the rule of reason, *jus aequum* or equity⁷⁰. It has infused reasonableness and good faith into legal relations. Equitable considerations have exercised their strongest formative influence on the principle of State responsibility in international law. The *prima facie* presumption is that one, at least, of the parties to a dispute has acted contrary to its obligations under international customary or treaty law⁷⁰. The implication which flows from the legal relationship involved, must be to contrast the rights of the injured party with the duties of the one who acted contrary to its obligations. Some jurists have argued that not only is the balance of rights and duties a necessary feature of a legal system, but that these two concepts are themselves logically inter-connected in an essential way⁷¹. Rights and duties are correlatives. A contrary view is expressed by Kelsen, who points out that the conjunction of right and duty, though common enough, is not a necessary one. For there may be duties which are imposed without conferring any rights⁷². Attempts which have been made to assert that rights exist in all cases in favour of persons (individual or corporate) or subjects of international law where a State has acted contrary to its obligations have been unfavourably received by some, if not all, newly independent nations of Africa, Asia and Latin America. The inequities in international law and relations make certain principles of State responsibility unacceptable to those countries. On the surface, the equitable aspects of the relevant rules of State responsibility tend to enlarge the sphere of sovereignty and international non-responsibility⁷³.

The principle of State responsibility is often discussed in conjunction with the norms governing the treatment of aliens⁷⁴. But a State is responsible for all the acts and omissions of its government and its officials. Where the acts or omissions produce a violation of the rights of another State, appropriate reparation must be effected. Payment of damages may be due. Castaneda⁷⁵ contends that the – “doctrine of responsibility of States was merely the legal garb that served to cloak and protect the imperialistic interests of the international oligarchy during the 19th century and the first part of the 20th”

Thus resentment, according to Lissitzyn⁷⁶, was caused by the – “coercive measures – including military force – that the more advanced powers sometimes employed, not only to enforce their interpretation of the standard but also to exact concessions and other special privileges for their nationals and to intervene in the domestic affairs of the weaker States.”

Both Anand⁷⁷ and Sinha⁷⁸ agree that the rules of State responsibility appear to have been conceived and formulated specifically to suit the interests of the great powers. Dr. Louis Padilla Nervo⁷⁹, later a Judge at the International Court of Justice, condemned the principle

70 Georg Schwarzenberger, “Equity in International Law”, *The Yearbook of World Affairs* 1972, p. 359.

71 Lord Lloyd, *op. cit.* p. 311.

72 For example, in the case of many public and social-welfare duties. This applies to much (if not to all) of criminal and administrative law.

73 Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, London, Stevens, vol. 1, pages 632, et seq; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London, Stevens, 1953.

74 A violation of the standards of treatment of aliens exposes a State to diplomatic protests and claims of damages by the States whose nationals are the victims of the violation. It must be remembered that such protests and claims, however, are generally premature until the individuals concerned have exhausted all the remedies which may be available to them under the law of the State alleged to have committed the violation.

75 J. Castaneda, “The Underdeveloped Nations and the Development of International Law”. 15 *International Organization* 38 (1961).

76 O. Lissitzyn, *op. cit.* page 79.

77 R. P. Anand “Role of the New Asian-African Countries in the present International Legal Order”. 56 *American Journal of International Law* 385.

78 S. P. Sinha, *op. cit.* page 92.

79 Judge Louis Padilla Nervo, 1957 *International Law Commission Yearbook* (I) page 155.

of State responsibility. It was established, according to his view, not merely without reference to small States but contrary to their interests; and the principle was based almost entirely on the unequal relations between great powers and small States.

The manifest scope of its rules was such that inequality of strength was reflected in an inequality of rights, the vital principle of international law, *par in parem non habet imperium*, being completely disregarded. In general, many of the less developed countries are critical of the principle of State responsibility. The representative of India, at the International Law Commission, indicated that the traditional rules of State responsibility came into existence because of the principle that every State has the right to protect its nationals abroad and all other States have a corresponding duty, but that such right could not be extended to securing a privileged position for its own nationals⁸⁰.

A number of developing nations strongly maintain that the classical rules of State responsibility have no relevance to the exigencies of the world today. Many newly independent States claim that it is not wise, reasonable, or equitable to apply the principle of State responsibility to the Universal Declaration of Human Rights. Even in many developed countries like the United States of America, France, the United Kingdom, the Declaration is still not a binding instrument. Nor can the nationals of these countries institute claims for damages based on the violation of the Human Rights Declaration.

The main arguments advanced by the developing countries against the strict application of the rules of State responsibility are as follows.

(1) International law is no longer a mere "code of conduct" for the members of an exclusive "club". It is a vital means for resolving contemporary issues. The developing nations insist that the interests of "newly sovereign peoples" should be taken into account in determining the extent to which alien interests in their countries merit special protection under the international law. In other words, equity should play a role in this connection.

(2) The representatives⁸¹ of certain underdeveloped countries argue, convincingly, that whereas legislative measures take care of alien properties and interests in developed States, alien interests in the newly independent States are expected to be protected under the principles of international responsibility. Justice and reason demand that such interests should be governed no differently under the legislation of the newly independent States than in the western countries. The crux of the matter lies in the fact that foreign technical and financial assistance is required for the economic development of the newly independent States, and this may be seriously jeopardised if adequate guarantees are not provided. In consequence, these States promise full legal protection for foreign capital under local laws⁸².

(3) The sufficiency of the amount of compensation paid for the expropriation of alien property should not be judged by the standard of just compensation acceptable by other States whose outlook and social background are basically or profoundly different with respect to such issues. The integrity of the newly independent States should not be judged by the so-called "world standard".

⁸⁰ The developing countries consider that, if an alien comes to a country to pursue a commercial enterprise, he must face the local conditions prevailing in the State in which he has decided to trade, and that he exposes himself to whatever political vicissitudes may occur there. The rule that a State must respect the property of aliens cannot exclude a State's right of interference with private property for the purposes of taxation, police measures, public health, public utility, or in order to carry out fundamental changes in the political or economic structure of the State, or for far-reaching social reforms. The State concerned has the sole right to fix compensation.

⁸¹ See 1957 Yearbook of International Law Commission for the comments of the representatives of India at pages 158, 160; Syria at page 169; and Thailand at page 161.

⁸² Under international law, the source of the rights of aliens, and therefore of State responsibility, is known as the standard of civilized justice. See E. M. Borchard, "The Minimum Standard of the Treatment of Aliens", 1939 Proceedings of the American Society of International Law page 60.

(4) As the number of developing countries increases and as more of them participate in international co-operative ventures and open their doors to foreign capital, it would be foolhardy to provide an opportunity for many arbitrary claims to be made against them under the guise of State responsibility. A considerable number of aliens reside in the territories of the developing nations. Many of them own property and have other economic interests. Many more would like to do so since the new States have attained their independence. But the rules of State responsibility present an obstacle which is so formidable that it generates suspicion and bad faith in certain quarters. It is still difficult for some people to accept that the enormous changes which have transformed world society have also had a complex impact on international law.

Against this background the underdeveloped nations of the world suggest that new values and new needs should be the yardstick for measuring the rules of State responsibility in international relations. These new elements must find expression in the purposes and principles of the United Nations. These include, among other things, (a) the promotion of peaceful coexistence of all States, (b) the respect for the sovereign equality of States, and (c) the raising of the standard of living of mankind through economic and social development⁸³.

State responsibility is an area of international law which presents many problems in today's society. It is hardly conceivable, let alone convincing, that the primary function of international law today is to protect vested interests arising out of an international distribution of political and economic power which has irrevocably changed. Would it not be better, as Jenks⁸⁴ suggests, to adjust the conflicting interests on a basis which contemporary opinion regards as sufficiently reasonable to be entitled to the organized support of a universal community?

One of the consequences of the conflict of equities, arising from disagreements over State responsibility in international affairs, is the bad publicity which it has given the less developed world. This in turn has dealt a damaging blow to the integrity of the new world which may be hard to repair.

4. The New International Economic Order

The developed countries have exerted no less influence in the sphere of international economics than they traditionally exerted in the sphere of international law. They possessed the wealth, they dictated the terms of trade and they established the international economic institutions, such as the International Monetary Fund. The hegemony which they enjoyed in international economic affairs in almost every way matched their influential position with regard to international law.

Just as the Third world has called into question the validity of classical international law in the world of today so it has also challenged the established international economic order, and has done so with considerable justice on its side⁸⁵. The danger that the political shackles of

83 The principle of international responsibility is to be grounded in the realisation of the inherent rights of peoples to own and develop their own natural resources, as formally enunciated in the UN General Assembly Resolution 626 (VII).

84 C. W. Jenks, *Common Law of Mankind*, London, 1958, page 85.

85 "Probably the most difficult problem today concerns the relationship between political communities that are economically advanced and those in the process of development. Whereas the standard of living is high in the former, the latter are subject to extreme poverty. The solidarity which binds all men together as members of a common family makes it impossible for wealthy nations to look with indifference upon the hunger, misery and poverty of other nations whose citizens are unable to enjoy even elementary human rights. The nations of the world are becoming more and more dependent on one another, but even so, it will not be possible to preserve a lasting peace so long as those glaring economic and social inequalities persist." John XXIII, *Mater et Magistra*, 1961. These sentiments were echoed by his successor, Paul VI, in *Populorum Progressio*, 1967, and remain as true today as when they were first written.

their imperialist past might well be replaced by even more onerous economic shackles holding the developing countries in bondage to the developed nations of the world or to wealthy multinational corporations, of which the oil companies have been the exemplars, has been keenly felt. This has resulted in a degree of co-operation on the international diplomatic scene between the countries of the Third world which has significant implications for the future of international affairs.

The achievement of independence for many ex-colonial countries brought to their new political leaders an awareness of the realities of the existing economic order. Money was invariably in short supply. The economic structure of the countries had been framed in accordance with the places occupied by them in the particular political units of which they formed part. The economic needs and infrastructure of each new nation needed to be re-evaluated in the light of its becoming a new political and economic entity in its own right; an entity with its own legitimate aspirations and needs⁸⁶.

In the 1950s and 1960 the international economic order was not equipped to aid the development of the third world countries. It had been developed, piecemeal, over many years by the developed countries with their own needs primarily in mind. So far as the developing countries were concerned, their interests (so far as they were taken into account at all) were viewed paternalistically by the developed countries as they sought first to establish and then to protect their own trading interests. World War 2 naturally disrupted the pattern of world trade completely, and a new pattern had to be established rapidly after its conclusion.

The re-established world trading pattern, however, was dominated initially, as one might expect, by the victorious powers⁸⁷, represented chiefly by the developed nations. The war itself played a significant part in hastening the process of decolonization which resulted in many countries attaining independence in the 1950s and 1960s. But they attained their independence too late to be able, as sovereign States, to influence significantly the pattern of trade in the postwar world. As a result of an international conference held at Bretton Woods in 1944, the International Monetary Fund had been established with the aim of stabilising international exchange rates. Following the same conference, the World Bank was established to provide credit facilities for development and reconstruction. The terms of world trade were, to some large extent, laid down about the same time in the General Agreement on Trade and Tariffs; that treaty, commonly known as GATT, has been modified subsequently. These arrangements, and others, were essentially made by and for the benefit of the developed countries of the world⁸⁸.

The newly independent countries perhaps found that it was harder than they expected to survive in the fiercely competitive markets of the world. Following independence, they lacked the support which they had formerly enjoyed from the excolonial powers. Moreover, they lacked the contacts, the experience and the financial resources of their competitors from the developed countries; unhappily, they were also more vulnerable than those countries to the fluctuations of external economic forces. In some instances, the newly independent countries found themselves almost controlled in respect of certain aspects of their economies by transnational corporations which had established trading links with them during their

86 See S. Sideri, "The New International Economic Order and UNCTAD IV", Final Report on a Seminar on The New International Economic Order and UNCTAD IV, The Hague, Institute of Social Studies, 1975.

87 It is one of the supreme ironies of the modern world that two of the most powerful economic nations in the world today are West Germany and Japan, the vanquished nations in World War 2; and that the other main limb of the defeated Axis, powers, East Germany, has proved preeminently successful in economic terms in the East European bloc.

88 It is not here suggested that the developed countries deliberately attempted to shut off the countries now collectively known as the countries of the third world from the world market. It should be noted that the International Finance Corporation and the International Development Association were both formed specifically with the needs of the developing countries in mind.

colonial era and which dictated the terms of trade to them. The subject of the disadvantages from which the developing countries suffered is essentially outside the scope of this study, but the preceding general comments should suffice to indicate the background to a remarkable achievement by the developing countries in international diplomacy.

At a special meeting of the U.N. General Assembly⁸⁹, the countries of the Third world persuaded the member States to approve a resolution declaring the establishment of a new international economic order. Following this, a programme of action was agreed to implement the resolution. The new international order was based on the principles of “equity, sovereign equality, interdependence, common interest and co-operation amongst all States” and was intended to –

“correct inequalities and redress existing injustices, make it possible to eliminate the widening gap⁹⁰ between the developed and developing countries, and ensure steadily accelerating economic and social development in peace and justice for future generations.”

The passing of this resolution is probably the most significant achievement to date in the diplomatic sphere by the representatives of the Third world and seems to have forged a unity of approach between the countries of the Third world in relation to economic affairs.

The resolution and programme of action⁹¹ deserve careful study in their own right. It is possible here to mention only a few pertinent points. The new international economic order stresses the principles of equality and sovereignty of States; and from this flows the recognition of the full permanent sovereignty of each State over the natural resources lying within its boundaries. From the same principle flows the right of States to regulate and control the affairs of transnational corporations conducted within their borders. The new international economic order also calls for a just and equitable relationship between the prices of raw materials, foodstuffs and commodities exported by the developing countries and the prices of manufactured goods which they import from the industrialized countries; in short, the new international economic order calls for an improvement in the terms of trade. It calls also for an extension of the active assistance offered by the international community to developing countries, an adequate flow of real resources to those countries and the transfer of technology to assist their industrialization.

The second general conference of the U.N. Industrial Development Association⁹² was held in Lima in 1975 in the wake of the U.N. resolutions. The Industrial Development Association defined the primary objective of the Third world as an increase in industrial production from 7 per cent of the world total in 1975 to 25 per cent by 2000. The Lima declaration called for the dismantling of tariffs to give developing countries greater access to the markets of developed countries. It called for the reform of the international monetary system⁹³ with full participation by the developing countries. It asked for the conversion, where possible, of the debts of developing countries into grants; failing that, a rescheduling of the debts of developing countries. It further called for the relocation of appropriate industries in the Third world,

89 1 May 1974.

90 The developing countries constituted 70 per cent of the world population but received only 30 per cent of the world income.

91 See U. N. General Assembly Resolutions 3201 (S-VI) and 3202 (S-VI).

92 See generally Bamadeva Prasad Aryal, *United Nations Industrial Development Organization in the light of the New International Economic Order*, The Hague, Institute of Social Studies, 1977.

93 The International Monetary Fund has been a particular object of concern to the developing countries as evidenced by Abdul Muktadir Mazumder in *Contemporary Policies and Operations of The International Monetary Fund*, The Hague, Institute of Social Studies, 1977, page 19; “. . . the Fund itself is formally concerned only with the exchange rates and exchange restrictions. Trade policies, however, have such an intimate connection with the exchange rate policies that the IMF has assumed authority not only over exchange restrictions, but restrictions maintained for balance of payments reasons, which may include import restrictions and protective tariffs. Legally and formally the Fund has no power to dictate changes in a country's internal policies. In practice, it does this in the case of most drawings made beyond its first credit tranche. The anti-inflationary policies which it insists upon touch the very heart of national sovereignty by affecting government spending, taxation and credit policy.”

the drafting of international codes of conduct for transnational corporations to restrict “un-acceptable” practices by them, and for the provision of additional aid.

The Industrial Development Association conference was followed in 1976 by the fourth session of the U.N. Conference on Trade and Development at Nairobi. Again, there is significance in the unity displayed at that conference by the Third world representatives⁹⁴. The resolutions at Nairobi called for a programme of global action to improve international market structures in commodities emanating from the developing countries and recommended an acceleration in the preparation of a draft code on the transfer of technology.

The ability of the Third world representatives to find a common purpose and to obtain the passing of far-reaching resolutions of wide-ranging implications in the international arena is significant and of great historical moment. There is a danger, however, that the passing of resolutions may be regarded as an end in itself.

The International Development Association conference witnessed open opposition by some developed countries to the attitudes of the Third world representatives. This opposition has been apparent also in the U.N. Conference on Trade and Development sessions. However justified the Third world representatives may be in calling for change, they will achieve little unless they are able to convince the industrialized nations of the justice of their plea that the economic health of the international community is dependent on the health of each of its constituent parts⁹⁵. Whilst the Third world should not diminish its demands, it would be well advised to support these by less public diplomacy and the sensitive cultivation of the political leaders and the mass media in the western world.

On of the most evident changes in the world economic order⁹⁶ in recent years has been the greatly enhanced oil revenues of the member countries of the Organisation of Petroleum Exporting Countries (“OPEC”). This change in the balance of economic power has been significant in two separate ways. The first is that OPEC countries have wrested their economic destinies from the grasp of the multi-national corporations in oil. In doing so, they have demonstrated that multinational corporations can be subjected to regulation and control; and indeed can be beneficial partners to developing countries. Of even greater interest, the OPEC countries have shown that the producers of primary materials can set their own price for their produce in the international market and need not suffer dictation by the buyers in traditional commodity markets⁹⁷.

The second way in which this change has been significant is that the OPEC countries have contributed very substantially to the flow of official development assistance to the countries of the Third world. They have done so despite the considerable scope for industrialization in their own lands. This aid was distributed in part through the OPEC Special Fund established in Vienna⁹⁸. The Fund now operates under a new name with increased resources at its disposal.

94 A common position had been established in advance of the Nairobi Meeting by the Group of 77.

95 The developing countries should not forget the long struggle by Wilberforce and others to abolish the slavetrade, nor the centuries before women were emancipated in the western world (some would argue that today they have not yet achieved a position of equality with men). Few would today deny the intrinsic evil of slavery or the rights of women to equality; but it took centuries before these ideas were generally accepted.

96 It is in some ways misleading to speak of the “world economic order” since this may suggest a planned and balanced system under formal constraints of symmetry and which is susceptible to formal modification as a whole. The international economic institutions have largely been established on an ad hoc basis and trading arrangements have similarly been concluded.

97 Too much significance should not be attached, however, to the success of the OPEC countries in this respect; it must be borne in mind that the oil-producing countries were in a particularly strong market position.

98 The OPEC Special Fund was established in January 1976 by Algeria, Ecuador, Gabon, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, United Arab Emirates and Venezuela. Its original fund totalled US \$ 800,000,000. In its first balance of payments support programme, the fund provided \$ 200,000,000 in interest-free loans to 45 countries most seriously affected by the economic crisis. It also committed \$ 420,000,000 to the International Fund for Agricultural Development.

Aid for developing countries from other sources has usually⁹⁹ been in the form of interest-bearing loans or aid with commercial or political implications. The inability of the poorest countries even to pay interest on these loans may force the creditor nations to accept another principle of the new international economic order – the rescheduling of loans, if not their conversion into grants.

The call for the transfer of technology would appear likely to create more formidable problems for the industrialized countries. Often patent rights and other forms of intellectual property are in private ownership and therefore not available to be transferred freely by government agencies. Nevertheless, some concession to the principles, enshrined in the new international economic order was made in the first¹⁰⁰ Lomé Convention signed by the European Communities and the African, Caribbean and Pacific States. Further, the European Communities and the International Development Association exchanged letters in November 1976 on effecting a co-operation agreement between the organizations. It is intended in the initial stages to cover such matters as industrial studies, technical assistance and the promotion and financing of industrial projects. Such arrangements as these would seem to be a means of paving the way for an eventual exchange of technology.

Some serious thought needs to be given, however, to what technology needs to be transferred to the developing countries; and, even more fundamentally, to what should be the long-term objectives of the Third world. E. F. Schumacher has called for the development of intermediate technology¹⁰¹ as a means of resolving some of the endemic problems of the developing countries and of averting the disintegration of societies. President Julius Nyerere of Tanzania has said:¹⁰²

“Nations which are already wealthy have to accept that they are members of the world, with a right to a fair share of the world’s resources but no more . . . And the poor nations have to face facts too. They need to stop trying to ape the rich. They have to accept that ‘closing the gap’ does not mean . . . a western style or level of consumption.”

The developing countries would do well to heed President Nyerere’s advice and to avoid attempting to imitate the western world and, by way of example, risking the loss of their own cultural identities. The drift from the rural areas into the cities and the inexorable growth of the cities on the pattern of the western world must be resisted¹⁰³. Computer-assisted technologies, which can have a disastrous effect on unemployment statistics¹⁰⁴, and nuclear power, to which there are acceptable and viable alternatives¹⁰⁵, are typical of the industrial technologies which the Third world (and probably the industrialized nations also in the case

99 In recent years, perhaps following the lead given by the OPEC countries, much aid has been given in the form of grants rather than loans.

100 See Council Regulation (EEC) No 199/76 of 30 January 1976 (O. J. L25, 30 January 1976, page 1).

101 E. F. Schumacher, *Small is Beautiful*, London, Abacus, 1974, pages 143 et seq.

102 *The Economic Challenge – Dialogue or Confrontation*. (An address given to the Royal Commonwealth Society) London, Catholic Institute for International Affairs, 1975.

103 “As an illustration, let me take the case of Peru. The capital city, Lima, situated on the Pacific coast, had a population of 175,000 in the early 1920s, just fifty years ago. Its population is now approaching three million. The once beautiful Spanish city is now infested by slums, surrounded by misery-belts that are crawling up the Andes. But this is not all. People are arriving from the rural areas at the rate of a thousand a day – and nobody knows what to do with them. The social or psychological structure of life in the hinterland has collapsed; people have become footloose and arrive in the capital city at the rate of a thousand a day to squat on some empty land, against the police who come to beat them out, to build their mud hovels and look for a job. And nobody knows what to do about them. Nobody knows how to stop the drift.” Schumacher, *op. cit.* page 58.

104 “If we feel the need of machines, we will certainly have them. Every machine that helps every individual has a place, but there should be no place for machines that concentrate power in a few hands and turn the masses into mere machine minders, if indeed they do not make them unemployed.” Schumacher, *op. cit.* pages 27, 28, quoting Mahatma Gandhi.

105 See Amory B. Lovins, *Soft Energy Paths: Towards a Durable Peace*, Hammondsworth, Penguins, 1977. A particularly perceptive report on the effect of the development of nuclear power on fundamental liberties has been published by Justice entitled *Plutonium and Liberty*.

of nuclear power) would do well to restrict, if not to avoid altogether. As Schumacher has written:¹⁰⁶

“No degree of prosperity could justify the accumulation of large amounts of highly toxic substances which nobody knows how to make ‘safe’ and which remain an incalculable danger to the whole of creation for historical or even geological ages. To do such a thing is a transgression against life itself, a transgression infinitely more serious than any crime ever perpetrated by man. The idea that a civilisation could sustain itself on the basis of such a transgression is an ethical, spiritual, and metaphysical monstrosity. It means conducting the economic affairs of man as if people really did not matter at all!”

To conclude, it must be said that the proclamation of the new international economic order marked a great diplomatic achievement by the developing countries. Nevertheless, the resolution by the U.N. General Assembly itself achieved nothing. The Third world needs to advance from that triumph. To do so, each developing country needs to evaluate carefully its true needs in the immediate future and in the longer term. Additional aid from the developed countries is more likely to be obtained for the relief of real poverty than for the establishment of industries of advanced technology but with little relevance to the long-term needs of the country concerned. At the same time the diplomats of the developing countries need to press the justice of their case patiently on governments and peoples of the western world and upon international organisations and agencies¹⁰⁷. The real wealth of the world is finite and its redistribution may well necessitate the acceptance of a zero growth rate in the industrialized countries and this would call for great political skill on the part of their leaders and equally great forbearance on the part of their peoples. As President Nyerere has said:¹⁰⁸

“ . . . if the wealthy nations . . . still have an ambition for material growth and greater consumption, then they need to ask themselves whether they are serious in their desire to reduce the gap between rich and poor countries, and eradicate poverty from the earth . . . The leaders of the rich countries must have the courage to tell their peoples that they are rich enough.”

106 Schumacher, *op. cit.* pages 120, 121.

107 Attention might be focused on the vast sums spent each year by the industrialized world on “defence”; this spending is reflected also in the sums spent by some developing countries on sophisticated weapons of war. The diversion of the moneys so spent to development projects throughout the world could greatly enhance both the quality of life of all peoples, and most noticeably of those in the third world, and the prospects of world peace. This is not an aim which can be achieved overnight; but a planned scaling down of world expenditure on armaments and the diversion of the funds so liberated to development could be one of the legitimate and most rewarding aims of third world diplomacy.

108 President Julius Nyerere, *op. cit.*

CONCLUSIONS

The less developed countries do not constitute a homogeneous entity. The factors conditioning their approach to international problems are not the same; or, at least, do not apply to each with the same intensity. It is unwise, consequently, to presume that their attitude to international law is uniform or similar in every respect. They differ in cultural background, levels of education, political orientation and specific interests. Within each nation, moreover, there may be significant differences in attitudes toward international law. Generalization is as difficult as it is dangerous. The Latin-American nations are not highly developed economically, but share the western cultural heritage¹⁰⁹ and have been, for the most part, politically independent for more than a century; whereas the developing countries in Africa and Asia have only recently attained independence. They were dominated by colonial powers for a long time and certain tendencies which are apparent from their general attitudes are both a product of resentment of past foreign domination and attitudes of superiority, and a result of a low level of economic development with resulting economic and technological dependence on the more advanced countries. But side by side with conflicting values and interests are many common or mutual interests and through these a general pattern is apparent which more often than not sets them apart from the western States.

There is a certain ambivalence, or at least inconsistency¹¹⁰, in their attitude towards some of established rules of international law. No plea of a lack of consent is made with respect to traditional rules of international law which conform to their interests. The principles of self-defence and territorial jurisdiction are good examples of traditional principles which have been fully accepted by the developing nations. The idea of rejecting norms of international law is not really clear cut. It would be more correct to refer to the difficulty of interpreting these norms. The approach of the developing nations reflects a conflict of economic and political interests which conditions their external policies and relations. It would seem – that is, if their whole approach is taken into consideration – that they are only using the means available to them in order to achieve equity and justice. But in its original concept, anyone seeking equity must come with clean hands. A good illustration is the treatment of Asians in Uganda at the time of Amin. Admittedly, Britain made a political blunder, but this was in no way comparable to the subsequent inhumane treatment of the Asians in Uganda. This atrocity was gracefully sustained by the doctrine of sovereignty.

The developing countries have nevertheless contributed a distinctive influence towards the development of modern rules of international law, both in relation to the speed of change and also in relation to the shape which the new rules take. They can fairly derive satisfaction from their unity of purpose and diplomatic success in establishing the new international economic order. This satisfaction must be tempered, however, with the realization that further progress is most likely to be achieved only after they assessed their national aims in objective terms and thereafter only by patient and probably quiet diplomacy and careful fostering of the mass media in the western world.

109 O. Lissitzyn, *op. cit.*

110 See Dugard, "The Organization of African Unity and Colonialism", 16 *International and Comparative Law Quarterly* 157 (1967).

nated communist influence in the trade unions was crushed in 1945 to 1948. Besides the traditional trade union functions Malaysian trade unions have tried to strengthen their economic basis by forming economic ventures and cooperatives. They have not succeeded in organizing the rural areas.

The Malaysian trade unions have been able to influence some political decisions and to defend against the worst attempts to weaken them though their influence always has been limited. But they have been successful to uphold the multi-racial trade union ideology against the racially dominated political party structure. They have also been able to improve wages and working conditions with the most outstanding visible successes in the plantations.

The Pursuit of Rights and Justice in International Law by the Developing Nations

By EMMANUEL G. BELLO

As far back as 1912, Oppenheim predicted with reasonable certitude that immeasurable progress was guaranteed to International Law because of the eternal moral and economic factors working in its favour. Although that prophecy was made nearly seventy years ago, yet it still appears difficult for certain individuals to accept that the enormous changes which have transformed world society have also had complex impact on International Law. There is a growing recognition that a new and uncertain epoch has arrived, and that the old system has definitely ended. A march is on to justify this change in order to accomplish within a short space of time what took the industrialised nations almost two centuries to achieve. The purpose of this study is to make a survey and analyse that presumption.