THE IMPACT OF THE NEW NATIONS ON INTERNATIONAL LAW‡

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Preliminary Statement

In discussing the subject, *The Impact of the New Nations on International Law,* I deem it important to ask a preliminary question: Which international law do we refer to, the old classical international law, or the "new" international law?

It is worthy to note that some writers in the last decade, including those from the Western states, have discussed the "new" international law. Prof. Kunz believes that the science of international law has reached a turning point in its history without undergoing a revolutionary break with its past. According to him, international law is at present not only passing through an era of full transformation but it is also undergoing a profound crisis.[1]

Prof. Friedmann of Columbia University, made the following statement: "Not only is it difficult to say at what point a rule of international law, especially a customary one, has ceased to be valid, but it is even more difficult to say when a new practice has hardened into law.... Where a rule is essentially declaratory of existing custom it becomes obsolete without obsolescence of the custom. Where the rule is created by a law-making treaty the legal formula to express its obsolescence is probably the clausula, *rebus sic stantibus.*"[2]

General Observations On The Development Of The Principles Of International Law

In a paper[3] read in 1964, Judge Philip Jessup of the International Court of Justice wondered whether "[the development of] international law has not suffered from the fact that, in many quarters and over

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[1]Josef L. Kunz, 56 Am. J. Int'l. Law 488 (1962). See also, Prof. Richard A. Falk, *New Approaches to the Study of International Law,* 61 Am. J. Int'l. Law 477 (1967).

[2]Wolfgang Friedmann, *The Changing Structure of International Law,* 133 (1964). See also, W. Friedmann, *The Changing Dimensions of International Law,* 62 Col. Law Review 1147 (1962).

[3]*Diversity and Uniformity in the Law of Nations,* 58 Am. J. Int'l. Law 341 (1964). See also. Richard A. Falk, *New Approaches to the Study of International* Law, 61 Am. J. Int'l. Law 477 (1967).

decades, it was considered to be the law of an undeveloped or underdeveloped international society." The theme or subject of my paper takes on a different aspect of that same subject, namely, *the impact of the new nations on the development of international law.* For whether international law is really a law for an undeveloped, perhaps primitive, international society, or whether we can speak of it only in the context of a mature legal system, the fact is that in the process of growth, international law, homegrown in the West, cannot ignore, indeed cannot escape, the influence of the emergent nations of Asia and Africa.[4]

For indeed the noteworthy feature of the international development during the last decade is that the new nations now constitute the majority of the entire membership of the United Nations where at the time of the founding of that world organization they were clearly in the minority. Early in the history of the United Nations these nations began a movement to rid themselves of the obligations resulting from unequal treaties or other international conventions. As Professor Wilfred Jenks observed: "The new developing nations are exerting themselves to change or modify the existing law which are no longer applicable to modern conditions."[5]

Without denying or depreciating the role of international law in world affairs, the new nations nevertheless feel some degree of discontent because several traditional norms do not serve the needs and aspiration of the peoples in these areas. That they should feel thus is not surprising, considering that international law grew in the Western soil.[6]

Let me articulate some of the aspirations of the new nations of Asia and Africa and assess their probable impact on the development of international law. For this purpose I shall draw heavily on the

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[4]See, George M. Abi-Saab, *The New Independent States and the Scope of Domestic Jurisdiction,* 1960 Proceedings, Am. Society of Int'l. Law 84-90; R. P. Anand, *The Role of the 'New' Asian-African Countries in the Present International* Law, 56 Am. J. Int'l. Law 388 (1962); Quincy Wright, *The Influence of New Nations of Asia and Africa upon Int'l. Law,* 7 Foreign Affairs Report, 39, 1958; S. Prakash Singha, *New Nations and the Law of Nations,* 1967; Edward McWhinney, *The New Countries and the New International Law,* 60 Am. J. Int'l. Law 1 (1966).

Dr. Francis Deak, in his address before the American Society of Int'l. Law in 1962 on the subject, "Observations on International Law in Undeveloped Areas," 56 Am. J. Int'l. Law 756 (1962), mentioned that "in the Philippines, there is much activity in the field of international law."

[5]Jenks, *The Scope of International Law,* 31 British Yearbook of International Law, 1, 1954.

[6]Prof. Oliver J. Lissitzyn attributes the unique role of the West in the development of international law to the inter-action of several historical factors, namely, "the decline of the authority of religion, the rise of relatively small nation-states in a balance of power system, exploration and conquest of distant lands, revival of the study of Roman Law, and the 'law habit' which had developed in the pluralistic feudal society, partly under the influence of the Roman legal tradition."

brilliant and perceptive monograph of Prof. Oliver J. Lissitzyn of the Columbia Law School, entitled, "International Law in a Divided World,"[7] and the three conferences held under the auspices of the UN, dealing on the Law of the Sea, the Diplomatic Intercourse and Immunities, and the Law of the Treaties. A more detailed discussion showing the stand of the new nations on these three topics will be taken up later.

To begin with, the newly independent states desire to incorporate in international law certain principles that have been usually regarded in the West as political rather than legal and that by their generality and flexibility of application led themselves to manipulation. For instance, the concept of self-determination has been used primarily as an instrument of political pressure for the emancipation of colonies from Western rule. "Self-determination" has likewise been invoked in the drive of less developed nations for reaffirmation of their sovereignty in the economic sphere: the right to dispose of one's natural resources and, by implication, to limit or de-emphasize the right of the capital-exporting states to protect the investments of their nations in these resources. On the issue of protection of foreign investment, as on other issues, the tendency of the new nations to challenge traditional international law has received the encouragement of the Soviet bloc which has seized the opportunity to further its own self interests.

Then too, with regard to the Law of the Sea, most of the new nations have thrown the weight of their numbers against the traditional three-mile doctrine of the width of the territorial sea that is still upheld by the leading maritime powers of the West and by Japan. Some of them have tended to expand the maritime area under their control in other ways.

The Philippines and Indonesia, for example, have claimed all the waters between the islands that constitute their territories. They have each unilaterally adopted the so-called "Archipelago theory" by which they could draw a perimeter around their outstanding island, on the waters lying within that perimeter as historical internal waters.[8]

The maritime nations of the West and Japan regard the extension of the width of the territorial sea as a threat to their interest. They have also refused to recognize the claim to all the water between the islands of large archipelagoes. The desire of the government of some of the less developed nations to extend their territorial waters is tempered by the realization that sovereignty implies responsibility as

[7]International Conciliation, March 1963.

[8]Arthur H. Dean (Chairman, U.S. Delegation), *The Second Geneva Conference on the Law of the Sea: The Fight for the Freedom of the Seas*, 54 Am. J. Int'l. Law 751 (1960).

well as authority, and that the smaller and poorer nations may find it difficult to police large expanses of the sea adequately. As a result of the change of the position of the Canadian delegation, which was later joined by the U.S. and Great Britain, the six mile territorial sea doctrine was accepted, and twelve miles for fishing zone.

There are other issues to which the new nations have addressed themselves. In the Law of Treaties,[9] the less developed nations tend to oppose the "unanimity doctrine" of the admissibility and effect of reservations to multi-lateral conventions. This is the view that a state cannot become a party to a treaty with a reservation to which any of the parties objects. These same nations have tended to show preference for the so-called Pan-American Rule under which the reserving state becomes a party to the treaty with respect to other parties that do not object to the reservation.

Still another area of international law that is of interest to the newly independent nations is that of state succession, which is at present under study by the International Law Commission. In this area, there are few agreed "traditional" norms. In general, a new state does not succeed to the treaty rights and obligations of its predecessor. Nevertheless, many newly independent nations have voluntarily agreed to the inclusion of "devolution clauses" in agreements with their former metropoles. These clauses provide that the new states take over the rights and duties applicable to them as dependent territories under treaties made by their predecessors. Some new states have also voluntarily declared themselves bound by various multilateral treaties to which their predecessors were parties.

What then is the outlook for international law? Let me quote Prof. Lissitzyn's monograph:

"The conflicts of interest — and particularly those caused or reinforced by the Communist ideology and system of public order — today prevent a rapid expansion of the role of law in international affairs. The more exacting demands addressed to international law are not likely to be fully satisfied in the immediate future. A world public order comparable in scope and effectiveness to the public order of a well-organized nation is still far away. In the international community there are, as yet, no formally established special institutions for orderly modification of the law and of existing legal rights without the consent of the states concerned. But the conflicts of interest do not prevent mutually acceptable regulation of transnational activities

[9]Draft Articles and Commentaries on the Law of Treaties by the Int'l. Law Commission and submitted to the UN Conferences in Vienna in 1968 and in 1969, 61 Am. J. Int'l. Law 263-467 (1967).

in the areas of international relations where there is some community of interest, however, limited. Since all stages engage in such activities, there is a basis for the existence of 'universal' international law in the sense of a number of concepts and norms understood, invoked, and honored by all states, as well as of 'particular' international law — norms that apply to some but not all states. Both 'universal' and 'particular' international law may be expected to grow in scope and complexity as the volume and variety of transnational activities increase. Universal agreement on ideological goals and ethical values is not a pre-requisite for the existence — or even the growth — of international law."

THE UNITED NATIONS CONFERENCES

It is in the United Nations where the new nations are actively engaged in selling their ideas concerning certain principles of international law. Many of the new nations are of the opinion that several rules of international law are not relevant in the modern world.

It is fortunate that the UN decided to call three important conferences to consider the reports or draft articles of the International Law Commission on the Law of the Sea; the Diplomatic Intercourse and Immunities, and the Law of Treaties. Aside from these conferences, the Law on Consular Relations, based upon the report of the International Law Commission, was also approved in 1963.

It is upon these international conferences where the new nations took active part. It is also upon these conferences where the impact of the new nations on international law is evident.

(A) *The UN Conferences of 1958 and 1960 on the Law of the Sea*

As stated above, the new nations have thrown the weight of their numbers against the territorial three mile doctrine on the width or breadth of the territorial sea being upheld by some leading powers of the world including Japan. The Western powers as indicated above wanted to regard the extension of the width as a threat to their interests. However, in the last two conferences held in Geneva, the Western powers made substantial concessions to the new nations by extending the three mile limit to twelve miles, including fishing rights. Many of the new nations, however, have refused this limitation of 12 miles, particularly the Philippines and Indonesia, where their territories are surrounded by islands. It is the contention of the Philippines and Indonesia that all the waters between the islands constitutes part of their territory. It is for that reason that the proposal of the Western powers, notwithstanding the extension to 12 miles, failed to receive the required 2/3 vote. The conference failed to reach any agreement

on the breadth of the territorial sea and also fishing rights in waters off the coasts of other states. Notwithstanding failure of the UN Conference to agree on these two important matters, the conference nevertheless succeeded in adopting Conventions on Territorial Sea and Contiguous Zone; on the Living Resources of the Sea; on the Continental Shelf, and on the High Seas.

(B) *The UN Conference on Diplomatic Intercourse and Immunities*

The international conference called by the UN was the Conference to codify the rules governing diplomatic intercourse and immunities. Like the articles on the Law of the Sea, the draft articles governing the Conference on Diplomatic Intercourse and Immunities were also prepared by the International Law Commission.

Some of the rich Western powers wanted no limitation on the size of their diplomatic missions. On the other hand, the new nations, because of their limited resources, felt that a provision should be inserted in the Convention wherein, in the absence of a specific agreement as to the size of the mission, the receiving state may require the size of the mission to be kept within considerable limits. In fact, Art. 11 of the Vienna Convention of Diplomatic Relations, as approved, is a compromise between the Western powers and the new nations. This article reads: "In the absence of specific agreement as to the size of the mission, the receiving state may require the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving state and to the needs of the particular mission."

Parenthetically, it may be added that because of their limited resources, most of the new nations have adopted the practice of accrediting their ambassadors to several states in concurring capacities. For example, the Philippine Ambassador to London is concurrently accredited to the Scandinavian countries, except Finland. The Philippine Ambassador to Rome is concurrently accredited to Greece and Turkey. The Philippine Ambassador to Switzerland is concurrently accredited to Vienna. The Philippine Ambassador to Argentina is concurrently accredited to Montevideo. The Philippine Ambassador to Mexico is concurrently accredited to Carracas. The Philippine Ambassador to West Germany is concurrently accredited to Helsinki.

This practice is being followed by many new nations, whereas most of the Western powers which have enough resources, can send diplomatic representatives to each of most countries.

Another difference between the Western powers and the new nations in the Convention in Vienna was the use of wireless transmitters by

diplomatic missions. Most of the big Western powers desired to have no limitations or control upon by the receiving state on the use of wireless or radio transmitters. On the other hand, the receiving states, particularly the new states, are of the opinion that this new form of communication should be subject to the control or regulation of the receiving state.[10] As finally approved, the provision of the Vienna Convention on the use of wireless transmitters is as follows: "Art. 27... However, the mission may install and use a wireless transmitter only with the consent of the receiving state."

(C) *The UN Conference on the Law of Treaties*

The third conference called by the UN was the so-called Conference on the Law of Treaties,[11] which took place in Vienna in 1968 and in 1969. It took nearly 10 years before the International Law Commission could reach an agreement on the draft articles. It is noteworthy that the less developed or new nations tend to oppose the "unanimity doctrine" and its effect of reservation to multilateral conventions. This is the view that a state cannot become a party to a treaty with a reservation to which any of the parties objects.

Another move of the Socialist countries in the Second Conference of the Law of Treaties was to allow *all countries* to be signatories, if they so desire, in the Convention on the Law of Treaties. This was not approved.

With modesty, I was a delegate to the said three conferences mentioned above, to wit: The Law of the Sea in 1958 in Geneva, the Diplomatic Intercourse and Immunities in 1961 and the Law of Treaties in 1968 and 1969, all in Vienna.

The International Law Commission is deserving of tribute for its wonderful work in the preparation or codifying of some of the rules of international law, as evidenced by the draft articles prepared by it in the three above-mentioned Conferences.

SPECIAL COMMITTEE ON PRINCIPLES OF INTERNATIONAL LAW

Partly on the representation of the new nations, and partly on the initiative of the Soviet bloc, in the United Nations, the General Assembly created a *Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States.* This Committee was established pursuant to General Assembly Resolution 1966

[10] Kelly, Ernest K., *Some Aspects of the Vienna Conference on Diplomatic Intercourse & Immunities.* 56 Am. J. Int'l. Law 89 (1962).

[11] As previously stated, the draft articles and the corresponding commentaries on the Law of Treaties prepared by the International Law Commission are found in 61 Am. J. Int'l. Law 263-467 (1967).

(XVIII) of December 16, 1963. The President of the General Assembly was empowered to appoint the states that will constitute the membership of the said Committee. The work of the Committee was to precisely prepare a report for the purpose of the progressive development of the Four Principles designated by the 17th General Assembly. These Principles were:

1) States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

2) States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.

3) States shall not intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter.

4) States shall enjoy sovereign equality.[12]

When it was created in 1963, the members of this Special Committee counted with 27 states, but later Cameroon, and Afghanistan withdrew. The latter was replaced by Burma. The result was the grouping of 27 nations including, in addition, the permanent members of the Security Council (exclusive of China), strong representations from the developing regions of the world. This Special Committee had its first session in Mexico City in 1964. Most of the people appointed to this Committee are connected with the foreign ministries of the states concerned. Some of them had served in the UN General Assembly (Sixth Committee).

The new states are well represented in the Special Committee, as they have not been in the past on other international bodies concerned with law. This is, therefore, a great challenge to the new nations to demonstrate their capacity or ability to contribute to the development of international law on the various topics assigned to the Committee. Professor Hazard of Columbia University, in commenting upon the said Committee, made this pertinent remark: "The Special Committee could be a body supplementing regional groupings in preparing the way for old rules to meet the problems raised by inequality of power in newly developing nations. In doing so, it could have the

[12]Edward McWhinney, *The New Countries and the New Civil International Law*, The UN Special Committee, 60 Am. J. Int'l. Law 19 (1966). Prof. McWhinney stated that "one of the reasons for the creation of this Special Committee is to take into consideration the principle of this Special Committee is to take into consideration the principle of equitable geographical representation and the necessity that the principal legal systems should be represented."

advantage of permitting the newly developing nations to have a major say in creating the rules they need for their mutual protection."[13]

However, Prof. McWhinney has this observation: "It is a pity, in this regard, that the main Western countries' position in the Mexico City Special Committee seemed to be so generally defensive, with the main initiatives for new international law mainly coming from the Soviet bloc and the uncommitted countries."

With regard to the criticism that the work of the Special Committee is slow, Ambassador Robert S. Benjamin, U.S. Representative to this Committee, made the following statement:

"Let me begin by saying that we consider the work of the Special Committee in 1967 represents positive achievement.... Yet, when we pause to reflect on the difficulty of a number of aspects of this work, and its high degree of political sensitivity, we reach the conclusion that the Special Committee's record at the last session is a creditable one."[14]

Judging from the statement of the American representative to the Special Committee, the Drafting Committee was able to reach agreement on a text containing four short paragraphs, to wit:

1) Every state has the duty to fulfill in good faith the obligations assumed by it in accordance with the Charter of the United Nations.

2) Every state has the duty to fulfill in good faith its obligations under the generally recognized principles and rules of international law.

3) Every state has the duty to fulfill in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.

4) Where obligations arising under international agreements are in conflict with the Members of the U.N. under the Charter of the UN, the obligations under the Charter shall prevail.[15]

CONCLUDING STATEMENT

From the various articles and books written on the subject, it is evident that the whole attitude of the new nations could be summarized in the liquidation of imperialism in its widest meaning, with

[13]John N. Hazard, *New Personalities to Create New Law*, 58 Am. J. Int'l. Law 959 (1964).

[14]See, 62 Am. J. Int'l. Law 472 (1968).

[15]See Statement of Ambassador R.S. Benjamin, *supra*.

all its political, economic, military and psychological implications. They want to change the status quo, and are striving to reconstruct some of the rules of international law so as to reach a more equitable situation. They want to modify some of the 19th century conceptions of international law to bring them into conformity with the principles of the UN Charter.

Prof. R. P. Anand is of the belief that in some instances even the great powers have also failed to give support to international law. He believes, however, that the present atmosphere has created a situation in which there is a balance of conflicting interests favorable to the development of international law. Prof. Anand concluded his comments as follows: "International law should reflect a consensus of the entire world community, including the new emerging states. It is for this reason that unjustified and harmful political consideration should be eliminated and international law should be modified so as to reflect the essential principles of the UN Charter."[16]

The new nations have been playing a substantial role in the development of international law. Most of the contributions of these new nations are made through some of the agencies or several committees created by the UN. Some of these committees or organizations are the International Law Commission, the Special Committee on the Principles of International Law, and several international conferences called by the General Assembly and other regional bodies.

In making a re-appraisal of the work of the International Law Commission, Prof. Lee commented that "Codification of international law is essential as a parallel to any progress to the development of any international adjudication. Indeed, only by making the rules of international law more certain and evident can states be encouraged to undertake a judicial settlement of international disputes." It may be observed, in this connection, that originally the International Law Commission was composed of 15 members, then it was raised to 21 in 1956, and again it was increased to 25 in 1961 in order to provide better representation to the new nations.

The position of the new Asian countries upon some changes in the development of international law may be gleaned from some of the articles of George M. Abi-Saab, "The Newly Independent States and the Scope of Domestic Jurisdiction," 1960 Proceedings, Am. So. Int'l. Law, 84-90; 99-101; R. P. Anand, "The Role of the 'New' Asian African Countries in the Present International Order"; and Quincy

[16]*The Role of the "New" Asian-African Countries in the Present International Order* 56 Am. J. Int'l. Law 388 (1962).

Wright, "The Influence of the New Nations of Asia and Africa upon International Law," 7 Foreign Affairs Reporst, 39, 1958.

Dr. R. P. Pal, the Indian member of the International Law Commission, made this apt observation: "International law was no longer the most exclusive preserve of the peoples of European blood by whose consent it exists and for the settlement of whose disputes it is applied or at least invoked. Now that international law must be regarded as embracing other peoples it clearly required their consent no less."[17]

Parenthetically, it may be added that the protest against some of the rules of international law is not confined to Asian-African states. Even many of the Latin-American countries which have the same social and religious background or heritage as the European countries, have challenged the present system of international law in a number of places. The Calvo and Drago Doctrines that emerged from the Latin-American countries are also challenges to the traditional international law.

From the various citations or statements of the articles on the role of the Asian-African nations in the development of international law, it can be concluded that these new nations are contributing their might towards the modification of some of the rules of international law, so that they will be in consonance with the modern conditions of the world. It may be added that most of the Western powers have been cooperative towards this objective.

It is sincerely hoped that the great task of the United Nations, well started in various Commissions, Agencies, or Special Committees, and even in international conferences along this line, that is, the progressive development of international law, will be continued. International law is passing through an era of transformation. The subjects of international law are continually expanding. Each and everyone of us can contribute towards the progressive development of present-day international law.

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[17]56 Am. J. Int'l. Law 383 (1962).

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