# THE THIRD WORLD AND INTERNATIONAL LAW

*The Third World is attempting to extort – through economic blackmail, moral bullying, and outright theft – a portion of the West's legitimately acquired wealth.*

– *Patrick Moynihan*
*(Former U.S. Ambassador*
*to the United Nations)*

The position of the Third World[1] in international affairs is a difficult one. Often misunderstood, this group of developing countries has participated in numerous bitter international confrontations in the recent past. Forced to defend their positions in what appears to them as unfriendly, if not hostile environments, many countries of the Third World have been branded "blatantly irresponsible."[2] In the aftermath of the 1974 Oil Crisis, some of them were chided as childish and vindictive for resorting to their superior numbers to pass "meaningless" resolutions during the 1975 United Nations General Assembly Sessions. They have also been accused of breaching or being unwilling to abide by the generally "accepted" rules of international law.

The reticence of the Third World to accept certain norms of international law has created a most difficult situation, if not a crisis, in the international legal order. This crisis must be resolved if the rule of law is to ultimately prevail in the international legal process, and if international law is to play its assigned role in the peaceful settlement of disputes.

What truths exist in the accusations meted against the Third World? How did the cleavage highlighted above come about?

In general, this paper answers these questions by presenting, *from the viewpoint of the Third World*, the origin of the international legal system, its historical development and growth in importance, and the reasons why the countries which now constitute the Third World view the subject differently from those which comprise the industrial or developed bloc.

No effort is made in this paper to argue, defend, or justify specific Third World positions nor to take into account differences between Third

[1]The term "Third World" is generally used to refer to those developing and have-not countries. Other expressions which are also used to refer to Third World countries include "the LDCs" (the less developed countries), "the South" (in contrast to the industrialized North) and "the Group of 77." See *Time Magazine*, 22nd December, 1975, at pp. 34–42.

[2]See e.g. Address to U.N. General Assembly by U.S. Ambassador John Scali on 6th December, 1974 as reported in the Dept. of State Digest of U.S. Practice in International Law (1974) pp. 14–17.

World countries on specific issues. Rather, the intent is to portray an accurate, general picture of Third World perceptions and positions with respect to international law and international issues with legal connotations.

Specifically, it begins with a discussion of the contributions made to the origin and development of international law by ancient non-Christian, non-Western civilizations. The paper continues with a challenge to the point of views of the Eurocentrics, that is, those writers strong in their belief that international law was exclusively of Western European and Christian origin, spread over the world in the wake of European expansion between the sixteenth and nineteenth centuries. Among them Wheaton[3], de Martens[4], Twiss[5], Westlake[6], Lawrence[7], Hall[8], Liszt[9], Oppenheim[10], Fauchille[11], Reibstein[12] and Verzijl[13].

Then, a new era. An era when Europeans took upon themselves the White Man's burden of civilizing the world and thereby created a new order in international law, including a novel concept of *terra nullius* and the introduction of capitulation treaties. The "passivity" of those countries which ultimately came to form the Third World while the above developments took place is next considered. Then, before concluding, some major areas of confrontation are presented to demonstrate the present cleavage between the "Two Worlds". The conclusion highlights the aim of this paper – that by presenting the Third World's position on international law, a better understanding of their point of view will ensue. Such understanding will undoubtedly strengthen the rule of law, a keystone in the edifice of world peace.

[3] H. Wheaton, *Histoire de Progres du Droit des Gens*, (1865).

[4] F. de Martens, *Traite de Droit International*, (1883).

[5] Sir Travers Twiss, *Droit des Gens*, (1887).

[6] John Westlake, *Principles of International Law*, (1894).

[7] T.J. Lawrence, *Principles of International Law*, *(1923)*.

[8] W.E. Hall, *Treatise on International Law*, (1924).

[9] Franz von Liszt, *Volkerrecht*, (1921).

[10] Oppenheim, *International Law*, (1958).

[11] P. Fauchille, *Traite de Droit International Public*, (1922).

[12] E. Reibstein, *Volkerrecht*, (1958).

[13] J.H.W. Verzijl, *International Law in Historical Perspective*, (1968).

I

EUROCENTRICS V. THE CLASSICISTS

It is logical to assume that rules of conduct between States (whether called international law or something else) existed from earliest times. "States" in the modern sense may be of European creation, but political entities antedate the European States. Those ancient polities dealt with each other and some rules of conduct had to govern their relations. For example, archaeological discoveries reveal that Egyptian pharaohs entered into treaties with neighbouring kings as early as the fourteenth century B.C.[14], as did the early Hebrew kings[15]. These agreements preserved on tablets and monuments, dealt with the subjects of peace, alliance, extradition and the treatment of envoys, and included practices some of which have survived to this very day.

The ancient Chinese were also involved in "inter-State" relations. Their early philosophers developed lofty precepts of universal conduct, and schemes such as the Grand Union of Chinese States, planned by Confucius between 551 to 479 B.C.[16], suggest the concept of international co-operation in the interest of order and peace.

An "inter-nation" system of rules which governed the conduct of nations both in war and peace also existed in ancient India.[17] These rules, including the rights of conqueror over conquered territory, the law relating to contraband and neutrality, jurisdiction over vessels in ports and over piracy, can be traced to the works of Indian classical writers, for example, Manu and Kautilya.[18]

The principle of *pacta sunt servanda*, still considered a pillar of international law, was practised by the Muslim Prophet Muhammed[19] as well as by many pre-colonial African states[20] long before the Europeans even adopted it as a fundamental precept of law. J.C. van Leur, a prominent Dutch historian has observed that some of the non-European powers, including the Mogul Empire in India, Persia, Burma and Siam, were, even

[14] Krader, *Anthropology and Early Law* (1966).

[15] *Ibid.*

[16] See N. Chan, *La Doctrine de Droit International Chez Confucius* (1940); Cheng, *International Law in Ancient China*, in 11 Chinese Social and Political Science Review 38, 251 (1928).

[17] See Armour, *Customs of Warfare in Ancient India*, 8 Transactions of the Grotius Society pp. 71–138 (1923); S. Viswananatha, *International Law in Acncient India* (1925); All-India Seminar, Delhi University, *Indian Traditions and the rule of Law Among Nations* (1962).

[18] See also Ruben, *Inter-State Relations in Ancient India and Kautilya's Artashastra*, Indian Yearbook of International Affairs, Vol. IV at pp. 137–162.

[19] Hamidullah, *Muslim Conduct of State*, (1961).

[20] Rhyne, *International Law*, (1971).

as late as the eighteenth century, on a level of political, military or economic equality with European powers[21]. Thus, the conclusion is warranted that ancient nations in their relations inter se, well before the advent of the European states, laid the groundwork for those rules of conduct now known as international law.

The conclusion is supported by some of the foremost classical international law writers. These jurists also recognized the part played by non-European States in the development of international law and strongly defended the right of these States to be treated as equals in the family of nations and thus under the protective umbrella of international law. A review of their position is now in order.

One of the earliest witnesses to events in the Eastern World is Hugo Grotius. His monograph *Mare Liberum* which constitutes one of the chapters of his work *De Jure Praede* deals with the struggle between the Portuguese and the Dutch in the East Indies. The freedom of the seas doctrine appears to a great extent as a by-product of this main subject. By concentrating on the political struggle, analyzed from the Dutch point of view, he is compelled to review the alliances concluded by European powers with East Indian rulers. In developing his topic, the Asian world of the sixteenth and early seventeenth century, and its entry into the family of nations is highlighted.

In his introduction to *Mare Liberum* Grotius stressed that the case between Portugal (which was claiming a monopoly of the East Indian trade) and Holland (which disputed the monopoly) did not depend upon an interpretation of the Holy Writ ("in which many people find many things they cannot understand"), nor upon the decrees of any one nation ("of which the rest of the world very properly knows nothing"). It simply depended upon universal law:

> The law to which we appeal is one such as no king ought to deny to his subjects, and one no Christian ought to refuse to a non-Christian. For it is a law derived from nature, the common mother of us all, whose bounty falls on all, and whose sway extends over those who rule nations, and which is held most sacred by those who are most scrupulously just.[22]

To claim, as often done by the Eurocentrics, that the people of the East were uncivilized was, Grotius observed, untrue:

> These islands of which we speak, now have and always have had their own kings, their own government, their own laws, and their own legal systems.[23]

[21] J.C. van Leur, *Indonesian Trade and Society*, (1955).

[22] Hugo Grotius, *De Jure Praedae Commentarius*, p. 5.

[23] *Ibid* p. 11.

Other classic writers have expressed similar views. Wolff stated: "On account of a difference in religion no nation can deny to another the duties of humanity which nations owe to each other".[24] In a similar vein, Vattel wrote: "The natural law is the sole rule of the treaties of Nations; religious differences are entirely foreign to them. Nations treat with one another as bodies of men and not as Christians or Mohammedans. Their common welfare requires that they will be able to treat with one another and to rely upon one another in so doing."[25] Denying Christianity as the criteria for civilization of nations, Pufendorf in the preface to his work on International Law, wrote: ". . . this study concerns not Christians alone but all mankind."[26]

The Eurocentrics state the opposing point of view with equal firmness. According to Brierly, ". . . the expansion of the system from being the law of the small family of nations among which it arose into one that is world-wide and now claims the *allegiance of nations which had no part in building it up*,[27] is one of the problems which has profoundly affected the fortunes of international law."[28]

Wheaton wrote: "Is there a uniform law of nations? There certainly is not the same one for all the nations and States of the World. The public law has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin."[29] Rolling is equally emphatic: "There is no doubt about it," he says, "the traditional law of nations is a law of European lineage."[30]

To sum it all, Verzijl states: "Now there is one truth that is not open to denial or even to doubt, namely that the actual body of international law, as it stems today is in all its vital aspects mainly the outcome of Western European practice and theory."[31]

Whatever may be the leanings of a particular writer, one factor, however, is not denied. For a number of centuries non-European States *were* excluded from participation in the development of International Law. How this came about is discussed in Part II below.

[24] Christian Wolff, *Jus Gentium Methodo Scientifico Pertractatum*, (1749).

[25] Vattel, *Droit des Gens*, (1758).

[26] Pufendorf, *De Juris Natural et Gentium Libri Octo*, (1672).

[27] Emphasis added.

[28] Brierly, *The Law of Nations*, (1963).

[29] Wheaton, *op. cit.*

[30] B.V.A. Roling, *International Law in an Expanded World*, (1960).

[31] J.H.W. Verzijl, *op. cit.*

II

THE WHITE MAN'S BURDEN

*(a) Terra Nullius*

Early in the Fourteenth Century, tales of wealth and splendour of the East spread across Europe following the publication of Marco Polo's journey to the Court of Kublai Khan. Europeans, eager to benefit from Marco Polo's experience, began voyages of discovery, leading to new contacts and commercial intercourse with various foreign States. The Eastern Trade brought prosperity to Europe to an extent never experienced in that region. Ironically, it was this sudden prosperity that caused a gap to emerge between Europe and the rest of the "newly discovered" world. Raw materials were a key element in the development of Europe; without them it could not maintain the momentum of its prosperity. The intense competition between the European states demanded a new and more expeditious method of acquiring these essential items because normal trading practices were proving too slow and less productive. What better method to insure the future than by acquiring for themselves the geese that laid the golden eggs? Consequently, former "trading partners" were, through various pretexts, forcibly acquired with an attendant loss of international personality to the losers in unfair and uneven political struggles. However, such actions required justification. Ingeniously the Europeans invoked the *terra nullius* doctrine. But they gave it a new meaning.

In its original concept, the principle of *terra nullius* referred to the *isla nascita,* the island which suddenly emerges from the waves, uninhabited, without an owner, and which should rightfully belong to the State which is the first to discover and occupy it.

Legal authors cite the case of an island which suddenly appeared off Sicily in July 1831. Great Britain immediately took possession under the name of the Island of Saint Ferdinand, but after barely a year, the island sank to the bottom of the sea and disappeared. The Island of Pontia in the Sea of Tuscany, which was annexed by the Roman Republic, has also been cited. Madeira, the Azores, and St. Helena were uninhabited islands, discovered and occupied by the Portuguese, the first in the fifteenth century and the last in 1502; Reunion, the Kerguelen Islands, Clipperton Island, and the Glorieuses and Roches Vertes Islands were occupied by the French in 1642, 1744, 1858 and 1892 respectively. The islands of Aldara and Cosmoledo north-west of Madagascar were occupied by the English.[32] There are also contemporary examples. Jan-Morgen Island was occupied by Norway on 8th May, 1928. Hardly ten years ago, on 23rd February

[32] See M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926).

1968, Spain took possession of the island of Alboran in the Mediterranean.[33] Similarly, the theory of *terra nullius* was applied in the polar regions which, because of the severe climate, were practically uninhabited.

Thus, as long as the question concerned territories which were uninhabited, the problem was posed in international law in relatively simple terms and the theory of *terra nullius* was applied without any great difficulty. But the problem assumed complicated proportions when States claimed and took possession of inhabited territories.

And so, during the so-called era of discovery a "revised" concept of *terra nullius* was born. *Terra nullius* were not only discovered, uninhabited territories, but also those populated and organized if it happened that their ruler was not a Christian prince. The religious camouflage had become, for the period, the prerequisite for saving the theory of *terra nullius*.

Thus, as Roling observed, Christianity became a criteria in determining the sovereignty of certain peoples. "Answering the call", Europeans swarmed to all corners of the earth and their rulers, unfurling the flag of Christian nations, deemed it the duty of their peoples – indeed their burden as the white race – to govern and civilize the backward "half-devil and half-child, sullen and wild" peoples of Asia and Africa. As Kipling succinctly put it:

Take up the White Man's Burden –
Send forth the best ye breed –
Go bind your sons to exile
To serve your captives' need;
To wait in heavy harness,
On fluttered fold and wild –
Your new-caught, sullen peoples,
Half-devil and half child.[34]

Indeed, there was a remarkable religious revival during this period and one of the most notable manifestations of increased fervor was the sudden expansion of missionary efforts. Going out to preach a kingdom not of this world, missionaries found themselves very often builders of very earthly empires. Sometimes they promoted imperialism quite unintentionally. Being killed by savages, not deliberately of course, was a very effective patriotic service which might afford the home country a reason or a pretext for conquest. Thus, the murder of two German missionaries in China gave Germany a pretext for seizing a Chinese port. But more important was the direct impetus intentionally given to

[33] See Charles Rousseau *Chronique*, Revue Generale de droit international public, (1968).

[34] See T.S. Elliot, *A Choice of Kipling's Verse*, (1941) at p. 136..

imperialism by missionaries. Livingstone, the famous Scottish missionary to Africa, desired with all his heart that British rule might be extended in the Dark Continent, to wipe out slavery, to spread civilization and Christianity.[35] Aggression was rationalized by Christian missionaries as a divine opportunity for civilizing and saving benighted heathens. As one learned Christian missionary put it, "Why have India, Burma, and Ceylon . . . been placed under the control of the British sceptre? . . . We cannot doubt that . . . nations have been placed under our auhority that we ought to carry on with better effect the good work of the world's conversion from darkness to light and from the powers of Satan unto God."[36]

However, early in the nineteenth century a new turn of events caused the erosion in the link between the Church and the *terra nullius* doctrine. Inter-denominational disputes between the Churches erupted and the Pope lost his absolute control over Europe. Nevertheless, the Europeans, in order to justify their dominance over inhabited territories which they "discovered", provided yet another definition for *terra nullius*. Instead of "Christianity", "civilization" became the keyword. The order of the day during this period was explicit: a territory not belonging to a civilized State was *terra nullius*.

Any "civilized" State, but only "civilized" States, could form part of the "international community of States" organised and recognized by the European States. Accordingly, any State which did not form part of this closed club was not a civilized State, and its territory could be made the subject of occupation. In other words, political entities of the world not organized according to the canons of the nineteenth century and the models of Europe were considered no more than barbarian States or non-State entities to which the *terra nullius* theory could be applied.

A French authority on international law, Fauchille, summed up a view of the Eurocentrics of the nineteenth century regarding the "uncivilized" peoples of the world: "Savage peoples or barbarian tribes have no right to the lands they occupy, neither a right of property nor, *a fortiori*, a right of sovereignty. They are no more than *de facto* holders thereof, temporary possessors."[37]

Thus, it became common to designate as "savage" any society that did not share the European ethical, political, philosophical or religious belief. And, if a colonial power coveted a "savage territory" its inhabitants were under one pretext or another, deprived of their sovereignty. The ultimate refinement was to say that if the "savages" were incapable of the sovereign

[35] P.T. Moon, *Imperialism and World Politics,* (1929) at p. 64.

[36] R.S. Hardy, *The British Government and the Ideology of Ceylon,* (1841) p. 6.

[37] Fauchille, *op. cit.*

management of their public affairs, this was because they were not even able to appreciate what was good for them or their own salvation. They were thus relegated to the legal status of infants, who under the tutelage of their colonial masters, would some day reach the age of reason and become responsible citizens.

Even the United States, which not long before had rid itself from the yoke of colonialism, joined the rest of the European bands. Thus, as a reason for annexing the Philippine Islands, President McKinley declared:

> There was nothing left for us to do but to take them all, and to educate the Filipinos, and uplift and civilize and Christianize them as our fellow-men for whom Christ also died.[38]

In 1916, another U.S. President, Wilson, sent General Pershing into Mexico with twelve thousand soldiers in order to punish a Mexican revolutionary by the name of Pancho Villa. A matter of particular interest is Wilson's justification for his action. Invading another nation's territory is under international law an act of war, but if the invaded nation is a "backward" nation, it is only a "punitive expedition", and so President Wilson regarded it.[39]

The manner in which sovereignty of "uncivilized" territories was transferred is worthy of note. Whether the result of a remorseful conscience, a fetish for legality or something else, the cession of territories was very often accomplished with a decree of formalism and apparent equality totally incompatible with the true state of affairs between the interested parties. Examples of these so-called treaties of cession abound. One such treaty is that concluded on 1st April 1884 between Henry Stanley, acting on behalf of the International African Association, and the kings and chiefs of Ngombi and Mafela, in the Congo basin, whereby the latter:

> cede to the said Association freely, on their own initative for all time, in their own name and in the name of their heirs and successors the sovereignty and all rights of sovereignty and government over their territories, in return for a piece of cloth each month to each of the undersigned chiefs in addition to the gift of cloth given today; and the said chiefs declare that they accept this gift and this monthly subsidy as payment for all of the rights ceded to the said Association.[40]

*(b) Capitulations*

As proof of the inferiority of non-European States, and hence, their necessary exclusion from the "international law club", Eurocentric writers often raised the issue of capitulation treaties. Capitulations no longer exist

[38] C.S. Olcott, *Life of William McKinley*, Vol. II p. 109.

[39] Moon, *op. cit.*

[40] Stanley, *Cing annees au Congo*, pp. 623 and 624.

today. Formerly, when in effect, they were embodied in treaties which allowed aliens jurisdictional privileges outside the judicial machinery of the sovereign in whose territory they resided. To generalize capitulation treaties as a sign of weakness and legal incapacity of the non-European States is nevertheless incorrect. Two reasons are submitted in support of the last statement:

(i) Capitulations were practised not only in Eastern but in Western countries as well.

(ii) The granting of extra-territorial rights did not per se involve a derogation of sovereignty. At least, not to such an extent as to deprive a State of its international personality.

It is a recognized principle of modern international law that every independent and sovereign State possesses absolute and exclusive jurisdiction over all persons and things within its own territorial limits. This jurisidction is not qualified by differences of nationality, and extends to the person and property of subjects and foreigners alike.[41] Nowhere is this principle of territorial jurisdiction more effectively pronounced than in the case of THE SCHOONER EXCHANGE v. M'FADDON & OTHERS, where Chief Justice Marshal gave his opinion in this oft quoted passage:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its own sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restrictions. All exceptions, therefore to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.[42]

In this passage due allowance is made for the limitations upon the main principle; and in practice there are a number of well-known exceptions to the general rule.[43] One of the most important of these concerned capitulation treaties.

The principle of territorial sovereignty as stated in THE SCHOONER EXCHANGE was unknown in the ancient world. In fact during a large part of what is usually termed modern history, no such conception was ever entertained.[44] In the earlier stages of human development, race or

[41] Hall, *A treatise on International Law* (1917) p. 49; Phillimore, *Commentaries upon International Law* (1879) Vol. 1 at p. 443.

[42] 7 Cranch 116 (U.S. 1812).

[43] For the immunities of foreign sovereigns, diplomatic agents, military, see Bishop, *International Law*, (1971) at pp. 658–741.

[44] Maine, *Ancient Law*, (1888) at p. 99.

nationality rather than territory formed the basis of a community of law. An identity of religious worship seems to have been during this period a necessary condition of a common system of legal rights and obligations. The barbarian was outside the pale of religion, and therefore incapable of amenability to the same jurisdiction to which the natives were subjected.[45] For this reason, we find that in the ancient world foreigners were either placed under a special jurisdiction or completely exempted from the local jurisdiction. In these arrangements for the safeguarding of foreign interests are found the earliest traces of capitulation arrangements.

Under the reign of King Proteus of Egypt, in the thirteenth century, B.C., Phoenician merchants from the city of Tyre were allowed to dwell around a special precinct in Memphis known as the "camp of the Tyrians", and to have a temple for their own worship.[46] Seven years later, King Amasis (570–526 B.C.) permitted the Greeks to establish a factory at Naucratis, where they might live as a distinct community under their own laws and worshipping their own gods.[47] In his work on *The International Law and Custom of Ancient Greece and Rome*, Dr. Coleman Phillipson says: "The Egyptians often allowed foreign merchants to avail themselves of local judges of their own nationality in order to regulate questions and settle differences arising out of mercantile transactions, in accordance with their foreign laws and customs; – the Greeks especially enjoyed these privileges on Egyptian territory."[48]

Capitulation treaties were not entirely absent in the Roman empire. In the first century of the Christian era, Emperor Claudius (41–54, A.D.) accorded to the merchants of Cadiz, the privilege of choosing magistrates, who were given the jurisdiction of the tribunals established by Caesar in Baetice.[49] Under the rule of Justinian (483–565, A.D.), the Armenians were granted the benefit of the same laws on certain subjects as those which ruled the Romans; but questions of marriage, succession to property, and personal status generally, were left to be settled either by

[45] c/f Twiss, *op. cit.* at note 5.

[46] Herodotus, bk. II, ch. 112. Sir Travis Twiss also mentions "that the merchants of Tyre who were strangers to the religion of Egypt, were nevertheless permitted in the twelfth century before Christ to establish trading factories in three different cities on the Tanitic branch of the Nile, where they were allowed the privilege of living under their own laws, and of worshipping according to their own religious rites." *Op. cit.* vol. i, p. 444.

[47] Herodotus, *op. cit.* ch. 178; Twiss, *op. cit.* vol. i, p. 445; Pardessus, *Collection de lois meritimes anterieures au XXVIIIe siecle* (1828) Vol. 1, p. 21.

[48] Pardessus, *op. cit.* Vol. 1, p. 193.

[49] Miltitz, *Manual des consuls* (1837), Vol. 1, p. 15.

the Armenians themselves or by a magistrate named by the Emperor to administer Armenian law.[50]

In Sir Paul Rycaut's *The Present State of the Ottoman Empire*, there was published for the first time a document known as the Testament of Muhammed dated 625 A.D. which gave the Christians certain privileges and concessions, one of which was the protection accorded to Christian judges in the Muslim provinces.[51] The explanation for the position held by the Muslim on this subject, must be sought in his religious beliefs. In the Quran, there is the following passage:

Say: O ye Unbelievers!
I worship not what ye worship,
And ye are not worshippers of
What I worship;
And I am not a worshipper of
What ye have worshipped,
And ye are not worshippers of
What I worship
To you your religion; and to me
My religion.[52]

Inasmuch as the Quran was a judicial as well as a religious code, a non-follower of the religion was naturally not amenable to the law. Hence, it was necessary to submit the foreigner to a special jurisdiction, the most reasonable being that of his own country.

An interesting treaty between Frederick II, Emperor and the King of Sicily and Abbuissac, Prince of the Saracens of Africa, dated 1230, provided that in the island of Corsica, there should be a Muslim consul or prefect to administer justice to the Muslim merchants residing there, although the consul should be established by the emperor and administer justice in his name.[53]

The Capitulations granted to France, on which all later claims of Europe to extra-territorial jurisdiction in the Ottoman Empire were chiefly based, bear the date of 1535. In the instructions which Francis I issued to his envoy in Constantinople, M. Jean de la Foret,[54] there is no intimation

[50] Pears, *Fall of Constantinople* (1886), p. 148.

[51] "By this Covenant . . . I promise to defend their judges in my Provinces, with my Horse and Foot Auxiliaries, and other my faithful Followers." Rycaut, *op. cit.*, p. 100; Van Dyck, *Report on the Capitulations of the Ottoman Empire*, U.S. Sen. Ex. Doc. 3, 46th Cong., Sp. Sess., (Appendix I).

[52] *The Koran*, Sura cix.

[53] Dumont, *Corps universel diplomatique*, (1726), Vol. 1, pt. 1, p. 168.

[54] Charriere, *Negociations de la France dans le Levant*, Vol. 1, pp. 255 et seq.

of a demand for special judicial status. As a matter of fact, had any such demand been made it would have been categorically rejected, for it must be remembered that when it granted the Capitulations of 1535, Turkey was at the zenith of its power.

That the Capitulations were not imposed upon the sultans at the beginning and were but gratuitous concessions on their part may further be corroborated by the exemption of the sultan's non-Muslim subjects from Ottoman justice. Immediately after the conquest of Constantinople, Sultan Mohammed II granted to the Armenians, Greeks and Jews their special rights of jurisdiction. At Constantinople, a Greek patriarch was chosen as chief of the nation, president of the synod, and supreme judge of all the civil and religious affairs of the Greeks. The Armenians had at Constantinople, Caesarea, and Jerusalem three patriarchs invested with the right of deciding civil disputes. The Jews likewise had their courts, and a triumvirate composed of three rabbis served as their supreme court at Constantinople.[55] This was in accord with the Muslim theory that those who were outside the pale of religion were also outside the pale of the law.[56]

Another remarkable example is the treaty of September 24th, 1631, between Louis XIII, Emperor of France, and Molei Elqualid, Emperor of Morocco containing terms of absolute reciprocity on extra-territorial jurisdiction.[57] The most interesting provision of this document is Article 9 stating that the ambassador of the Emperor of Morocco in France and the ambassador or consul of France in Morocco should determine all disputes between Moroccans in France and Frenchmen in Morocco respectively.[58] In cases between Frenchmen and Moors, the local authorities on either side were alone competent,[59] and to make mutual intervention in territorial jurisdiction impossible, Article 12 contains the admonition that all judgements and sentences given by the local authorities should be "validly executed" without interference from the other contracting party.[60] Here, then, is a treaty of perfect equality and reciprocity between

[55] Feraud-Giraud, *De la Jurisdiction francaise dans les Echelles du Levant*, vol. i, pp. 31–32.

[56] See supra p. 12.

[57] Dumont, *op. cit.* vol. VI, pt. 1, p. 20.

[58] "That if any differences should arise between the Moorish merchants who are in France, the Ambassador of the Emperor of Morocco residing in France shall terminate them, and the same shall be done by the Ambassador or Consul of France in Africa."

[59] Article 10.

[60] "That all the judgments and sentences given by the Judges and Officers of the Emperor of Morocco [in disputes] between the subjects of His Christian Majesty and

a Christian and a Muslim Power, which assures the parties reciprocal extra-territorial jurisdiction of a limited sort. The arrangement is all the more significant when it is remembered that France, of all the continental European Powers, was the first in which national sovereignty was most completely established and a systematic jurisprudence most fully developed.[61]

G.F. de Martens states in his "*Cours Diplomatique*" that the States General of the United Provinces of the Netherlands concluded in 1631 a treaty with Persia in which they accorded to Persian traders in the Netherlands reciprocal benefits "en revanche de privileges accordes aux Hollandais en Perse."[62]

Thus it is inaccurate to maintain that capitulations were exclusively a medium through which Europeans obtained privileges in the East. The Dutch-Persian treaty of 1631 shows that there had been a readiness on the part of some European powers to make reciprocal arrangements. Under the commercial treaty of 1718 between Austria and the Ottoman Empire giving Austria all the rights of a capitulatory power, the Ottoman Empire received the right to appoint consuls for Austrian territories. Moreover, there were numerous settlements of Muslims in East Europe such as in Poland or in the Balkans who were governed by their own law, and possessed some measure of internal autonomy.[63]

By the Capitulations of 1782[64] and 1799,[65] Spain granted reciprocal extra-territorial jurisdiction respectively to the Ottoman Empire and Morocco, both of which, be it remembered, were Muslim Powers. These Capitulations throw overboard the theory that extra-territoriality was in any way intended to derogate from the sovereignty of the State granting it. They also go far to prove that the institution of extra-territoriality was not contrived, at any rate at the beginning, to meet the special situation of defective legal systems in non-Christian Powers.

Of course, some of the legal systems were inferior under Western

---

the subjects of the said Emperor, shall be validly executed, without any complaint to the Kingdom of France, and the same shall be practised between the subjects of Morocco and the Frenchmen in France."

[61] Moore, *A Digest of International Law*, (1906) Vol. ii, pp. 774–779.

[62] de Martens, *op. cit.*

[63] See Bogdanowiz, *The Tartar Community in Poland*, (1943).

[64] Article 5: ". . . it shall be the same with regard to the subjects and merchants of the Ottoman Empire in the dominions of Spain." Noradounghiau, *Recueil d'actes internationaux de l'Empire Ottoman* (1897), Vol. I, p. 346.

[65] Article 6. Martens, *Recueil des principaux traites*, (1801).

standards. A striking example on this point was the Chinese method of administering justice in the pre and early twentieth centuries. Thus, according to G.W. Keeton:[66]

(i) Chinese law was unsuitable for application to foreigners. In particular, the law of homicide and affrays did not differentiate between murder and manslaughter, or between them and accidental homicide. Moreover, the Chinese Penal Code imposed the death penalty for over three thousand offences.[67]

(ii) Chinese modes of trial were a travesty of justice. The object of the proceedings was to secure a confession from the prisoner. Even witnesses might be tortured to extract evidence from them.

(iii) There was no separation between official functions. Each Chinese magistrate had a limited law-making power, and he also set in motion the machinery of enforcement.

(iv) The officials were corrupt, because they received negligible salaries, and they were therefore compelled to take bribes.

(v) The conditions in Chinese prisons were appalling. The condition of prisoners awaiting trial was a species of living death. Foreigners could not be surrendered to answer charges so long as these conditions existed.

(vi) The principle of responsibility made many persons vicariously responsible for the crimes of others.

It must be considered that there was much truth in all these allegations; the evidence in support of them is abundant. But most of the defects also existed in European legal systems. For example, the English historian, Walpole, writing in the nineteenth century, says:

> Among the grievances which formed the subject of remonstrance and complaint both in Parliament and out of doors, nothing was more anomalous, more unfortunate, and more indefensible than the criminal code which disgraced the statute-book. During the earlier years of the present century the punishment of death could be legally inflicted for more than two hundred offences.[68]

It was not until the reforms of Sir Robert Peel that this savagery was

[66] Keeton, *Extra-territoriality in China*, Chapters I and II.

[67] From the standpoint of the Americans, there had been a case where a sailor on an American ship had accidently killed a Chinese. The Chinese demanded that the sailor be handed over to the Chinese authority, which was done. No Americans were permitted to appear at the trial and give testimony and the sailor was adjudged guilty and executed by strangulation. Following that incident, the Americans naturally refused to hand over any more of their nationals accused of crimes by the Chinese. – The China Weekly Review, June 19, 1925, p. 1.

[68] Walpole, *History of England*, Vol. II p. 39.

modified. Both English and Chinese law, however, were more severe in theory than in practice. Magistrates in China, like juries in England, seized upon any available excuse to avoid the infliction of the death penalty, and many who were formally condemned were subsequently reprieved. Again, there were periods in the eighteenth and nineteenth centuries when the legal proceedings of various European States could be described as a travesty of justice. Gladstone used exactly these words in describing the activities of the Neapolitan courts in the eighteen-fifties. Further there were few European countries which, in the eighteenth and nineteenth centuries, had not at some time cause to complain of the venality and corruption of their magistrates.[69]

Further examination of the subject of capitulations appears unnecessary in view of the above. Suffice to say, in conclusion, that capitulations were misused by Eurocentric writers to deepen the cleavage between European, Christian nations and non-European, non-Christian countries in the field of international law.

## III

### SOME AREAS OF CONFRONTATION

#### *(a) The Myth Explodes*

Tricked, induced or coerced into giving up what was originally theirs, the colonized States of Africa and Asia nevertheless often accepted their white masters without much opposition. They realized they had lost their freedom, but who cared? After all, with new masters came new schools, hospitals and roads. Their standard of living often improved and life was better. All these achievements of the masters were viewed by the native populations with almost mystical esteem. Very soon, even the fact that they once owned the land their masters were now managing was forgotten. For a long time and with relatively minor exceptions (note, for example, the Gandhi-Nehru and the Soekarno movements of India and Indonesia respectively) this state of affairs remained. Then World War Two came. Most of the European colonies in the Far East were overrun by the Japanese, and, despite hardships undergone during the Japanese Occupation, a spirit of resistance developed during this time among the Asians. There was an awakening of political consciousness that was to bear fruit when the Japanese left. The Japanese Occupation, although destructive, had stimulated the Asians' desire for national independence, and more importantly, had abolished the myth of the superiority of the white man. This in turn broke the grip of the white colonial rule not only in Asia but Africa as well.

One by one countries of the Third World emerged from the colonial

[69] Keeton, *op. cit.*

yoke, but contrary to their will, they remained engulfed in some traditions and norms repugnant to them. True, some had been made in their behalf during a period when they were deemed incapable of self-government. In this context there are certain areas in the field of international law where the views of the Third World are in almost complete antithesis to that of their Western counterparts. State Responsibility, State Succession and the Law of the Sea are next discussed to highlight areas of confrontation between the Third World and the more developed nations, particularly those belonging to the Western bloc.

*(b) State Responsibility*

It is the purpose of the law of state responsibility to extend the protection of international law to those who travel or live abroad and to facilitate social and economic ties between States. No State, regardless of its political or economic philosophy, can remain indifferent to mistreatment of its nationals abroad. In an interdependent world the well being of many countries rests upon an influx of foreign funds and managerial skills, the owners of which must be given effective protection against unjust prosecution or discrimination.[70]

The Western-Third World conflict in the field of state responsibility rests in the main in two areas, namely (a) its origin and (b) the so-called doctrine of minimum standard.

During the 414th meeting of the International Law Commission held on 11th June 1957, Sir Gerald Fitzmaurice seemed to echo the opinion of the Western States when he said that the rules relating to state responsibility were centuries old. Thus according to him they could be found, in *De Bello, de Represaliis et de Duello*, a treatise written by the Italian jurist Giovanni da Legnano, three hundred years before Grotius. The reason for the rules was that the treatment of foreigners in most European countries had, in those days, been such as to give rise to numerous altercations and disputes. It was, he submitted, perfectly natural that centuries later, when they had come in contact with other countries where foreigners were treated in that way, the European countries should have applied the same rules that, in an earlier age, had enabled them to settle such problems satisfactorily among themselves.[71]

Mr. Padilla Nervo of Mexico, however, voiced differently. As far as Latin America was concerned he said, the history of the institution of state responsibility was the history of the obstacles placed in the way of the new Latin American countries – obstacles to the defence of their

[70] Sohn and Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, AJIL (1961) p. 545.

[71] Yearbook of International Law Commission 1957 Vol. I.

independence, to the ownership and development of their resources, and to their social integration.

International rules of state responsibility, Nervo said, were established, not merely without reference to small States but against them, and were based almost entirely on the unequal relations between great Powers and small States. Probably ninety-five per cent of the international disputes involving state responsibility over the last century had been between a great industrial Power and a small, newly-established State. Such 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.

As a corollary to that state of affairs, Nervo added, an unbridled positivism had reigned supreme; its sole criterion was the practice of States, and in the nineteenth century that meant the practice of the Great Powers. Once international lawyers had abandoned the criterion of justice in assessing the conduct of States and reduced the systematization of law to a catalogue of the practice of States, it was hardly surprising that the doctrine of State responsibility became a legal cloak for the imperialist interests of the international oligarchy during the nineteenth century and the beginning of the twentieth.[72]

The Mexican delegate was of course voicing the views not only of Mexico but also of the Third World. The other Third World representations at the meeting (e.g. Egypt, Syria, Thailand, Iran and India) supported his line of argument.[73]

However, it is over the second area of conflict namely the so-called minimum standard doctrine, that non-Western countries are most vehement against Western interpretation of state responsibility.

Bishop says that "when the treatment accorded an alien falls below the standard required by international law, the receiving State is deemed culpable of violating an international legal interest of the State of which the alien is a national."[74] It has been repeatedly laid down that there exists in this matter a minimum standard of civilization, and that a State which fails to measure up to that standard incurs international liability.[75]

The *Draft Convention on the International Responsibility of States For Injuries to Aliens*[76] as revised by the Harvard Law School in Article 2

[72] *Ibid.*

[73] *Ibid.*

[74] Bishop, *International Law*, (1971) at p. 745.

[75] Oppenheim, *op. cit.*, Vol. I p. 350.

[76] See AJIL (1961) at p. 55.

concerning the primacy of international law provides that the responsibility of a State is to be determined according to international law and that a State cannot avoid international responsibility by invoking its municipal law. And to add salt to a wound, paragraph 3 of the Article adds:

> Nothing in this Convention shall adversely affect any right which an alien enjoys under the municipal law of the State against which the claim is made if that law is more favourable to him than this Convention.

In other words, the alien, under the Draft Convention gets the benefit of both worlds. He is entitled to a higher standard (the international minimum) if the local standard is *lower* than the minimum standard prescribed by international law. But, if the local standard is higher than the minimum standard, he is entitled to the (higher) local standard.

That non-Western countries can hardly accept the above Western interpretation of State responsibility is evident from the utterances of their representations on various occasions. .

The Mexican Minister of Foreign Affairs in a Note to the United States dated August 3rd. 1938, contested the right of the United States to demand compensation for the agricultural lands of American citizens expropriated by Mexico, from 1927. Vigorously invoking Article 9 of the *Convention on the Rights and Duties of States* signed at Montevideo, 1933, which provides for complete jurisdiction of States within their national territory over all inhabitants, to the effect that:

> . . . nationals and foreigners are under the same protection of the law and the national authorities, and foreigners may not claim rights other than or more extensive than those of nationals. . .

the Mexican Minister said:

> The principle of equality between nationals and foreigners, considering that the foreigner who voluntarily moves to a country . . . in search of a personal benefit, accepts in advance, together with the advantages which he is going to enjoy, the risks to which he may find himself exposed. It would be unjust that he should aspire to a privileged position safe from any risk, but availing himself, on the other hand, of the effort of the nationals which must be to the benefit of the collectivity.[77]

At the 1957 International Law Commission Meeting, the representative from India stressed that international law was no longer the almost exclusive preserve of the peoples of European blood "by whose consent it exists and for the settlement of whose differences it is applied or at least invoked."[78] International law he said must now be regarded as embracing

[77] The entire correspondence is printed in 32 AJIL, Supp. (1938) at p. 188.
[78] Westlake, *The Native States of India*, 26 LQR at p. 313.

other peoples, it clearly required their consent; and that fact must be steadily borne in mind in attempting to determine to what extent alien property or alien interests in the newly freed countries merited the protection that international law could afford.

The traditional rules of state responsibility, the Indian delegate further pointed out, emanated from 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 nationals. If an alien comes to a country in pursuit of commercial enterprise, it is held he must cast in his lot with the citizens of the State in which he has decided to trade and he exposes himself to whatever political vicissitudes occur there. For the rule that a State must respect the property of aliens cannot exclude a State's right of interference with private property, either for 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. In all such cases, the State concerned must have the sole right to fix its own compensation terms for the damage done and to employ its own agencies for this purpose.

The need of many countries of the Third World for technical and financial assistance from foreign countries, as well as their need for increased international trade, requires that adequate protection be provided to aliens' personal and property rights.[79] Such protection, it must be noted, is grudgingly given – especially if it discriminates against the local subjects. Third World countries are therefore generally not in favour of acknowledging a universal "minimum standard of justice" in respect of State responsibility.

### *(c) State Succession*

The transfer of territory from one national community to another gives rise to legal problems of a difficult and complex character. Such transfers have been frequent in modern history and often drastic in their extent and consequences. They have been effected in a variety of ways: by violent annexation, by peaceful cession, by revolution or emancipation of subject regions, and by extensive territorial resettlements. Despite their formal differences these changes possess one common feature; one State ceases to rule in a territory, while another takes its place.[80]

Succession of States has for long been one of the most controversial problems of international law. Writers on international law have advanced divergent views on the definition of succession.[81]

[79] Sinha, *New Nations and the Law of Nations* (1967).

[80] Feilchenfeld, *Encyclopedia of Social Sciences* (1934) Vol. XIV at p. 345.

[81] See H. Bokor-Szego, *Succession of New States and International Treaties* (1964) at p. 159.

Juridically, State succession is completely different from the changes of Government which occur within a State and have no legal effect upon the international personality of the State or the extent of its territory. Theoretically, it may be possible to conceive of the complete extinction of a State without any successor, as would happen if an island which formed the entire territory of a State completely disappeared as the result of some convulsion of nature -- or indeed of nuclear warfare. But in practice the cases arise when one State succeeds, wholly or in part, to the personality and the whole or part of the territory of another State. When this occurs, what is the position of the treaties of the latter State?[82]

Colonial powers often conclude treaties of succession with new States. Recognition of the independence of a new State is often made conditional on the conclusion of such agreements, or at least strong pressure is exerted on new States to assume certain obligations. In this respect the problem of the succession of States is closely linked with that of the validity of unequal treaties.

Yasseen, the Iraqi member of the International Law Commission, explained that succession of States, especially in the sphere of decolonization or the emanicipation of peoples, could give rise to unequal treaties concluded between parties which were unequal both in fact and in law. That inequality was shown by differences in legal status such as those between a colonizer and a colony, a mandate holder and a mandated territory or a protecting Power and a protectorate. A general convention on succession of States should, above all, prevent such inequality from leading to abuses or the exploitation of weak States by means of bilateral treaties.[83]

The question of a newly independent State's acceptance of the treaties of its predecessor has two aspects:

(a) Whether that State is under an obligation to continue to apply those treaties to its territory after the succession of States; and

(b) Whether it is entitled to consider itself as a party to the treaties in its own name after the succession of States.

Western States are of the view that a newly independent State cannot be allowed to free itself from obligations imposed in treaties entered by its predecessor State in its behalf. For to do so would merely endanger the *pacta sunt servanda* doctrine without which international law cannot survive. Third World States on the other hand insist that treaties to which they were not parties should not be forced upon them. They advocate the clean slate doctrine, that is, the concept that newly independent States

[82] McNair, *Law of Treaties*, (1961) at pp. 589-590.
[83] See *Yearbook of International Law Commission*, (1963)

begin their international life free from any obligation to continue in force treaties previously applicable with respect to their territories. In fact the Third World States argue this doctrine was applied by the United States when she obtained her independence from Great Britain.

Another argument put forth by the Third World against accepting treaties created by their predecessors is the application of the *rebus sic stantibus* doctrine in that a vital change of circumstances has occurred, or the object of the treaty has disappeared upon independence.

Although Third World States do not in practice totally subscribe to either the clean slate or the *rebus sic stantibus* doctrine, they have nevertheless adopted a custom of rejecting those treaties which they find incompatible with the exercise of their sovereignty. By way of illustration, reference is now made to an excerpt of a speech made by Prime Minister Nyerere of Tanganyika on November 30th, 1961 at a session of Parliament:

> . . .There are two treaties which call for special mention and on which I wish to make the attitude of the government of Tanganyika quite clear. They are agreements of 15th March, 1921, and of the 6th April, 1951, between the United Kingdom and Belgium about port facilities in Kigoma and Dar-es-Salaam. The 1921 Agreement contained two classes of provisions - first, provisions dealing with transit across Tanganyika for persons and goods coming from and going to the neighbouring territories of the Congo and Ruanda-Urundi. Under the second provisions, the Government of Belgium was granted a *lease in perpetuity at a rent of one franc per annum* for sites at Dar-es-Salaam and Kigoma for the construction of port facilities. The 1951 Agreement contained arrangements for the exchange of the site at Dar-es-Salaam granted in the 1921 Agreement and for the provision of a new site on similar terms.
>
> Now, the Government of Tanganyika has no objection to the continued enjoyment, by all persons belonging to friendly nations, of the facilities for transit which exist between Dar-es-Salaam and the neighbouring States. Indeed, we welcome the use of our transit facilities. . . We would not object to the enjoyment by foreign States of special facilities in our territory if such facilities had been granted in a manner fully compatible with our sovereign rights and our new status on complete independence. But such was not the case with the facilities which we granted to Belgium under the 1921 and 1951 Agreements. A lease in perpetuity of land in the territory of Tanganyika is not something which is compatible with the sovereignty of Tanganyika.[84]

A number of prominent international lawyers, among them Shearer,

[84] H. Bokor-Szego, *op. cit.* at pp. 171 -172.

have criticized Tanganyika's argument especially with regards to Nyerere's reference to State sovereignty. State sovereignty does not mean that States are authorized to act arbitrarily in any field of international relations in contravention of the general principles of international law. State sovereignty cannot mean that any State would have the right to indulge in practices which are at variance with the obligation to maintain peaceful relations. According to Shearer, such an obligation involves obedience by a new State to treaties made by its predecessor. The rationale behind this, in Shearer's words is as follows:

> A very practical consideration is that a new State, in the first decade of its international life, simply has not the time or the resources to spin an entirely new web of international agreements for its welfare. . . The interests of the population of a new country are served better by the continuity of treaties than by a sudden break in treaty relations with other States.[85]

From the point of view of the Third World, however, to hold that treaties should be automatically transmitted to a new State is to discard the vital principle of self-determination. A new State must retain, at least initially, some right to object against obligations established by its predecessor. It is highly unlikely that such protests would concern treaties involving boundaries which are rapidly settled under customary law. But Third World States feel that it is important to retain this right to object because, for example, a treaty concerning boundaries may also include other burdensome provisions such as those contained in the Tanganyika treaties. To fetter a newly independent State in this way by claiming that these onerous provisions should bind a new nation without its consent is, to the Third World, not only incompatible with the principles of independence but also politically unrealistic.

*(d) Law of the Sea*

During the Third United Nations Law of the Sea Conference held at Caracas in June 1974, three main points were generally agreed on. These were expected to provide a foundation for negotiations at Geneva in 1975:

(i) Territorial seas adjoining coastal nations should be widened from the current three miles to twelve miles.

(ii) Economic zones should be established, extending 200 miles from land, to whose fish and mineral resources the coastal nations would hold title.

(iii) Mineral resources of the high seas – the oceans beyond national jurisdictions – should belong to all nations.

But when it came to interpreting these principles during the follow-up

[85] Shearer, *State Succession and Non-Localized Treaties*, at. pp. 42–43.

sessions at Geneva and New York, the same national division that had created turmoil at Caracas resurfaced.

Although there were alignments representing every major political, geographic and economic interest – which often broke down as nations defected on particular questions – the Conference was basically dominated by two contending viewpoints. On one side were most of the leading industrial and maritime nations of Western Europe, the United States, Japan and the Soviet Union, who favoured the traditional freedom of the seas with limited national jurisdiction in coastal waters and wide latitude on the high seas. At the other extreme, members of the Third World (calling themselves the Group of 77) regarded the Conference as the opening wedge in their drive to achieve a "new economic order" by transferring the world's wealth from the "have" nations to the "have-nots". To this end, they sought to gain monopolistic rights in their 200-mile zones, and to restrict exploitation in the high seas by the developed countries.[86]

The Conference has now recessed and is scheduled to be reconvened in Geneva in the spring of 1978. It is a matter of speculation whether a universally-acceptable law of the sea will ultimately emerge from this Third Conference.

While participating in the development of a common law for the exploration and exploitation of the deep seabed and its resources, the Third World countries want to take this opportunity to revise the old maritime law which they say was developed by a few great Powers in a very different age and so often been found outmoded. They not only reject narrow limits of territorial waters[87] but were generally opposed to the traditional freedom of the sea doctrine which, they feel, confers an undue advantage on States which, while possessing the technological and financial capacity to exploit, often misuse their powers. More often than not, the freedom of the high seas has been transformed into a licence to overfish and pollute. It has long been interpreted by the powerful military States as giving them a right to threaten smaller States or to subjugate and colonise other peoples. It is important to note that only nations which have their own navies and merchant marines sailing round the globe, or which possess highly mechanised fishing fleets capable of sailing to distant waters, or which have the capacity to carry out oceanographic research and to mine the deep ocean floor, insist upon this doctrine and benefit from it. On the other hand, nations which lack marine technology and are

[86] R. Schiller, *The Grab for the Oceans,* (1975), at pp. 105 -106.

[87] In 1960, 13 States claimed a territorial sea which was 12 miles in breadth. A 12-mile territorial sea is now being claimed by 52 States, while another 11 States claim a belt which varies between 18 and 200 miles. Only 28 States, including all the important maritime States, cling to the old 3-mile limit. See also Delupis, *International Law and the Independent State,* (1974), at pp. 29–58.

confronted with distant-water fishing fleets of other nations catching millions of tons of fish within their sight, or which want to keep off the might of the big powers, or wish to be saved from those who haunt their coasts for the purpose of "gathering data" by electronic procedure combat the freedom of the seas doctrine.[88] It is not without reason that Senator Metcalf of the United States pointed out that "under the freedom of the seas doctrine there is not much equity between developed and under-developed coastal nations" and that "a less developed nation is a second-class citizen."[89]

Besides serving as a vital link between States, the sea has always been a source of wealth, power and knowledge. The deep ocean floor, hitherto remote and protected from man's depredations, provides the latest challenge and perhaps the highest prize of the modern age. Determined not to be left behind, as they were for centuries when the sea was exploited only by a very few powerful States for their own benefit, the Third World countries wish to be "partners in development" and to share the benefits to be derived from the deep seabed. Indeed, to the poor under-developed countries of the Third World, the seabed offers a new, unique opportunity to augment their economic resources by tapping a new resource.

Thus, they lay claim to a fairly wide area of the sea and of the seabed which is to fall within their national jurisdiction and the resources of which, both living and non-living, are to be for their exclusive benefit. Thus, beyond the limits of extended territorial waters, most of the Third World countries claim an "economic zone" which is to extend up to 200 miles and which is intended to keep the developed countries off their shores. If they do not yet have the technological capacity to exploit the resources of this zone, they may employ contractors, enter into joint ventures with foreign States or companies, or make other bilateral arrangements for its exploitation. This does not, however, detract from the fact that they have the exclusive right to regulate resource exploitation activities in this area. As the representative of Kenya explained:

> The exclusive economic zone concept is an attempt at creating a framework to resolve the conflict of interests between the developed and developing countries in the utilization of the sea. It is an attempt to formulate a new jurisdictional basis which will ensue a fair balance between the coastal States and the users of the neighbouring waters.[90]

[88] R.P. Anand, *Interests of the Developing Countries and the Developing Law of the Sea*, Annales D'Etudes Internationales, Vol. 4 (1973) at pp. 16–17.

[89] Congressional Record, Senate, 92nd Congress, First Session, March 10th., 1971 at p. S2815.

[90] F.C. Njenga (Kenya), U.N. Doc. A/AC 138/SC II/SR.29, March 31st, 1972, at p. 24, but cf. U.N. Third Conference on the Law of the Sea, Informal Single Negotiating Text, Part III, Art. 45, A/CONF.62/WP.8/Part II at p. 19.

Perpustakaan Undang-Undang Universiti Malaya

Ironically, the United States which throughout its history had assigned such high priority to the preservation of narrow territorial-sea claims, had itself been guilty of setting some of the precedents used to justify many expanded claims. The Truman Proclamation of 1946[91] which claimed for the United States jurisdiction over the resources of the continental shelf, with undefined limits, was later incorporated in the 1958 Geneva Convention on the Continental Shelf which, with equally open-ended obscurity, established the jurisdiction of the coastal States in the shelf to a water depth of 200 meters or "beyond that limit to where the depth of the superjacent waters admits of the exploitation of the natural resources."[92]

Truman's Proclamation had legal consequences both domestically and internationally. Domestically, it settled the controversy between the Federal Government and the various coastal State Governments which claimed sovereignty over the areas beyond their coastlines.[93] Internationally, the claim of the United States was followed by a similar claim by the United Kingdom, affecting offshore claims to certain overseas possessions. Saudi Arabia, Iran, Pakistan, India, the Philippines, Australia, Bulgaria, Israel, Egypt and Iraq also followed the American example in claiming jurisdiction over the resources of the seabed contiguous to their coasts.[94]

The Truman doctrine proclaimed in effect a "special interest" of the United States in offshore oil deposits, a precedent which the Latin Americans were not slow to borrow in support of other special interests. Peru, Ecuador and Chile (which possess hardly any continental shelf because their coastlines drop sharply) claimed exclusive fishing rights out to 200 miles. Later both Argentina and Brazil extended their territorial sea to 200 miles and have tried to obtain Latin American agreement, plus concurrence from other developing States in the doctrine that each State may, within reason, assert its claims in accordance with its "special circumstances".[95] The proliferation of offshore oil leases granted in various parts of the world including Indonesia and the Philippines have led to still another set of "special circumstances." Those two States have claimed the right to draw their territorial sea from straight baselines connecting the outer reaches of their island archipelagoes, thus purporting to acquire territorial rights over vast reaches of the Pacific Ocean on the basis of their special and unique geography.

[91] For the full text of the Truman Proclamation, see 10 Federal Register 12303 (1945), 59 Stat. 884.

[92] M.L. Gerstle, *The U.N. and the Law of the Sea*, San Diego Law Review, at p. 575.

[93] See, e.g. U.S. v. CALIFORNIA, 85 S. Ct. 1401 (1965).

[94] H.A. Freeman, *Law of the Continental Shelf* (1970) at p. 112.

[95] For an exhaustive discussion on the legitimacy under international law of the Latin American claim, see K. Hjertonsson, *The New Law of the Sea* (1973).

The Third World countries hope "that sooner or later it will be recognized that the welfare of peoples takes priority over the excessive profits of private enterprises."[96]

When confronted with the persistent criticism against claims which, it is alleged reflect the "obstructionist" and "stubborn" attitudes of the Third World countries and "extravagant and obsolete parochialism", these countries sometimes wonder who is really "obstructing" an agreement on the subject – the less-developed nations whose alleged crime is that they are trying to defend their inalienable right to the full utilization of their natural resources, or the States which do "not hesitate to resort to threats, reprisals and even the freezing of international credits" against them.[97]

The Third World States argue that their present tendency to extend national jurisdiction, including territorial waters, is neither inspired by "parochialism" nor by any "considerations of national pride", but is merely intended "to meet the growing economic needs of the peoples of the world."[98] The Third World countries cannot, it is said, "restrict their maritime sovereignty or sacrifice their national interests in the expectancy of benefits that might be derived from the resources of the sea under a regime whose powers" have yet to be defined.[99]

In justification of their right to extend their sovereignty and jurisdiction to the extent necessary to conserve, develop and exploit the natural sources of the maritime area adjacent to their coasts, its soil and its subsoil, the Latin American States represented at the Montevideo meeting on the Law of the Sea in May, 1970 pointed out in a declaration that:

> Scientific and technological advances in the exploitation of the natural wealth of the sea have brought in their train the danger of plundering its living resources through injudicious or abusive harvesting practices or through the disturbance of ecological conditions, a fact which supports the right of coastal States to take the necessary measures to protect those resources within areas of jurisdiction more extensive than has traditionally been the case and regulate within such areas any fishing or aquatic huntings, carried out by vessels operating under the national or a foreign flag, subject to national legislation and to agreements concluded with other States.[100]

[96] A. Arias-Schreiber (Peru), U.N. Doc. A/AC. 138/SR. 46, March 15th, 1971 at p. 21.

[97] *Ibid*. at p. 19.

[98] M.L. Allouane (Algeria), U.N. Doc. A/AC. 138/SR.54, March 22nd., 1971, at p. 114.

[99] A.K. El Hussein (Sudan), U.N. Doc. A/AC. 138/SR.55, March 22nd., 1971, at p. 138.

[100] See Montevideo Declaration, in U.N. Doc. A/AC. 138/SR.34, April 30th., 1971, at p. 2.

The Representative of Kenya pointed out to the Subcommittee II of the Seabed Committee that:

> ... in 1970 the developed countries with less than one-third of the world's population had taken sixty per cent of the world catch of fish, while only forty percent had gone to the developing countries ... [A] system which permitted such inequality is clearly unbalanced and should be changed.[101]

It must be noted that the current controversies concerning the limits of national jurisdiction in the sea and the seabed are economic in origin. The developing countries have no great strategic interests and are to all intents and purposes mere spectators of the competition between the great powers. Their interests are basically economic. The claim to wider territorial waters is not and cannot be an absolute claim for a *mare clausum*. Similarly, wide claims of exclusive and preferential fishing or economic zones are meant to protect the economic interests of developing States. Since the freedom of navigation is as much in the interest of the developing States as that of the advanced countries, and since it is the very life-blood of international trade, the developing States do not seek to restrict this freedom unnecessarily. Indeed, the fear of the so-called "creeping jurisdiction"[102] has no basis in history. As a United States Senate Subcommittee on the Outer Continental Shelf declares in a report:

> We have found little evidence to support such allegations. The overwhelming majority of coastal nations which have become parties to the Continental Shelf Convention have limited their jurisdictional claims both qualitatively and quantitatively to the terms of that treaty. They have indeed honoured the commitments.[103]

Only a "minuscule minority of nations", the Subcommittee points out, "has been reluctant to fully recognize and respect the freedom of the seas doctrine."[104]

[101] U.N. Doc. A/AC. 138/SC.II/SR.29, March 31st., 1972, at p. 6.

[102] See L. Henkin, *The Extent of the Legal Continental Shelf*, in Pacem in Maribus (1970), Vol. II; The Royal University of Malta Press, *Legal Foundations of the Ocean Regime*, (1971) at p. 15; G. Scelle, *Plateau Continental et droit international*, Revue generale de droit international public, (1955) Vol. 59, at p. 5; W. Friedmann, *The Future of the Oceans* (1971) at p. 38.

[103] See Report by the Special Subcommittee on the Outer Continental Shelf to the Committee on Interior and Insular Affairs (Chairman: Senator L. Metcalf), U.S. Senate, December 21st., 1970, Washington, D.C., Government Printing Office, (1971) at p. 17.

[104] *Ibid.*

Apart from causing irritation to a few distant-fishing States, the claims of the developing States are not expected to affect anybody else. In any case, the answer to "creeping jurisdiction", it is suggested, does not lie in limiting the access of the coastal States to the resources of their own shelf and adjacent sea, but rather in reaching international agreement on the limits of the territorial sea and the economic zone.

Beyond the area of national jurisdiction, which is not defined, there are vast oceans which the less developed countries feel they own in common with others. They want to partake of its resources without being bothered by the unpleasant implications and strings of "economic aid". The fact that the seabed beyond national jurisdiction was declared a "common heritage of mankind"[105] symbolises the interest, needs, hopes and aspirations of the developing States and serves as a useful rallying cry in support of their objectives. They have stood solidly behind this concept, which they consider as the most basic principle of the future law governing the exploration and exploitation of the sea-bed and ocean floor. Unruffled by the criticism of the Western countries and scholars that the concept of "common heritage" is "a neologism" and "not a legal principle" but merely embodies a "moral commitment",[106] they admit that the concept that any area should "be administered in common for common good was somewhat alien to existing international law." But they insist that "its introduction as the basis of international law" is "essential, not only for the development of that environment but also for the peaceful development of the world."[107]

The fundamental objective of the Third World countries is, of course, to secure the largest possible share of the resources of the seabed. They have not only been emphasizing the need for equitable distribution of the

[105] Repeated in several resolutions, this declaration was enshrined in Resolution 2749 (XXV) on the "Principles Governing the Seabed and Ocean Floor and the Subsoil thereof, Beyond the Limits of National Jurisdiction", which was unanimously adopted by the United Nations General Assembly on December 17th., 1970.

[106] See E.D. Brown, *The 1973 Conference on the Law of the Sea. The Consequence of Failure to Agree*, Proceedings of the Sixth Annual Conference of the Law of the Sea Institute, University of Rhode Island, June 1971, Kingston, R.I., (1972) at p. 18; J. Debergh (Belgium), U.N. Doc. A/AC. 138/SC I/SR. 13, August 13th., 1971, at p. 16; A. Beesley (Canada), *ibid* at p. 18; S.Oda (Japan) U.N. Doc. A/AC. 138/SC. I/SR.14, August 14th., 1969, at p. 24; S.N. Smirnov (U.S.S.R.), U.N. Doc. A/AC.138/SC. I/SR.8, March 21st., 1969, at p. 80.

[107] A. Pardo (Malta), U.N. Doc. A/AC. 135/WG. I/SR.3, September 3rd., 1968, at p. 52; see also L.F. Ballah (Trinidad and Tobago), U.N. Doc. A/AC. 138/SC. I/SR. 12, November 6th., 1969, at p. 47.

benefits to be derived from the activities on the seabed but have persuaded the international community to commit itself to giving special consideration to their interests. Thus, the United Nations General Assembly has declared in several resolutions that the seabed must be explored and exploited "for the benefit of mankind as a whole, and taking into particular consideration the interests and needs of the developing countries."[108]

Although it is almost impossible "to transform the present inequitable distribution of land resources and the law and economic practices so as to justify and protect them," it has been suggested that it would be "rational and still possible to devise and establish a system of laws and practices for the sea and its resources which would serve the present and future generations."[109] Most of the countries of the Third World demand that the distribution of benefits reflect the international desire to bridge the gap between the inordinately rich and the desperately poor countries and to promote universal peace and well-being.[110]

It must be stressed once again that economic development is for the majority of the Third World countries a matter of survival, a fundamental issue. The seabed is the only area of the earth which has not so far been exploited by the industrialized countries to their sole advantage, and the under-developed countries are determined to protect it.

The threats made by the technologically-advanced countries convince the under-developed States more than ever that the "haves" do not want to let them into the twentieth century and that they, the advanced Western countries, "are veritable octupi whose tentacles are drawing ever tighter on the developing world,"[111] The Third World countries are afraid that their "territorial seas and continental shelves" are "being eyed greedily, just as their land had been in past centuries."[112] The so-called "obstructionist" attitude of some of the Third World countries in the negotiations on the formulation of the law of the sea and their protracted arguments on procedural or peripheral issues which halt or slow down any

[108]See in particular the Declaration of Principles contained in Resolution 2749 (XXV) *op. cit.*

[109]J.S. Warioba (Tanzania), U.N. Doc. A/AC. 138/SC. I/SR. 5, July 20th., 1971, at p. 5.

[110]See M. Zafera (Madagascar), U.N. Doc. A/AC. 138/SC. I/SR. 8, July 29th., 1971, at p. 4.

[111]President Boumedienne of Algeria, quoted in A. de Borchgrave, *Scandal of the Century: Rich and Poor,* Newsweek, October 30th., 1967, at p. 26.

[112]M.L. Allouane, *op. cit.* at p. 113

work on the substance of the rules to be discussed merely indicate that they are frustrated by their failure to persuade the advanced countries to give heed to their interests. However, a recent United States Senate action has given Third World countries hope that their frustration over this matter may soon be over.

On January 28th., 1976, the United States Senate voted 77 to 19 to broaden the United States fishing jurisdiction to a distance of 200 miles off the coasts beginning in July 1977. Whatever may have been the reason behind this action, the Senate move has been enthusiastically welcomed by Third World countries which now feel that the United States, by adopting a method which they have been clamouring for recognition for a long while, is at last giving heed to their interests. As the acting Foreign Minister of Ecuador put it:

> . . . it is highly satisfactory to see it becoming clearer in the international conscience that it is the sovereign right of each country to fix the limits of its jurisdiction off its coasts with the purpose, among others, to make use and protect ocean riches.[113]

## IV

### LEGAL FRAMEWORK TO FILL AN "EMPTY SHELL"

Although the Third World nations can hardly be described as monochromatic, they do share some attitudes which permit generalization. In or out of the United Nations they are the large majority of States, and where they are in agreement, can shape law in their image and interest. Not surprisingly, it is in regard to norms and obligations of particularly political character that they are virtually united and can make and unmake law. They are "have-nots", inevitably questioning the law made by the "haves" in support of the status quo, seeking new laws that will accelerate change, afford them status and a greater share of the world's goods. As newly independent States, they have particular animus toward colonialism, and may resist, for example, claims upon them as "successor governments" for the undertakings of their erstwhile masters. They are sensitive to mistreatment on account of race and have sought to develop law to forbid it (e.g. the case of South Africa). Where race or colonialism is involved, they may seek new exceptions to general principles of law, even to basic law forbidding unilateral force. They may be skeptical with respect to particular norms and obligations which hamper their freedom at home, for example, in matters relating to nationalization of alien property or cancellation of foreign concession, or human rights for political prisoners.[114]

[113] The New York Times, January 30th., 1976 at p. 2.

[114] L. Henkin, *International Law and the Behavior of Nations*, Recueil Des Cours, Vol. 114, at pp. 218–219.

A common accusation against Third World States is that, depending on circumstances, they tend to regard some of the procedures and rules of international law as obstacles to or instruments for the promotion of national interests.[115] This tendency has been criticized by some international lawyers in the West as opportunistic and indicative of an excessively political approach to international law.[116] Such a criticism overlooks the extent to which all legal order, domestic or international, is a value-realizing process by which the actors in a social system try to attain their goals by various means or strategies. There is nothing static or intrinsically valuable about law – its validity depends ultimately upon its capacity to satisfy the particular interest of participants and the aggregate interests of the community.

What is often not appreciated by the industrialized West is that the "national interest" and sometimes double standard attitude towards rules and norms of international law is far from being a unique feature of the Third World.

Towards the end of 1975, Indonesia, a staunch Third World State, clearly breached international law by her incursion into Portuguese Timor. Her proclaimed justification was national interest. And she did not need to go far to find international precedents for her action. Did not the United States employ the same reason for many of her overseas "adventures"?

Indonesia could easily find support for her Portuguese Timor action in an answer made by President Ford to a reporter's question at a news conference held in Washington D.C. on September 16th., 1974. At that conference, Ford was asked the following question:

> Under what international law do we have a right to attempt to destablize the constitutionally elected government of another country, and does the Soviet Union have a similar right to try to destabilize the Government of Canada, for example, or the United States?

The question was asked in the context of other questions related to Congressional testimony concerning evidence of activity by the Central Intelligence Agency to "destabilize" the Allende administration of Chile. President Ford responded:

> I am not going to pass judgment on whether it is permitted or authorized under international law. It is a recognized fact that, historically as well as presently, such actions are taken in the best interest of the countries involved.[117]

[115]See G.M. Abi-Saab, *The Newly Independent States and the Rules of International Law. An Outline*, Howard Law Journal (1962) at pp. 95 -121.

[116]See e.g. A.V. Freeman, *Professor McDougal's 'Law and Minimum World Public Order'*, AJIL, (1964) at pp. 711–716.

[117]Department of State, *Digest of United States Practice in International Law*, (1974) at p. 4.

Whenever a Third World State breaks an international agreement (especially in cases where the aggrieved party happens to be a Big Power Western State) it normally has to bear not only the onslaught of protests but, at times, even economic sanctions in one form or other. A powerful Western State, however, may breach international obligations with lesser consequences. The United States tragic involvement in Vietnam is certainly a case in point.

The issue in question was whether the United States breached any international agreement with the Government of South Vietnam when it failed to rescue that Government from the final Communist onslaught. International law on the issue is crystal clear. Assurances and intimations given by Secretary Kissinger in the context of negotiating the Paris agreements of 1973 were certainly not "private" arrangements as suggested by the editorial of the New York Times of April 6th., 1975. Rather, they were the actions of the United States Government creating international legal obligations.[118]

A Eurocentric author Alwyn Freeman has singled out the Third World States as:

> . . .primeval entities which have no real claim to international status or the capacity to meet international obligations, and whose primary congeries of contributions consists in replacing norms serving the common interest of mankind by others releasing them from inhibitions upon irresponsible conduct.[119]

Freeman and those who may agree with him are certainly out of touch with reality. As Professor Falk puts it:

[118] The relevant case concerns a declaration on the status of Eastern Greenland made by M. Ihlen, the Norwegian Foreign Minister.

In the context of the Paris Peace Conference of 1919, the Danish Foreign Minister proposed that Denmark would raise no objection to Norway's claim to Spitsbergen if Denmark would encounter no difficulty from Norway in extending its sovereignty to all of Greenland. As recorded in the minutes of the conversation made by M. Ihlen himself, it was stated by him that:

> . . . the Norwegian Government would not make difficulties in the settlement of this question.

In 1931, Norway issued a decree claiming sovereignty over part of Eastern Greenland. Denmark referred the case to the Permanent Court of International Justice. Norway's argument was that Ihlen lacked constitutional authority to bind the Norwegian Government by such a statement. The argument was unpersuasive. As the PCIJ put it:

> The Court considers it beyond all dispute that a reply of this nature given by the Minister of Foreign Affairs on behalf of his Government in response to a request by the diplomatic representatives of a foreign power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.

[119] A.V. Freeman. *op. cit.* at p. 712.

> Can we be so proud of such Western and "civilized" states as Hitler's Germany, Mussolini's Italy ... [or] Franco's Spain ... to permit ourselves to make in good faith the invidious repudiation of the new States or the Socialist States? Is Indonesia's aggressiveness or India's coercive settlement of the Goa dispute out of line with the behaviour of aggressive States in the West? Does not the continued reliance upon force by the great powers which find their vital interests challenged suggest that the Afro-Asian are not alone in their unwilingness to have their vital interests foreclosed by the rules of international law developed to prohibit recourse to force?[120]

Nowhere else is the dichotomy of the industrialized West and the Third World more evident than at the United Nations. An air of confrontation has developed between these two blocs which threatens the very existence of the United Nations.

In July 1975, the then United State Secretary of States, Henry Kissinger, voiced his fears about the survival of the Untied Nations and accused the Third World of trying to turn that institution into a weapon of political warfare. "Those who seek to manipulate U.N. membership by procedural abuse," Kissinger said, "may well inherit an empty shell."[121]

Kissinger described the United Nations as a place where the United States and the other industrialized nations were continuously harassed by the Third World whose "inflamatory rhetoric and procedural abuses"[122] threatened to wreck the organization.

No one will deny the increased aggressiveness of the Third World bloc within the last few years. This group was largely responsible for South Africa's suspension from the General Assembly and for the continued alienation of Israel from world agencies such as UNESCO. These countries have also orchestrated continued support for the Charter of Economic Rights and Duties of States[123] which includes such concepts as guaranteed prices for designated "primary products", more aid from the industrialized nations and, in some instances, the expropriation of foreign investment without compensation.

As a retort to Kissinger's comments on procedural abuse, the Third World quotes the New York Times:

> ... [the] moral basis from which the United States criticizes the irresponsibility of the "non-aligned" General Assembly majority is, to

[120] R.A. Falk, *International Legal Order: Alwyn Freeman v. Myres S. McDougal*, 59 AJIL (1965) at pp. 66–69.

[121] The New York Times, July 17th., 1975.

[122] *Ibid.*

[123] The Charter was adopted by the General Assembly on December 12th., 1974.

be sure, flawed by American's own past record. In the 1950s, when it was the United States and its allies that could claim the near-automatic majority, Washington contributed its share of one-sided and self-serving resolutions. American delegates were never above using procedural devices to further their arguments. It was the United States, moreover, that held out to the end in defense of the most blatant violation of universality of membership, in opposing the admission of mainland China.[124]

It becomes readily apparent that the United Nations, like any other organization, is bound to be manipulated and abused. This is of no real significance. What is significant is that new avenues of approach must be created to turn world confrontation between these two groups into co-operation.

An international order can neither be stable nor just without accepted norms of conduct. International law both provides a means and embodies an end. A body of principles can be drawn from the practice of States and used as a foundation for fashioning new patterns of relationships between both the industrialized and Third World States. Any new order, however, must benefit all peoples equally and not be the preserve of any one nation or group of nations. One example where this may be possible is that of regulating multinational corporations.

Third world States believe multinational enterprises influence their economies in ways unresponsive to national priorities. Concern is also voiced that these entities may evade national taxation and regulation by means of operations abroad. Certainly no one can deny that recent disclosures of improper financial relationships between some of these entities and government officials in several countries raise legitimate apprehension. It is also true, however, that multinational enterprises can be useful tools for accomplishing co-operation between the industrialized nations and the Third World. They can gather and organize huge capital resources, initiative, markets and technology in ways that vastly increase production and productivity.

What is needed is an international treaty which establishes binding rules for these entities. The United Nations Commission on Transnational Corporations is currently working on such a project.

The Lima Conference of Non-Aligned Countries held in the summer of 1975, debated, but did not adopt, a comprehensive and highly restrictive statute to govern foreign investment. Among the points discussed were twelve rules of corporate behaviour:

(1) Refrain from intervening in the internal affairs of a host State.

(2) Refrain from aggravating the relations between a host country and

[124] The New York Times, *op. cit.*

another country, particularly when the latter is the home country of the parent company.

(3) Respect the permanent sovereignty of a State over its natural resources.

(4) Submit to host country jurisdiction in investment disputes.

(5) Refrain from involving other countries, particularly the one where the parent company is domiciled, in litigation with the host country.

(6) Refrain from political activities or being an instrument of coercion.

(7) Refrain from restrictive and monopolistic practices.

(8) Invest in such a way as to make a net economic contribution to the host country.

(9) Contribute to local research and development.

(10) Put at the Government's disposal information concerning all corporate activities, especially books and records of financial relations between the parent and subsidiary.

(11) Respect the identity, values and social and cultural mores of the host country.

(12) Make operations conform to development objectives of the host country.[125]

More important than the rules themselves is that they reveal how multinational investment is perceived by the Third World. An understanding by the industrialized West of the Third World's view, however right or wrong it may be, is extremely important. It is only through the mutual understanding of opposing views that co-operation can be found.

Legal principles can be used as a bridge to forge such co-operation. Certainly an international treaty which sets forth specific rights and obligations of multinational enterprises adopted by both groups of nations would serve as a means of fostering international co-operation and development. As mentioned earlier, it was trade which started the cleavage between the Europeans and the non-Europeans in international law. It would indeed be a pleasant irony if trade could bring all nations together again.

The nations of the world must recognize that a just international order cannot be built on power but only on restraint of power. If the members of the United Nations realize this fact, then, there may be hope for advancement. Judge Phillip Jessup states that the United Nations is only as good as the members of that organization make it. Perhaps the most meaningful statement which expresses the importance of law in formulating solutions to the United Nations confrontation was made by Justice Felix Frankfurter:

[125] Business Latin America, September 10th., 1975 at pp. 294–295.

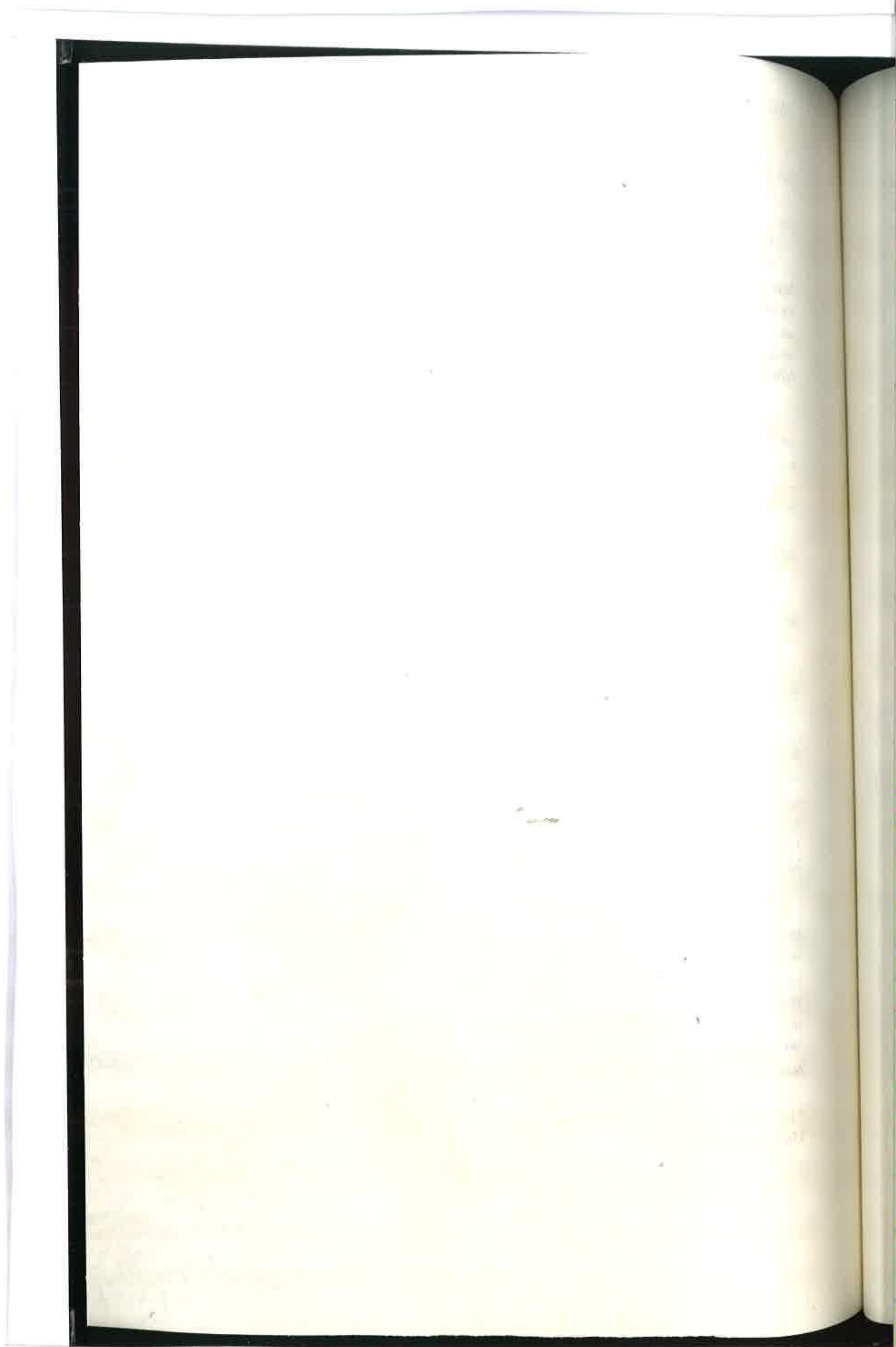
> Fragile as reason is and limited as law is as the institutionalized expression of reason, it is often all that stands between us and the tyranny of will, the cruelty of unbridled, unprincipled, undisciplined feeling.[126]

The aim of this paper has been to present the Third World's position on international law. By understanding such a position, an avenue of communication can be established whereby both the industrialized West and the Third World can better interact with each other. Such interaction will undoubtedly strengthen the rule of law by moving away from confrontation toward conciliation.

Tunku Sofiah Jewa*

[126] Department of State, U.S.A., Bureau of Public Affairs, Office of Media Services, *International Law, World Order and Human Progress*, Aug. 11th., 1975, P.R. 408.

*Lecturer, Faculty of Law,
University of Malaya



# SCHOLARSHIP AGREEMENTS IN MALAYSIA: A NEW DEAL

## I. INTRODUCTION

Born out of the wedlock between the 19th century doctrinaire approach and the colonial thinking of those days, the Indian Contract Act, 1872,[1] the precursor of the (Malaysian) Contracts Act, 1950 (revised 1974),[2] failed to take in its strides, the 20th century problems of a free and industrialised society. Of the many problems, which beset the fast developing countries of Asia today, one is brain drain and the allurement and rush for better-paid jobs. This doubtless results in a set back to national economy, national reconstruction and national progress.

Numerous persons, including infants, become beneficiaries of scholarship schemes and attain necessary qualifications and training at the expense of the authorities to help them in their task of achieving goals of national planning. Subsequently some of them are tempted to violate their

[1] The Law Commission of India in their thirteenth report on the Indian Contract Act, 1872, have suggested various recommendations in some fields of contract law, but none in the law of damages or scholarship agreements.

[2] The provisions contained in the Indian Contract Act, made their debut in the federated Malay States of Perak, Selangor, Negri Sembilan, Pahang under "Contract Enactment of 1899". Like the Indian enactment, the Contract Enactment of 1899, contains no provisions on scholarship agreement. The Malaysian Contracts Act, 1950 (revised 1974), on the other hand, has some specific provision in exception 3 and its explanation to section 29, which reads:

> Nor shall this section render illegal any contract in writing between the Government and any person with respect to an award of a scholarship by the Government wherein it is provided that the discretion exercised by the Government under that contract shall be final and conclusive and shall not be questioned by any court.
>
> In this exception, the expression "scholarship" includes any bursary to be awarded or tuition or examination fees to be defrayed by the Government and the expression "Government" includes the Government of a state".

As to India, it appears that the Central Government has some administrative schemes to absorb technical and scientific persons working abroad. In addition, there is the Foreign Contribution (Regulation) Act, 1976 whereunder:

> Every citizen of India receiving any scholarship, stipend or any payment of a like nature from any source shall give, within such time and in such manner as may be prescribed, an intimation to the Central Government as to the amount of the scholarship, stipend or other payment received by him and the foreign source from which and the purpose for which such scholarship, stipened or other payment has been, or is being, received by him. *Id.* Section 7(1).