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A. A. Fatouros

Indiana University School of Law

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COMMENTS ON INTERNATIONAL LAW AND ECONOMIC DEVELOPMENT

By A. A. FATOUROS

Indiana University School of Law

I shall start by stressing a point which may be related to one of Mr. Feliciano's observations. One difficulty in considering the topic of international law and economic development is that there is really no such thing as international development; there is only the development of the underdeveloped countries. The adjective "international" adds a certain dimension to the problem, by indicating that it is a matter for international concern. But the basic process remains a "national" one—one which has to occur inside states. In the terms of political scientists (and I do not claim to be one), international law moves on a systemic level of analysis while development occurs on a sub-systemic level. There is thus no exact correspondence between international law concepts or processes and national ones. If "aid" is the international concept, "development" is not its national equivalent.

We know too little about the influence of law on the economic or social developments which occur inside a national state. We know even less about the actual or potential rôle of international law. The present situation in many developing states challenges the basic assumptions about the legal, economic and political structures of states members of the international society which were made, rightfully and as a matter of course, in traditional international law. This situation arises on the political level as well, but it is even more compelling a challenge in the case of economic development. In considering its problems, not only political ideology, but also political instability, social structure, even cultural and religious features, are of essential significance. We have to inquire into their effects. I take it that it is to considerations of this sort that Professor Lasswell refers in his list of questions concerning the participants in the aid process. The questions which arise concern more specifically the recipient states and relate to the identity and legitimacy of their officials, the ultimate binding effect of commitments made by them, the officials' perception of their own nations and of the international environment, etc.

It is with acute awareness of these vast areas of inadequate knowledge or theory that I should like to proceed to comment further on some of the questions raised in the papers by Professor Lasswell and Professor Friedmann. I should like to inquire more precisely into the manner in which the developing principles and institutions of modern international law are affecting or are going to affect the process of social and economic development in the less developed countries.

Take the "principle of capability." The identification of this principle or, better, the convergence of views as to its existence and validity (for both speakers agree on that) is a most important step in bringing international law to bear upon the development process. I take it that no one asserts that this is an actual, firmly established legal principle. In fact,

it is far from being so. What we have at present is but an indication of a possible direction in which the international society appears to be moving, a direction in which many steps have been taken but where a final stage, or even a plateau, has not yet been reached.

The central question is, what kinds of relations and transactions would come under this principle and how would they be affected by its existence? Professor Lasswell has given us some indications as to this, and I would like to pursue the point a little further.

One major difficulty is that the international order is an "horizontal" system of relations, and therefore international transactions are bilateral and multilateral arrangements between participants which offer the appearance of contractual transactions as we know them from municipal law. Here, as elsewhere, appearances are often deceiving as well as confusing. The problem may become clearer if we consider that in municipal law the principle of capability is implemented, as it is in the modern welfare state, through legislation and not by means of contractual arrangements. Its implementation is rightfully considered not as a private but as a political matter, and politics have been recently described as referring to the process whereby a result is reached when there is no universal agreement about it.

Now, international economic assistance is the most typical of the transactions which come under the principle of capability. Is it the only one? Professor Lasswell's reference to private foreign investment would suggest that it is not. The question arises, how does private foreign investment come under this principle? Professor Lasswell's paper is not very clear at this point; he appears to insist on the traditional conditions to "attract" investments: "fair return on capital," "capital security." Are then all business transactions, all transfers of resources, when they involve developing countries, to be held as coming under the principle of capability? But then what difference does the principle make?

Let us look at the actual content of this principle. It seems to me that the core of the principle is the abandonment of formal reciprocity and immediate mutuality as a chief test of the "fairness" of the international transactions. When the contribution of one party to the transaction is not the equivalent, by market criteria, of that of the other, then the principle of capability comes into play. However, the elimination of the market test of immediate and reciprocal advantage does not imply a disregard of the interests of one of the parties. Professor Lasswell provides the answer to this in his very definition of the principle: "given the common interest in value optimalization on a world-wide scale." It is the common, long-run, interest of the world community (and, contrary to Mr. Feliciano, I would insist on the long-term character of this interest), an interest which includes the interest of the developed countries, that eventually balances out the transaction.

I agree with Professor Lasswell that the development process should be understood as continuing indefinitely and not as being concluded when all nations reach some ideal state of equal development. For this reason I

cannot agree with his suggestion, if I understand it correctly, that at some future stage the unbalanced transactions, under the capability principle, will be transformed into "normal" market relations, and that presumably the principle will wither away. As long as differential rates and stages of development exist, the principle of capability continues to be necessary.

The application of the principle is rather evident in the case of foreign aid, but it obtains as well in other fields; for instance, in international trade, where the recent claims of the developing nations may be seen as being aimed at the implementation of the principle.

On another issue I should like again to express agreement with Mr. Feliciano and to stress a point which, if I understand him correctly, is substantially the same with one he made. Does application of the principle of capability mean that the aid recipients or, more generally, the developing countries which benefit from its operation, have no obligations? I do not think so. The recipient's basic obligation is to utilize the resources transferred to it, in good faith and with the maximum efficiency possible under the circumstances, for its economic development; perhaps even to use them in the manner most conducive to the development of other countries and, more generally, in conformity with the common interests of the international society.

I know I am in trouble here and what I am saying would probably be rejected outright by most spokesmen for the developing countries. I am suggesting that a traditionally "domestic" question, that of economic and social development, has become a matter of international concern. What about national sovereignty? But I find this conclusion necessary and unavoidable. If there is an international public policy, binding on the developed nations, in favor of assisting economic development, then there must be a public policy in favor of promoting their own (and the international) development which is binding on the developing countries. I am not suggesting that the final judgment as to the carrying out of this obligation should be left merely to the donors or creditors, but I do not see how it can be left to the uncontrolled discretion of the recipients; conversely, I do not believe that the decision as to the granting or quantum of assistance can be made only by the recipients or only by the donors. Methods for internationalizing the decisions and for policing the obligations must be found.

Professor Lasswell's repeated insistence on the necessity of third-party adjudication is quite appropriate here, but only if understood as referring to the creation and acceptance of channels for communication, decision-making and review rather than to the determination of the identity of specific individual decision-makers of a judicial or semi-judicial character, as his reference to "tribunals" might indicate.

Here, then, is where international institutions will have to come in. However, I do not share Professor Friedmann's even qualified optimism and I am not at all convinced of the present ability of the existing organizations to cope with this problem and to control effectively the carrying out of the related obligations on both sides. Perhaps the methods currently ex-