

1964

## International Law and the Third World

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### Recommended Citation

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# VIRGINIA LAW REVIEW

VOLUME 50

JUNE 1964

NUMBER 5

## ARTICLES

### INTERNATIONAL LAW AND THE THIRD WORLD

*A. A. Fatouros\**

*After a detailed examination of the unique position of the emerging nations, the "third world," Professor Fatouros urges that the Western nations should undertake a change in approach and a reassessment of the objectives of international law since the present situation of international society is so dissimilar to that in which the law evolved. He concludes that special, new rules should be formulated, based on a broad and positive consideration of the urgent need of the emerging nations to develop their natural resources as effectively and as rapidly as possible—a need which international law must take into account if it is to be meaningful to the third world nations and if they are expected to be effective, responsible members of the international legal community.*

THE two major facts of contemporary international life are the conflict between the Western and the Soviet blocs and the emergence and increasing importance of a "third world," the new group of states in Asia, Africa, and Latin America.<sup>1</sup> Both are constantly in the minds of those in control in national and international affairs and thus

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The author would like to thank his hosts at the University of Chicago for their patience in submitting to repeated discussions on this topic. In particular, he wishes to express his gratitude to Professor Soia Mentschikoff for her stimulating suggestions, and to Professor Kenneth W. Dam for his cogent criticism of a draft of this article.

1. The terms "bloc" and "group" are used here interchangeably to describe groupings of states of varying degrees of cohesion. The terminological problems involved are discussed succinctly in FARAJALLAH, *LE GROUPE AFRO-ASIATIQUE DANS LE CADRE DES NATIONS UNIES* 4-6 (1963).

directly influence the processes and structures of the international community. The present paper is an inquiry into the effects on international law of the second of these major facts. Most of these effects are not yet manifest; accordingly, this study is, in major part, an exercise in prophecy. As such, it cannot pretend to do more than identify and describe certain trends which are today discernible and point out the direction in which the rules and techniques of international law appear to be moving.

### *Definitions and Assumptions*

The international law we are concerned with here is understood in a broad sense; it includes legal rules derived from all of the traditional sources: customs, bilateral and multilateral treaties, writings of scholars and general principles of law. To limit the meaning of international law in the present context to customary law alone would be not only unduly restrictive but also highly unrealistic. International treaties, for instance, are today the chief tools for the development of the law;<sup>2</sup> their study is essential to a complete description of existing international law rules and also provides valuable indications of possible future developments.

The "third world" is a vividly descriptive and perhaps tendentious term, less commonly used in the United States<sup>3</sup> than in Europe. There is some disagreement as to its precise meaning. Some writers use it to refer to the "new" states of Africa and Asia, without including Latin America.<sup>4</sup> Others extend its meaning to include all those states which—basically by reason of the stage of their economic development, but also because of differences in culture, tradition, current political regime and national interests—are distinct from both the economically developed states of the West and the developed or semi-developed states of the Soviet bloc.<sup>5</sup> The latter is the meaning adopted for the purposes of this article. Geographically, then, the third world includes most of the Asian, African, and Latin American states. There is no total cohe-

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2. On the role of international treaties in current international relations as "an essential instrument for the renewal of the law," see DE VISSCHER, *THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC* 198-99 (3d ed. 1960); De Visscher, *Coutume et traité en droit international public*, 59 *REV. GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 353, 359-66 (1955).

3. *But see* ROSSI, *THE THIRD WORLD* (1963).

4. See, *e.g.*, *id.* at 4-5.

5. This may perhaps be considered the "correct" or more widely used meaning of the term. See *LE TIERS MONDE—SOUS-DÉVELOPPEMENT ET DÉVELOPPEMENT* (Balandier ed. 1956).

sion among its members; their policies often diverge, but they tend on the whole to follow similar lines with respect to a number of important topics.

Since this article deals with the influence of the third world on international law, the majority of the problems of the cold war will not be considered. The cold war, being one of the two most important facts of contemporary international life, cannot be ignored in examining any aspect of international relations. It lies always in the background of our consciousness, beyond the "horizon" of immediate concern. Without in the least ignoring its importance, however, it is possible and necessary to leave its problems aside while examining our present topic. Cold war issues will be studied only to the extent that they are directly relevant to the problems at hand. Such treatment also involves the assumption that the cold war will remain static, that new developments in the relations between the West and the Soviet bloc or within the blocs themselves will not affect the situation of the third world or its relations with the two blocs. It needs neither great perspicacity nor special sources of information to realize that, however necessary for the purposes of the present study, this is a highly unrealistic assumption. It is therefore to be seen as a major implied qualification to all statements or findings.

It has become evident already that this paper will not be limited to strictly legal questions and that it will deal in part with political and economic matters. No apology is needed for this. Any study of legal change must deal with the political and other forces involved. Law-making is a political process, and, particularly with respect to international law, any attempt to ignore political and economic elements would lead to obviously meaningless results. While taking into consideration the substantive non-legal factors, however, the present paper attempts to deal in the main with international law; political and other elements are considered only to the extent necessary to understand the international legal problems and developments involved.

### *The Reasons for Change*

In recent years international law has expanded phenomenally, essentially in two directions. First, the number of its subjects has increased;<sup>6</sup>

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6. We are chiefly concerned here with states as subjects of international law; we do not discuss, therefore, the problems arising out of the increasing role of other new subjects, such as international organizations, or quasi subjects, such as individuals and international companies. This is a significant limitation on the scope of the present inquiry, for such subjects play a most important role in current international affairs. See Friedmann, *The Changing Dimensions of International Law*, 62 COLUM. L. REV. 1147,

the international legal order is now, for the first time, really universal, and it includes, on an equal footing, almost all distinct human communities on the globe.<sup>7</sup> Second, the scope of international law has greatly expanded as to subject matter; it now regulates, in whole or in part, a great number of topics which either did not exist in the past (nuclear energy, space law) or were left to the exclusive jurisdiction of the individual states (especially economic matters). This expansion in scope is directly relevant to the interests and concerns of the third world. In view of the extent of the expansion, there would have been a need for changes in existing legal rules even if all the present members of the international society were similar to one another in culture, interests, mentality and stage of economic development. The fact that they are not, and the presence of important differences between the older and the new members of the world community is an additional compelling reason for international legal change.

The most important of these differences, and the one bound to play a significant role in fashioning the "new" international law, is that between the stages of economic growth of the old and the new states. The "underdevelopment" of the third world is a basic factor which leads to an extensive, though by no means total, divergence of the national interests of the new and the old states. The nations of the third world aspire to a rapid economic development that will consummate their recently acquired political independence. Economic development, in this sense, is a shorthand way of referring to a process that is economic only in part, and which involves social, economic, political and even cultural and psychological change. The same process, seen from the political and cultural rather than the economic angle, is sometimes described under another name: that of "decolonization." Thus, in a thoughtful short essay, the Tunisian Minister of Planning points out that "decolonization must not be the reverse process of colonization. Decolonization must signify, to start with, a profound revolution of mental, moral, social and economic structures."<sup>8</sup> Political revolution

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1155-62 (1962); Reuter, *Principes de droit international public*, 103 HAGUE RECUEIL 425, 586-90 (1961).

7. The profound originality of the element of equality should be stressed. Though inequalities of power retain their importance, this is the first time in history that virtually all distinct human communities are at least presumptively treated as equal, in the legal as well as the social and moral sense. However precarious the presumption, it represents a definite improvement over the past.

8. Ben Salah, *Significations et perspectives de la décolonisation*, 25 L'ESPRIT 891 (1957).

and the independence that follows are not ends in themselves, they are only means. Decolonization itself is only a provisional end; it, too, must "transcend itself toward permanent values." Seen in this light, the process of decolonization is not limited to "an operation at the level of governments and of the administrative machinery. . . . It implies a transformation of man and of the conditions in which he lives."<sup>9</sup>

The third world's quest for economic development cannot but affect the structure of the international society and the substance of the rules which govern relations among states. Political and economic development in the new states depend to a large extent on the attitude and assistance of the older and more developed states.<sup>10</sup> At the same time, the needs of their political and economic development often prompt the new nations to act in a manner detrimental to the immediate interests of the developed countries. The need for assistance and understanding on the part of those who, in the short run at least, may be injured by the development of the assisted (whatever the long-range effects may be), is one of the basic contradictions of the present international scene. It is obviously a situation where the development of appropriate legal rules could be of great assistance in apportioning gains and injuries and permitting a continuing process of collaboration between the participants.

Whether the cultural differences between the third world and the nations of either bloc will be of decisive importance in determining the extent and content of the impending changes in international law is a matter of considerable controversy. It is argued, on the one side, that international law has been the creation of a Western European society of states at a certain stage of its development, and that it is, therefore, founded on Western European culture, characterized by Christianity, a Greco-Roman past, and a respect for rationality expressed in political and legal ideas.<sup>11</sup> Yet the majority of the nations of the

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9. *Id.* at 892; cf. Touré, *Africa's Future and the World*, 41 FOREIGN AFFAIRS 141, 143 (1962). "[T]he struggle for independence . . . had just one meaning for the African peoples: to acquire the first tool to open the way for them to solve their problems as human beings fully conscious of their responsibilities." *Ibid.* But, however inadequate, political independence is no mean achievement: "[T]he worst decolonization will always be superior by far to the best colonization. The difference between decolonization and colonization is not a matter of degree . . ." Césaire, *L'homme de culture et ses responsabilités*, 1959 PRÉSENCE AFRICAINE No. 25-26 (N.S.), 116, 118.

10. Economic aid is the prime example of the type of action needed, but other kinds of economic and political action are also necessary.

11. See, e.g., Scheuner, *Ius Gentium and the Present Development of International Law*, in VOLKENRECHTELIJKE OPSTELLEN (Festschrift Van der Molen) 123 (1962); Verzijl,

third world have a different cultural background. Their religious traditions, whether Buddhist, Confucian, Moslem or pagan, differ radically from the Christian; their political and legal ideas are different, and philosophically they place less reliance on rationalism.

The argument on the other side, to the effect that the cultural differences between the European nations and the new states are of little, if any, relevance to present-day international law, is, in our view, far more realistic and convincing. This position has been succinctly stated as follows:

Despite all the difference in religious, cultural, and historical background, the traditional attitude of the major centers of Asian civilization with regard to international politics and law has not been markedly different from that of their Middle Eastern or European counterparts. Further, whatever the differences may have been in the past, the facts of modern state organization and international life have completely overshadowed any traditional differences of outlook and philosophy. The representatives of Asian values have become modern nation states, of greater or lesser power, organized on the lines developed by the European nations in previous centuries, and seeking to realize national aspirations. In doing so they are subjected to the same tensions between international community interests, reflected in international law, and national aspirations, reflected in the power politics of states.<sup>12</sup>

The United Nations is perhaps the most obvious example of an institution created on the basis of "Western" legal ideas and now being successfully utilized by the non-Western members of the third world.

Still, it would be too much to argue that the difference between the cultural backgrounds of the new nations and those of the Western states is of no significance whatever. Each nation sees its interests not only from a specific standpoint which can be objectively determined,

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*Western European Influence on the Foundation of International Law*, 1 INTERNATIONAL RELATIONS 137 (1955); Wright, *Asian Experience and International Law*, 1 INTERNATIONAL STUDIES 71 (1959).

12. Friedmann, *The Position of Underdeveloped Countries and the Universality of International Law*, 2 COLUMBIA SOC'Y INTERNATIONAL L. BULL. 5 (1963). See also JENKS, *THE COMMON LAW OF MANKIND* 106, 109, 120-67, 169-72 (1958); SYATAUW, *SOME NEWLY ESTABLISHED ASIAN STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW* 225-34 *passim* (1961); Abi-Saab, *The Newly Independent States and the Rules of International Law: An Outline*, 8 HOW. L.J. 95, 99-101 (1962); Anand, *Rôle of the "New" Asian-African Countries in the Present International Legal Order*, 56 AM. J. INT'L L. 383 (1962); Friedmann, *supra* note 6, at 1147, 1150-53.

but also through its own peculiar spectacles, whose exact coloring and focus is determined by the cultural, political and other background of that nation. An ex-slave (or ex-colonial subject) does not see his ex-master in an "objective" manner, *i.e.*, in the same light as others (presumably not ex-slaves) would see him. Whether in love, respect, hate, or all three, his perception of the ex-master is different. What is true of the perception of objects holds true of the understanding of concepts or norms. The process is not exclusively emotional; intellectual familiarity with or knowledge of a concept or rule may have the same effect: an expert's conception of a medical or commercial term is by no means the same as that of the layman. Culture, as part of a recent historical background, will then influence the manner in which the rulers of the new nations will conceive their national interests and the character or effect of the relevant international law norms. But it should be stressed that, in addition to culture or religion, several other elements combine to form the basic background which influences a nation's mentality and perception.

The cultural background of the new nations of Africa or Asia may influence international law in another way, too. Nearly all of these nations adopted initially, upon acquiring independence, the political systems of the West. In many cases, the Western political models have by now suffered greater or smaller changes and have taken peculiar forms, and this trend will probably continue. For instance, the single-party system is in many, though not all, cases a bona fide attempt to construct a new kind of political regime, which is certainly influenced by Western models, democratic and otherwise, but deviates, in form as well as in substance, in order to conform to, and take advantage of, existing forms of social and political order.<sup>13</sup> This is an experiment which may ultimately fail, but, if it is successful, the new political forms and methods that will develop will probably affect the techniques and the structures of international law.

Finally, cultural traditions may also be of some importance in particular situations, when their effect happens to coincide with the needs of the promotion of the new states' interests. Thus, certain techniques used in international relations may fit well both the cultural predilections and the rational pursuit of interests of some of the new states. This may

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13. See AFRICAN ONE-PARTY STATES (Carter ed. 1962); THE POLITICS OF THE DEVELOPING AREAS 40-42, 551 *et seq.* (Almond & Coleman ed. 1960). For representative statements by African leaders, see M. Keita, *Le parti unique en Afrique*, 1960 PRÉSENCE AFRICAINE No. 30 (N.S.) 3; MBOYA, FREEDOM AND AFTER 83-88 (1963).

be true, for instance, of the use of techniques of conciliation, rather than adjudication, for the settlement of disputes. But in such cases, it would be surely incorrect to attribute the preference for such techniques to cultural factors only.

Certain additional elements of the present day international situation are also of importance in determining the extent to which international law will be affected by the emergence of the third world. First, war has become today unacceptable as an instrument of large scale legal change. It is not necessary to enter into the discussion of to what extent war is "unthinkable," illegal, or impossible. What is important for our purposes is that, though armed force may still be used occasionally, with or without success, limitations, not so much formally legal as pragmatic, are increasingly imposed on its use.<sup>14</sup> Traditional international law, however, developed at a time when war was possible as a last, and not necessarily uncommon, resort, and when its legality was not seriously questioned. The use or threat of armed force was an accepted method of coercing states into paying their debts, treating aliens fairly or, more often, granting them privileges, or into political or economic dependence upon the Great Powers. In most cases today, force cannot be effectively used or threatened to achieve such aims, whether legitimate or illegal. There arises, therefore, a need for changes in the specific rules and the general structure of international law to adjust it to the new reality of relative warlessness.

The existence of limitations on the use of force for the pursuit of national interests generally favors the economically and militarily weaker states and is thus in the interest of the third world.<sup>15</sup> Its members are today in a position to act much more freely than the weaker states of fifty years ago. There is even a danger that the abusive exploitation of this freedom will intensify the existing international instability.<sup>16</sup> However, the extent of the third world's freedom of action, in this as in other respects, should not be exaggerated. Many other

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14. For an exhaustive recent study along traditional lines, see BROWNIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (1963) (especially the conclusions at 431-36). See also McDUGAL & FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961).

15. This is true with respect to the relationship between the third world and the older states of the Western or the Soviet bloc. The stronger members of the third world, however, may not favor such limitations to the extent that they limit their freedom of action toward their neighbors.

16. See STONE, *QUEST FOR SURVIVAL* 41-44 (1961); Stone, *A Common Law for Mankind?*, 2 *INTERNATIONAL STUDIES* 414, 429-32 (1960); cf. BROWNIE, *op. cit. supra* note 14, at 289-301.

methods of pressure and persuasion, apart from the threat of armed action, are available to the major powers. Moreover, the presence of international organizations diminishes significantly the threat of instability.

Another factor favoring the increased influence of the third world on international law is that, under present conditions, this group is the one that has the most to gain from the establishment of a relatively stable international legal order through the elaboration of legal, rather than purely political, methods and channels.<sup>17</sup> The protagonists of the cold war cannot expect to gain much from the substitution of legal for political methods. Each is generally capable of protecting its vital interests through political or economic methods and cannot expect great immediate gains from the increased use of legal channels. The states belonging to the third world are individually in a much weaker position. Their main defense is the invocation of the danger of utter chaos or of nuclear escalation. But even that is of little avail where the state concerned cannot rely on the support of other members of the third world or on the concern of one of the major powers. By and large, therefore, it is to the interest of the third world states, as it has always been in the interest of the weaker, to strengthen the international legal order and promote the use of legal channels in interstate relations. This does not mean that the third world either desires or is prepared to strengthen the *status quo* in the present international society. On the contrary, its members want change, preferably peaceful and, if possible, legal—change of the factual situations through change of the legal rules concerning them. In achieving such change, however, it is clearly in their long-range interest to avoid weakening the international legal order.<sup>18</sup>

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17. See Abi-Saab, *supra* note 12, at 99; Castañeda, *The Underdeveloped Nations and the Development of International Law*, 15 INTERNATIONAL ORGANIZATION 38, 41 (1961); Lissitzyn, *International Law in a Divided World*, Int'l Conc., March 1963, p. 65.

18. A legal order, be it national or international, operates essentially only in the presence of a general consensus among those who are subject to it. The content of this consensus is not necessarily that the particular legal order is the best possible; nor does the presence of a consensus imply a general agreement as to the values sought or sanctioned by the order. The necessary consensus is merely the conviction that it is to the interest (material, spiritual or whatever) of the subjects to obey the law and not to disturb the legal order. If a general agreement as to values exists, then the subjects may uphold the legal order because they value the ends it pursues. But even where such agreement is lacking, fear of coercion, religious beliefs, respect for tradition, ignorance, emotional drives or a dislike for disorder may keep the legal order in operation. When it becomes obvious to the subjects that their interests are better served by the dissolution of the existing order (whether it is to be followed by disorder or by a different legal order) that order will not survive. These considerations are fully

In this connection, the eagerness of the new states to participate actively in the life of the international society should be noted. Upon the declaration of its independence, each new state has established a foreign affairs ministry and a diplomatic service, however rudimentary, almost before any other major department of government. All of the new states have asked immediately for admission to the United Nations, and most of them have quickly established a considerable number of embassies and legations abroad. Of the approximately eighty states in the United Nations which may be said to belong to the third world, all have established embassies or legations in the United States, and over sixty have done so in the United Kingdom and in France.<sup>19</sup> Within the United Nations most of the new states have generally been very active; those that have not yet attempted to play an international role (for instance, Algeria after independence) are few. At the same time, the new states have supported projects for the improvement of their own knowledge of international law: for example, the United Nations' recently inaugurated programs for the teaching of international law.<sup>20</sup> It is also characteristic that most of the topics with which the Asian African Legal Consultative Committee has been concerned are traditional and relatively noncontroversial questions such as sovereign immunity, diplomatic privileges, extradition and recognition and enforcement of foreign judgments.<sup>21</sup>

In many cases, the international activity of new states precedes their independence. International conferences and meetings of international organizations are often effectively used by the representatives of revolutionary parties or governments to hasten the independence of their territories. The Algerian question was thus internationalized in fact long before Algeria itself became a formally recognized independent state.<sup>22</sup> Similarly, the presence of many delegations of colonial terri-

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applicable to the international legal order. It can exist effectively only when the states (and their citizens) are convinced that their interests are better served by its existence.

19. See 1963-I EUROPA YEARBOOK 444-45, 553; 1964 WORLD ALMANAC 63-64. See generally Quermonne, *Les engagements internationaux des nouveaux états*, in LES NOUVEAUX ÉTATS DANS LES RELATIONS INTERNATIONALES 323, 329-34 (Duroselle & Meyriat ed. 1962).

20. See U.N. Gen. Ass. Res. 1816 (XVII), December 18, 1962.

21. See the summary of the Committee's activities since 1956, in ASIAN AFRICAN LEGAL CONSULTATIVE COMMITTEE, FOURTH SESSION, TOKYO, 1961, REPORT OF THE SESSION 5-9, 15-17, *passim* (1961).

22. On the international aspects of the Algerian war, see BEDJAOU, LAW AND THE ALGERIAN REVOLUTION 110-38 (1961), and the comments in ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL by Charpentier: *La reconnaissance du G.P.R.A.*, 5 ANNUAIRE 799 (1959);

tories in the Bandung Conference served to make evident and to strengthen the Afro-Asian movement toward independence. The phenomenon was not unknown in the past, but its high incidence is quite recent, for today's increased pace of international activity gives greater importance and effectiveness to such limited participation of prospective states and governments in international life.

There are many reasons for the emphasis that the new states place on their international role. It is tempting to explain it in psychological or emotional terms: the newly liberated elites wish to mimic their ex-masters, to enjoy international prestige and to cling to the external signs of independence, while ignoring the difficult and painful realities.<sup>23</sup> No doubt, there is some validity to such explanations, but there is much more to these policies than mere vanity or emotionalism. The development of "parliamentary diplomacy" has given the weaker states the opportunity to express themselves in the international forum, and it has thus given them a certain limited, but no less real, power to influence decisions. The nuclear stalemate has led to a downgrading of the importance of military power as a prerequisite for "responsible statehood." It can be said of many of the new states that they survive only because of their formal statehood. Their leaders realize that their chief means for discouraging direct or indirect attacks on their territorial integrity is to become active and "known" on the international scene. But in addition to such defensive motives, participation in international life, meaning largely participation in international organizations, has an important positive function. The development of an "international law of cooperation"<sup>24</sup> makes such participation rewarding in many ways. Indeed, nonparticipation or exclusion is today a much feared sanction which serves to enforce the standards and rules enacted by international organizations.<sup>25</sup> All in all, the international dimension of states has become today far more important, rationally as well as emotionally, than ever before.<sup>26</sup>

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*La France et le G.P.R.A.*, 7 ANNUAIRE 855 (1961), and by Flory: *Algérie et droit international*, 5 ANNUAIRE 817 (1959); *Algérie algérienne et droit international*, 6 ANNUAIRE 973 (1960); *Négociation ou dégageement en Algérie*, 7 ANNUAIRE 836 (1961); *La fin de la souveraineté française en Algérie*, 8 ANNUAIRE 905 (1962). And for an excellent summary of the practices and problems of the building-up of diplomatic relations before independence, see, Quermonne, *supra* note 19, at 326-29.

23. See, e.g., Quermonne, *supra* note 19, at 348-52.

24. See FRIEDMANN, *LAW IN A CHANGING SOCIETY* 460-61, 475-81 (1959); Friedmann, *supra* note 6, at 1162-65.

25. See Friedmann, *National Sovereignty, International Cooperation, and the Reality of International Law*, 10 U.C.L.A.L. REV. 739, 747-53 (1963).

26. It is true that, in the past as well, some of the weaker states have participated

The third world's participation in international life differs in one respect from the corresponding activities of Western states. In the Western European and North American states, there is extensive private activity and participation in international affairs through nongovernmental organizations and associations. Such private concern appears to be lacking in the African and most of the Asian states, where only the government and the official groups and agencies (including trade unions and professional associations) are involved in international activities.<sup>27</sup> This is probably due to the acuteness of the domestic problems, the lack of a tradition in this field and, in some cases, to the limited participation of the bulk of the population in public life. The limitation of most international contacts to the governmental or official level creates serious problems of communication.

### *The Power of Impotence*

It is not enough to show that there exist certain compelling reasons for legal change. Certain objective conditions making possible legal changes desired by the third world must also be shown to exist. Such conditions do exist today. This may seem paradoxical, at first glance, for it is obvious that the power of the third world in military, economic or political terms is minimal. The fact is that the main source of political strength for the third world is precisely its military, economic and political weakness. The chief pragmatic consideration that induces developed states to make concessions on legal, political or economic matters to the underdeveloped nations is that, if concessions are not made, if a certain minimum movement toward economic development and decolonization does not start soon, the present instability will reach such proportions that it will result in political and economic, not to mention legal, chaos. Such a development would be in no one's interest, if only because it would tend to make the rivalry between the two blocs even more acute and thus render war, with its connotation of nuclear catastrophe, more probable.

A closely related consideration, the significance of which cannot be actively in international life, for reasons probably similar to those noted in the text. This was true, for instance, at the turn of the century, of several Latin American states and of the economically underdeveloped Eastern and Southern European states. On the other hand, it was certainly not true of the few independent African and Asian states, with the exception of Japan. See Castañeda, *supra* note 17, at 38-40; RONNING, *LAW AND POLITICS IN INTER-AMERICAN DIPLOMACY* (1963).

27. See Gerbet, *Les nouveaux états et les organisations internationales*, in *LES NOUVEAUX ÉTATS DANS LES RELATIONS INTERNATIONALES* 447, 478-80 (Duroselle & Meyriat ed. 1962).

overstressed, is the presence of the cold war. Individually or as a group, the nations of the third world are in a position to bargain with the developed countries by threatening to join, or to become more closely related with, one of the two blocs. In fact, the importance of the third world increased considerably from the moment, after the death of Stalin, that the Soviet Union and its allies decided to consider neutralist or non-aligned nations not as potential enemies, as they more or less had before, but as potential friends.<sup>28</sup> Under present conditions, the overwhelming concern of the United States and the Soviet Union with the cold war, and the continuing interpretation of international events in terms of that concern, provide a useful bargaining tool to the third world. This attitude is not necessarily cynical or irresponsible. It corresponds to the third world's basic refusal to accept the cold war as the only or even as the most important factor in international relations, disagreeing here with most governments and academic commentators within the two blocs. From its point of view, international economic development is far more important than the struggle for domination between two substantially developed power blocs and two largely alien and seemingly irrelevant ideologies. Thus, the third world nations consider their bargaining with the two blocs as beneficial to the international society as a whole, since it tends to restore some balance in international relations. However, this bargaining is occasionally pushed too far and acts as an additional element of instability rather than as a stabilizing force.<sup>29</sup>

On an economic plane, the third world as a whole possesses certain other means for exercising pressure to promote its interests. Its members are today the chief sources of raw materials necessary to the economies of the developed nations.<sup>30</sup> Individual countries can normally use this to exert pressure to a limited extent only, but, here also, the cold war enhances their bargaining power. The concerted action of several such states could be even more effective. There have been no clear instances of this sort of concerted action, but the possibility definitely does exist. Some of the third world leaders are obviously trying to promote such action, while the Western states and the private companies concerned are, somewhat less openly, trying to avoid it.<sup>31</sup> The presence and opera-

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28. See DALLIN, *THE SOVIET UNION AT THE UNITED NATIONS* 37-41, 58-59, 116-19 (1962).

29. See STONE, *op. cit. supra* note 16, at 98; Kaplan, *Bipolarity in a Revolutionary World*, in *THE REVOLUTION IN WORLD POLITICS* 251, 262-66 (Kaplan ed. 1962).

30. This seems to be, at the moment, more valid with respect to the Western countries than with respect to the Soviet bloc, though Soviet imports from the third world also consist predominantly of primary products.

31. Since the establishment of the Organization of Petroleum Exporting Countries,

tion of Western private companies in many of the third world states is another element which strengthens, to some extent, the position of these states vis-à-vis the developed ones. The foreign enterprises are, from one point of view, "hostages" of the local government. The threat of a taking or of interference with their operation is a consideration that must be taken seriously into account by the foreign offices of Western states. Nevertheless, the effective use of such pressure by the host states is severely restricted because of the need for more foreign capital, public and private, and because of the possible use by the developed nations or the companies involved of several methods of effective pressure. There have been cases where foreign enterprises were the victims of unsuccessful bargaining or attempts by either side to exercise pressure, but in most instances where such enterprises have been seriously affected by governmental measures, it was not bargaining of this sort but other considerations (economic, nationalistic, etc.) that were predominantly operative. Finally, the third world countries are actual or potential markets for exports from the rest of the world. Especially in the context of the cold war, this gives them an opportunity to promote their interests through bargaining on commercial matters.

Pragmatic considerations are not the only elements which have to be weighed. Certain other objective conditions exist which are of importance, though they may not be capable of being stated in quantitative terms or in terms of economic self-interest. The claims of the third world, to begin with, often have a moral persuasiveness which undoubtedly affects the attitude of the developed countries. One need not be "moralistic" to realize that such factors play an important role in international affairs, perhaps more today than in the past. The extent to which the third world attributes responsibility for its present condition to colonialism or to other past actions and attitudes of the Western powers may often be exaggerated, but there remains enough truth in the charge to provoke hot denials by the West; these denials are an indication of the relevance of the moral element, even though they do not prove the validity of the charges. It is not suggested that states will sacrifice their vital interests to atone for past crimes, even if admitted; the moral element is rarely, if ever, a controlling factor in international relations. It remains, nonetheless, a consideration, the importance of which should not be ignored.

A related consideration of limited, yet real, value is that of "world

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recent developments in the petroleum industry can be profitably interpreted in this manner.

public opinion." While it is certainly true that there is no strict definition of this factor, that it can be manipulated by propaganda, and that states seldom bow to its dictates when important interests are involved,<sup>32</sup> nevertheless, something that can be referred to by this term does play a marginal but undeniable role in today's international affairs. For many reasons, including the expansion of the international society, the increased role and efficacy of communications, and the ideological context of the cold war, states and governments are seriously concerned with their "image" abroad. Although no state is prepared to sacrifice its vital interests merely in order to obey an indefinite and partly artificial world public opinion, decisions on minor matters may be affected, and these often have a cumulative importance. The preservation of a favorable public opinion abroad, among governments as well as private individuals, is treated today as one of the elements of the national interest. Since the attitude of the third world is a significant element of world public opinion, the older nations do consider it; it is, therefore, another source of power for the third world states.

#### *A Digression on Method*

It has been desirable to discuss the *reasons* why the emergence of the third world renders changes in traditional international law necessary and to describe the objective conditions making such changes practically possible; but the *existence* of the need can hardly be challenged. It is more difficult, however, to determine in concrete terms the actual substance of the impending developments. This is where imagination, speculation and prophecy enter. Although it is not possible to achieve a high degree of precision in predictions, something more than vague generalities can be ventured. Indications of existing trends and movements may be found, and, even though the final effects remain obscure and undetermined, we may indicate the direction in which they are moving and study the problems raised.

The materials on which descriptions and predictions can be based are still limited. Up to a few years ago the majority of the recognized members of the world community were relatively old states. The poorer, and in many cases younger, states then in existence were far less important and, therefore, far less vocal than they are today.<sup>33</sup> But the whole context of the world community and the very atmosphere of international affairs has changed so radically, that the events and

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32. See MORGENTHAU, *POLITICS AMONG NATIONS* 260-71 (3d ed. 1960).

33. *But see* note 26 *supra*.

attitudes of the past can be considered only as the background or the prehistory of present developments, not really as part of them. The impact of the third world is very new, and developments and attitudes have had no time to crystallize and become manifest. Furthermore, it is difficult to determine with any precision the present attitudes and policies of many states belonging to the third world. The difficulties of obtaining documentation, a perennial problem for the international lawyer, are much more acute in the case of the third world. Moreover, in many cases, the states in question have had no opportunity to direct their attention to particular rules or principles because no specific problems have arisen. More important, most of the states concerned are faced with a scarcity of international law experts to advise them and to elaborate in technical terms the state's approach to international law and to specific international rules. This is less of a problem with some of the older states belonging to this group, for instance, the Latin American states.

In addition to the writings of jurists who have dealt with the problems discussed here, two, or rather three, main sources of information and inspiration have been used. First, in view of the importance attributed to the factor of underdevelopment (or the "debtor" position), the past practices and attitudes of the older "debtor" countries have been found to be relevant and useful. Second, the debates and activities within the United Nations and its various organs and agencies have been a rich source of indications and statements concerning the questions we are dealing with. In fact, this is too rich a source, and the present paper only skims the surface of the available material. The third source, if it may properly be so termed, upon which this article is based, is more difficult to define. It may be called speculation or, perhaps, imagination. If one takes as given certain objective conditions and attitudes, including the pursuit of certain goals and the resulting conflicts of national interests, and if the "theories and realities" of contemporary international law are taken into consideration, it is possible to reach certain specific conclusions with respect to the probable claims and attitudes of the third world, the probable reactions of the rest of the world and the probable grounds of compromise and agreement. These conclusions can be checked against the available evidence, and their total effect upon traditional international law norms can be assessed.

The concrete effects of the emergence of the third world on the whole body of international law cannot be explored in a single article. Accordingly, attention is focused here on a branch of the law where,

amid much controversy, considerable change has been taking place—the law governing the economic relations between states and between states and foreign traders and investors.

*International Law and Economic Development*

One of the difficulties in trying to visualize the developing international law is the limiting effect of existing classifications and subdivisions of the “fields” or “branches” of public international law. When dealing with certain specific topics, therefore, it is necessary to consider whether shifting some sets of rules from one “branch” to another or setting up new branches may be of assistance in clarifying the issues and facilitating the search for solutions. In approaching the problems which arise in connection with economic relations with the nations of the third world, we shall start by drawing an analogy, setting up a hypothetical state and looking at the problems at hand in the context of a state’s domestic politics.<sup>34</sup> We may thus be able to see better the substantive problems without allowing the formal classification of legal rules or concepts to obscure the real issues. While the similarity between the national and international situations is not complete, it is essential not to ignore the underlying identity of the basic problems as manifested in the national and the international contexts. It should be clear, especially at this particular moment in the United States, that the problems of economic development and of its preconditions and effects are closely related to the need to assure the effective participation of all members of a community in the community’s economic and political processes. In today’s United States the civil rights movement and the “war against poverty” are manifestations of the same basic realization. They are attempts to resolve the same basic problems that, on the international

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34. Use of a hypothetical situation is dictated by the need to simplify the issues and to avoid the qualifications and reservations necessary if an analogy to certain concrete historical situations were to be drawn. The present condition of the international society has been rightly compared to that of the national societies of the Western European states at the turn of the century. The present position of the third world in the international setting bears a definite resemblance to that of the working class in late nineteenth century Western European national societies. See RÖLING, *INTERNATIONAL LAW IN AN EXPANDED WORLD* 56-67 (1960). This is a perceptive and useful analogy, as long as it is treated as such. It becomes misleading when an attempt is made to use it as the basis for an interpretation of the present world situation in terms of Marxist “class struggle.” The resulting picture of the world community as a society where the capitalist Western countries are the “ruling class” and the third world the “proletariat” is so inaccurate and leaves so much unexplained and unprovided for, even in Marxist terms, that it lacks any real usefulness. See EMERSON, *FROM EMPIRE TO NATION* 181-82 (1960).

scale, the United Nations and the individual states are trying to deal with through international economic aid, the promotion of international economic development and the encouragement of peaceful change.

Suppose then that in an isolated, unevenly developed country, the "oppressed classes" have finally managed to emancipate themselves, within the framework of the existing legal order. And assume further that the old "ruling class" retains its economic power, though its political power has been curtailed. What, in terms of law reform, would be the claims or desires of the previously oppressed classes at the time of their emancipation? First, they would want to be rid of past debts and obligations which they have had to enter into when still not free. Second, they would want to be able to earn a living wage under fair working conditions. Third, they would want to protect themselves against possible future oppression through economic exploitation. Fourth, they would seek the initiation of a "crash program" of public assistance to make possible the education of their children and to assure them of tolerable living conditions. Fifth, they would seek to have some provision made for the discharge or modification of those obligations and debts which were contracted after emancipation, but before the members of the classes concerned had acquired enough economic power to be able to bargain on an equal basis. It is evident that through these claims the newly emancipated classes would be seeking both to give substance to their new political position and to assure that economic pressures would not drive them back under oppression. Each set of claims is different from the others and at the same time is complementary to them.

In the international context, these claims (obviously those of the third world) are both more familiar and more complex. One important new variable has to be introduced, namely, the distinction between public and private interests and bodies, for traditional international law distinguishes sharply between claims of a state against other states and claims directed against private persons. Moreover, the claims enumerated above would be treated under different headings and as belonging to distinct branches of international law. The first set of claims would be considered in the law of state succession; the fifth in the law of treaties and the law of state responsibility; the second, third and fourth sets of claims would be regarded as formally irrelevant to general customary international law and proper subjects for treatment under treaty-made law.

It is to be expected that the third world countries that have recently

become independent would wish to rid themselves of the obligations imposed on them prior to their independence or, at least, to be given an opportunity to decide whether they wish to be bound by these obligations. In traditional international law, the solution depends essentially on whether the obligation has been undertaken toward other states or toward private persons. Without attempting to summarize the law of state succession, it is fair to say that with respect to obligations toward other countries, the new state has a considerable margin of freedom and flexibility. Though neither theory nor state practice are fully consistent and no full investigation of recent state practice has yet been made,<sup>35</sup> it seems clear that, with some exceptions (*e.g.*, treaties relating to boundary questions), the successor state can, at the very least, "pick and choose" among the treaties concluded by its predecessor to decide which will continue in force. The present trend is definitely toward increased flexibility, but with some concern for avoiding measures that might strongly prejudice the stability of the legal order. Most new states do not declare that they are not bound by treaties concluded by the colonial power, but do state that they reserve the right to repudiate them, or that the treaties remain in force during a certain period of time only until new arrangements can be made.<sup>36</sup> The great need today is not so much for a change of the relevant legal rules, as for an orderly legal procedure through which the position of the successor states can be made clear within a relatively short time. Such a procedure does exist with respect to membership in international organizations and to certain multilateral conventions. The secretariats of international organizations play a preponderant role in inducing states to clarify their intentions on these matters.<sup>37</sup>

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35. The International Law Commission is currently studying this topic and is expected to review such recent practice. A special subcommittee has already settled on an outline of the problems to be included in the report of the Special Rapporteur. See U.N. Doc. No. A/CN.4/160 (1963). Several interesting and informative memoranda, by the U.N. Secretariat and by members of the subcommittee, have already been prepared. See U.N. Docs. Nos. A/CN.4/157 (1963), A/CN.4/150 (1962), A/CN.4/151 (1962), A/CN.4/149 (1962).

36. See, *e.g.*, Statement by the Prime Minister of Tanganyika before the Tanganyika National Assembly, Nov. 30, 1961, in 11 *INT'L & COMP. L.Q.* 1210 (1962); Declaration by the Prime Minister of Tanganyika to the Secretary-General of the United Nations, Dec. 9, 1961, in U.N. Doc. No. A/CN.4/160, Annex II, App. (1963).

37. Thus, when each new state gains its independence, the Secretary-General of the United Nations addresses to it an inquiry concerning its succession to multilateral treaties entered into by the predecessor state to which the United Nations is depository, and he requests a notification by the head of state or Foreign Minister regarding the devolution of these treaty obligations. See U.N. Doc. No. A/CN.4/150, at 45-46 (1962).

Difficult questions arise regarding the so-called "acquired rights" of private persons. With few exceptions, the traditional rule is that the successor state is bound to respect such rights. However useful or valid in the past, the distinction between public and private law rights is today losing much of its relevance.<sup>38</sup> The extent of state intervention in economic and social affairs is such that the rights of private persons are normally bound to be affected extensively and frequently, while, in the new nations, the drive for economic development adds to the importance of the state's role. The continuing validity of rights of a private or semi-private character, which were granted or made possible by the predecessor state, constitutes a significant limitation on the new state's freedom to pursue effectively the methods of rapid economic development it may prefer. It is more realistic, then, to allow greater flexibility to the new state. In the future, the resulting problems will probably be dealt with on a government-to-government basis, along lines similar to those more or less accepted in the case of intergovernmental obligations.<sup>39</sup> The objective, in both cases, is to assure a minimum of stability while allowing the new state as much freedom as possible in handling its own affairs.

The problems which arise when a state attempts to free itself from obligations undertaken, with its own consent, at a time when it was at least formally independent are often similar in substance. An important difference exists, however, namely, the fact that the obligations were not undertaken by another power acting by virtue of colonial conquest but by the state itself.<sup>40</sup> This may be a somewhat technical consideration

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38. See Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279, 281-85 (1963). Compare Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143 (1958).

39. During the debates on permanent sovereignty over natural resources in the Second Committee of the United Nations General Assembly in December 1962, Algeria proposed an amendment to the draft resolution to the effect that international law obligations "cannot apply to alleged rights acquired before accession to full sovereignty of formerly colonized countries," and that, consequently, such "alleged acquired rights" must be subject to review as between equally sovereign states. The amendment was later withdrawn, in favor of another amendment, proposed by the United States and the United Kingdom, to the effect that the provision of the resolution on the conditions for the legality of expropriations of property in no way

prejudices the position of any Member State on any aspect of the question of the rights and obligations of successor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule.

U.N. Gen. Ass. Res. 1803 (XVII), December 14, 1962. See also note 42 *infra*.

40. An intermediate situation which cannot be examined here in detail is the case where the new state undertakes certain general or specific obligations toward the ex-colonial state by virtue of a treaty or constitutional enactment at the time of independence. It is not yet clear how far such instruments are binding on the new state.

since the state may have been at the time, in fact or in its retrospective view of the matter, unable to resist. However, the law has to take into account such formal elements in order to draw certain distinctions. In municipal law, there are several procedures for inquiring as to the existence of any element vitiating the free consent of a party (duress, fraud, etc.). No such procedures are easily available in international law. The presence of formal independence raises a rebuttable presumption that the substance also exists. This is more or less the traditional approach to the subject; it remains valid to a considerable extent, but the realities of modern international life and especially the drive for economic development are exercising a profound influence on the relevant rules of international law. Traditionally, the matter is treated under two distinct headings: (1) when the obligations have been undertaken toward another state, the relevant international rules are found in the law of treaties, particularly the rules concerning the application of the principle *rebus sic stantibus*; (2) when the obligations are undertaken toward private persons of alien nationality, the matter is usually regarded as coming under the law of state responsibility for injury to the interests of aliens.

In recent years, there have been few cases of official invocation of the principle *rebus sic stantibus* by states of the third world.<sup>41</sup> There are several reasons for this. Many of the obligations undertaken by states in international treaties are of such a character that they do not restrict extensively the power of the state to act in matters relating to its economic welfare or its political interests. Moreover, many treaties include express provisions for renegotiation or termination in exceptional circumstances or, quite often, at the instance of either party without any justification. Finally, since many of the third world states have only recently become independent, the law of state succession has provided a more flexible instrument than the law of treaties for the rejection of unwanted obligations. Still, the less developed countries and their representatives have consistently emphasized the importance of the principle *rebus sic stantibus* in official and unofficial discussions and writings.

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See Fischer, *La décolonisation et le rôle des traités et constitutions*, 8 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 805 (1962); Seidl-Hohenveldern, *International Organizations and the Protection of Private Property*, 90 JOURNAL DU DROIT INTERNATIONAL 627, 655 (1963).

41. See HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 344-45 (1963). See generally, from the abundant body of literature on the *clausula rebus sic stantibus*, LECA, *LES TECHNIQUES DE RÉVISION DES CONVENTIONS INTERNATIONALES* 295-314 (1961); VERDROSS, *VOELKERRECHT* 121-23 (4th ed. 1959); Brierly, *Règles générales du droit de la paix*, 58 HAGUE RECUEIL 1, 212-20 (1936).

State measures directed against alien private persons, typically companies owned by foreign nationals, in contravention of obligations undertaken by the state of investment, are a source of frequent problems. These controversies are still phrased in terms of the traditional rules on expropriation of foreign-owned property. However, these rules were intended to cover exceptional situations which occurred in a different social and political environment. Present conditions and conceptions are radically different, and no solution can come merely through minor adjustments of the traditional rules. A basic change of perspective is needed; the whole problem must be placed in a different context.

The domestic law analogy may be helpful in clarifying the issues. What is involved, as already noted, is essentially the wish of the newly emancipated classes to retain full independence, political as well as economic, and, at the same time, to be able to survive and improve their position. The attitude of the new states is essentially the same: they wish to develop their economies in order to provide a higher standard of living for their people and to exploit profitably their natural resources, while, at the same time, retaining their newly acquired independence. The best way to deal with such a problem is to confront the whole of it, rather than try to dispose of isolated manifestations in formal legal terms. It is necessary to stress the affirmative aspects of these claims, the values sought to be realized (and the need for a legal structure that can assist in their realization) rather than the negative limitations which international law may impose on the measures for their realization.

The problem is placed on a more meaningful basis when it is studied in terms of "sovereignty over a state's natural resources." This is the positive aspect and what the third world is striving for. However, this sovereignty has to be understood with its full implications. Sovereignty over natural resources is a mere abstract potentiality when the means for developing these resources are lacking. The freedom to exploit natural resources implies, therefore, at least some cooperation between developed and underdeveloped states, since it is only the former that can provide to the latter the means for developing their resources. The basic question is, then, what will be the terms of cooperation.<sup>42</sup> Seen

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42. The element of international cooperation is properly, though perhaps not sufficiently, stressed in U.N. Gen. Ass. Res. 1803 (XVII), December 14, 1962, on "permanent sovereignty over natural resources." For comments on this important resolution, see, Fischer, *La souveraineté sur les ressources naturelles*, 8 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 516 (1962); Schwebel, *The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources*, 49 A.B.A.J. 463 (1963); Seidl-Hohenveldern, *supra* note 40 at 631-50. For earlier discussions of U.N. activities in this field, see Hyde,

from such an angle, the problems of concessions, economic development agreements and the like become part of a more general picture which includes economic assistance, capital and technical, educational and commercial relations: the whole field that has recently been called "the law of international economic development."<sup>43</sup>

Such a statement of the problem does involve a change of perspective, but it is not in substantial conflict with the tenets of traditional international law. In systematic terms, the rules of law concerning the treatment of aliens belong, not to the law of state responsibility, but to the branch of international law dealing with jurisdiction of states—jurisdiction over territory and resources, and over residents, nationals and aliens. It is only the exposition of the effects of a violation of the relevant rules of treatment that should properly be included in the law of state responsibility. The latter field, in itself, is only concerned with the legal effects of any violation of international law norms.<sup>44</sup> This theoretical statement of the problem has never been seriously disputed though writers sometimes have tended to treat both the substantive rules on the treatment of aliens and the rules providing for the results of the former's violation in the context of state responsibility.<sup>45</sup>

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*Economic Development Agreements*, 105 HAGUE RECUEIL 267, 332-49 (1961); Hyde, *Permanent Sovereignty Over Natural Wealth and Resources*, 50 AM. J. INT'L L. 854 (1956).

43. Friedmann, *supra* note 6, at 1164-65.

44. See, e.g., 1 OPPENHEIM, INTERNATIONAL LAW 335 (8th ed. Lauterpacht 1955); 1 SCHWARZENBERGER, INTERNATIONAL LAW 562, 584 (3rd ed. 1957); Ago, *Le délit international*, 68 HAGUE RECUEIL 415 (1939). For an articulate exposition of the position outlined in the text, see Sorensen, *Principes de droit international public*, 101 HAGUE RECUEIL 1, 217-18 (1960).

45. The International Law Commission's study of the subject is characteristic in this respect. In his first report on international responsibility, the Special Rapporteur dealt with the subject as a whole, expressly stating that it was not limited to the topic of responsibility for injury to aliens. In view of the complexity and extent of the general subject, however, he indicated that the specific topic of state responsibility for damage to the person or property of aliens, being the topic that was "most ripe for codification," should be considered first. See 1956-II INTERNATIONAL L. COMM'N YEARBOOK 173, 221 (1957) (U.N. Doc. No. A/CN.4/96). Since a report and not a draft convention was involved, the Commission did not give the Special Rapporteur any precise directives on this or any other point. See 1956-I YEARBOOK 232, 233, 236, 240, 248 (1956); 1957-II YEARBOOK 104-05 (1958) (U.N. Doc. No. A/CN.4/106). Accordingly, the subsequent reports dealt with various aspects of the limited topic. After the 1960 and 1961 debates at the Sixth Committee of the U.N. General Assembly on the work of the International Law Commission, the study of the topic of state responsibility was again undertaken and a subcommittee was appointed for a preliminary examination; see U.N. Doc. No. A/5209 (1961). The subcommittee recommended that the Commission should start by defining the general rules which govern international responsibility, such as the "determination of the component parts of the international wrongful act," the "various kinds of viola-

This is convenient, because most of the cases adjudicated by international tribunals and commissions involving the responsibility of states have arisen in connection with damage to the person or the property of aliens. If, however, this method were to be followed with respect to other international law branches as well, the law of international responsibility would in effect include the whole of international law, both substance and procedure. The law of international responsibility is then more correctly understood as the branch of international law which states the general principles that govern the responsibility of states and the duty of reparation for internationally wrongful acts.

There is no doubt that the shift of focus from the negative statement of what a state can and cannot do with respect to aliens and their property to the affirmative inquiry into the conditions under which the state's utilization of its natural resources can be more effective is due largely to the efforts of the third world. Such a restatement of the problem is surely to its interest, but it is also in the general interest of the international community, since, in addition to properly stressing the importance of developing the world's natural resources, it also offers better possibilities for compromise between the diverging interests of states whose social and political structure, degree of development, and ideological commitment differ widely. At the same time, this restatement offers an opportunity for fuller cooperation between nations in developing their respective resources and ultimately raising the standard of living of their peoples. The recognition of the underlying unity of the problems of international trade, economic assistance and foreign investment is a first step in the search for those legal norms and institutional arrangements that will make fuller international economic development possible.<sup>46</sup>

The exact form of the arrangements and the content of the norms are

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tion of international obligations" giving rise to international responsibility, the duty to make reparation and the forms that reparation may take. See U.N. Doc. No. A/CN.4/152(1962). The International Law Commission agreed to proceed in the direction suggested by the subcommittee and appointed a Special Rapporteur on the subject. See U.N. Doc. No. A/5509, repr. in 58 AM. J. INT'L L. 241, 318-20 (1964).

46. Whether or not intended to that effect, the "Hickenlooper amendment" to the Foreign Assistance Act of 1962, 22 U.S.C. § 2370(e) (Supp. IV, 1962), providing for termination of economic aid to states taking American property without offering compensation, serves to emphasize the unity of the various legal aspects of the problem of international economic development. It also serves to show, once again, the futility of a strict distinction between public and private law problems in international affairs. On the amendment itself, see Lillich, *The Protection of Foreign Investment and the Foreign Assistance Act of 1962*, 17 RUTGERS L. REV. 405 (1963).

not clear yet. The basic difficulty lies in the divergence of political and social regimes existing in today's world. Traditional international law rules on economic relations reflect the nineteenth century conception of a liberal state, where economic activities are almost exclusively in the hands of private persons and where the state's chief role lies in providing the legal, institutional and political framework for such private activity. This conception of the state, in its pure form, does not prevail now, even in the states which claim to have retained it. Today there are many other kinds of regimes—regimes in which the private individual's activities are variously restricted. The influence of this situation on the effectiveness of the traditional international law norms governing commercial relations and foreign investment is evident, but the solutions of the problems that have arisen are much less so. The problems, and perhaps the possible solutions, can be profitably discussed with particular reference to the international law regarding the treatment of alien property.

There are, at this moment, three distinct positions on the matter. The first is by and large the traditional international law position (though there is considerable uncertainty as to its precise content) and is espoused today by most Western states. According to this view, there is an objective international law standard which specifically provides how property owned by aliens should be treated. Thus, aliens should not be unjustly discriminated against through taxation, exchange regulation, etc., and their property should not be taken by the state except for a public purpose—and then without discrimination and with payment of just compensation. The precise meaning of “unjust discrimination” or “just compensation” is not clear.<sup>47</sup>

A second position, also based on traditional international law and supported by the Latin American states, views the international law requirement as of a contingent character, states being bound to treat the

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47. Traditional international law allows a considerable degree of differentiation (*i.e.*, discrimination) between aliens and nationals in many matters, probably including property. Such discrimination may become unjust when it goes beyond a certain point, but the point is not well determined. The writers, however, generally insist on the validity of the requirement of nondiscrimination. See, *e.g.*, FOUILLOUX, *LA NATIONALISATION ET LE DROIT INTERNATIONAL PUBLIC* 256-60 (1963); FRIEDMAN, *EXPROPRIATION IN INTERNATIONAL LAW* 189-93 (1953); WHITE, *NATIONALISATION OF FOREIGN PROPERTY* 119-44 (1961). Most current controversy centers around the requirement of compensation. From the voluminous recent literature, see *id.* at 183; Dawson & Weston, “*Prompt, Adequate and Effective: A Universal Standard of Compensation?*,” 30 *FORDHAM L. REV.* 727 (1962); Jimenez de Arechaga, *The Duty to Compensate for the Nationalization of Foreign Property* (memorandum submitted to the International Law Commission Subcommittee on State Responsibility), in U.N. Doc. No. A/CN.4/152, Annex II (1963).

property of aliens in substantially the same manner in which they treat the property of their own nationals. This is the principle of "national treatment" or, better, of "equality of treatment." In the words of a majority of the Inter-American Juridical Committee, the principle is "that there is no responsibility to an alien except in those instances in which the state is responsible to a national."<sup>48</sup>

Finally, according to a third position not always clearly distinguished from the second, an alien's property should be treated in accordance with local laws, whatever their content and international law should allow states to act in any manner they see fit. This view has been strongly supported by Soviet jurists:

International law does not consider the nature of property rights nor does it regulate property relations within a state. Under international law states are sovereign, therefore only municipal and not international law can regulate all matters connected with the acquisition, transfer and loss of ownership rights, including the loss of ownership under the terms of a nationalization law. This cannot become a subject for discussion by another state. The laws of the state carrying out the nationalization, and not international law, determine the conditions under which property is taken from private persons and in particular to whom the law extends, whether or not compensation shall be paid, etc., etc. This postulate applies equally to the property of aliens.<sup>49</sup>

The implication is clear that the host state's measures may be discriminatory. Though statements in qualified support of "equality of treatment" are found in Soviet doctrine,<sup>50</sup> it would seem that this standard is understood in a negative rather than a positive sense. That is to say, while "foreigners cannot enjoy greater rights than the citizens of the country concerned,"<sup>51</sup> they may enjoy less.

An apparently similar position has been enunciated in somewhat am-

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48. INTER-AMERICAN JURIDICAL COMMITTEE, CONTRIBUTION OF THE AMERICAN CONTINENT TO THE PRINCIPLES OF INTERNATIONAL LAW THAT GOVERN THE RESPONSIBILITY OF THE STATE 12 (1962). The report was signed by six of the eight members of the Committee with the other two dissenting.

49. Vilkov, *Nationalization and International Law*, 1960 SOVIET YEARBOOK OF INTERNATIONAL L. 58, 78 (quoted from summary in English).

50. See, e.g., Tunkin, *The Problem of State Responsibility in the International Law Commission*, 1960 SOVIET YEARBOOK OF INTERNATIONAL L. 92, 103-04 (English summary).

51. See Yevgenyev, *The Subject of International Law*, in INTERNATIONAL LAW 89, 132 (Kozhevnikov ed. 1957). See also Chizhov, *Population in International Law*, in INTERNATIONAL LAW 136, 174 (Kozhevnikov ed. 1957).

biguous terms by the Asian African Legal Consultative Committee. In the "principles concerning admission and treatment of aliens" adopted by the Committee in 1961, it is first provided that "subject to local laws, regulations, and orders and subject also to the conditions imposed for his admission into the State, an alien shall have the right to acquire, hold and dispose of property."<sup>52</sup> It is then further stated that "the State shall, however, have the right to acquire, expropriate or nationalize the property of an alien. Compensation shall be paid for such acquisition, expropriation or nationalization in accordance with local laws, regulations and orders."<sup>53</sup> Since no general statement as to "equality of treatment" or nondiscrimination is included in these principles, the "local laws, regulations and orders" may well be directed solely against aliens or against a single category of aliens. Though compensation is mentioned, there is no actual requirement that any compensation be paid.<sup>54</sup> The commentary proposed by the Committee's secretariat does not throw any light on the precise meaning of these articles. In fact, both the text of the commentary and the authorities cited therein seem to express policies contradictory to those that the text of the principles appears to be stating.

There is an irreconcilable conflict between the three principal points of view, and this conflict persists as long as one insists on approaching these questions on the basis of traditional doctrines and concepts. What is needed is a radical change of approach, a reassessment of the objectives sought by the international law rules in this field. It is evident that each of the three approaches described can be upheld on the basis of the values, or sets of values, that this branch of international law is deemed to serve. If respect for private property is the chief value sought, then the traditional approach in terms of a specific international standard of treatment is valid. If the principle of sovereignty and national independence is the highest value, then the third position, providing for treatment in accordance with local law can be validly upheld. If a compromise is sought between the two principles, then the standard of equality of treatment appears to be a reasonable way to achieve it. It has already been noted, however, that the law concerning the treatment of foreign property is today part of a wider field, covering the

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52. ASIAN AFRICAN LEGAL CONSULTATIVE COMMITTEE, FOURTH SESSION, TOKYO, 1961, REPORT OF THE SESSION 49, Article 11, at 119 (1961).

53. *Id.*, Article 12, at 131.

54. It is noteworthy that the Japanese delegation refused to accept this formulation and insisted that reference should be made to "just" compensation. *Ibid.*

problems of international economic development. The purpose of the international law norms on the matter is then to assure the optimal development of the world's natural resources consistent with the maximization of benefits to the state and the region in which the resources are located.<sup>55</sup>

When tested against this objective all three positions are found wanting. General adoption of the traditional international minimum standard approach would encourage the investment of Western private capital in the developing countries, and thus promote the development of their natural resources. At the same time, through its requirement of full compensation for any taking of, or injury to, alien property, it limits the freedom of these countries to take the measures they may later deem necessary for their economic development. It thus tends to import highly rigid elements in a field where, in view of the rapid technological and other developments, flexibility is of the essence. In judging the probable effectiveness of this standard, it is relevant to note that it is most unlikely that it will be widely adopted. On the other hand, the standard of equality of treatment is also insufficient. It would give to the host countries greater flexibility, but it would provide too little security and certainty to the prospective foreign investors. Granted that complete certainty is not possible today, in view of the existing objective causes of uncertainty, still, it cannot be expected that responsible investors will be encouraged to invest in the less developed countries without any legal assurance of minimum security.<sup>56</sup> Similar objections are, of course, applicable to the third position described, which would not offer the investors even the limited assurances of equality of treatment. This last position is not reflected in the actual state practice of the past or of the present.<sup>57</sup>

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55. Note again the double emphasis on "international co-operation for the economic development of developing countries" and on "economic independence" and "permanent sovereignty over natural resources" in U.N. Gen. Ass. Res. 1803 (XVII), Dec. 14, 1962.

56. It is important to note that the lack of security in a given country does not necessarily result in the total absence of private foreign investment therein; from the point of view of the general interest of the world community, this may have been a lesser evil. But lack of security will usually encourage the undertaking of the wrong kind of investment. While investors thinking in terms of long-run operations will be discouraged, speculators prepared to gamble for high stakes may decide to invest, with the hope of a swift turnover and extraordinary profits. Such investment is of minimal assistance to the capital-importing country's economic development; it also tends to create or enhance a popular attitude of enmity and suspicion toward foreign investors.

57. Some jurists argue that the traditional requirement of full compensation has not been affected by the numerous recent lump-sum agreements on partial compensa-

Both the international minimum standard of treatment and the standard of equality of treatment were meaningful in the past. The real basis for these standards was the existence of an implicit understanding that the property of aliens was to be treated more or less in conformity with the principles derived from the conception of the liberal capitalist state. Today the situation has changed. There is no implicit understanding on the legal position of private property, whether owned by aliens or by citizens. This fact certainly undermines the rationale of the international minimum standard, but what is often not noticed is that it also undermines the usefulness and applicability of the standard of equality of treatment. For the latter to be meaningful, as a general standard, there has to be some basic understanding or assumption as to what is implied by its application. When its concrete content is as variable as it is today, it is difficult to see the benefits from its use.

### *The Rationality of a Double Standard*

An effective solution to the problems at hand must be founded on the present realities of international relations. One of the basic facts is the current division of the globe into three distinct "worlds" which differ significantly in political, economic, ideological, social and cultural terms. To take this fully into account, different legal standards must be established for each of the different groups of states. Such an application of different standards is in actual fact commonplace in international relations. The provisions of an agreement between two developed Western nations differ in important respects from those of an agreement on the same topic between two nations of the third world or one between two members of the Soviet bloc. Agreements between countries belonging to different groups also have distinct traits of their own.<sup>58</sup>

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tion for nationalized property, because such agreements are "political" or are expressions of charity and good will on the part of the states of the investors' nationality. See, e.g., WORTLEY, *EXPROPRIATION IN PUBLIC INTERNATIONAL LAW* 124, 157 (1959). This approach has an interesting parallel in that of those who argue that the conclusion of such agreements is no evidence of the existence of a general requirement of compensation in cases of nationalization, because these agreements are merely expressions of good will on the part of the expropriating states. See, e.g., Vilkov, *supra* note 49, at 78.

58. Compare Treaty with Germany on Commerce and Navigation, Oct. 29, 1954, art. XII, [1956] 2 U.S.T. & O.I.A. 1839, T.I.A.S. No. 3593 (provisions on exchange restrictions), with Treaty of Amity and Economic Relations With Viet-Nam, April 3, 1961, art. VIII, [1961] 1 U.S.T. & O.I.A. 1703, T.I.A.S. No. 4890 (provisions on exchange restrictions). It is the express policy of the United States, in its current FCN treaty program, to follow two basic models of treaties, one designed for developed or semi-developed states and the other for states at a low level of administrative and economic

Since we are concerned here with the latter type of relations and more particularly with relations between the Western countries and the third world, we shall often refer to a "double standard" or to two different standards without implying thereby that more standards (*e.g.*, for intra-Soviet bloc relations or for relations between Soviet bloc members and states of the third world) do not or cannot exist.

The development of such distinct standards has definite advantages. A high degree of predictability is assured; the legal standards appropriate to states of a certain structure and a particular stage of economic growth are not imposed on all countries, yet some uniformity in legal standards is retained. The acceptance of distinct standards for the treatment of alien property would make possible the establishment of effective general legal rules which would refer, as to substance, to the standards in question but, as to assessing their observance or the effects of their violation, would refer to generalized legal criteria. These advantages far outweigh the possible objections to or difficulties of the application of double standards. There is no inherent injustice in applying different tests of legality to action taken by parties in significantly different situations.<sup>59</sup> To the contrary, it would seem less than fair to apply precisely the same tests to the actions of the parties under such conditions.

Traditional international law has accepted on occasion the rationality of a "double standard." If a warship of state *B* stops a merchant ship of state *C* to inspect its cargo, this is normally an internationally wrongful act. If, however, state *B* is at war with state *A*, state *C* being a neutral, then the action is not illegal. It may be argued that the state of war is a very special case in international law and gives rise to a great number of "exceptions" to the general rules. This is certainly true, but it is submitted that the existence, with respect to the third world, of a state of necessity akin to war, arising out of its attempt to achieve rapid economic development, should be recognized.<sup>60</sup> It would be thus possi-

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development. See *Hearing on Commercial Treaty of the Senate Committee on Foreign Relations*, 83d Cong., 1st Sess. 6 (1953) (State Department statement).

59. Uniformity is good only when it is convenient . . . . It is bad when it results from an artificial assimilation of dissimilar cases, each of which should be treated differently. The nature of international society not only makes it difficult to develop rules of international law of general application, it often happens that it makes them undesirable.

Brierly, *Règles générales du droit de la paix*, 58 HAGUE RECUEIL 1, 17-18 (1936).

60. On the relevance of the state of war to the present situation in underdeveloped countries, see Fatouros, *International Economic Development and the Illusion of Legal Certainty*, 57 AMERICAN SOC'Y OF INTERNATIONAL L. PROCEEDINGS 117, 119-20 (1963); RONNING, *supra* note 26, at 56.

ble to judge the actions of the third world states on the basis of a legal standard that takes into account the presence of a continuing emergency. At the same time, the elaboration of a legal standard would result in greater precision and certainty than can be achieved by treating all specific cases as mere "exceptions" to a "general rule" of limited effectiveness.

An undeniable difficulty lies in the present uncertainty as to the precise contents of the standards. They are still at an early stage of development, and, though sometimes applied, they have not yet been formulated in exact terms. They are being developed in several manners and directions. They are embodied in special agreements between states or between foreign investors and host states, concluded either before any related dispute arises, or at the time of the settlement of particular disputes, as a result of the use of conciliation or mediation procedures. In both cases, the concrete solutions given to specific problems will provide material for the determination of some patterns of uniformity which can ultimately grow into legal standards to be incorporated in future arrangements. The technical legal elements for the construction of such standards are not lacking either. The experience of the Western legal systems is not irrelevant, though the applicability of specific rules or principles will have to be tested against today's realities. Comparative law research can elucidate certain general principles of law which might be adapted for use.<sup>61</sup> International organizations, both regional and universal, can be of considerable assistance. Already the Economic Commission for Africa is firmly oriented toward promoting studies of the legal regulation of foreign investment and economic development.<sup>62</sup> The work of specialized international agencies and foreign technical advisors may assist importantly in the achievement of greater uniformity and sophistication in the municipal law regulation of economic matters.

It is extremely difficult, at this point, to predict what the actual content of these standards will be. With respect to the treatment of the person of aliens, traditional international law has shown a high degree of flexibility and has not tied itself to specific methods and procedures, so that its standards are relatively easy to adapt to the conditions prevailing in the third world. It is the treatment of property rights and interests

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61. See Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279 (1963); McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 BRIT. YB. INT'L L. 1 (1957).

62. See, e.g., U.N. Doc. No. E/CN.14/192, at 12-13 (1963). And see, particularly, the ECA's report on investment laws and regulations in Africa, U.N. Doc. No. E/CN.14/INR/28 (1963), the first section of which is reproduced in 3 INTERNATIONAL LEGAL MATERIALS 179 (1964).

of aliens that presents great difficulties. In developing standards applicable to economic relations with the third world, it is probable that great emphasis will be placed on express provisions of documents (contracts, licenses, instruments of approval) which relate directly to the particular transaction or relation between the alien and the host government, rather than on general abstract rules, whether of international or municipal law. It is to be expected that a considerable margin of freedom will be left to the host government with respect to its decisions and actions. Thus, in connection with takings of foreign-owned property, the probable limitation will be, not the traditional requirement of "public purpose" and "nondiscrimination" but that of good faith in the particular action (or, obversely, the absence of an abuse of rights). The requirement of compensation will probably be retained, because it constitutes an appropriate basis for compromise between different systems and points of view. The less developed countries would thus be free to take bona fide measures which may affect the property of aliens, subject to the payment of some compensation. A number of criteria will probably be set up, by which the "fairness" of the compensation in the particular case will be judged. Such tests might be: the origin of the investment and its possible illegal or unequal beginnings; the length of time of past operations; the rates of return during that time; the kind of enterprise involved; the circumstances of the taking or damage, and especially the presence or absence of arbitrary action or discrimination against the alien; the financial and general economic position of the state concerned; and the actual loss to the investor and the actual gain (the "enrichment") of the host government. Of course, the manner, time, currency and other elements of the compensation itself will also be taken into consideration. The final assessment most probably would fall short of a "full" compensation for the market value of the enterprise, except in case of measures taken in bad faith. Nevertheless, by virtue of the existence of concrete tests such as those enumerated above, an approximation of a concrete "fair" value might be achieved and a minimum basis for the investor's expectations thus provided. The procedure for the determination of the compensation and the body charged with its assessment are, of course, essential elements in providing an assurance of fairness. In the near future, related disputes will probably be settled chiefly through negotiations, conciliation or other nonbinding settlement procedures. Once the standard is determined with some precision through the accumulation of precedents, it might be possible to rely on arbitration or judicial proceedings.

Governments are going to play an important role in this whole process—not only the governments of host countries but also those of the developed countries. International economic development is a major common objective to which all members of the world community are now committed; it is therefore proper for the governments of the developed countries to assist and encourage their citizens to invest in underdeveloped regions.<sup>63</sup> Such assistance may take the form of investment insurance, on a national basis, as is presently the case with the governments of three major capital-exporting countries, or on an international basis, as has been recently suggested.<sup>64</sup> It may also take other forms; the fundamental objective in all cases is the spreading of the risks of investment over the entire world community. This is fair to the investors, who cannot be asked to bear the whole burden of international economic development, and it also serves to promote such development as preferred by the Western countries. Extensive assistance to private investors, however, will ultimately involve a certain degree of control over their activities by their state of nationality.

With respect to commercial policies the need for diversity of standards has already been strongly stressed by many writers. Gunnar Myrdal speaks in that connection of “the rationality of a double standard of morality in international trade.”<sup>65</sup> More recently it has been argued that:

Left to themselves, the underdeveloped countries would probably wish to enter into selective agreements for granting one another exclusive market privileges through some form of joint industrial planning. Such agreements would undoubtedly fall far short of customs unions or free trade areas . . . Partial and selective discrimination is often regarded as the sin of sins in commercial policy. . . . But whatever may be the case against discrimination of the traditional type, it has nothing whatever to do with the situation in which the underdeveloped countries now find themselves. If discrimination will advance the development of these countries, all other considerations should take second place. Irrelevant analogies from the world of

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63. Note that, with respect to charitable activities abroad, considerable indirect control is exercised by the state, though somewhat haphazardly. See Alford, *Voluntary Foreign Aid and American Foreign Policy: the Element of State Control*, 46 VA. L. REV. 477 (1960).

64. See INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, *MULTILATERAL INVESTMENT INSURANCE: A STAFF REPORT* (1962); Brewer, *The Proposal for Investment Guarantees by an International Agency*, 58 AM. J. INT'L L. 62 (1964).

65. MYRDAL, *AN INTERNATIONAL ECONOMY* 288 (1956).

developed countries should not prevent the underdeveloped countries from acting to avoid a repetition of past mistakes in the duplication of productive facilities.<sup>66</sup>

It is evident that any change in commercial policy would be expressed in legal terms, more precisely in terms of international treaty law, for instance through amendments to the General Agreement on Tariffs and Trade and other bilateral or multilateral agreements. At this writing, the Geneva Conference on World Trade and Development has not yet met. But it is safe to predict that suggestions of this sort are going to be strongly advocated, though the ultimate result is far from clear.<sup>67</sup> Measures aimed at regulating the international trade in primary commodities are also necessary. Here, institutional arrangements are probably necessary, rather than changes in customary or conventional law.

The "crash program" of assistance for the newly emancipated classes in our domestic analogy is represented on the international scene by international economic aid. The practice in its present form is new, and its present-day rationale is even newer.<sup>68</sup> Though it is difficult to find any customary rules on the matter, there does exist today an international law of economic aid. A vast network of agreements, between states and between states and international organizations, is in force, and by now a great number of practices have crystallized. In this vast body of *ad hoc* arrangements, a number of uniformities can be detected and described. Thus, the principle of financing specific projects rather

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66. DELL, TRADE BLOCS AND COMMON MARKETS 367-68 (1963). See Ward, *Imagination in Development*, in RESTLESS NATIONS—A STUDY OF WORLD TENSIONS AND DEVELOPMENT 181, 190-92 (Council on World Tensions 1962).

67. In a specifically legal context, it should be noted that trade between Western countries and the Soviet bloc is possible today precisely because appropriate rules and standards have been developed and embodied in commercial agreements. These rules are not exactly the same as those applied between merchants belonging to free-enterprise states although, because of the peculiar conditions and necessities of international trade, they are not very different basically. The important point is that it is possible to operate on the basis of variable legal standards, properly adjusted to the differences between the character of the parties. See Berman, *The Legal Framework of Trade Between Planned and Market Economies: The Soviet-American Example*, 24 LAW & CONTEMP. PROB. 482 (1959); Hoffman, *Problems of East-West Trade*, 1956-57 INT'L CONC. 259 (1957); Schmitthoff, *International Business Law: A New Law Merchant*, 2 CURRENT L. & SOCIAL PROBLEMS 129, 139-53 (1961).

68. *But see* LISKA, THE NEW STATECRAFT 36 (1960), who considers foreign aid a continuation of the subsidies given to friendly princes in past centuries. While admitting the existence of important differences, *id.* at 58-64, Liska stresses the element of historical continuity.

than providing grants or loans for unrestricted use prevails in practice. The delimitation of the competences between donor and donee states (or creditor and debtor) also follows certain fairly uniform principles. Variations do exist, of course, as a result of many factors. Some may be the result of the particular legal character of the donor or creditor: certain provisions found in loans given by international organizations may not be found in loans given by states and vice versa. Other variations may be traced to differences in the ideologies or policies of the states involved: loans and other arrangements with the Soviet bloc countries are governed by rules differing in some respects from those governing the assistance given by Western countries. The situation and attitude of the recipient may make a difference as does the nature of the project involved.<sup>69</sup> It is not possible to generalize further or to be more specific in the absence of a general study of the actual principles operating in the field of international economic aid.<sup>70</sup> Note, however, that in the case of the international law of economic aid, the need for a double standard does not arise. With few exceptions (*e.g.*, the Marshall Plan), economic aid is a phenomenon limited to the relations between the underdeveloped and the relatively developed countries, between the third world and the states of the other blocs.

### *The Changing Structure of the International Legal Order*

The third world has "emerged" in an international legal order whose basic assumptions and structures are in a process of change in which the third world itself is both catalyst and creator. The traditional international legal system regulated the relations among human communities on the globe chiefly in an indirect manner: whatever topics were not governed directly by international law were considered as coming under the competence of the individual states-members of the international society; similarly, international law regulated the relationships between metropolitan states with respect to their colonial territories, but did not cover the relationships of the states with the colonies themselves. The latter were treated as mere objects; in the international system, colonies, like

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69. For a review of methods and conditions in foreign aid, see FRIEDMANN, *METHODS AND POLICIES OF PRINCIPAL DONOR COUNTRIES IN PUBLIC INTERNATIONAL DEVELOPMENT FINANCING—A PRELIMINARY APPRAISAL* (mimeo, 1962). See also AGENCY FOR INTERNATIONAL DEVELOPMENT, *PRINCIPLES OF FOREIGN ECONOMIC ASSISTANCE* (1963); ASHER, *GRANTS, LOANS, AND LOCAL CURRENCIES—THEIR ROLE IN FOREIGN AID* (1961); FATOUROS & KELSON, *CANADA'S OVERSEAS AID* 44-52, 57-71 (1964).

70. The results of the research project on public international development financing, currently being conducted by the Columbia University International Legal Research program, should provide much-needed information.

slaves in national legal systems, were regarded as property. Today, all distinct human communities are gradually becoming subjects of international law while—partly because of this but for many other reasons as well—an increasing number of substantive questions are regulated on an international basis. The international legal order, however, has not yet developed the methods and techniques necessary for the task of regulating directly the whole of the world community.

The eventual outcome of this situation is, of course, unknown. Perhaps it will be chaos, a nuclear holocaust, or totalitarian domination by a single power or system. Fortunately, these are not the only alternatives. To solve the immediate problems without precluding an eventual evolution into a more integrated system, the international society may move in certain other directions. Today such a movement is perceptible, though it is still too early to tell whether it is speedy enough and whether it is sufficient to avoid the threatened breakdown of the international legal order.

International law and the international legal order are developing unevenly in many directions at once, through the development, at varying speeds, of distinct bodies of international law and separate international legal suborders.<sup>71</sup> This process goes on at several levels. A universal body of international law, customary as well as treaty-made, continues to regulate a limited number of matters (limited, but still a greater number than under traditional international law): in particular, problems of war and peace, disarmament, etc., which concern directly all the members of the world society,<sup>72</sup> as well as matters without significant

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71. This phenomenon has been noted by many scholars who have drawn varying conclusions from its existence. The emphasis here reflects our concern with the problems of the third world. For some of the many relevant approaches, see JENKS, *THE COMMON LAW OF MANKIND* 14-19, 73-79 (1958); McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 *AM. J. INT'L L.* 1, 10 (1959); McWhinney, *Operational Methodology and Philosophy for Accommodation of the Contending Systems of International Law*, 50 *VA. L. REV.* 36, 53 (1964); Sohn, *The Many Faces of International Law*, 57 *AM. J. INT'L L.* 868 (1963).

72. Note also that these are generally the fields in which the leadership of the United States and the Soviet Union is asserted more effectively and, one might add, with more justification, since the bloc leaders are the essential basis of the military and economic strength of each bloc. Once they reach agreement on certain issues of this sort, the rest of the world will generally follow. The Moscow Treaty of August 5, 1963 (Partial Test Ban treaty), is an illustration both of the validity of this observation and of the existence of exceptions to this as a general rule. Nevertheless, the role of some third world states in this field, as mediators or as an "active audience" to negotiations, should not be underestimated. See, e.g., Jack, *Nonalignment and a Test Ban Agreement: The Role of the Nonaligned States*, 7 *J. OF CONFLICT RESOLUTION* 542 (1962). See also Haas,

ideological overtones, where a substantial universal consensus already exists, such as diplomatic law and the law of treaties, and several more or less technical fields of immediate general interest, such as public health and communications.<sup>73</sup> International agreements and international organizations are the chief means of lawmaking in these fields. At the same time, several particular groups of states are developing distinct non-universal bodies of international law. These groups are sometimes distinguished from one another by differences in the substantive content of the legal rules regulating the relations among the members of each group. More often, the distinguishing feature is not the substance of the rules but the intensity and the number of legal relationships among the members of the group. Thus, the rules established by the members of the Atlantic community to govern their relationships in a certain field may be very similar to those in effect among members of the Soviet bloc; this emphasizes rather than diminishes the distinctiveness of the two blocs.

Some groups are more distinct than others and show a higher degree of cohesiveness. It is difficult to deny the existence of a body of law and institutions common to and governing the relations between the developed Western states, whose ties are ideological, cultural, economic and, perhaps to a smaller extent, geographical,<sup>74</sup> or the existence of a "socialist" international law among the states of the Soviet bloc, founded again on ideological, economic and geographical ties.<sup>75</sup> The existence

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*Dynamic Environment and Static System: Revolutionary Regimes in the United Nations*, in *THE REVOLUTION IN WORLD POLITICS* 267, 290-91 (Kaplan ed. 1962).

73. These two sets of subject matters probably correspond to some extent to Friedmann's "law of coexistence" and "law of cooperation." See authorities cited note 24 *supra*. Note that such matters, and especially those of the latter kind, are also regulated on a nonuniversal level. In that case, they are usually dealt with in greater detail and in a more specific context and may result in closer relationships.

74. See, e.g., STEIN & HAY, *CASES AND MATERIALS ON THE LAW AND INSTITUTIONS OF THE ATLANTIC AREA* (1963); Hoffmann, *Discord in Community: The North Atlantic Area as a Partial International System*, 17 *INTERNATIONAL ORGANIZATION* 521 (1963).

75. See *INTERNATIONAL LAW* 71-87 (Kozhevnikov ed. 1957); TUNKIN, *DAS VOELKERRECHT DER GEGENWART* 241-61 (1963). For more precise descriptions, see BRZEZINSKI, *THE SOVIET BLOC, UNITY AND CONFLICT* (1960); Loeber, *Die Rechtsstruktur des Ostblocks*, 6 *OSTEUROPA RECHT* 196 (1960). Recent Soviet doctrine lays great emphasis on the development of a "socialist international law" which is said to govern "a new, higher type of international relations," TUNKIN, *op. cit. supra* at 241, and whose principles and rules are "of a much higher type compared with general international law." Tunkin, *Forty Years of Co-Existence and International Law*, 1958 *SOVIET YEARBOOK OF INTERNATIONAL L.* 15, 47 (English summary). It is further argued that this body of law is so new and different that the definition of general (universal) international law does not properly cover it. See Tunkin, *The 22nd Congress of the CPSU and the Tasks of the*

of an "inter-American" international law is scarcely less evident; this is perhaps the oldest of the distinct regional international legal suborders.<sup>76</sup> There are indications that a body of international law, or rather a set of separate bodies, bearing a "family resemblance" to one another, is developing in other regions of the third world; it is probable that in the near future we shall witness the development of an Asian or an African international law.

The relations between the various legal suborders are regulated in part by rules of universal international law and in part by distinct "mediating" legal rules or standards, which differ according to the characteristics of the specific parties involved. Thus, the rules and standards governing economic and political relations between members of the Western and members of the Soviet bloc differ from those governing relations between members of either bloc and members of the third world. On the other hand, there exist definite similarities in the substance of the rules of, say, the international law of economic aid as developed between the West and the third world and between the Soviet bloc and the third world.

The fundamental cause of the development of such distinct suborders has already been noted: it is the necessity to deal directly with an increasing amount of "transnational" problems arising among an increasing number of states, coupled with the fact that the universal legal order is not yet equipped to deal with them. The specific factors that determine the composition of the suborders are more difficult to identify. Two factors are probably of major importance (especially

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*Soviet Science of International Law*, 1 SOVIET LAW & GOVERNMENT Nos. 3, 18, 25 (IASP transl. 1962). Compare, LAPENNA, CONCEPTIONS SOVIÉTIQUES DE DROIT INTERNATIONAL PUBLIC 149-54 (1954). The descriptions of the Soviet bloc system available in the West are by no means convincing as to the profound originality of "socialist international law." It is probable that its affirmation is chiefly designed to preclude the application within the bloc of the principles of "coexistence." See DALLIN, THE SOVIET UNION AT THE UNITED NATIONS 46 (1962); McWhinney, *Soviet and Western International Law and the Cold War in the Era of Bipolarity*, 1963 CANADIAN YEARBOOK OF INTERNATIONAL L. 40, 76-77. Compare text accompanying note 78 *infra*.

76. See the exhaustive treatment of the problem of the distinctive character of "American" law in JACOBINI, A STUDY OF THE PHILOSOPHY OF INTERNATIONAL LAW AS SEEN IN WORKS OF LATIN AMERICAN WRITERS 121-42 (1954). The identity of content between "American" and "European" international law is not as evident today as may have appeared in the past; Latin American doctrine and state practice since the last century could be usefully re-examined in the light of contemporary world problems and trends. See, e.g., CASTAÑEDA, MEXICO AND THE UNITED NATIONS 165-96 (1958). As Jacobini points out, however, the difference in content is irrelevant if the existence of a distinct body of law is to be judged (as it is, in part, here) by the intensity or number of legal relations among the group's members. JACOBINI, *supra* at 133-36.

when, as is common, they are combined): a geographical factor, which favors regional formations, and an economic factor, which leads to closer cooperation among states at similar stages of economic development.<sup>77</sup> Ideology or a state's political system appear to play a subsidiary role: it is difficult to conceive of a Western democracy becoming a member of the Soviet bloc, and vice versa, but there are many variations in shades of political color which do not appear to affect significantly the participation of states in regional groupings.<sup>78</sup> The composition of these groupings varies over time, of course, but it may even vary according to the kind of subject involved. A state may belong to one group for certain purposes and in view of some of its characteristics, and to another group for other purposes and because of other characteristics. From an ideological viewpoint, for instance, a state may belong to the Western group, though, from an economic point of view, it belongs to the third world. Its legal relationships with the Western states will then be, in the case of political or military matters, those of a member of the group, and, in economic matters, those of an outsider, or a member of another group.

The relationships between members of the same legal suborder are regulated chiefly through international agreements, often resulting in the creation of international organizations. Two sorts of agreements are of particular importance: multilateral conventions in which all the members of the group participate, and bilateral treaties constituting a network of agreements between each member of the group and a central common party, usually a state in a dominant position within the group. In addition, a multitude of other agreements between states are being concluded, which are intended to deal with particular situations or to

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77. Castañeda's argument, CASTAÑEDA, *op. cit. supra* note 76, that the participation of the United States in Pan American regional organizations is the cause of the latter's lack of success, points to the importance of the second of these factors. That the regional factor is not controlling can also be seen from the composition of several of the groups, for instance, that of the Western bloc; surely, on a regional basis, the whole of Europe, rather than the "Atlantic Community," is the appropriate unit. However, no factor operates in a political, legal or economic vacuum.

78. The insufficiency of the ideological test has been graphically demonstrated by the repeated failure of the attempts by Soviet jurists to found upon it a theory of international law. See LAPENNA, *op. cit. supra*, note 75, at 69-79, *passim*; SCHLESINGER, *SOVIET LEGAL THEORY* 275-90 (1945). These views have now been explicitly rejected, and Professor Tunkin has unequivocally stated that, for international law to exist, neither an underlying identity of interests nor the absence of ideological conflict is needed. See Tunkin, *Co-Existence and International Law*, 95 H<sub>A</sub>GUE RECUEIL 1, 46, 53, 59 (1958). These affirmations, however, are somewhat at variance with the recently increased emphasis on the originality of "socialist international law." See note 75 *supra*.

resolve specific problems or disputes. The incidence of such "casual" agreements among members of the same group of states is higher than between states belonging to different groups.<sup>79</sup> Agreements of this sort are often of limited general importance. However, by resolving specific problems, establishing particular kinds and patterns of legal relationships and creating or sanctioning new factual relationships and situations, they serve to indicate and promote legal change at its incipiency. They are the materials upon which scholars or statesmen may base their predictions of present and future trends.

It is too early to tell whether distinct international customary rules may develop. Although it is probable that custom will not be the main law-creating technique, treaty relationships and the practice of international organizations may lead to the establishment of certain distinct legal standards. This will make possible the application of the same legal norms in different manners in each suborder in accordance with its particular needs and characteristics.

The development of distinct international legal suborders is not necessarily subversive of universal international law. In many cases the new, nonuniversal rules regulate matters that were previously left to the exclusive competence of individual states or that, while traditionally belonging to international law, are now controlled in much greater detail and more directly. The present developments, then, may actually strengthen the international legal order, since they substitute international (even if not universal) legal norms for national ones. In this context, the role of the third world appears essentially positive; paradoxically, its emergence has strengthened the international legal order precisely by increasing the number and the intensity of the differences and conflicts of interests among the members of the world society. In the first decade after the Second World War, the international legal order was being threatened by the struggle between two powerful blocs whose conceptions of the international order not only were different but were claimed to be incompatible. The emergence of the third world did not eliminate the conflict, but it has changed its character by introducing powerful new elements of diversity. The role of universal international law and organization has now become more important, since these provide a degree of cohesiveness, the need for which is more evident in a pluralistic than in a bipolar world society. In

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79. For some tentative indications with respect to third world states see Quermonne, *Les engagements internationaux des nouveaux états*, in *LES NOUVEAUX ÉTATS DANS LES RELATIONS INTERNATIONALES* 323, 344-47 (Duroselle & Meyriat eds. 1962).

the same manner, the appearance of new interests and points of view, acting as balancing elements between the two "poles," has improved the stability of the international legal order.