STUDIES IN INTERNATIONAL LAW

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PREFACE

This book is a compilation of various lectures given by me in different universities as National Lecturer in 1974-75 under the University Grants Commission Scheme. I thought it proper to get them published in order to give the benefit of my research to others interested in the subject. The subjects are topical and of great importance to the present world community.

There is a great controversy as to how far the European-oriented international law is binding upon the newly independent States. I have selected a few topics of international law which need to be modified in the light of views of the Third World on them. These topics have been pin-pointed although there could be difference of views on other topics also.

Chapters two and three dwell upon the recent developments in the regime of sea. I have tried to project the views of the developing world on the subject. Chapter four on the recent trends in Air Laws does not need any elaboration.

Chapter five deals with the knotty problem of succession to treaties by new States. I have opted to include this article despite the recent Vienna Convention on the subject. The readers are welcome to compare my views with the recently concluded Convention. Chapter six dwells upon the refugee problem in Asia which has indeed made the world situation explosive in many ways.

Chapters seven to nine dwell upon the laws of war. Somehow, I feel that the laws of war of the World War II days were heavily drafted to suit the Allied Powers. I have tried to be as objective as possible. Chapter ten is devoted to thoughts on reorientation of laws of war which need to be overhauled.

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THE IMPACT OF NEW STATES ON THE DEVELOPMENT OF INTERNATIONAL LAW

The concept of International Law, with which we have hither-to grown up, is at the cross-roads today. We have so far known international law as has been given to us by the Western powers, reinforced by Western authors. This kind of international law is Western-cum-power-oriented. It is the product of a one-way traffic in which the Western countries, particularly Europe and the United States of America, were the adjudicators and the erstwhile colonies and weak States of the so-called Orient or from elsewhere were the meek recipients thereof. Until very recently, international law was considered to be the monopoly of the so-called civilised nations and we from Asia and Africa were considered anything but civilised. Therefore, we were not entitled to participate in the law-making process as members of the world community. The famous conferences on international law, like the Westphalian Peace Treaty in 1648, the Vienna Congress in 1815, the Congress at Aix-la-Chappel in 1818 had no participating State from the Afro-Asian region. The two Hague Peace Conferences of 1899 and 1907 had only six States from Asia but none from Africa.

The result of this Western monopoly in the formulation of international law was the formation of such norms which purported to suit their convenience in their dealings with the Afro-Asian States and other weak States from Latin America. Whatever customary international law was developed in the process was self-motivated—whether it was assumption of jurisdiction over its nationals in foreign countries or the Monroe Doctrine in the Americas. Those were the days of hegemony and spheres of influence. The weak States of Latin America, Europe and Asia-Africa had little say in the formulation of the customary rules of international law. Needless to say, the governmental actions of the Western Powers were reinforced by support given to such actions by the national writers on various aspects of international law. The consequences were obvious. The

practices of Western nations emerged as customary rules of international law.

Today, of course, the situation is different. The post-World War II period has witnessed revolutionary changes in the world community. The United Nations has increased its membership from the original 51 to the present 152. Most of these members are new entrants to the world community. They hail mostly from Asia and Africa. The post-World War II period is just like a Bastile Day to these States. They chant the same hymns of liberty, equality and fraternity. In the process, the world community, which was until recently the exclusive club of the Western Powers, has come under the stresses and strains of new States. The balance of power has swung, at least numerically, from the European States to Afro-Asian and Latin American States. These States do not consider themselves bound by all the practices of the Western Powers which were labelled customary international law. They seek to disown such practices which are prejudicial to their interests or are inconsistent with their new status. They challenge some practices alleged to have matured into customary international law on the ground that no rule of international law can be binding on them without their consent. In particular, they challenge some rules which need to be overhauled in view of the changed situation and their emergence as sovereign States. On the other hand, the European States seek to challenge some well-established rules because these prove to be inconvenient to them. A few burning topics like nationalisation, intervention, unequal treaties and use of force are discussed in order to show the difference between the past and present thinking.

Nationalisation

Nationalisation of means of production or other industries which may involve the acquisition of foreign property within national boundaries has been given considerable importance in the realm of international law. Today, nationalisation of essential industries has become an integral part of the national economic policy of a State, whether it is wedded to a socialistic pattern of society or otherwise. This necessarily involves the acquisition of foreign property. The process started with the nationalisation decrees of the Soviet Union immediately after it came into power in 1917. It was followed by the Mexican decrees in 1938-40. The post-World War II period has

witnessed a spate of nationalisation decrees. This has raised two questions of international law—the legality of nationalisation involving foreign property and the quantum of compensation to be paid for such nationalisation.

Enjoyment of territorial sovereignty is one of the basic principles of international law. This would imply that a State is entitled to do anything within its territory, so long as it does not offend any outstanding treaty obligation or a customary rule of international law. A State, therefore, can nationalise property, including foreign-owned property.[1] It would, indeed, be a derogation of territorial sovereignty if anyone were to challenge the right of a State to nationalise property within its territory. This is a fairly settled principle of international law now, although there were some earlier attempts to challenge this right.

However, sometimes a nationalisation decree is sought to be challenged on the ground that it is a violation of international law. This was done in Banco National de-Cuba vs. Sabbatino in 1961.[2] In this case, Federal Judge Dimock of the Southern District of New York held that nationalisation in violation of international law can be challenged.[3] This decision almost rocked the Act of State doctrine as given in the case of Underhill vs. Hernandez.[4] Fortunately, the U.S. Supreme Court upheld the Underhill case and said in an appeal in the Sabbatino case that:

> "We decide that the judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign extant and recognized by this country at the time of suit, even if the complaint alleges that the taking violates customary international Law."[5]

The controversy should have ended here but for the subsequent reaction to this ruling among international lawyers in the United States. The following remark is typical of this feeling:

> "The Supreme Court refrained from condemning a political enemy of the United States for violating what many observers regard as clearly established rules of customary international law governing the taking of property owned by aliens."[6]

This attempted resurrection of the dead horse raises some doubts among the Afro-Asian States whether Western courts, supported by some writers, would try to dilute the Act of State doctrine if it suits their convenience and thus question the sovereign acts of newly emergent States. The Act of State doctrine is a well entrenched

principle of international law and it will indeed shake the faith of the new States if a well established rule is sought to be wrecked for selfish reasons by those very States which formulated the rule.

Nationalisation does not become illegal because it may have violated any international commitment. Nor does it become illegal in case it has not provided for compensation. It is possible, however, that the nationalising State may incur international liability for violating any agreement.

The other question connected with nationalisation is the problem of payment of compensation for acquiring foreign property. Here, two questions may be posed: whether there is any customary rule of international law which may oblige the nationalising State to pay some compensation for the nationalised property; the quantum of compensation which may be given.

Regarding the obligation to pay compensation, I must admit that after having gone through some of the practices of nationalisation, I have not been able to find any rule which may have matured into a customary rule of international law, indicating such an obligation. And, indeed, if practices of nationalising State could be any indication, they are to the contrary. Thus, it has been noticed that a number of States have nationalised foreign enterprises without providing for compensation to the aliens. The Soviet Union did this after World War I. The other socialistic countries did the same after World War II. And although eventually some compensation was given by these States for nationalising foreign enterprises[7], it was more out of international comity than out of any international obligation.[8] In other cases, where property was nationalised by simultaneously providing for compensation, it was either because of the national requirement for giving compensation or because of the intention of the nationalising State to maintain international good will. Nowhere was the compensation given because of any customary rule of international law.

One is reminded, in this connection, of the finding of the International Court of Justice in the Asylum case. While adjudicating upon the question whether practice of diplomatic asylum has become customary international law in the Americas, the court held:

> "The party which relies on custom, must prove that this custom is established in such a manner that it has become binding on the other party . . . that the rule involved . . . is . . . in accordance with

a constant and uniform usage practised by the States in question, and this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. . . .''[9]

From this ruling, it is clear that if payment of compensation were to be treated as a customary rule of international law, the nationalising State should treat the payment of compensation as a duty towards the foreigner whose property has been nationalised. Such a foreigner should consider the receipt of compensation as a right. However, such a relationship is wanting.[10]

Despite the absence of any international duty to pay compensation, States have many times given some compensation. But the quantum of compensation has remained controversial. A number of categories of compensation have been noticed: (a) market value of the acquired property; (b) value of the property based on the total investment, profits earned, value of the property according to income tax returns after making the allowance for depreciation; (c) some compensation depending upon the capacity of the State to pay; and (d) illusory compensation.

Payment of compensation on the basis of market value would be an ideal compensation. It is sometimes called "prompt, adequate and effective compensation."[11] But this may not be possible in case of the developing States. Payment of compensation on the basis of total investment, profits earned and value of the property as given in the income tax returns may be the second best form of paying compensation. But even this type of compensation may not be promptly payable by the nationalising State. The third type of compensation may have been arbitrarily determined by the paying State depending upon the capacity of the State to pay. The last type of compensation may be just illusory and pretentious.

Whatever compensation may be fixed while nationalising any particular industry or enterprise, it must be remembered that there cannot be two yardsticks, one for compensation to its own nationals and the other for giving compensation to foreigners. While in India, it would violate Article 14 of the Indian Constitution which guarantees equality of law and equality before the law, it may arouse ill feelings of the nationals against foreigners if the latter are given a better deal than the former. Therefore, the principle of "national treatment"[12] should be considered as sacrosanct. It hardly needs to be said here that citizens of developing countries are already suspi-

cious of Western States and their nationals and any partiality shown to them would only aggravate the situation. The Afro-Asian Legal Consultative Committee has said that "Compensation shall be paid for nationalisation in accordance with local laws."[13]

Thus, while a State may nationalise any property, including foreign owned, there should be some compensation depending upon the capacity of the State to pay. The mode of payment may also be left to the discretion of the nationalising State which, I am sure, will think of the possible loss or gain of international good will while determining the quantum and mode of payment. This has now been upheld by the United Nations Charter on Economic Rights and Duties of States as adopted by the General Assembly on 12th December, 1974. Under this Charter, States have the right to nationalise, expropriate and transfer the ownership of foreign property with "appropriate compensation" to be paid by the State according to its relevant laws and regulations and all circumstances that the State considers pertinent.[14] In short, it should be a fair compensation, depending upon overall situation, economy of the nationalising State, total investment and amount of money pumped out by the nationalised company.

INTERVENTION

Intervention, which may be defined as dictatorial interference in the internal or external affairs of another State[15], is another point which requires rethinking. Every act of intervention affects the sovereignty of a State and, therefore, is a violation of international law.[16] Yet, it is asserted in some quarters that there is a right of intervention under certain circumstances.[17] This type of assertion needs to be examined.

Intervention is nothing else but gunboat and trigger-happy diplomacy by which a strong nation assumes the right to interfere in the affairs of a weak State. One has yet to see a weak nation interfering in the affairs of another State even though the rights of the weak nation may have been grossly violated or may be in jeopardy. Does this mean that the right of intervention is the right assumed by Western nations to interfere in the affairs of a weak State like any of the Afro-Asian or Latin American States.[18] Some situations where such a right is asserted are examined as follows.

It is alleged that there is a right of intervention in case of violation of any customary or conventional rule of international

law; in cases where there is guarantee by treaty for the maintenance of a particular form of Government or given dynasty; and in case of protection of its citizens abroad. Naked form of this instance was witnessed by the movement on part of the U.S. Seventh Fleet, "Enterprise" (nuclear guided aircraft carrier) to the Bay of Bengal in December, 1971 at the imminent prospect of the fall of Dacca. The pretext was to save U.S. lives in Dacca although the intention was to boost the Yahya regime which was collapsing in Pakistan then. A new form of the right of intervention was asserted by Kissinger, U.S. Secretary of State, when he said that the United States may intervene militarily in the Middle East if there is strangulation of the Western economy by Arab oil-exporting countries. He was reported to have said: "A country of the magnitude of the United States is never without political recourse. Recourse to military intervention, however, would be made only in the 'gravest emergency' . . . . Some actual strangulation of the industrialized world would be one such emergency."[19]

It may be submitted here that there is no customary right of intervention as such. If any strong nation does assume such right, it arises from a conceited notion of self-righteousness. If any State has violated any customary or conventional rule of international law, the right course left for the aggrieved State is to take up the matter diplomatically with the violating State or, in case of failure of this procedure, to move the International Court of Justice if its jurisdiction can be invoked or seek the good offices of a common friendly State or approach the United Nations.

The same is true with regard to a situation where a State has guaranteed a particular form of government or dynasty in another State. The people have an inherent right to revolt and decide for themselves the form of government they desire. This is implied in the right of self-determination given by the U.N. Charter under Article I (2) as well as under the Charter of Economic Rights and Duties of States. A foreign State does not have the right to intervene in the choice of people only because it has guaranteed the perpetuation of particular government or dynasty. No such right exists in international law. Every State has a right whether it would have monarchical, presidential, parliamentary or dictatorial form of government.

Nor should there be any right of intervention on the pretext of protection of its citizens in a given country. It is likely that in some

countries, citizens of another country may have suffered some injustice and their government has a right to take up their matter diplomatically or through other available means. But intervention should not be permitted, unless there are two kinds of international law: one for the weak nations and another for strong nations. To my mind, there is no such thing.[20]

Lest any doubt exists in the minds of the Western Powers, there is a U.N. Declaration on Non-intervention adopted by the General Assembly in 1965.[21] It declares that "No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State." This has been confirmed by the U.N. General Assembly Resolution No. 2625 (XXV) of 4th November, 1970 and the Charter of Economic Rights and Duties of States as adopted by the General Assembly on 12th December, 1974.

Kissinger's assumption of the right of intervention in case of the strangulation of the Western economy by oil-exporting countries is equally misconceived. It is the sovereign right of a State to exploit its natural resources and fix a price for its commodities. It does not lie in the power of a foreign State to dictate prices of a commodity in another State, except through international competition. Can the West be compelled to sell armaments or manufactured goods at reduced rates? Surely, it would resist any such attempts. Why then threaten the Arab countries which are not so strong militarily. Would the United States think in such terms if the Arab world were militarily strong? Perhaps not.

There is also talk of the right of intervention to prevent violation of human rights in a given State. The International Commission of Jurists thinks that there could be humanitarian intervention under some conditions.[22] Others assert the right of humanitarian intervention if there is imminent or on-going gross human rights violations and all non-intervention remedies have been exhausted. According to them, there should be least interference with the authority structure of the concerned State.[23]

However laudable humanitarian intervention may be to protect the violation of human rights in a given State, right of such intervention will open a flood-gate to any unscrupulous State to intervene in the affairs of its neighbouring State on the pretext of the latter having violated human rights. This will not be a welcome step. Therefore, it would be better to deny any such right of

humanitarian intervention, whatever be the motivations.

Something needs to be said about Deconcini's Amendment which was attached to the Panama Treaty ratification by the United States Senate on 16th March, 1978. Arizona Senator's Amendment, which was accepted by the U.S. Administration, was that "the United States of America and the Republic of Panama shall each independently have the right to take such steps as it deems necessary, in accordance with its constitutional processes, including the use of military force in Panama, to reopen the canal or restore the operations of the canal, as the case may be." To make the things worse, the Senator explained during his floor speech in the Senate that his main motivation "is directed towards situations in which the canal is closed because of internal difficulties in Panama."

Deconcini's amendment was clarified by a Senate vote on 18th April, 1978. According to it, any United States action "to assure that the Panama Canal shall remain open, neutral, secure and accessible shall not have as its purpose nor be interpreted as a right of intervention in the internal affairs of the Republic of Panama or interference with its political independence or sovereign integrity." How far this clarification is genuine or a camouflage, it is yet to be seen. It may, however, be made clear that any action under the pretext of keeping the Canal open will be construed as intervention, irrespective of any other name given to such an action. Deconcini's Amendment has an interventionist tone.

There may be one permissible form of intervention which is normally termed intervention by invitation. Thus, the government of a given country may invite a foreign State to help the former in repelling an armed attack from outside or in quelling a local revolt. In the latter case, foreign aid may be sought and given if the rebels are also supported by a foreign power. Otherwise, it may be considered as a local affair between the government in power and the local revolters and they should decide between themselves as to who would govern them.[24] In such a case, no foreign aid may be sought or given. But when foreign aid is given, it should be called aid or assistance by a friendly foreign power rather than intervention by invitation. In fact, the phrase "intervention by invitation" is meaningless because intervention by invitation ceases to be intervention when it is not dictatorial. A situation can be visualised where the government in power invites another State for assistance despite the fact that the rebels are not supported by any foreign power. In

such cases, intervention by a foreign power, even though through invitation, should not be permissible.

UNEQUAL TREATIES[25]

There is also a problem of unequal treaties between a strong nation and a weak nation.[26] Thus, if a treaty has been entered into by a weak nation under some pressure, it may be denounced later as and when the weak nation gets an opportunity to do so. The Egyptian Government nationalised the Suez Canal in 1956 because it considered that the Constantinople Treaty was not entered by the Egyptian Khalifa on equal terms.

It is, therefore, heartening to note that Articles 51 and 52 of the Vienna Convention which concluded on 23rd May, 1969 on the Law of Treaties provides that a treaty concluded under pressure shall be considered as void.[27] However, Article 52 of the Convention has not gone to the depth of the problem, inasmuch as it has not considered economic or diplomatic pressure as sufficient for vitiating the treaty. This is despite the fact that some members of the International Law Commission had raised this plea.[28] While force is a naked form of pressure, diplomatic and economic pressure are more subtle but equally effective and perhaps more effective in some cases. In the circumstances, any treaty entered into under diplomatic or economic pressure should also be void.

USE OF FORCE

Until recently, nations resorted to the use of force as an instrument of their national policies. States have used force to maximise their values. Use of force had been considered by nations as an attribute of sovereignty. In the formative stage of international law, the use of force had been labelled as a form of self-help when all other avenues for settlement of international disputes failed. Things have begun to change.

The first modern attempt at outlawing war-use of force—was the Kellog-Briand Pact of 1928 by which nations swore not to use force as an instrument of national policy. The Pact was confined to Europe where it miserably failed in the wake of World War II. The second attempt has been made through the U.N. Charter. Article 2 Clause 4 obligates the members to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other

manner inconsistent with the purposes of the United Nations." The third attempt has been made through General Assembly resolutions which forbear the fruits of war.

Nevertheless, wars have occurred although the theatres of war have changed. Previously, it was Europe which witnessed a continual state of war. Today the war virus has spread to the Afro-Asian regions where wars are fought either by proxy or due to the over-zealousness of the newly independent States. But that does not make war as a permissible instrument of national policy. In the context of the present situation, use of force has been banned except in a few cases which are given below.

(*1*) *Wars of Independence:* Colonies and trust territories have a right to secure independence through the use of force if the metropolitan power is recalcitrant in the grant of independence. The whole process of decolonisation in the post-World War II era is an amalgam of voluntary and forcible attainment of independence by about one hundred new States. There are numerous United Nations resolutions which permit a colony to use force in order to exercise the right of self-determination. India also liberated Goa, Daman and Diu in the sixties because Portugal's Salazar was averse to grant of independence to these Portuguese enclaves within the heart of the Indian territory. Angola, Algeria and Indonesia are other examples of attainment of independence through use of force. Article 1 Clause 2 of the U.N. Charter gives out respect for the principle of self-determination of peoples as one of the purposes of the United Nations.

(*2*) *Self-defence:* Nations have the right to use force to repel force initiated by another State. There is an inherent right of self-defence under Article 51 of the Charter. It could be individual right of self-defence or collective right of self-defence. No State can be deprived of its right of defending itself. There is no controversy as to that.

However, there is controversy regarding the right of pre-emptive self-defence. Some States plead for it. Others reject it on the ground of fear of its misuse. In all fairness, it must be said that consensus is against permitting pre-emptive self-defence.

(*3*) *Recovery of Lost Territory:* Use of force being illegal, no State can retain the fruits of war. This is the main reason for asking Israel under Security Council Resolution 242 to vacate territories occupied by her during the 1967 war. Thus, when Egypt launched

hostilities across the Suez in October, 1973, there was no condemnation of Sadat's act. It was motivated to recover territories lost during the 1967 war.

A State has the right to forcibly recover territory lost in war if the aggressor is not ready to part with it voluntarily. This principle gets strengthened if the United Nations has urged upon the occupying State to vacate the territory but it has not been vacated despite such resolutions of the United Nations.

(*4*) *United Nations Enforcement Action:* States may resort to the use of force as part of an enforcement action under Article 42 of the U.N. Charter. This is supplemented by the Preamble of the U.N. Charter which says that armed force may be used in common interest. There cannot be better common interest than when the States are asked to take action under Chapter VII of the Charter or under the collective self-defence system. This may be done on the basis of exhortation of the United Nations under Articles 2 (5), 44 and 45 or under 52 and 53 dealing with regional arrangements. However, individual punitive actions as taken by China against Vietnam in 1979 is not permissible in international law today. Not even joint action by a group of States as was done by the Warsaw Pact States in Czechoslovakia.

Conclusions

Some of the strains caused by the emergence of Afro-Asian States on the international scene have been discussed. They are now the members of the world community which was until recently an exclusive club of the Europeans and the Americans. Naturally, there is a ferment in the regime of international law.

But this does not mean that the new Asio-African States have rejected *en masse* all the norms of Western international law. Any such assertion or impression will be far from the truth. Undoubtedly, the new States take the traditional international law with a pinch of salt. They accept such international norms as could really be considered as customary law in the universal sense. There is less difficulty about conventional rules of international law because they have consented to it. However, there is difficulty about pre-existing customary law which can bind the new States only when they accede to these norms. This is no violation of international law. Consent being the basis of international law, whether customary or conventional, no international rule can bind a new State against its will.

The new States do not propose to start from scratch. They adopt such norms of existing law as are universal. They disown others which are power-oriented and inconsistent with their new status as sovereign independent States. By this process, new international law in the real sense, which is universal in its application, will emerge. Naturally, international law which was created by a few States originally cannot bind 152 States now. The position has been rightly analysed and summarised by the Carnegie Endowment Report for 1968-70 when it says, "The so-called new States now constitute as majority in an international community still largely dominated by an international legal system that reflects the values and needs of the older States. Not surprisingly, the States of this new majority seek to determine how far contemporary international law corresponds to their own needs and values and, where necessary, to bring about change."[29] Unfortunately, Scali, former U.S. Ambassador at the United Nations, called it 'tyranny of the majority', little realising that earlier international law could as well be labelled 'tyranny of the powerful'.

NOTES AND REFERENCES

1. Gillian White, *Nationalisation of Foreign Property* (1964) **4**.
2. 193F Suppl. 375 as given in 1961, *American Journal of International Law*, **741**.
3. Ibid., p. 745.
4. 168 *U.S.* **250**.
5. 376 *U.S.* 398 at p. 428.
6. Richard A Falk, "The Complexity of Sabbatino", 1964 *A.J.I.L.* **935**.
7. Alfred Drucker, The Nationalization of United States Property in Europe, 1951, *G.S.* 95-114; O'Connel, D.P., International Law, Vol. **II**, pp. 841-2.
8. The U.S. Supreme Court remark in the Sabbatino case is worthy of mention here: "However, Communist countries, although they have in fact provided degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking State," as given in 1964 *A.J.I.L.* **57**, p. 792.
9. Asylum Case (Colombia v. Peru) 1950 *I.C.J. Reports*, pp. 276-7.
10. There are three prevailing schools regarding payability of compensation: One school says that no compensation is payable provided there is no discrimination; second school envisages payment of compensation according to capacity; the third school asks for just or full compensation. O'Connel, op. cit., pp. 858-9.
11. In a four page White House statement on Economic Assistance and Investment Security in Developing Nations issued on 19th January, 1972, President Nixon said: "Under International law, the United States has a