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Internal Change and the International Legal Order:

A Third World Perspective

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I. Introduction

Before treating the problem of law and social change on the international level, it is necessary to examine briefly the issue of law and change in general.

It is true that one basic function of law as such is the maintenance of order and the protection of legitimate expectations in society. But this does not necessarily mean that law always provides the formal sanction of the existing social order.

In primitive societies, where the degree of social organization is still rudimentary and the primordial problem is that of maintenance of peace in society, it is possible to envisage order and the protection of legitimate expectations in terms of the preservation of the status quo. But beyond this very early stage of social evolution, where law coincides with the most elementary social need for peace, divergent needs and values make themselves felt in society and the protection of legitimate expectations would depend on whose expectations one is considering. It thus becomes impossible to equate the protection of legitimate expectations with the mere maintenance of the status quo. Order becomes orderly change and the protection of legitimate expectations has to be understood as undertaking change, where it has to take place, within the structure and by the use of processes provided for in the legal system itself.

How does this generalization apply to the international legal order? Can we say that the international society is still at the very rudimentary stage of having to preserve peace at the price of preserving the status quo? or has it reached the stage where it can legally accommodate peaceful change?

It is in relation to the Third World that the problem of law and social change most acutely arises. For not only does the Third World encompass the majority of humanity and its advent on the international scene constitute one of the most fundamental changes to take place in international society after the Second World War. But it is in the Third World that the most drastic changes are sought and that change, whether desired or undesired, will undoubtedly take place.

The desired changes in the states of the Third World are basically of an internal character. But they are conditioned both positively (as to the resources needed for achieving them) and negatively (as to the extent to which they can go, especially as regards foreign vested interests) by external factors. To the extent the international legal order can have a bearing on these external factors, it is potentially relevant to internal change in the Third World.

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To what extent has the international legal order been responsive - to what extent does it foster, hinder or remain indifferent - to the aspirations of, i.e. the desired social changes in the Third World?

It is perhaps by enumerating the problems facing the Third World and examining its aims and aspirations that the distance between the actual and desired situation can be measured and the claims laid by the Third World on the international legal order, as well as its response to them, can be assessed.

## II. Factual Challenges

What are the problems and aspirations common to all States of the Third World and to which international legal order can be potentially relevant? These are innumerable but can be classified in the following four categories:

### 1. Colonialism past and present

It can be said without exaggeration that colonialism, if it is not the source, at least it is intimately related to all the material and psychological conditions obtaining in the Third World today.

Not only has colonialism remoulded and thus left a deep imprint on the societies it embraced by favouring certain classes, and thus reallocating power, by introducing new methods of social and political management, by restructuring the economy to make it more compatible with its own needs and by destroying to a great extent the cultural identity of the colonized people, leaving them with deep psychological wounds and complexes, but also it came to an end, where it did, in a messy way.

Indeed, the process of decolonization was far from orderly. In many cases, if not most, decolonization came either too soon or too late. In some cases, instant independence was granted in order to keep factual dependence. In others independence was reached after a bitter and protracted struggle which caused great sufferings, material destruction and the erosion of institutions, all of which compounding the difficulties of reconstruction after independence.

The international legal order has played a rather passive role in the process of decolonization. International law does not regulate or decree an orderly process for decolonization. If there is now a large measure of consensus on the principle of self-determination, this has been the result rather than the cause of decolonization.

But colonialism is not only the colonial legacy. Colonialism is well and alive and living in the midst of the Third World. It is an illusion to consider colonialism a spent force. Indeed, what remains is the hard core cases, including the most difficult and vicious type of colonialism, the colonies of settlement. These not only deny the right of self-determination to the peoples of the territories where they settle, but act as a permanent threat and obstacle to radical social change in the neighbouring countries.



This is why the States of the Third World consider colonialism as a unified force which directly threatens them wherever and as long as it exists.

The newer forms of colonialism, which are usually referred to as neo-colonialism, are part of the colonial legacy to which we now turn.

## 2. The colonial legacy

Decolonization has left many states of the Third World in a situation where fragile structures of a modern state are superimposed on heterogeneous populations in ethnic, tribal, religious or cultural terms, which have been united only by their common colonial past. But even where they are imposed on a more homogeneous population, these structures have to replace traditional ones and to be managed by a very limited elite which, in many cases, does not have the benefit of proper preparation or experience. Moreover, it has to deal with masses which are uneducated, undisciplined, and unused to political participation. Many services, especially in technical fields, have to continue to be run by foreign personnel, frequently from the ex-colonial country. The masses live at a near subsistence level and suffer from illiteracy, poor health, and malnutrition.

On the economic level, a state of underdevelopment and dependence on the outside world prevails. It is characterized by very low per capita income and specialization in agriculture or extractive industries, depending in large part on exports, with very wide differences between its traditional and modern sectors, as between city and country side. This situation is compounded in general by scarce resources in terms of capital and skilled labour both of which are difficult to generate under these conditions.

The modern - extractive and/or export - sector, which has usually been developed to satisfy the needs of the colonial power, remains in the hands of foreign interests. Thus, the country does not have control over the most efficient and productive sector of its economy nor does it reap a fair share in its rewards. Any serious programme for economic development cannot avoid reconsidering the questions of control and proceeds of this vital and strategic sector of the economy. But by so doing, it cannot help undermining the foreign controlling interests in this sector. This, in turn, could create great difficulties for the country in question, in view of the vulnerability of the Third World in international economic relations.

## 3. External economic vulnerability

The process of decolonization went hand in hand with an objective economic trend, that of the declining importance of the underdeveloped countries to the developed ones, both as a source of raw materials (through the development of synthetics and as a result of the decreasing proportion of raw materials in advanced industrial goods) and as a market for final products (full employment can now be maintained, aside from exports, by internal economic measures). This trend is reflected in two alarming signs. The first is the declining share of the underdeveloped countries in world trade (from 30 % in 1950 to 19 % in 1965). The other is the secular adverse movement of the terms of trade of these countries (the "Prebisch effect"), i.e. they have to give more of their exports (raw materials) in order to get the same volume of their imports (industrial goods).

Both make for the stagnation, in absolute terms, or the decline, in relative terms of their exports proceeds. This is at a time when the foreign trade sector is relatively more important, even vital, to the underdeveloped countries than to the developed ones, both because exports constitute a larger proportion of their national income and in view of the great importance of their imports of capital goods to their development efforts.

To some extent, this decline in trade and exports proceeds was offset by aid, which was the most important factor in the international economic relations of underdeveloped countries in the 1950's, when it was increasing at a rate of 15 % per annum. But most of this aid was given in the form of loans, which accumulated to such an extent (33 billion dollars in 1966) that servicing them (in terms of repayment and interest) has become too burdensome for, and exhausts a large proportion of the exports proceeds of, the underdeveloped countries. At the same time the supply of aid has been dwindling and the conditions for loans have been tightened up.

Aid, especially bi-lateral aid, is a very important tool of influence in contemporary international relations. It has been and is used to keep the states of the Third World politically in line and to make sure they behave, in their internal economic policies, in a manner consistent with the interests of the capital exporting countries.

#### 4. Problems of nation-building, modernization, and development

The states of the Third World embark on their international life with great handicaps. The severance of colonial ties leaves them in a weak and an overexposed situation. How do they face up to this situation? By following the only path of hope, but also the most ambitious and difficult one, that of translating independence into a social reality.

Indeed, without going into the old controversy on whether nation precedes State or State precedes nation, it can be said that all the states of the Third World are engaged in what modern political science calls "nation-building", in the sense of building the social and economic infrastructure necessary to support a modern State. This task is overpowering by its dimensions and also by the time-horizon set for it by the revolution of rising expectations of the masses.

Nation-building is thus a shorthand for enormous tasks on the political, administrative, economic, and social levels. In all these fields the task is to transform whatever fragile structures remaining from the colonial era into structures capable of autonomous and sustained growth. Thus, the governing elites of the newly independent States face an overwhelming challenge in nation-building because without much experience or resources they are called upon to perform innumerable difficult tasks on all fronts, and have to seek tangible results in relatively short periods, a situation which was not faced by the now developed countries when they were at the same stage of development. Moreover, these tasks require in many cases the destruction of traditional patterns which necessarily destroys many of the social safety valves and conditions of stability in society. Facing such odds, success is not guaranteed and failure can be disastrous.

## 5. Political instability and foreign intervention

The conditions described above breed both internal and external instability. Until the process of nation-building is achieved, multi-racial, ethnic or religious states in the Third World will remain, prone to dissensions which can be easily exasperated through internal or external manipulations. Moreover, ambitious goals, backed by slender resources, in the absence of the habits of self-discipline and under the pressure of impoverished and impatient populations, constitute an explosive situation.

In addition, the artificial delimitation of many colonial entities, especially in Africa, left a situation favouring irredentism, which could be used either as a screen for internal weakness and sluggishness or as a challenge for persisting colonial divisions. It is true in this regard that the Charter of the O.A.U. recognizes colonial frontiers as the legal and legitimate ones. But this has not prevented boundary conflicts to arise and even to degenerate into armed conflicts.

The difficult economic situation of Third World States has led many of them to adopt radical economic programmes which have threatened the economic interests of the colonial or other capital-exporting countries in these States. Such action has also led to serious conflicts.

All these causes of political instability and conflict increase the vulnerability, one could almost say the attraction, of the Third World to intervention by the big Powers. Indeed, hegemonial intervention by the big Powers in what they consider as their sphere of influence is on the increase. It makes mockery out of the formal independence of the States of the Third World and reduces them to an arena of competition and conflict in the global strategy of the big Powers.

Thus, while the States of the Third World start with a very fragile internal and vulnerable external situation which would have made it difficult for them simply to continue their existence as they are, they aspire to, and have no alternative but to try to achieve very ambitious tasks on all fronts, which by far exceed their resources and increase their fragility, vulnerability, and dependence.

In these circumstances, what they need most is protection from foreign intervention and undue influence and at the same time maximum help in the form of transfer of resources to ease the strains of nation-building and development.

### III. Legal Responses

These are the challenges i.e. the problems and aspirations of the Third World. How did the international legal order react to them? Before attempting an answer to this question it is necessary to clarify one basic jurisprudential point. This is that law is not an autonomous force in society. To a great extent it is itself the outcome of social interaction, a reflexion of the relative weight of the forces in presence.

In the area under consideration, these forces are basically the Third World and the West. The socialist group has played a more limited role, siding in most cases with the former.

In this respect also, it is necessary to distinguish attitudes and interactions on the legislative or legal policy level and those on the level of practice.

On the legal policy level, one could witness a first period of hesitation during which the Western States maintained that nothing has changed on the legal plane and that newly independent States are born into a legal universe which they have to accept as it stands, while the new States insisted that the existing international legal order is alien to them, does not take their interests into consideration and cannot be considered to be binding upon them. But slowly it emerged that the solution lies not in denouncing the system as a whole nor in maintaining it as it is but in renegotiating its rules.

This effort has been and is still being done basically within the framework of the United Nations. In what follows a brief survey is essayed of what has been achieved in the three main areas covered by the international legal order.

1. Constitutive principles:

these are the parameters of the international legal order, which determine its character and which constitute the cardinal principles on which is founded the present system of international relations. They can be found in very succinct and general terms in article 2 of the United Nations Charter. But since 1960, as a result of an initiative of the Socialist group for the codification of the principles of peaceful coexistence, and under the impulse of the Third World, there has been a strong movement in the United Nations for a more detailed elaboration of these principles. A Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States (known as the Committee on Friendly Relations), was created for that purpose. After seven years and six long sessions, the last terminating here in Geneva some weeks ago, a draft declaration was adopted by consensus (and should be adopted by the General Assembly, also by consensus, at its 25th session this autumn).

The seven principles which have thus been elaborated and interpreted in the draft declaration, which constitutes the common understanding of the representatives of all blocs and tendencies, are:

- a) the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purpose of the United Nations;
- b) the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered;
- c) the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter;
- d) the duty of States to co-operate with one another in accordance with the Charter;
- e) the principle of equal rights and self-determination of peoples;

- f) the principle of sovereign equality of States;
- g) the principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter.

Though the elaboration of several of these principles has not brought any new elements into light (and has thus remained at the level of a minimum common denominator), the draft declaration gives the Third World great satisfaction on two main points. The first is the recognition for the first time by delegates of Western states of self-determination as a legal right. This leads to the consideration of forcible denial of self-determination as a form of force prohibited by the first principle, and its resistance, even by force, as legitimate. Moreover, it establishes the right for other States to help those who are struggling for self-determination.

The other important advance lies in the wide definition given to the principle of non-intervention to include political and economic pressure, which goes a long way in responding to the legitimate worries of the Third World.

## 2. Rules governing international transactions.

These are the substantive rules governing the flow of intercourse and relations. The most important among them are those pertaining to treaties and to State responsibility.

As concerns the law of treaties, the long work of codification and progressive development in the International Law Commission, followed by the Vienna Conferences of 1968 and 1969, led to the adoption of the Vienna Convention on the Law of Treaties of 1969. This Convention gives satisfaction to the Third World on several points, of which two are of cardinal importance. The first is article 52, which for the first time establishes the principle that "A Treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the UN".

The other cardinal point, which drew a lot of attention and political and academic debate, is the recognition, in article 53, again for the first time in a binding instrument, of the existence of an international jus cogens, i.e. a core of peremptory norms of general international law, which are binding on all States in all circumstances. The concept of jus cogens, of an international public order, has been strongly resisted by the West at the beginning, and was ultimately accepted only if linked with compulsory arbitration.

There is no general agreement as to the content of jus cogens. But at least it is accepted that the principles of the Charter, what we have called the constitutive principles, as well as certain humanitarian principles, have jus cogens character. The former, especially the principles of prohibition of threat or use of force, of non-intervention and of self-determination explain why the Western bloc, especially its leaders, were not enthusiastic for the recognition of the existence of an international jus cogens as they were not enthusiastic for the elaboration of the principles of friendly relations. On both scores, the outcome has been quite satisfactory to the Third World.

In the other important field of rules governing international transactions, that of state responsibility, the work of the ILC has not advanced much. Legal policy has taken the form not of codification but of judicial pronouncements, and it clearly demonstrates that in this crucial field for economic relations - perhaps the most contentious between the developed and the developing States - it is not the latter but the former who are the revisionists, who want to change the rules.

Thus in response to a contention that a concession agreement between a government and a private company constitutes a treaty or should be assimilated to one, the International Court of Justice, in the Anglo-Iranian Oil Co. case, declared:

"The Court cannot accept the view that the contract signed between the Iranian Government and the Anglo-Persian Oil Company has a double character (of a concessionary contract between the Iranian Government and the Company and a treaty between the two Governments). It is nothing more than a concessionary contract between a government and a foreign corporation". (ICJ Rep. 1952, p. 112).

The same Court, in its most recent judgement in the Barcelona Traction, Light and Power Company case (1970) denied the right of the country of the shareholders to exercise diplomatic protection over their interests or the interests of the Company whose share they hold when the company is of a different nationality. By so deciding, the Court has put a stop to a persistent effort on the part of Western jurists to widen the grounds of diplomatic protection, an effort which has been as persistently resisted by those of the Third World.

### 3. The international law of co-operation

This is a new branch of international law, drawn by and evolved within the framework of international organizations; it is a law emanating from multilateral efforts to ease the process of nation-building and development through the agency of international organizations.

Here the principles of international solidarity can be converted into international law. But the reluctance of the Western powers to admit an international obligation to help or to concede certain advantages as a matter of principle, is great.

The principles in UNCTAD I were not accepted nor voted for by the largest Western powers. However, it can be said now that the principle of non-reciprocity in international economic relations between developing and developed States, is more accepted now than in 1964. But the international responsibility for development and the pledge to give 1 % of GNP have not been accepted formally except by a few small Western powers.

Evidently, this is the most crucial area to the Third World, being the most relevant to its efforts at nation-building and economic development. And it is in this area that progress has been the slowest and satisfaction the least.



#### IV. Three Possible Future Worlds

It remains to be asked whether this imposing edifice of legal institutions promises to be effectively followed in the behaviour of States big and small, old and new. For the international legal order is as much, if not more, determined by the interaction between States or groups of States as by solemn pronouncements and codifications of rules in abstracto.

In consequence, it is difficult to foresee a clear path of evolution of the international legal order either towards a greater accommodation of desired changes in the Third World or towards denial of such changes. The final outcome will depend on the relative bargaining power and attitudes of, and interaction between the States of the Third World on the one hand, and the old established ones on the other. The Third World being the weaker group, the outcome will depend more on the policies of the others, especially those of the big Powers. In this respect three alternative paths are possible.

1. A policy of continued active intervention in, and competition over the Third World.

This policy would generalize the instability and make catastrophe more probable. Moreover, there will be formal denial by action of all the principles enunciated in general, especially the constitutive ones. Aid will be used basically as a tool for politics and would not bear fruit. There would be more instability and violent change in the Third World, more intervention, attempted domination and neo-colonialism. And the infernal circle will continue to spin around itself, leading to poor man's wars and eventually to an international class war.

There are indications that this pattern tended to dominate in the second half of the sixties, the decade of frustrated hopes, which witnessed the shattering of the myth of the Third World as a major force in international affairs.

2. A quarantine strategy adopted by the developed countries with a view to leaving the Third World to itself in order to avoid contamination by its instability and to unburden themselves from its weight.

This would constitute a policy of withdrawal and isolationism vis-à-vis the Third World with concentration on internal problems and co-operation and trade between developed countries.

There are some indications that such a policy is being considered in the two super powers. Thus the neo-isolationist tendency in the United States, the concentration on the internal problems of race relations and poverty and the new absorbing interest in conservation and ecology. In the USSR, similar interest can be found in enhancing the production of consumer goods and economic efficiency. As far as external relations are concerned, interest in the United States is basically in trade with EEC and the Eastern bloc, while the USSR is mainly interested in establishing order in the Eastern bloc and in East-West relations, especially trade.

This policy would be a kind of international apartheid which may have the passive virtue of non-intervention but not the positive one of community-building on the international level.

It may work in the short run but cannot in the long run, for several reasons. First, the big Powers have spheres of influence and security zones which they are not willing to relinquish in the foreseeable future. Second, accumulated frustration in the Third World will inexorably lead to chaos which sooner or later will spill over the rest of the world in the form of poor man's wars or otherwise. Finally, the Western colonies of settlement in the Third World constitute neuralgic points of conflict which will necessarily draw the big Powers into the game in the long run.

3. The third and most beneficial policy is that of sympathetic co-operation.

It would come from recognition by the big Powers and developed States of the states of the Third World as full fledged members of the international community. This would entail stopping to treat them as an arena of competition and accepting them as fellow actors. In other words, this policy entails taking seriously the constitutive principles of international law and at the same time helping the States of the Third World to achieve stability from within, which leads to more external maturity and responsibility, through a genuine assistance effort and adhesion to the rules of the new international law of co-operation.

This also means a self-denying ordinance or abstention on the part of the developed countries on the political level, combined with massive action in the social and economic fields. And in both it implies accepting to work through, and delegate to international institutions which are more trusted by the Third World, in order to avoid the psychological hurdle of bilateral relations.

Such a policy would be an investment in long run stability and the common interest at the expense of possible short run advantage. Unfortunately the wisdom of the powerful is but a meek guarantee.

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