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THE 'RIGHT TO DEVELOPMENT' AND THE NEW INTERNATIONAL ECONOMIC ORDER
WITH SPECIAL REFERENCE TO AFRICA

Rose D'Sa

The collection of papers included in this Symposium aim to examine the issues involved in Human Rights and Development. It is necessary for the purpose of understanding the context in which my paper is written, to explain that human rights are, by definition, the rights of individual human beings. International Law, on the other hand, is concerned mainly with relations between states, and the individual is rarely the subject of rights or obligations in the context of Public International Law. This paper is therefore not concerned, unlike some of the other contributions, with the possible area of overlap between human rights and development, but focusses exclusively on the right to development and the issue of its international enforcement by states rather than by private individuals. It is also restricted to that aspect of development related to economic issues, with specific reference to one continent, namely Africa.

The call by developing states for the New International Economic Order was officially proclaimed by the General Assembly of the United Nations in 1974 in its Declaration on the Establishment of a New International Economic Order¹ and the Programme of Action in the Establishment of a New International Economic Order.² Later the same year, the United Nations strengthened the impetus for change by adopting the Charter of Economic Rights and Duties of States.³ The need for a most thorough reappraisal of international economic and financial relationships had been growing since the end of the Second World War but probably reached its height around 1973 when the five fold increase in the price of crude petroleum made dramatically clear the inequities and imbalances of the present international economic system.⁴ In essence, the world economic order at the moment can be summarized as being based on an international division of labour in which 70% of the nations in the world are in the position of being the suppliers of raw materials, in exchange for finished products. They are therefore not participators in the high, value added activities of processing and manufacture. Furthermore, as a result of the present international monetary system being tailored to the needs of the developed countries and hence to their domestic economies, any inflation in these economies will directly affect their terms of trade with the developing countries and thus the terms on which raw materials and primary products are traded for manufactured goods.

The movement towards a change in the present system and the creation of a New International Economic Order (NIEO) has broadly two objectives.⁵ Firstly, it emphasises that every state should have control over its natural resources. This was the result of a shift in priority brought about by the attainment of independence by a large

number of new states. Attention shifted from the political aspects of colonialism to economic issues. In particular, the new members of the international community showed a growing awareness that political independence alone was not enough.

Secondly, the claim for a NIEO, is concerned with the various ways that more developed states can help the less developed nations to develop their economies through a comprehensive reform of existing international trade relations. International economic law necessarily encompasses the international law of development because the latter is clearly in part related to economic growth. There is, however, a part of development which is not related to economic growth such as social development, culture and even political progress.⁶ It has also been argued⁷ that the very purpose of this new Order also goes beyond the economic sphere and extends to the development of "all men and women, and every aspect of the individual, in a comprehensive cultural process, deeply permeated with values and embracing the natural environment, social relationships, education and welfare."⁸ In other words, it is illusory to assume that a NIEO will be brought about simply by changing international economic structures. It is also necessary to achieve changes in the social and economic structures of each country so as to provide for a more equitable internal distribution of resources. Such a change would clearly have to be implemented within the domestic framework of individual states. The call for a NIEO can therefore be looked at from both a national and an international perspective. However, for the purpose of this paper, discussion is limited to those aspects of the international law of development which do fall within the scope of international economic law, and in particular to the second objective of the NIEO, namely a reform of the present structure of international trade. This aspect of development will then be analysed with specific reference to the African continent.

It is clear that within the framework of international development law, any reference to a 'right of development' necessarily implies the existence of a duty to promote economic growth. There is no reason in principle why this right cannot exist. However, problems arise in connection with two main issues. Firstly, who is the holder of such a right and on whom do the duties or obligations correlated with this right fall? The first question presupposes that the right to development has a determinate content which defines the frame of reference in which it operates. The second issue can be looked at in a different way, namely is the right to development a legal right, or is it a mere political theory or moral principle?

The right to development appears to have been originally conceived of as a right within the international sphere, being a right of political entities, states and peoples subjugated to foreign or colonial domination.⁹ In the context of international law, the holder of this right could be states, particularly the underdeveloped nations, while the corresponding duty or obligation to achieve the goals of development is placed on the international community, especially the developed nations.

It has been suggested by some jurists that the right to development is also a right in municipal law. When the existence of such a right was first propounded it was originally conceived of as a collective right, but has since expanded to encompass the idea of a right to development as a human right, that is a right belonging to individuals.¹⁰ The juridical basis for the recognition of a right to development in municipal law is, however, beyond the ambit of this paper. I propose to limit discussion to the possible legal content of the right to development, in the context of relations between states within the NIEO.

This involves an investigation into the question as to whether there is a legal duty on the developed nations of the world co-operate with the Third World so as to bring about development through economic growth. Some writers take the view that there is already such a legal obligation in existence on the grounds of necessity, namely that interdependence between states is a reality of international relations and this is recognized by the existence of a binding duty of co-operation in international law.¹¹ The idea of the mutual interdependence of nation states was advanced with great conviction by the Brandt Commission¹² which conducted an extensive examination of the issues involved in North-South dialogue between 1978 and 1980. The Commission's terms of reference included paying careful attention to the U.N. resolutions and those of other international fora on development and related issues. Its report stressed the fact that there was a common interest between North and South and that the search for solutions is a condition of mutual economic survival for the future.¹³ This viewpoint is re-emphasized in the most recent report of the Brandt Commission, published in 1983.¹⁴

Although the Brandt Commission Reports are cohesive and thought-provoking analyses of the problems of development finance in its international context, they have so far failed to create a sense of urgency or to convince the Western decision-makers of their central theme of mutual economic interdependence.¹⁵ This is partly due to the fact that while the assumption of mutuality of interest is superficially attractive, it ignores some realities of international trade. These suggest, for instance, that while expanded markets in the South are clearly beneficial, they can also cause destructive competition in Northern domestic markets, so that the concept of mutual benefit is not as straightforward a proposition as it first seems. Secondly, it is important to recognize that even if economic development along the lines proposed by the Commission were achieved, the linear expansion of the Gross National Product of a country would not necessarily reflect corresponding human happiness or fulfilment.¹⁶

However, whatever the practical and moral merits of the argument advanced by the Brandt Commission and other commentators for improving the economic plight of the Third World, these are not enough to endow the 'right to development' with legal force. On the contrary, the language of many international instruments on this subject amount only to declarations or proposals of what the legal rules relating to development

should be, rather than an embodiment of already existing legal rules on the subject. This conclusion can be supported first of all by reference to the language used, for instance in the Charter of Economic Rights and Duties of States of the U.N. mentioned earlier. The obligatory language of the original draft was in fact amended in significant respects, indicating that the intention of states proposing the resolution was to put it forward as a policy prescription, rather than as a document having the force of a treaty, codifying and developing legal rules.¹⁷ This is reinforced by the fact that the Charter covers a very wide range of issues, from a pronouncement on the elimination of apartheid (Article 16) to environmental policy (Article 30), which creates the impression that the provisions were not meant to be of normative value.

However, a number of arguments have been advanced in favour of regarding General Assembly resolutions as having legal effect. The first is that advocated by the dissenting Japanese Judge Tanaka in the South West Africa cases,¹⁸ namely that General Assembly resolutions relating to apartheid are, because of their continuous repetition, evidence of customary international law. However, many would argue that whilst such resolutions might be evidence of opinio juris, an element of usage or state practice has also to be present for them to contribute towards the formation of customary international law.¹⁹ Another view is that General Assembly resolutions on human rights issues such as apartheid are valid legal interpretations of the Charter. However, it must be borne in mind that there is no exclusive right of interpretation of the Charter given to any U.N. organ and that the General Assembly has certainly not been specifically allocated any such function in the field of human rights. An interesting theory advanced by D'Amato,²⁰ posits that, if international law is nothing more or less than what States think it is, then do not particular rules of international law owe their existence to the flow of international consensus? On this view, consensus is not merely a law creating process but rather consensus is international law. This means that what states believe to be the law is law. The question then arises: What do states believe? Obviously, unanimous consent to a General Assembly Resolution suggests that it is in fact a rule. However, what if the consent is nearly unanimous but not totally so and there are in fact few states who either abstain or vote against? This has often been the case in the long history of debates on topics such as colonialism and apartheid. Is there now a rule that declares that a significant, that is an overwhelming majority, is sufficient to bring about a legislative effect? It would be safe to say that this is not felt to be the position as yet, even though some such as Falk²¹ have argued that the trend is in that direction. At the moment, dissenting States are not bound by General Assembly resolutions and whether assenting States are so bound must, according to D'Amato,²² still await the consensual development of a rule to that effect. Thus, at present, according to an objective analysis of accepted sources of international law, General Assembly resolutions of this nature do not, in any event, have binding legal effect except insofar as they declare existing rules of international law.²³ Nevertheless, it is clear that such resolutions can be evidence

of the opinio juris of states. In this connection, the Texaco case²⁴ is of interest. It involved a dispute between Libya and two U.S. oil companies over nationalization measures. Professor Dupuy, the Arbitrator, held that neither the Declaration and Programme of Action nor the Charter of Economic Rights and Duties of States could be regarded as stating customary international law. In his opinion they were de lege ferenda and not a statement of current law because they lacked the measure of general support necessary to give them legal effect. In particular, they were not supported by any of the developed countries with market economies which carry on the biggest part of international trade.²⁵

The problem inherent in deriving binding legal rules relates partly to content. The word "economic" can cover an enormous diversity of economic activity. Law itself cannot be neutral and value-free - it is necessary to reconcile sometimes opposite view points on international economic issues, as world trade is complex and involves diverse economic and political interests. Secondly, it does not seem practical when an attempt is made to lay down rules governing relations between states, to ignore the great economic power of private business enterprise which is intrinsically tied into the very nature of world trading activity and which can extensively influence the political decisions of world leaders. To illustrate, it would be wishful thinking to develop rules governing the energy policy of a country in which Mobil, Texaco or Shell, for instance, or even a consortium of similar multinational companies, effectively own and control the prospecting, mining and marketing of that country's resources, without taking the latter situation into account.

However, despite the problems involved in creating NIEO of a legally binding nature, there has been wide support for a discussion of the legal issues in many international fora. One positive step has been taken within UNCTAD where negotiations have led, after four years of tough negotiations, to the conclusion, on 27th June, 1980, of an agreement establishing a Common Fund for stabilising raw material prices and a set of rules and principles regarding restrictive business practices. Although this agreement has yet to be ratified²⁶ it is a step in the direction of a fairer distribution of the world's riches. Products affected by its operation will be primarily copper, cocoa and coffee.²⁷ The Fund sets an important precedent in that its voting structure is not rigorously tied to financial contributions and poor countries in fact have the largest voting share (4%). This achievement must be regarded as a positive step of a binding legal nature, towards the fulfilment of the principles originally laid down in the Declaration and Programme of Action of 1975.²⁸

Another positive step in the direction of creating binding rules of law in this relatively new area is the progress which has been made by the International Law Commission²⁹ (ILC) in submitting a final set of draft articles on "the most favoured nation clause" (carrying out a General Assembly recommendation originally made in 1976).³⁰ It is

significant that the ILC decided in 1976 to place this topic on its programme as legal clarification might be of assistance to the work of UNICTRAL as well as of interest in the Sixth Committee of the General Assembly.³¹ There are numerous reasons for regarding the topic of the most-favoured nation clause as being of fundamental importance for international relations. The clause has been described as one of the soundest institutions of international treaty law, occupying a fundamental position in the treaty practice of states.³² The use of the clause has also enabled world trade to be expanded and liberalized on the basis of non-discrimination and the equality of sovereign states. As such, it should serve a useful purpose in helping to eliminate inequality and discrimination in economic relations between developed and developing countries, and for this reason the dominant aspect of debates in the ILC and the Sixth Committee has been the role and place of the most favoured nation clause in the formation of legal rules which could contribute to the establishment of the NIEO.³³

In the final set of draft articles submitted by the ILC to the General Assembly,³⁴ the most-favoured nation clause is defined in Article 4 as:

a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured nation treatment in an agreed sphere of relations.

The most-favoured nation treatment is defined in Article 5 as:

treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable³⁵ than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.

The Commission thus treated the most-favoured nation clause as a technique or means for promoting the equality of states or non-discrimination. However, if the clause were to be seen only in this context, then it would clearly fail to take cognizance of the fact that in a world which consists of states whose economic development is strikingly unequal, the most-favoured nation clause could be used as a device to perpetuate inequity. As indicated in the report prepared by the Secretariat of the UNCTAD ("the UNCTAD memorandum")³⁶ "application of the most-favoured nation clause to all countries regardless of their level of development could satisfy the conditions of formal equality, but would in fact involve implicit discrimination against the weakest members of the international community."

The Commission therefore took into account the different levels of

economic development of states and took action to advance the interests of the developing countries in the field of international trade, by the inclusion of draft articles 23, 24 and 30. These draft articles, discussed below, show that the ILC did not confine itself to codifying existing rules but aimed at the progressive development of international law so as to take account of the fact that the trade needs of the developing countries differed from those of the developed countries.³⁷

Article 23 deals with the most-favoured nation clause in relation to treatment under a generalized system of preference and states that:

A beneficiary State is not entitled under a most-favoured nation clause to treatment extended by a developed granting State to a developing third State³⁸ on a non-reciprocal basis, within a scheme of generalized preferences established by that granting State, which conforms with a generalized system of preferences recognized by the international community of states as a whole or, for the States members of a competent international organization, adopted in accordance with its relevant rules and procedures.

Article 24 deals with the most-favoured nation clause in relation to arrangements between developing states themselves and provides that:

A developed beneficiary State is not entitled under a most-favoured nation clause to any preferential treatment in the field of trade extended by a developing granting State to a developing third State, in conformity with the relevant rules and procedures of a competent international organization of which the States concerned are members.

Articles 23 and 24 therefore effectively provide for important exceptions to the application of the most-favoured nation clause.

When speaking of Article 23, the Commission stated in its report³⁹ that there seems to be a general agreement that States will refrain from invoking their rights to most-favoured nation treatment, with a view to obtaining in whole or in part the preferential treatment granted to developing countries by developed countries. Accordingly contracting parties to the GATT have waived (subject to certain conditions) their rights to most-favoured nation treatment under Article 1 of the General Agreement.⁴⁰ The Commission's approach, as evidenced in Article 24, demonstrates that the importance of trade expansion, economic co-operation and integration among developing countries, whether within organized economic groupings or otherwise, have clearly been accepted as important elements of an "international development strategy" and have

accordingly been given some measure of legal protection.

Furthermore, Article 30 states that:

the present articles are without prejudice to the establishment of new rules of international law in favour of developing countries.

In this regard, the Commission felt that it could not enter into a field outside the scope of its mandate, namely the promotion of the trade prospects of developing countries with a view to their economic development in areas other than those to which Articles 23 and 24 refer, but instead decided to draft an article which left the matter open for future development within the international community. The argument which the ILC put forward in support of this reasoning was that it did not feel it had sufficient information on the relevant doctrines and practice of international development law to enable it to formulate existing rules.⁴¹ It is interesting therefore that when the Sixth Committee reviewed the Commission's report, it maintained that this argument was incorrect and that in reality the beginnings of an international development law already existed in the general principles established and sanctioned by the General Assembly, in resolutions 2626 (XXV) (concerning the International Development Strategy), 3201 (S-VI) and 3202 (S-VI) (known as the Declaration and Programme of Action on the Establishment of a NIEO) and 3281 (XXX) concerning the Charter of Economic Rights and Duties of States.⁴² Nevertheless, although the ILC had not attempted to codify and define legal rules from the above texts, draft articles 23, 24 and 30 have made a noteworthy contribution towards the establishment of the NIEO,⁴³ since the Commission clearly showed that it was possible to draw up rules of international law which were universal in scope and were in favour of the developing countries. Although these rules are of a somewhat minimal character they do nevertheless stand a chance of being included and adopted in an international convention.

Finally, it is apparent from the legal definition of the most-favoured nation clause that it is, in its simplest form, of a unilateral nature. One state, the granting state, gives a legal undertaking and the other state, is the beneficiary. The clause accordingly takes on a unilateral character. A similar clause could be those in which most-favoured nation treatment is accorded to the ships of a land-locked state in the ports and harbours of the granting maritime state. Since the land-locked state is not in a position to offer in return the same kind of treatment, the clause remains unilateral. (However, the same treaty may of course provide for another type of concession). In the African context, the use of the clause in relation to landlocked states is by no means irrelevant since the greatest number of landlocked countries are to be found within the African continent. Hence Article 126 of the U.N. Convention on the Law of the Sea,⁴⁴ provides for the exclusion of the application of the most-favoured nation

clause from provisions of the Law of the Sea Convention relating to special rights accorded to landlocked states. Thus, although it is now widely accepted that such unilateral clauses are exceptional today and that the more usual case is for both states' parties to a treaty to accord each other similar treatment, it is submitted that the legal possibility of 'unilateral' most-favoured nation treatment is of importance in certain cases such as that illustrated above, as well as being in conformity with the general demand by developing countries for a NIEO. The unilateral clause is clearly in keeping with Third World demands for preferential and non-reciprocal treatment in trade.⁴⁵

However, despite this evidence of some progress towards the establishment of a right to development within international legal framework, there has been a much longer list of failures or setbacks to the creation of a NIEO. Recent examples of these include the objection of a number of states such as the U.S. and the U.K. to the deep sea-bed mining provisions of the Law of the Sea Treaty, the reduction of funds for the International Development Association (the World Bank's concessional lending arm) and generally worsening trade conditions. The overall impression must be that the creation of a de jure NIEO is far from being a reality and the world economy is still essentially divided into two groups, the developing and the industrialized nations, with co-operation towards development remaining painfully slow at the present time.

While the global economic problems facing states, particularly those in the Third World, have a serious and urgent character, the prospects for African countries are particularly gloomy. Africa contains 21 of the world's 45 least developed states and during much of the past decade, prospects for progress and development have been inauspicious. Africa's total gross national product accounts for only 2.7% of the world's product and Africa has the lowest average per capita income in the world (at 365 dollars), while its infant mortality rate (at 157 per 1000) is the world's highest. Unemployment now affects 45% of the active population. In rural areas there is, on average, only one doctor for every 26,000 inhabitants. Worse still, Africa is excessively dependent on other countries even for food. Trade and commercial exchanges are almost invariably in a "North South" direction with the inevitable consequences of deteriorating terms of trade, outward orientation of production, little domestic processing of raw materials,⁴⁶ and balance of payments problems. How did this sorry state of affairs come about? To begin with, the world economic situation as a whole is itself a source of serious concern. In almost all industrial countries, there is a recession with a corresponding slow-down in the growth of world trade. The developing countries such as those in Africa are invariably the ones which in the present international economic system, suffer most from the side effects of a recession. However, it must be stressed that these shortcomings are not to be found merely at the international level. It is also clear that internal African development strategies have in the past achieved only very poor results.⁴⁷

Thus, although a number of unresolved international problems exist in translating the development needs of states into a legal right, African countries have also had to face their own difficulties at a regional level. This is not to suggest that they have abandoned prospects of eventually attaining the desired New Economic Order on an international level but rather that the use of the world 'international' in the context of development, may be legitimately applied to regional as well as global arrangements to achieve the desired goals.⁴⁸ For instance, both the Charter of Economic Rights and Duties and the Declaration of the Sixth Special session of the General Assembly expressly recognize that the U.N. is not the only forum for discussion of the relevant issues. It is submitted that African nations are increasingly aware that while continuing to pursue their efforts for changes at an international level, they must also look for ways and means through which they themselves, acting collectively, can improve their own economic position on a regional and sub-regional basis.

One of the most recent and significant regional initiatives has been undertaken by the Organization of African Unity (OAU) which is the sole organization with a continent-wide membership in Africa.⁴⁹ Although the principal objectives of the OAU Charter relate to the political goals of African solidarity (Art. II(a)(a)) and the total eradication of colonialism (Art. II(1)(d)), the Charter also refers to the aim of economic and social development. The Preamble states that the OAU Member States are conscious of their "responsibility to harness the natural and human resources of the continent for the total advancement of our peoples..." and Art. II(1)(b) also reiterates the need for African states "to co-ordinate and intensify" their "co-operation and efforts to achieve a better life for the peoples of Africa." The OAU's aims in this area were subsequently elaborated in a Memorandum ratified by the 7th Ordinary Session of the Assembly of Heads of State and Government of the OAU in 1970⁵⁰ which reaffirms the responsibilities and the role of the Organization in the economic and social field. Since then, the African Ministerial Conference on Trade, Development and Monetary Problems, jointly sponsored by the OAU, the Economic Commission for Africa (ECA) and the Africa Development Bank, prepared a Declaration in 1973 which was subsequently adopted by the Assembly of Heads of State and Government at its 10th Ordinary session, entitled the "OAU Declaration on Co-operation, Development and Economic Independence."⁵¹ This document expressed its concern for the "ineffectiveness of the measures adopted during the past decade to combat under-development" as well as "the inability of the international community to create conditions favourable for the development of Africa." With regard to the former, the Declaration reiterated the conviction that mobilization of the African continent's resources could yet lead to a rapid transformation of the African economies and raise the peoples' standard of living.

The essential emphasis of the Declaration was on economic co-operation and integration between African countries with respect to their human and material resources. The theme of regional co-operation

was put forward as a solution to both internal development problems as well as the problem of improving the external conditions necessary for promoting African development, by facilitating a common front, a common economic policy, in the belief that "unity is strength" and that political co-ordination on economic issues would improve Africa's bargaining position internationally. The goal of regional collective self-reliance was a practical and useful objective, but the political initiatives for implementation were left to individual member states.

In 1979 the OAU organized a symposium of great importance on the future development prospects of Africa towards the year 2000. It was attended by African experts in various fields who took part in their personal capacity, and was financed by the United Nations' Development Programme (UNDD) and the ECA. It resulted in the drafting of a document which has come to be known as the "Lagos Plan of Action"⁵² which was adopted by all 53 member states of the OAU. The plan⁵³ aims at the creation of an African Common Market to be established by the year 2000. This Common Market is to be based on existing and planned regional economic communities of the continent, such as the Economic Community of West African States (ECOWAS). Two ten year stages are envisaged. The emphasis is on encouraging and building upon existing regional and sub-regional groupings rather than trying to launch entirely new institutions.

In this connection, the formation of ECOWAS (whose 16 members began implementation of the Community's detailed programme in June 1981), is an important step in the right direction.⁵⁴ This programme aims at uniting members into a regional common market, which will stretch over a vast area, 2000 miles from Mauritania to Nigeria and 1,500 miles from the Sahara to the Atlantic. The Common Market consists of a free trade area with tariffs on unprocessed goods being gradually eliminated by member countries. It includes a common customs tariff (with compensation from the ECOWAS Fund for members who might lose revenue as a result), and by gradual stages ECOWAS will introduce totally free movement of the citizens of ECOWAS states. However, one of the goals includes that of a common currency, and it remains to be seen whether this will be achieved.⁵⁵ Although there are a number of other important economic institutions also situated in the same region, an economic community for the West African sub-region, if successfully implemented, would constitute one of the greatest developments in the economic history of the sub-region.⁵⁶ As such, it should provide positive impetus for the principles laid down in the Lagos Plan. Some evidence of such an impetus is the signing of a treaty establishing a Preferential Trade Area in May 1981 by 9 Heads of State and Government of Eastern and Southern African countries, a treaty aimed at leading eventually to the creation of an economic community of states in the region.⁵⁷ The Southern African Development Co-ordination Conference (SADCC) of nine Southern African countries held in Lusaka in April 1980 is another example of the strategy of regional collective self-reliance.⁵⁸ However, although the Lagos Plan contains specific, action-oriented targets, it relies for its

success on the close collaboration and political will of individual African countries. Nevertheless, the development plan for the year 2000 is an important landmark in the efforts of African countries as a whole to bring about, through their own regional efforts, significant improvements of their development prospects. Whether the ultimate realization of a continental economic union is ever achieved, is a question that time will answer.

In 1981, the Eighteenth Assembly Meeting of the OAU Heads of State and Government signed the African Charter of Human and Peoples' Rights.⁵⁹ This Charter also refers to a right of all peoples to "economic social and cultural development" and reiterates that "States shall have the duty, individually or collectively to ensure the exercise of the right to development." (Art.22(2)). This Charter will come into legal force when a simple majority of OAU Member States ratify or adhere to it. Its wording is of legal interest because it refers to a peoples' right of economic development and places a corresponding duty on states to enforce this right. However, what seems important in the context of this paper is that it clearly does not advance any further the legal concept of a right to development by African or other Third World countries vis à vis the developed nations.⁶⁰

One final aspect of the African (regional) strategy for development remains to be considered. It will be recalled that the new emphasis on co-operation and integration as embodied in the OAU Declaration on Co-operation Development and Economic Independence⁶¹ contained sections dealing not only with trade among African states themselves, but also between African states as a whole with the developed market economies. The main principle was that of co-ordination and harmonization of the African stand during all negotiations with developed countries in order to safeguard the interests of African countries as a whole.⁶² A significant example of this principle being carried into effect, is afforded by the successful conclusion of the Lomé (II) Convention between the nine members of the European Economic Community and 58 African, Caribbean and Pacific states (ACP) on 31st October, 1979. This is the second Convention governing trade and other relations between the two groups;⁶³ (the first Lomé convention expired on March 1st, 1980). It provides for a comprehensive range of measures from traditional financial co-operation to the stabilization of export earnings, trade and industrial co-operation.⁶⁴ In the context of both African Development policy and the present failure of the North/South dialogue, it is submitted that the Convention is a significant achievement which is consistent with the spirit of the proposed NIEO.

One aspect of the call for reform at the international level relates to the need for financial aid on a long-term basis to African states to facilitate their economic recovery and growth. The aid promised under the new Lomé Convention amounts to a sum of \$7,457 million over the next five years.⁶⁵ While the ACP countries maintain that this figure is not enough to ensure progress in such crucial areas as industrial

co-operation, they do agree that the Convention does represent in terms of North-South co-operation if not a great leap, at least a firm stride forward.⁶⁶ Another aspect of trade co-operation intended to favour the developing countries is that 99.5% of ACP products will enjoy duty-free access to markets within the EEC and this is to be non-reciprocal so that ACP states are free to apply their normal customs duties on products imported from the EEC. This is in keeping with Third World demands for preferential and non-reciprocal treatment in trade⁶⁷ and is a practical example of the use of unilateral most-favoured nation clauses. One of the most original features of the Convention is the Stabilization of Export Earnings from Commodities (STABEX) which guarantees ACP states a stable level of export earnings from (a now increased number of) basic commodities exported to EEC markets. It originally covered 26 agricultural raw products essential to the economies of the ACP countries. This grew to 34 under the Lomé I Convention and ten additional products are now included.⁶⁸

The scheme comes into operation in the form of a direct transfer of funds whenever there is a significant drop in a member country's export earnings for any one of the commodities covered. STABEX transfers to the 35 least developed countries are made in the form of grants and for other countries they consist of interest-free loans under flexible terms. In order to qualify, the country concerned must have a specified "dependence" threshold, that is a certain proportion of that country's total budget must be covered by the product concerned, and its export earnings for that "qualifying" product must also drop below a certain level known as the "trigger threshold."

However, although STABEX is of considerable importance and benefit to ACP countries, it is limited in that it covers only primary products and not finished (processed) goods. Secondly, although increased financial resources are available under Lomé II, the lowness of payments has been criticized.⁶⁹ Thirdly, since the reference period for calculating the correct price of the export earning stabilization is continually changing, today's earnings become tomorrow's norms so that theoretically a price, however low, eventually becomes normal over a period of time.⁷⁰ Nevertheless, STABEX does play a role in preventing the disruptive effects of fluctuations in the price of raw materials (a major scourge facing developing countries) and in this respect represents an advance in favour of the Third World. Under Lomé II, minerals have also been included in a similar scheme to safeguard and develop production. The assistance takes the form of an "accident" insurance scheme (known as Sysmin or Minex) backed by financial aid in situations where either local or economic factors cause a significant drop in a country's export production or earnings. However, unlike STABEX, the help does not take the form of a straight budget transfer but of special loans to finance projects or programmes proposed by the ACP country to restore production and exports.⁷¹ There are also new chapters in Lomé II on co-operation in various fields such as energy policy, agricultural development and human rights. However, despite the undoubted concessions made to the ACP

participants, it cannot be said that the Convention has really changed relations between the North and the South. Such a dramatic result would clearly have received international attention, which has not been the case. Nor has there been any evidence of a dramatic improvement in the economic situation of the ACP countries particularly vis à vis the non-Lomé developing countries (although it should not be overlooked that certain ACP countries may have been much worse off had it not been for EEC aid). Thus, in the global context of relations between developing countries and their richer partners, nothing has changed much.⁷² However, the successful conclusion of Lomé II and the co-operative efforts which were undertaken in 1974 during Lomé I, have helped to set solid foundations for renewed and more productive joint co-operation in the future, both between the developing countries themselves (since even ACP countries who are at war with one another can be expected to discuss investment projects) as well as relations between the Third World and Europe. The proposals submitted by the European Commission to the Council of Ministers regarding the negotiations for Lomé III which are now underway, also stress their aspect, calling for Lomé III to be a convention of indefinite duration, thereby signifying strong political commitment and a belief in the durability of the co-operation system.⁷³

Thirdly, the Convention represents concrete evidence of the renewed determination of Third World countries to adopt a united approach aimed at securing a fairer distribution of the world's wealth and resources. Thus, while the Lomé Convention continues to symbolize, according to some authorities, proof of Europe's commitment to a more just and equitable International Economic Order, others regard it as a mere 'face-saving device' which allows some Northern states to appear to be generous without actually giving up any privileges. The Convention nevertheless represents a real achievement. It seems that although Europe and other Western States have appeared in the past to block proposals for concrete reform, Europe has expressed willingness to do something to assist developing states through Lomé II. The Convention appears to represent progress, however small, towards a new and more equitable International Economic Order.

In conclusion, there is very limited evidence for the existence of a legal right to development in favour of Third World countries such as those in Africa. However, there is clearly a growing awareness internationally of the need for some progressive development of the law in this area. On a regional level, African countries are endeavouring to present a common, united front so as to facilitate concessions in their favour from the developed market economies. This may ultimately lead to the recognition of a legal obligation owed by the developed nations to promote economic growth in Africa. African states have also accepted the need for a new strategy for regional development which will lessen their dependence on the developed nations through the achievement of regional co-operation and integration. However, this strategy remains essentially a political one and the problem of translating it into a legally binding plan remains unsolved. Consequently the 'right to development' while

clearly gaining in importance on both the international plane and in a regional context with regard to Africa, cannot yet be said to have attained the status of a legal right.

FOOTNOTES

1. General Assembly Resolution 3201, 5-VI, 1 May, 1974.
2. General Assembly Resolution 3202, 5-VI, 1 May, 1974.
3. General Assembly Resolution 3281, 12 December, 1974.
4. Economic and Social Progress in the Second Development Decade, Report of the Secretary General, U.N. Doc. E/5981, ST/ESA/68 at p. 1.
5. P. T. Muchlinski, The Right to Economic Self-Determination, Essays for Clive Schmitthoff, ed. John Adams (1983), 75.
6. H. C. Espiell, "The Right of Development as a Human Right", 16 Texas International Law Journal, 190.
7. See generally the Report of the Secretary-General to the U.N. Commission on Human Rights, E/CN.4/1334, 2 January, 1979, at 83 et seq.
8. UNESCO, Moving Towards Change: Some Thoughts on the N.I.E.O., Paris (1976) at p. 19.
9. Ibid, 191.
10. See the papers in this volume by J.C.N. Paul, Developing Human Right for Development by and for People and P. Brietzke, Development as a Human Rite.
11. De Waart, Permanent Sovereignty over Natural Resources as a Cornerstone for International Rights and Duties in Essays on International Law and Relations in Honour of A.J.P. Tammes (1977), 304.
12. North-South: A Programme for Survival, The Report of the Independent Commission on International Development Issues Under the Chairmanship of Willy Brandt, (1980).
13. Ibid, 282.
14. Common Crisis North South: Co-operation for World Recovery, The Brandt Commission (1983).
15. See for example F. M. Green, "Things Fall Apart: The Third World Economy in the 1980's", Third World Quarterly, 90.
16. See further the paper in this volume by A. Allott, False Gods and Holy Writ.

17. G. White, "A New International Economic Order" (1976), 16 Virginia Journal of International Law, 330. See also Brownlie, I., "The Methodological Problems of International Law & Development" (1982), 26 Journal of African Law, 10.
18. "In short, the accumulation of authoritative pronouncements, such as resolutions declarations, decisions, etc., concerning the interpretation of the Charter by the competent organs of the international community can be characterized as evidence of the international custom referred to in Art. 38, paragraph 11b," from Judge Tanaka's judgment, South West Africa Case, Phase 2, (1966), I.C.J. Rep. 1966 (Judgment on Merits), 248 et seq., at 292. See also A. Bleicher, "The Legal Significance of the Citation of General Assembly Resolutions" (1969), A.J.I.L., 444.
19. Note in this sense, Thirlway, International Customary Law and Codification (1972), Chapter 5 and in particular 66-7.
20. A.A. D'Amato, "On Consensus" (1970), 8 Can. Yearbook of International Law at 104-122.
21. R. Falk, R., "On the Quasi-Législative Competence of the General Assembly" (1966), 60 A.J.I.L., 782-791, 784-785.
22. D'Amato, op. cit., 122.
23. See for instance, Thirlway, op. cit., Chapter 5. However, General Assembly resolutions exceptionally may have binding force (e.g., when a subsidiary U.N. organ is set up; in the area of admission, expulsion and suspension of states; the apportionment of the U.N. budget).
24. Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. The Government of the Libyan Arab Republic (1978), 17 I.L.M. 1 (English translation).
25. (1975), 17 I.L.M. at 30. Those voting against G.A. Res 3281 of 12 December, 1974 were Belgium, Denmark, West Germany, Luxembourg, the U.K. and the U.S. Abstaining states were Austria, Canada, France, Ireland, Israel, Italy, Japan, The Netherlands, Norway and Spain. There were 120 affirmative votes.
26. The Agreement comes into force when two-thirds of the 101 UNCTAD members representing the countries directly contributing capital, have ratified it. The need for speeding up the process of signature and ratification has been stressed by the Acting Deputy Secretary-General of UNCTAD, so that the facilities it creates can become available. See Report of the Committee on Commodities, First Special Session, 8-12 February, 1982, UNCTAD Trade & Development Board Official Records, 25th Session, Supplement No. 2, TD/B/694; TD/B/C.1/231, New York (1982).

27. Africa Research Bulletin, Economic, Financial & Technical Series, Vol. 17 No. 8, (1980), 5592.
28. G.A. Res 3201 (S-VI) and G.A. Res 3202 (S-VI).
29. Under Article 13, paragraph 1 of the Charter of the U.N., the General Assembly is required to initiate studies and make recommendations for the purpose of..."encouraging the progressive development of international law and its codification. As a means for the discharge of those responsibilities the General Assembly in 1947 established the I.L.C. Between 1949 and 1979 the I.L.C. has dealt with 27 topics and sub-topics of public (as opposed to private) international law.
30. See paragraph 4(a) of G.A. Res. 31/97 of 15 December 1976 and 32/151 of 19 December, 1977.
31. The Work of the I.L.C., 3rd Edition, U.N. (New York) (1980) at p. 73.
32. Report of the Sixth Committee, Thirty-third session, Agenda item 114, A/33/419, 13 December, 1978 at p. 11. See also G. Schwarzenberger, The Frontiers of International Law, London (1962), at 220.
33. Report of the Sixth Committee, ibid., 12.
34. Report of the ILC on the work of its Thirtieth Session, Thirty-third Session Supplement No. 10 (A/33/10), U.N. New York, (1978).
35. Underlining supplied.
36. Report of the I.L.C. on the work of its Thirtieth Session, op. cit..
37. Report of the I.L.C. on the work of its Thirtieth Session, Report of the Sixth Committee, A/33/419, (1978), 19.
38. Underlining supplied.
39. Report of the I.L.C. on the work of its 30th Session, op. cit., 153.
40. See decision of 25 June, 1971, GATT in Basic Instruments and Selected Documents Eighteenth Supplement, Sales No: GATT/1972-1, 24-26.
41. Report of the I.L.C. on the work of its 30th Session, op. cit., 176.
42. Report of the Sixth Committee, op. cit., at 21.

43. Ibid., at 19.
44. See Official Text of the U.N. Convention on the Law of the Sea, with Annexes and Index, Final Act of Third U.N. Conference on the Law of the Sea, U.N., New York, Sales No. E.83.V.5, (1983).
45. See for example the Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), para. 4(a)-(t).
46. Tévoèdjre, What Kind of Africa by the Year 2000?, O.A.U. (1979), at 13.
47. E. Kodjo, Building Today...The Africa of the Year 2000, What Kind of Africa by the Year 2000?, op. cit., 45.
48. White, op. cit., 326, 327.
49. By Art. IV of the OAU Charter, membership is open to all independent sovereign African states. This excludes the Republic of South Africa which is regarded as 'non-African' because it is ruled by a white minority. See Z. Cervenka, The OAU and its Charter (1969), 37.
50. Council of Ministers, Res. 219 (XV).
51. African Declaration on Co-operation, Development and Economic Independence, OAU Res. CM/ST.12 (XXI) (1973).
52. Lagos Plan of Action for the Economic Development of Africa, 1980-2000 published by the International Institute for Labour Studies, Geneva (1981).
53. Africa Research Bulletin, Economic, Financial and Technical Series, Vol. 17, No. 4 (1980), 5495.
54. Africa Research Bulletin, op. cit., Vol. 18, No. 5, June 30 (1981), 6024.
55. Ibid.
56. Ajomo, M.A., "Regional Economic Organizations - The African Experience" (1970), 25 I.C.L.Q., 100.
57. At the end of 1983 there were 14 Members of this newest Economic Community in Africa. They are Burundi, the Comoro Islands, Djibouti, Ethiopia, Kenya, Lesotho, Malawi, Mauritius, Rwanda, Somalia, Swaziland, Uganda, Zambia and Zimbabwe. Following the reopening of the Kenya/Tanzania border (which had been closed since 1977 due to disagreements over the financial settlement in respect of the defunct East Africa Community), it may now be possible for

Tanzania to join the P.T.A. However, only 9 States have ratified the Treaty and the U.N. Economic Commission for Africa has appealed to the others to do so, see Report of the Technical Preparatory Committee of the Whole, on its Fourth Meeting, April/May, 1983, E/ECA/OM.9/28, 26.

58. See Southern Africa Towards Economic Liberation: A Declaration by the Governments of the Independent States of Southern Africa, (SADCC), London (1980).
59. For text, see (1981), 27 ICJ.
60. See further Umozurike, U.O., "The African Charter on Human and Peoples' Rights" (1983), 77 A.J.I.L., 906, 907.
61. OAU Res OM/ST.12 (XXI) discussed supra.
62. Ibid.
63. Africa Research Bulletin. Economic, Financial and Technical Series, Vol. 16 No. 10 (1979), 5318. A.C.P. Ministers and their Community counterparts are already engaged in negotiation for the renewal of Lomé II, which expires on 28 February, 1985.
64. See further K.R. Simmonds, "The Second Lomé Convention: The Innovative Features" (1980), 17 Common Market Law Review, 415.
65. Ibid.
66. Africa Research Bulletin, op. cit., 5318. See also W. Benedek, "The Lomé Convention & The International Law of Development: A Concretization of the NIEO", 1982, 26 Journal of Africa Law, 91.
67. See the Declaration on the Establishment of a NIEO, G.A. Res. 3201 (S-VI), para. 4(a)-(t).
68. These are cashew-nuts, pepper, shrimps and prawns, squid, cotton cakes, oil-cake, rubber, peas, beans and lentils.
69. Africa Research Bulletin, op. cit., 5318.
70. See Fralon, J.A., (ed.), The Lomé Convention - Renegotiation and Renewal, Brussels, (1978), 92.
71. Africa Research Bulletin, op. cit., 5318.
72. Fralon, op. cit.
73. The Courier, ACP/EEC No: 79 (1983), p. 13.