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New Perspectives and Conceptions in Contemporary Public International Law

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FACULTY COMMENT

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In my recent book *New Horizons in International Law*,[1] an attempt was made to analyze the new developments that have arisen since the commencement of modern international law, dating from the inception of the United Nations in 1945. Various issues were discussed, touching on new processes of lawmaking in the International Law Commission,[2] new approaches to judicial process in the International Court of Justice,[3] and the breaking of completely new ground by the establishment of such organizations as the United Nations Conference on Trade and Development (UNCTAD),[4] the United Nations Commission on International Trade

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1. T. ELIAS, NEW HORIZONS IN INTERNATIONAL LAW (1979).

2. The United Nations International Law Commission was instituted by the General Assembly for the express purpose of undertaking the progressive development of international law and its codification to meet the growing needs of the international community. Its membership represents the principal legal systems of the world.

3. A most significant step was taken by the General Assembly when it adopted Resolution 3232 (XXIX), Nov. 12, 1974, 29 U.N. GAOR, Supp. (No. 31) 141, U.N. Doc. A/9631 (1974), calling specifically upon the International Court of Justice consciously to develop international law by means of its judicial decisions. Until this bold request the judicial process of the Court has been confined to applying the law to facts, not to making new law. So anxious is the modern international community within the United Nations to achieve a universality of international law that it is ready to throw fiction to the wind by changing the rules if and when necessary in the course of the judicial decision.

4. The United Nations Conference on Trade and Development was established as a permanent organ in the General Assembly in 1964. The main purposes of UNCTAD are to promote international trade with the aim of accelerating global economic development, to initiate action for the adoption of multilateral trade agreements, and to serve as a focal

Law (UNCITRAL),[5] and the various subsidiary organs of the United Nations Economic and Social Council (ECOSOC).[6] In addition, topics in the fields of human rights and humanitarian law were addressed. Developments in the law of treaties and the law of the sea were also outlined, thus spotlighting the expanding frontiers of public international law.

In the present Comment, I propose to attempt a broad survey of the major new perspectives and conceptions in international law, if only as a supplement to the earlier study. Five discernible areas call for special attention: human rights, diplomatic law, the law of the sea, wars of national liberation and humanitarian law, and the legal aspects of the New International Economic Order.

HUMAN RIGHTS

The basic legal documents in the field of human rights are the United Nations Universal Declaration of Human Rights,[7] the International Covenant on Civil and Political Rights,[8] and the International Covenant on Economic, Social and Cultural Rights.[9] The first of these instruments contains a general summary of the various rights and fundamental freedoms for all. States are called upon to use the Universal Declaration as a guideline in their promotion of democracy and the rule of law within their borders. More than two decades elapsed between the adoption of the Universal Declaration and of the two human rights covenants, primarily because of the reluctance of states to subject their several sovereign-

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point for harmonizing trade and development policies of governments and regional economic groups.

5. The United Nations Commission on International Trade Law was established in 1966 to promote the progressive harmonization and unification of the law of international trade. UNCITRAL was a response to the perceived need for the United Nations to play a more active role in reducing or eliminating obstacles to the flow of international trade. The Commission's work consists of coordinating the tasks of international organizations active in international trade laws, encouraging their cooperation in the promotion of participation in existing international instruments, preparing new international conventions and uniform law, and in training and assistance in international law.

6. The United Nations Economic and Social Council, one of the six principal organs of the United Nations, coordinates the economic and social work of the United Nations and the specialized agencies and institutions. ECOSOC makes recommendations and initiates activities relating to development, industrialization, natural resources, human rights, population, the status of women, social welfare, science and technology, and many other social and economic questions.

7. Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 at 71 (1948).

8. International Covenant on Civil and Political Rights, *entered into force* Mar. 23, 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1967), *reprinted in* 6 INT'L LEGAL MAT. 368 (1967); Optional Protocol, *entered into force*, Mar. 23, 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 59, U.N. Doc. A/6316 (1967), *reprinted in* 6 INT'L LEGAL MAT. 383 (1967).

9. International Covenant on Economic, Social and Cultural Rights, *entered into force* Jan. 3, 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1967), *reprinted in* 6 INT'L LEGAL MAT. 360 (1967).

ties to such limitations as are implicit in the adoption of the various provisions guaranteeing the rights and freedoms enshrined therein.

Other rights are guaranteed in other instruments. Prominent examples include the right to self-determination for peoples under colonial domination,[10] the elimination of racial discrimination,[11] and the protection of the rights and status of women[12] and children.[13] An examination of these documents illustrates the emergence of the legal personality of the human being as a significant feature of contemporary international law. As integral elements of contemporary international law, the fundamental rights and freedoms protected by these documents require immediate recognition in the design of international arrangements and the structure of international institutions.

Several interesting developments in this field deserve notice. The European Convention on Human Rights,[14] through the European Commission on Human Rights, already recognizes the right of the individual to bring cases involving the contravention of personal human rights before the European Court of Human Rights. In addition, a regional mechanism exists in the western hemisphere. On July 18, 1978, the American Convention on Human Rights entered into force.[15] Another notable development was the United Nations Conference on Human Rights held in Teheran in 1968,[16] at which certain important decisions were taken for the elaboration of ideas and processes to improve the implementation of existing human rights instruments.

Efforts are also being intensified for the formulation and adoption of an African Human Rights Charter with an accompanying Human Rights Commission. The Organization of African Unity adopted the Monrovia

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10. Declaration on the Granting of Independence to Colonial Countries and Peoples, Dec. 14, 1960, G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1961).

11. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 9, 1966, *entered into force* Jan. 4, 1969, 660 U.N.T.S. 195, *reprinted in* 5 INT'L LEGAL MAT. 352 (1966).

12. Declaration on the Elimination of Discrimination Against Women, Nov. 7, 1967, G.A. Res. 2263 (XXII), 22 U.N. GAOR, Supp. (No. 16) 35, U.N. Doc. A/6880 (1968); Convention on the Political Rights of Women, *done at* New York, Mar. 31, 1953, *entered into force* July 7, 1976, 27 U.S.T. 1909, T.I.A.S. No. 8289, 193 U.N.T.S. 135; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, G.A. Res. 34/180 (XXXIV), 34 U.N. GAOR, Supp. (No. 46) 193, U.N. Doc. A/34/46 (1980).

13. Declaration of the Rights of the Child, Nov. 20, 1959, G.A. Res. 1386 (XIV), 14 U.N. GAOR, Supp. (No. 16) 19, U.N. Doc. A/4354 (1959).

14. European Convention for the Protection of Human Rights and Fundamental Freedoms, *done at* Rome, Nov. 4, 1950, *entered into force* Sept. 3, 1953, Europ. T.S. No. 5, 213 U.N.T.S. 221, *reprinted in* COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS COLLECTED TEXTS 101 (11th ed. 1976).

15. American Convention on Human Rights, *entered into force* July 18, 1978, O.A.S. T.S. No. 36, at 1, OEA/Ser.A/16 [English], *reprinted in* S. Exec. Doc. No. F, 95th Cong., 1st Sess. (1978).

16. Proclamation of Teheran, U.N. Conference on Human Rights, Teheran, April-May 1968, U.N. Doc. St./OPI/326 (1968).

Resolution to draft an African Charter on Human Rights in July 1979.[17] The resolution specifically seeks to promote civil, political, economic, social, and cultural rights within Africa, focusing upon the latter three as requiring special and immediate attention. In September of the same year, the United Nations sponsored a follow-up seminar in Monrovia, pursuing the initial program drawn up by the OAU.[18] The outcome will be a draft report presenting a model African Commission on Human Rights.

DIPLOMATIC LAW

Very encouraging progress has been made in the field of diplomatic law. The first two significant attempts at codification of this branch of customary international law were the Vienna Convention on Diplomatic Relations of 1961,[19] and the Vienna Convention on Consular Relations of 1963.[20] For the first time the rights and duties of states in their diplomatic and consular relations were defined, thereby assuring protection, immunities, and privileges to diplomats and other personnel in the countries in which they were accredited. At the same time, these conventions protect host countries by prohibiting certain acts and omissions calculated to undermine their interests. The recent *Case Concerning United States Diplomatic and Consular Staff in Teheran*[21] provided an opportunity for the application of these conventions. The International Court of Justice determined that Iran had violated several provisions of the two conventions guaranteeing the personal inviolability of diplomats and consular staff by holding fifty-three Americans hostage, while demanding the surrender of the former Shah of Iran by the U.S. Government. The Court also held that provisions of the conventions guaranteeing the inviolability of embassies and of their premises, consulates, and archives had been violated by the seizing, ransacking, and looting of the U.S. Embassy and Consulate.

Soon after the seizure of the American hostages in November 1979, the United Nations adopted the International Convention Against the Taking of Hostages.[22] This convention condemns the taking of hostages

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17. Decision on Human and People's Rights in Africa, Organization of African Unity, Assembly of Heads of State and Government (July 17-20, 1979), *reprinted in* 34 U.N. GAOR, Annex (Agenda Item 23) 92, U.N. Doc. A/34/SS2 (1979).

18. Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa, Sept. 10-21, 1979, ch. V (Conclusions and Recommendations), U.N. Doc. ST/HR/Ser. A/4, GE 79-13767 (1979).

19. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

20. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261.

21. Case Concerning United States Diplomatic and Consular Staff in Teheran (United States v. Iran), [1980] I.C.J. 3. *See also* Rafat, *The Iran Hostage Crisis and the International Court of Justice: Aspects of the Case Concerning United States Diplomatic and Consular Staff in Teheran*, 10 DEN. J. INT'L L. & POL'Y 425 (1981).

22. International Convention Against the Taking of Hostages, Dec. 17, 1979, G.A. Res.

in order to compel a third party to do or to abstain from a particular act.

In addition to these conventions, the United Nations also enacted, in 1973, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.[23] This convention calls upon member states to discourage and, if necessary, to punish persons engaged in acts of terrorism and other unlawful acts against the persons of diplomatic representatives serving in one another's territory, including the agents and families of diplomatic envoys. The continuing mistreatment of diplomatic representatives endangers international diplomatic practice. The recalcitrant behavior of Iran in delaying the release of the American hostages for nearly thirteen months after the December 15, 1979 Order by the International Court of Justice angered and dismayed most of the civilized world. Effective international communication demands that diplomatic representatives of all countries be able to carry on their legitimate tasks without fear for their personal safety.

LAW OF THE SEA

Another area in which the international community has taken challenging initiatives is the law of the sea. The initial steps in this direction were taken at the Law of the Sea Conference held in Vienna in 1958. At that time it was already clear that customary international law relating to the use of the sea, the sea-bed, and the ocean floor, no less than the territorial seas, had become inadequate. After detailed consideration of the draft prepared by the International Law Commission, the Conference adopted four separate conventions, on the territorial sea and the contiguous zone,[24] on the high seas,[25] on fisheries and conservation of the living resources of the high seas,[26] and on the continental shelf.[27] Apart from

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34/146, 34 U.N. GAOR, Supp. No. (46) 245, U.N. Doc. A/34/46 (1979), *reprinted in* 18 INT'L LEGAL MAT. 1457 (1979).

23. The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *adopted* Dec. 14, 1973, G.A. Res. 3166, 28 U.N. GAOR, Supp. (No. 30) 146, U.N. Doc. A/OR/28/S/30 v.1 (1973), 28 U.S.T. 1975, T.I.A.S. No. 8532, *reprinted in* 13 INT'L LEGAL MAT. 43 (1974).

24. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

25. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

26. Convention on Fisheries and Conservation of Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

27. Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311. This convention was first applied in the North Sea Continental Shelf Cases, [1969] I.C.J. 3, between the Federal Republic of Germany and Denmark and between the Federal Republic of Germany and the Netherlands. This case raised the question of whether the rule contained in paragraph 2 of article 6 of the Continental Shelf Convention prescribing that in the absence of agreement, and unless another boundary is justified by special circumstances, the boundary should be determined by application of the principle of equidistance as a rule of customary international law. The Court was of the view that the equidistance method of delimitation was not obligatory upon the parties and that

these four conventions, the 1958 Conference adopted an Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes.[28] The Protocol provided for compulsory jurisdiction of the International Court of Justice if a dispute arose between signatory parties or, if the parties preferred, for submission of the matter to conciliation or arbitration. The Conference also adopted nine resolutions on various subjects, including the matter of convening a second law of the sea conference.[29]

The law of the sea conventions and the optional protocol came into force between 1962 and 1966. In the meantime, however, a second conference called by the United Nations Secretary-General in 1958 was held in March and April, 1960. This conference had as its purpose the further consideration of two questions left unsettled by the first conference: the breadth of the territorial sea and fishery limits. While no substantive proposals were adopted at this conference, a resolution expressing the need for technical assistance in fishery was adopted.[30]

In December 1972, the General Assembly resolved to resume work on the subject, and established a working group of fifty-two members to formulate fresh proposals on the law of the sea. After a series of meetings in Caracas, Geneva, and New York, a substantially revised negotiating text emerged. Unlike the 1958 Conference on the Law of the Sea, the present Third United Nations Conference on the Law of the Sea was not based on an initial draft text prepared by the International Law Commission. Instead, the plenary body of the Conference began by dividing the law of the sea into component subjects and complementary committees, each charged with the task of studying and elaborating upon specific aspects of the law of the sea. The plenary was entrusted with the task of formulating consistent, comprehensive proposals. The resultant text is an amalgam of the disparate drafts emanating from the committees.

The tenth session of the Third Law of the Sea Conference was opened in New York on March 9, 1981, by Secretary-General Kurt

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since no other single method could be regarded as obligatory, delimitation should be effected by agreement in accordance with the equitable interests so as to leave as much as possible to each State those parts of the continental shelf constituting a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other. Where there are areas that overlap, they are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a regime of joint jurisdiction, use, or exploitation for the zones of overlap or any part of them.

Another recent case, between Greece and Turkey, is the Aegean Sea Continental Shelf Case, [1978] I.C.J. 3, in which the continental shelf would have fallen for determination by the International Court of Justice but for the fact that the Court held that it had no jurisdiction to entertain the Greek application.

28. Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, *opened for signature* Apr. 29, 1958, 450 U.N.T.S. 169.

29. *See generally* NEW DIRECTIONS IN THE LAW OF THE SEA (S. Lay, R. Churchill, & M. Nordquist eds. 1973).

30. Final Act of the Second United Nations Conference on the Law of the Sea, Apr. 26, 1960, 8 Annex II, at 176, U.N. Doc. A/CONF.19/8 (1960).

Waldheim. This meeting, it was widely believed, would conclude the seven years of negotiation and produce a formalized text for the ratification of member states. Unfortunately, the position adopted by the U.S. Government, in its insistence to review thoroughly the draft convention and to oppose any attempt to adopt the text before the completion of that review, has cast a long shadow over the years of hard work leading to the tenth session.[31]

Nevertheless, an optimistic note was struck by Tommy T. B. Koh of Singapore, who was elected the new President of the Conference, replacing the late H. Shirley Amerasinghe of Sri Lanka. Mr. Koh, sensitive to the need for universal acceptance of the final instrument and the participation of all major maritime nations, has shown a willingness to await the United States' review of the draft convention. A brief summary of certain aspects of the text as it now stands will be attempted.

It would seem that there are three principal features of the proposed new law of the sea treaty which mark out new perspectives and conceptions of customary international law. First is the almost universal adoption of the twelve-mile limit in place of the traditional three-mile limit as the accepted breadth of the territorial sea. The second new conception is the two-hundred mile limit known as the exclusive economic zone. This zone would give the coastal state jurisdiction over the stretch of adjoining sea for fishing and the exploitation of the living resources of the sea in the superadjacent waters beyond the continental shelf. This new conception provoked questions and arguments, mainly between the developed industrialized countries and the developing countries led by the "Group of 77."[32] As the subject was discussed at the various conference sessions, it appeared that the two-hundred mile economic zone, which embraced the former ideas of the contiguous zone and the patrimonial sea, had been accepted. This would mark a decisive shift in the customary conception of the law of the sea.

The third, highly controversial new conception in the draft convention is that which considers those parts of the ocean formerly regarded as the high seas, and thus free for purposes of navigation and other uses, as the common heritage of mankind. The area in question is specifically limited to that portion of the sea beyond the limits of national jurisdiction, covering the sea-bed and all the minerals and other resources associated with it. In its simplest form the concept of the "common heritage of mankind" holds that all nations, regardless of their level of economic and technological development, are equally entitled to the benefits of the min-

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31. For an analysis of different perspectives of the decision of the Reagan Administration, see Moore, *Charting A New Course in the Law of the Sea Negotiations*, 10 DEN. J. INT'L L. & POL'Y 207 (1981).

32. The "Group of 77" is now comprised of over 100 countries located primarily in Africa, Asia, and Latin America. The group was established in 1963 with the introduction of the Joint Declaration of the Developing Countries, G.A. Res. 1877, 18 U.N. GAOR, Supp. (No. 15) 29, U.N. Doc. A/5587 (1963).

eral and other available resources.

It is in connection with this third new conception that controversies still threaten the successful conclusion of the third law of the sea conference, as evidenced by the United States' decision to review the draft convention. The crux of the problem is how to evolve viable institutions for the administration and exploitation of these resources in a manner acceptable both to the technologically more advanced states and to the less advanced states. The problem still awaits solution.[33]

It may be mentioned parenthetically that one important side-effect of the notion of the common heritage of mankind is the development of equitable principles concerning the measure of assistance to be given landlocked states that have no direct and immediate interest in the exploitation of the living resources of the sea-bed. In addition to ensuring their right of free passage through coastal states, the new draft provides that such geographically disadvantaged states should also have a limited share in the exploration and exploitation of the sea, both within the two-hundred mile exclusive economic zone and on the high seas, including the ocean floor.

WARS OF NATIONAL LIBERATION AND HUMANITARIAN LAW

One of the immediate and indeed inevitable byproducts of the grant of self-determination and independence to colonial peoples which accompanied the establishment of the United Nations has been the occurrence of wars of national liberation, particularly in Asia and Africa, the continents which in 1945 had the greatest number of dependent territories. Similar wars of national liberation had occurred during successive centuries in Europe, and within the last two centuries, in Latin America. These wars were often conducted with only rudimentary rules of warfare, essentially based upon the idea and practices of "just" and "unjust" wars. Insufficient regard was paid to the needs of the civilian populations of the territories that were ravaged and conquered in the process. Conquest was ruthlessly efficient as the principle of "might makes right" prevailed. By 1864, however, the initial steps were taken in the formation of humanitarian principles for the care of the disabled, the sick, the wounded, and the dead.[34] In the treatment of persons, distinctions were made between combatants and noncombatants. In 1899, the first organized attempt to regulate the conduct of warfare in a more humane manner resulted in the Geneva Convention of 1899.[35] The gruesome experience of the First World War led to the improvement, in 1929,[36] of the foundations laid by

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33. *See* Moore, note 31 *supra*.

34. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, T.S. No. 3770.

35. Convention With Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403.

36. Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074, T.S. No. 847; Convention Relative to the

the 1899 convention. Finally, after the Second World War, the modern rules of warfare were defined in a more precise manner by the four Geneva Conventions of 1949.[37]

Since about 1950 and continuing today, wars of national liberation have become almost the order of the day. Two important forces underlying this trend are the proclamation in the Charter of the United Nations establishing the right of nations and peoples to self-determination and independence,[38] and the adoption of the policy prohibiting all forms of racial discrimination.[39] Yet, despite the universal recognition of the right of all peoples to self-determination, the achievement of that goal was often accompanied with bloodshed and internecine struggles, particularly in Southeast Asia and in Africa.

It therefore became necessary to reconsider and to broaden the Geneva Conventions of 1949, taking into account the new developments in the field of armed conflict. The International Committee of the Red Cross accordingly proposed two Protocols to the 1949 Geneva Conventions. These addressed on the one hand traditional international conflicts,[40] and on the other, non-international armed conflicts,[41] primarily wars of national liberation. The Western view held that conflicts between states should be the only subject for regulation, while the newly independent African states and their Third World allies contended that wars of national liberation must be regarded as international wars within the meaning of Draft Protocol I to the 1949 Geneva Conventions.[42] These ideas

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Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, T.S. No. 846.

37. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *done* Aug. 12, 1949, *entered into force* Oct. 21, 1950, 6 U.S.T. 3144, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, *done* Aug. 12, 1949, *entered into force* Oct. 21, 1950, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, *done* Aug. 12, 1949, *entered into force* Oct. 21, 1950, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, *done* Aug. 12, 1949, *entered into force* Oct. 21, 1950, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

38. U.N. CHARTER art. 1, para. 2.

39. *Id.* para. 3.

40. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted at* Geneva June 8, 1977, by the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *opened for signature* Dec. 12, 1977, *reprinted in* 16 INT'L LEGAL MAT. 1391; also *reprinted in* 72 AM. J. INT'L L. 457 (1978).

41. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, by the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *opened for signature* Dec. 12, 1977. Text at 72 AM. J. INT'L L. 502 (1978).

42. Protocol I states that it applies to

> armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and

were proposed and discussed at the Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, held in Geneva from 1974 to 1978.[43]

The Conference included in Article 65 of Protocol I a Bill of Rights of Humanitarian Law. This document contained provisions requiring, among other things, that criminal offenses should be tried before independent and impartial tribunals, that the defendant before such tribunals should be charged with individual responsibility, that there should be a presumption of innocence in all cases, and that defendants should not be prosecuted under retroactive laws. The Bill of Rights also provided that the death penalty must not be pronounced upon persons under the age of eighteen years and that there should be no execution of any pregnant women or mothers of young children. Article 65 concluded with the provision that, at the end of an armed conflict, the victorious side should always grant amnesty to as many as possible of the participants in the conflict. It is notable that Nigeria did exactly that at the end of its civil war in January 1970. A general amnesty was granted to all and there were neither prosecutions nor military trials of those involved in the secessionist attempt.

Those who took part in the Angolan wars of liberation found themselves subject to a different set of ideas than those mentioned above. In the Angola trials of the so-called mercenaries and other participants, *ex post facto* laws were applied, following the alleged precedents established by the victorious powers at the Nuremberg and Tokyo trials. In the Angola trials, unlike the Nuremberg and Tokyo trials, the applicable laws were formulated by the tribunal. They were based upon three species of crime: crimes against humanity, crimes against peace, and the crime of mercenarism.

The crime of mercenarism is particularly obnoxious within the African context. In Africa, the mercenary is seen as the representative of colonialism and of racist oppression—an assassin hired to kill freedom-fighters in wars of national liberation and wars against racial oppression. It is significant that in 1967 the Organization of African Unity adopted a resolution soundly condemning mercenary activities in the Congo.[44] In 1969 a resolution was adopted calling upon all nations, especially Western European powers, to make the recruitment and training of mercenaries a

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Co-operation among States in accordance with the Charter of the United Nations.

Protocol I, *supra* note 40, art. 1, para. 4; 72 AM. J. INT'L L. 457, 458 (1978).

43. These conferences were part of an effort initiated by the Red Cross to update the 1949 Geneva Conventions. *See generally* Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 HARV. INT'L L.J. 1 (1975); Cantrell, *Humanitarian Law in Armed Conflict: The Third Diplomatic Conference*, 61 MARQ. L. REV. 253 (1977).

44. *See* Z. CERVENKA, THE UNFINISHED QUEST FOR UNITY: AFRICA AND THE OAU 94 (1977).

crime.[45] Another passionate condemnation of mercenary action was registered at the Lagos meeting of the Council of Ministers in 1970. At its 1971 meeting, the O.A.U. adopted a declaration on the preparation of a legal instrument for the coordination, harmonization, and promotion of the struggle of the African peoples and states against mercenarism.[46] Responding to the persistent and persuasive arguments put forth by the O.A.U., the United Nations General Assembly has adopted a number of important resolutions substantially in accord with those of the O.A.U.[47]

In the discussions prior to the adoption of the Geneva Protocol of 1977 concerning international conflicts,[48] the Nigerian delegation put forth the following definition of the term "mercenary": "A mercenary includes any person not a member of the Armed Forces of a party to the conflict who is especially recruited abroad and who is motivated to fight or to take part in armed conflict essentially for monetary payment, reward or other private gain." While not adopting this definition, the Geneva Diplomatic Conference did reach a consensus based upon it.[49]

An equally important development in the law against racial oppression is the declaration of the United Nations making the policy and the practice of apartheid in South Africa an international crime.[50] The policy and practice of apartheid is now on a par with genocide, wars against humanity, and wars against peace as an international crime. On December 12, 1979, the most sweeping resolution condemning apartheid to date was adopted by the United Nations General Assembly.[51] Among the topics covered in this resolution were an international conference on sanctions against South Africa, an arms embargo, an oil embargo, the situation of political prisoners in South Africa, women and children under apartheid, and foreign investments in South Africa. It is clearly evident that the international community has managed to marshall ever-increasing pressure to bear upon the inhuman and degrading apartheid policies

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45. Res. 58(VI), O.A.U. Assembly of Heads of State and Government (1969).

46. Declaration on the Activities of Mercenaries in Africa, Eighth O.A.U. Summit Heads of State Conference, Addis Ababa (June 1971).

47. *See, e.g.*, Question of Territories under Portuguese administration, G.A. Res. 2395, 23 U.N. GAOR, Supp. (No. 18) 59, U.N. Doc. A/7218 (1968); Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 2465, *id.* at 4; Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 2548, 24 GAOR, Supp. (No. 30) 5, U.N. Doc. A/7630 (1969); Basic Principles of the Legal Status of the Combatants Struggling against Colonial and Alien Domination and Racist Regimes, G.A. Res. 3103, 28 U.N. GAOR, Supp. (No. 30) 142, U.N. Doc. A/9030 (1973).

48. Note 40 *supra*.

49. *Id.*

50. International Convention on the Suppression and Punishment of the Crime of *Apartheid, adopted* Nov. 30, 1973, *entered into force* July 18, 1976. G.A. Res. 3068 (XXVIII), 28 U.N. GAOR, Supp. (No. 30) 75, U.N. Doc. A/9030 (1974), *reprinted in* 13 INT'L LEGAL MAT. 50 (1974).

51. G.A. Res. 34/93, Dec. 17, 1979, 34 U.N. GAOR, Supp. (No. 76) 29, U.N. Doc. A/34/46 (1980).

practiced in South Africa.

LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER

The New International Economic Order seems to be the current vogue in contemporary public international law at the United Nations. It emanates from two main sources. The first is in two parts: United Nations General Assembly Resolutions 3201(S-VI) and 3202(S-VI), which embody respectively the Declaration and the Programme on the Establishment of a New International Economic Order (NIEO). These were adopted on May 1, 1974.[52] The second main source is General Assembly Resolution 3281 (XXIX), which embodies the Charter of Economic Rights and Duties of States, adopted on December 12, 1974.[53] The objective of bringing about changes in the existing international economic order have been reinforced by subsequent resolutions of the General Assembly,[54] of UNCTAD IV in 1976,[55] and of UNCTAD in 1979,[56] and also by the agreement reached at the Conference on International Economic Cooperation in Paris in 1977.[57] At the 1978 session of the General Assembly, it was decided that there should be a review of the developments "in the field of international economic cooperation towards the establishment of the new international economic order," and that the Commission on International Trade Law (UNCITRAL) should take into account, in its work, all relevant decisions of the General Assembly.[58]

The Commission accordingly included among its priorities an item entitled "Legal Implications of the New International Economic Order."

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52. Resolution 3201 contains the Declaration on the Establishment of a New International Economic Order, May 1, 1974, G.A. Res. 3201, (VI-Special) U.N. GAOR, Supp. (No. 1) 3, U.N. Doc. A/9559 (1974), *reprinted in* 13 INT'L LEGAL MAT. 715 (1974). Resolution 3202 contains the Programme of Action on the Establishment of a New International Economic Order, May 1, 1974, G.A. Res. 3202, (VI-Special) U.N. GAOR, Supp. (No. 1) 5, U.N. Doc. A/9559 (1974), *reprinted in* 13 INT'L LEGAL MAT. 720 (1974).

53. Charter of Economic Rights and Duties of States, Dec. 12, 1974, G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1975), *reprinted in* 14 INT'L LEGAL MAT. 251 (1975).

54. *See, e.g.*, G.A. Res. 3362, Sept. 16, 1975, (VII-Special) U.N. GAOR, Supp. (No. 1) 3, U.N. Doc. A/10301 (1976) (implementing measures to bring about the NIEO); G.A. Res. 3506 (XXX), Dec. 15, 1975, 30 U.N. GAOR, Supp. (No. 34) 65, U.N. Doc. A/10034 (1976), (urging prompt implementation of Res. 3362); G.A. Res. 3460 (XXX), Dec. 11, 1975, *id.* at 58, (authorizing the U.N. Special Fund to convene a pledging conference); G.A. Res. 3510 (XXX), Dec. 15, 1975, *id.* at 67, (initiating review of U.N. policy toward economic emergencies in developing countries especially); G.A. Res. 3515 (XXX), Dec. 15, 1975, *id.* at 70, (requesting governments participating in the Conference on International Cooperation to ensure that its decisions take full account of the resolutions creating the NIEO).

55. Proceedings of the United Nations Conference on Trade and Development (Report and Annexes) 6, U.N. Doc. TD/218 (vol. 1) (1977).

56. Action Taken on Commodities, Development Aid, Technology, Shipping and Other Issues, U.N. CHRON., May 1979, at 44.

57. *See* [1977] U.N.Y.B. 385.

58. G.A. Res. 33/92, Dec. 16, 1978, 33 U.N. GAOR, Supp. (No. 45) 216, U.N. Doc. A/33/45 (1979).

At its first meeting, held in New York in 1980, a working group established by UNCITRAL included the following topics in its work program: (1) legal aspects of multilateral commodity agreements; (2) identification of legal issues arising in the context of foreign investments; (3) intergovernmental bilateral agreements on industrial cooperation; (4) harmonization, unification, and review of contractual provisions commonly occurring with international contracts in the field of industrial development; (5) identification of concrete legal problems arising from the activities of transnational corporations; and (6) concession agreements and other agreements in the field of natural resources. As is evident from this list of topics, UNCITRAL is actively seeking to create legal channels and techniques conducive to the successful implementation of the principles underlying the NIEO.

While the legal issues have been gaining more importance, the core of the NIEO philosophy still calls for active economic development among the less developed countries. It was in this vein that the Third General Conference of the United Nations Industrial Development Organization (UNIDO) was held in New Delhi from January 21 to February 9, 1980. Emerging from this conference was the New Delhi Declaration and Plan for Action.[59] The Conference proposed the establishment of a North-South global fund with the ambitious goal of collecting 300 billion U.S. dollars by the year 2000 to promote industrialization within the developing countries. In a meeting to be convened by UNIDO in late 1981, sectoral targets were to be established for important industrial growth areas, such as iron and steel, agricultural machinery, petrochemicals, food processing, capital goods, and fertilizers.[60] It should be noted that the New Delhi Plan is still at an early stage of development and the acceptance of the plan by the developed countries is by no means certain.

The eleventh special session of the United Nations General Assembly, devoted to global economic matters, met in New York from August 25 to September 15, 1980. While the Assembly was unable to agree upon a single unified plan to direct the continued economic development strategy, a number of development targets were enunciated.[61] All of the documents presented at the special session were transmitted to the Assembly's thirty-fifth regular session, which met from September to December 1980.

Among the various decisions taken during the thirty-fifth General Assembly session was resolution 35/36, of December 5, proclaiming the Third United Nations Development Decade.[62] This resolution essentially

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59. New Delhi Declaration and Plan for Action, Third General Conference of the United Nations Industrial Development Organization, Apr. 11, 1980, U.N. Doc. ID/CONF.4/22 (1980).

60. *See UNIDO to Convene 1981 Conference on $300 Billion*, U.N. CHRON., Apr. 1980, at 27.

61. *See New Development Targets Defined As Assembly Ends Special Session*, U.N. CHRON., Nov. 1980, at 27.

62. *See Third Development Decade Proclaimed As New International Strategy*

affirmed and reestablished the need for the implementation of the NIEO programs, and it is to be hoped that the problems and issues that have arisen with respect to the NIEO can be approached, by all parties, with a sincere desire to implement the various NIEO programs.

As evidenced by the program of UNCITRAL described above, increasing efforts are being undertaken within the United Nations to establish the legal means necessary to successfully implement the NIEO. It was in this light that the Assembly adopted resolution 35/166 on December 15, 1980, requesting the United Nations Institute for Training and Research (UNITAR) to prepare a study of the current and evolving norms of international law "relating to the new international economic order concerning the economic relations among states, international organizations, other entities of public international law, and the activities of transnational corporations."[63] Member states were urged to submit any material relevant to the study by July 31, 1981.

In addition to all these developments, other regulatory steps are being taken. Among these is the elaboration by UNCTAD of the International Code of Conduct on the Transfer of Technology. There is also a Code of Conduct on Transnational Corporations, being formulated by the United Nations Commission on Transnational Corporations. Under contemplation are proposals for the amendment of the General Agreement on Tariffs and Trade[64] and of the Paris Convention for the Protection of Industrial Property.[65] Steps are being taken in the promotion of national and regional legislation to improve the terms under which technological advancement can be pursued in developing countries. Finally, continuing efforts are being made to create new development arrangements giving effect to the principle of permanent sovereignty over natural resources.

CONCLUSION

As can be seen from the brief analysis presented above, new perspectives and conceptions are developing in contemporary public international law. Many areas, previously characterized by the enunciation of basic principles and goals, are now shifting towards the actual development of the legal mechanisms necessary to realize and to implement these goals. As this process continues, the importance of international law in the world community will also grow. The challenge to international law and to international lawyers is to devise legal instruments in such a way that the aspirations and rights of no state or people are promoted at the expense of other states or peoples. Clearly, negotiations and multilateral

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Adopted, U.N. CHRON., Mar. 1981, at 42.

63. *See UNITAR Study Requested on Legal Aspects of New Economic Order*, U.N. CHRON., Feb. 1981, at 63.

64. General Agreement on Tariffs and Trade, *concluded at* Geneva Oct. 30, 1947, 61 Stat. pts. 5 & 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

65. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *revised* July 14, 1967, 21 U.S.T. 1583, T.I.A.S. No. 6923.

meetings are necessary in this regard and these negotiations must be sensitive to the historical realities of both the developing and the developed countries. It is within this context that an equitable and just result must be sought. The basic rights and freedoms contained in the United Nations Universal Declaration of Human Rights must serve as both the underlying goal and minimum requirements of any negotiations.

The developments traced above are but steps in the evolution of modern international law. While the need for the enunciation of positive law in important areas of such as the law of the sea and nuclear armaments still exists, other areas have developed beyond the point of enunciation and now require implementation mechanisms. Human rights is a good example of an area where implementation must become the chief area of focus. Any law, be it domestic or international, only fulfills its purpose upon implementation. The new perspectives raised in the foregoing discussion are bound to transform customary international law in a manner calculated to serve the evolving international community in the foreseeable future.