INTRODUCTORY REFLECTIONS UPON INTERNATIONAL LAW AND DEVELOPMENT

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1 *Development*

International law may be an instrument for promoting development or an impediment to it.[1] The ongoing discussion on international law and development reflects the view that a suitable international economic order is very pertinent for the realization of economic, social and cultural rights.[2] This pertinence varies, of course, with the definition of both international law and development. As for the latter it differs according to whether development is considered to be a legal concept which law may come to grips with either as a process or effort or as a result.

The 1986 UN Declaration on the right to development[3] defines development in the context of the - emerging - pertinent human right as an effort, i.e.

> a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

Distinguishing between development as a principle of international law in general and a principle of human rights law in particular enabled the 1986 Seoul Declaration[4] to define development in terms of both a result for individuals and as an effort of States. By virtue of development as a principle of human rights law

> individuals and peoples are entitled to the *results* of the *efforts* of States, individually and collectively, to implement Articles 55 and 56 of the United Nations Charter.

However, development as a principle of international law merely covers efforts of States, i.e. their co-operation

> for the elaboration of civil, cultural, economic, political and social standards, embodied in the Charter of the United Nations and the International Bill of Human Rights, based upon a common understanding of the generally recognized human rights and the principles of public international law concerning friendly relations and co-operation among States.

The Limburg Principles[5], too, are based on the idea of development as an effort but not so much of States only as of all sectors of society. These principles stress the relationship between development and the implementation of economic, social and cultural rights, in particular for the alleviation of absolute poverty,[6] as is clear from their general observation:

> Given the significance for development of the progressive realization of the rights set forth in the Covenant, particular attention should be given to measures to improve the standard of living of the poor and other disadvantaged groups, taking into account that special measures may be required to protect cultural rights of indigenous peoples and minorities.

The above-mentioned international instruments and the present volume clearly reflect the views held in ILA and UN General Assembly and those of individual experts that development, and development assistance, form part of the law as legal principles or even as human rights or as rights of States. This view is not self-evident as is clear from the very first case - Nicaragua v. US - which enabled the ICJ to give its opinion on this question. In an otherwise careful analysis of customary international law the Court observed in respect of alleged violations of the 1956 Treaty of Friendship, Commerce and Navigation (FCN Treaty) between Nicaragua and the US that:[7]

> The cessation of economic aid, the giving of which is more of a unilateral and voluntary nature, could be regarded as such a violation only in exceptional circumstances. The Court has also to note that, by the very terms of the legislation authorizing such aid (the Special Central American Assistance Act, 1979), of which the Government of Nicaragua must have been aware, the continuance of aid was made subject to the appreciation of Nicaragua's conduct by the President of the United States. As to the opposition to the grant of loans from international institutions, the Court cannot regard this as sufficiently linked with the 1956 FCN Treaty to constitute an act directed to defeating its object and purpose.

The Court thus subscribed to the view expressed in the 1984 UNITAR study of principles and norms of international law relating to NIEO:[8]

> In fact, in spite of a certain regularity in the flows of assistance, it is difficult to maintain that they have given place to a concrete normative proposition, specific as to their content (level) or individualized as to their destination (or beneficiaries). In other words, though each developed country devotes a certain amount of resources each year to development assistance, and each developing country receives every year from diverse sources a certain amount of assistance and may rely on it, it is not legally possible yet to assert that there is a legal obligation resting on the former with a corresponding right in favour of the latter.

Although the above-mentioned Declarations in the opinion of the Court may be premature, they nevertheless at long last provide a suitable legal framework for development as a legal concept and for establishing an entitlement to development assistance. International labour conventions, ICESCR and other similar instruments have brought social security within the purview of international law as an important instrument to guarantee a minimum standard of living for everyone.[9] The principle of development may be said to express an emerging *opinio necessitatis* that alleviation of absolute poverty can no longer be dealt with as a matter of charity:[10]

> Besides generosity, what is necessary is rationality, an understanding and a conviction on the part of both the developing and the developed

> countries that it is in the interest of all of them to co-operate in the development process because, as has been widely said, development is the new name for peace.

President Nagendra Singh is of the opinion that the right to sustainable development is part of modern natural law and an inalienable right of a peremptory nature.[11] However, the relationship between international law and development differs depending on what is taken to be the basis of natural law, assuming that such a law is recognized. It may either be based on a rational and social human nature (Grotius) - and thus provide each man with an objective criterion superior to (for example) mere self-preservation; or it may be based on self-preservation (Vattel) and thus provide each State with a subjective criterion to determine in the last resort what are the offices of humanity.[12]

2 *International law*

According to Vattel a good sovereign should take care that his own society has a sufficient rate of employment. He ought to encourage industry and commerce. Vattel even poses the natural right of a State to buy[13] as the basis of the law of commerce. Each State has the right to provide itself with the things it needs by buying them at a fair price from peoples which do not need them. But the same reasoning does not hold true, to Vattel's mind at least, for arguing that States have a natural right to sell things against a fair price, for each human being and each State is supposed to be absolutely free to buy or not to buy things which are for sale. In other words, the law of nature for individuals and the law of nature for States - to Vattel unlike Grotius two separate systems of law - does not lay down a right to sell as a counterpart of the right to buy.

Vattel's concept of natural law implies, for instance, that each State has the right to defend itself against imports of foreign merchandise. On the other hand, States affected by such defence measures have no right to complain, not even if the measures constitute a refusal of rendering humanitarian services. Vattel argues that States like individuals do have an obligation to render such services but, in conformity with the law of self-preservation, only insofar as this may be done without neglecting duties towards themselves.[14] It needs no argument that in his opinion each State should decide itself whether or not a particular form of assistance to other States would harm its position. This sovereign right even prevails over the freedom of trade, however much he is otherwise in favour of that.

The spirit of Vattel still permeates the present world system although Grotius' concept of an international legal order may get new support from the above-mentioned international instruments inasmuch as these reveal a growing awareness of the inability of Vattel's natural law for States, even more than in his own days, to cope with international economic relations. This inability is accentuated by the fact that in a free market system States are not the only or even the main actors. What is more, Vattel's conceptual elimination of non-State actors from the international legal scene diminishes the relevance of international law for establishing an international economic order which effectively promotes and protects civil and political rights as well as economic, social and

cultural rights. However, the opinion is gaining ground that mankind may demand proper legislative measures whereby development is recognized as a principle of international law in general and of human rights law in particular.

According to the UN Declaration on the right to development, States have the right *and the duty* to formulate appropriate national development policies. Vattel's concept of law does not allow international legal research effectively to meet the need of contemporary society as reflected in international co-operation, solidarity, peace and development as emerging fundamental principles of international law. For Grotius positive, or volitional, law cannot be contrary to the law of nature. For Vattel only positive law is generally binding and thus decisive.[15]

Although the positivist philosophy of law no longer responds to actual needs of the contemporary international community, it is still adhered to by the ICJ.[16] However, as recent research has shown[17] the Court thereby

> has not flinched from applying natural law principles wherever possible. On the whole, the new synthesis comes out unscathed and its permanent character is reaffirmed.

This finding is fully supported by the subsequent judgment in the Nicaragua v. US case. International law may take courage from the fact that dividing lines are not automatically drawn between judges from North and South or East and West even in such a delicate dispute. As was the case in US v. Iran, the judgment in the Nicaragua v. US case was widely supported by judges hailing from all forms of civilization and from the principal legal systems. The same wide support also exists - and this is quite important - for the right of each State to choose its own political, economic, social and cultural system, and to formulate a foreign policy.[18]

According to the ICJ 'adherence by a State to any particular doctrine does not constitute a violation of customary international law'. No rule of international law opens up a right of intervention by one State against another on the mere ground that the latter has opted for some particular ideology or political system.[19] Therefore, no system - capitalist, communist or otherwise - may derive from international law an argument to claim hegemony. On the contrary, such a claim would be in clear violation of customary international law.

Of course, all systems should abide by international law. States should prevent their economic, political, social and cultural systems degenerating into a systematic violation of international law as was the case with nazism and still is with *apartheid*. The Seoul Declaration puts forward the proposition that States in the legitimate exercise of their economic sovereignty

> should seek to avoid any measure which causes substantial injury to other States, in particular to the interests of developing States and their peoples.

3 *Peace and security*

The UN Declaration on the right to development considering that international peace and security are essential elements for realizing the right to development states:

> All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control as well as to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries.

The US member of the working group of governmental experts on the right to development and his colleague from the USSR could agree on the above provision at a relatively early stage. The discussion in the working group showed that this may have been less indicative of a true consensus among the super--powers on disarmament and development than of a general feeling among other States that efforts thereto were not really their business. However, the Court's reasoning in the Nicaragua v. US case really surpassed this non-committal attitude which was shown at the political level by the authoritative and imaginative way in which it showed that the 1970 Declaration on principles of international law reveals an *opinio juris* in respect of the fundamental principles of peaceful coexistence.[20]

It is said that security policy should become part and parcel of social-economic policy.[21] Development is endangered by man-made disasters such as environmental pollution and indeed by war. Mankind is putting international law under heavy pressure to prevent States to exploit disparities in power positions and even to adjust not merely antagonistic interests between States on a basis of reciprocity only but to co-ordinate individual efforts of States for the better achievement of common purposes.[22]

In the Nicaragua v. US case the ICJ met the increasing demand for an international law of co-ordination in some degree by showing that the right to self-defence is restricted by the prohibition of the use of force, this prohibition being a peremptory norm of international law *(jus cogens)*. The ICJ thus enhanced the implied duty of States to pursue in good faith negotiations even on delicate topics such as the establishment of a system for the regulation of armaments with the least diversion of the world's human and economic resources.[23] In doing so the Court coped with the nearly impossible problem how[24]

> to find the path through precedent, through policy, through history to the best judgment that fallible creatures can reach in that most difficult of all tasks: the achievement of justice (...) through *reason* called law (emphasis added)

and grasped to the utmost the opportunity for developing international law in areas which are vital to the maintenance of international peace and security.

By deciding that for the exercise of 'inherent rights' of States such as the one to collective self-defence no rule in customary international law permits another State to settle the matter on the basis of its own assessment of the situation[25] the Court gave fresh support to those who give an affirmative answer to the still burning question whether international law is really law.[26] For even the maintenance of international peace and security is now longer - in Schwarzenberger's useful classification[27] - based so much on an international law of power as an on international law of co-ordination. President Nagendra Singh stated in a separate opinion[28] unambiguously:

The Court as principal judicial organ of the United Nations has to promote peace, and cannot refrain from moving in that direction.

Not only politicians but also researchers still tend to overlook the need for integrating security topics with social-economic topics.[29] In this connection a striking conclusion was reached in the 1984 RAWOO General Recommendation on research needs and priorities concerning legal aspects of international dimensions of development problems. It was found that the impact of research results in the field of armaments and development was so uncertain that this area could be recommended only as a secondary subject for research; this left as the main areas:

- the changing character of the global system
- processes of (capital) accumulation and technological development in an international context
- negative and positive aspects of developing countries' increasing integration into the world economic system.

Legal aspects of NIEO should likewise include a new law of armaments, for both economic and humanitarian reasons.[30] It seems that the legal profession is becoming more aware of the need thereof. The Oxford Human Rights Institute, for instance, held a conference 29-31 May 1987 on the theme 'Development, environment and peace as third generation human rights: is calling them rights a useful strategy toward their achievement?' The International Peace Bureau at Geneva - who were awarded a Nobel prize in 1910 - recently launched an appeal by lawyers against nuclear war. This was at the initiative of over fifty lawyers, amongst whom the Nobel prize winner Sean McBride and Judges T.O. Elias and Mohammed Bedjaoui of ICJ. International Physicians for the Prevention of Nuclear War (IPPNW; 1985 Nobel peace prize) stressed at its 7th World Congress in Moscow - May 1987 - an integrated approach by organizing colloquia in various other fields of science including law. The colloquium on 'international law and nuclear weapons' resulted in a call upon lawyers and their national and international organizations to join efforts for the promotion of peace and security and the prevention of nuclear war, following the example of the medical profession.[31]

At first glance the broad list of topics for legal research recommended at the 1987 Amsterdam seminar on international law and development does not yet reflect the foregoing developments, for the research programme[32] selected therefrom seems to be narrowing down once more to largely economic issues, viz.:

- permanent sovereignty
- international trade regulation
- international monetary regulation;
- implementation of economic, social and cultural rights
- right to development
- transfer of technology and intellectual property rights.

However, it is the responsibility of individual researchers to give shape to those topics, which indeed lend themselves for a truly comprehensive approach. After all, as pointed out in CERDS, peaceful coexistence belongs to the fundamentals of international economic relations. Moreover, the above research topics reflect,

as this volume may illustrate, pronounced views upon a peace which really surpasses the mere absence of war.

The 33 authors come from countries with different legal, political, economic, social and cultural systems in Africa (Ghana, 1; Nigeria, 1); Asia (Bangladesh, 1; PRC, 1; India, 3; Indonesia, 1; Pakistan, 1); Europe (Belgium, 1; Poland, 2; the Netherlands, 15; Switzerland, 1; UK, 1; Yugoslavia, 2); and Latin America (Argentina, 1; Guyana, 1). Their varying responsibilities as politicians, practitioners, international functionaries or teachers are attended by a common interest in legal research in general and in a common concern for NIEO in particular. The authors committed themselves to joint research. Some chapters are already illustrative of what such efforts can do, thanks to co-operation between authors in the ILA NIEO committee and to the Seoul Declaration as its trendsetting result. Anyhow it appears that co-operation in analyzing legal dimensions of development problems with a view to reaching common solutions need not imply sharing or even being familiar with each other's ideas[33] provided that these have not degenerated into ideologies.

Even the strongest defender of legal positivism may surprise his students from time to time - a good thing in my opinion - by pointing to some remarkable exception. Schwarzenberger, for instance, considers that 'The Court's Finest Hour' will come when the UN will ask the ICJ for an Advisory opinion on the present meaning of *civilised nations* in Article 38, paragraph 1 (c) of its Statute, one of his questions being:[34]

> Would the Court subscribe to the view, expressed by Alberto Gentili four centuries ago, on the unlawfulness of any weapons which are unacceptable because war, a contest between men, through these acts is made a struggle of demons?

I consider such anomalies as the very salt in the life of a researcher! Moreover they may put legal research in a better position for effective co-operation with other professional groups such as economists[35] and physicians.

Notes Introduction

1. See part 2, in particular chapter 2.1.
2. See part 6.
3. Annex 1. See part 7.
4. Annex 2. Emphasis added.
5. Annex 3. See chapter 6.1
6. Absolute poverty is defined as a condition of life so characterized by malnutrition, illiteracy and disease as to be beneath any reasonable definition of human decency. See *World Development Report*, 1980, p. 32. See also chapter 6.1.
7. *ICJ. Reports* 1986, p. 138. See also Hohmann and De Waart (1987), pp. 187-189. The Court did not deal with the problem of economic development of a developing country before. Only in one previous judgment the Court entered into the case of economic development but that judgment did not concern such a country (Fisheries Jurisdiction Case, *ICJ Reports* 1974, pp. 199-200).
8. Doc. A/39/504/Add. 1 of 23 October 1984, p. 91. See also Bulajić (1986), pp. 240-245.
9. See chapter 6.4.
10. Anand (1984), p. 125.
11. See chapter 1.1.
12. Remec (1960), pp. 237-239.
13. Vattel (1758), p. 37
14. Ibid. pp. 110-111.
15. Remec (1960), pp. 242 and 243.

16. Hussain (1984), p. 264.
17. Ibid. p. 266.
18. *ICJ Reports* 1986, p. 108. See chapter 2.1.
19. Ibid. p. 133.
20. Ibid. pp. 99-100. 101.
21. Tinbergen and Fischer (1987).
22. Schwarzenberger (1976), p. 10.
23. UN Charter, Article 26; Treaty on the Non-Proliferation of Nuclear Weapons, Article VI.
24. Judge Lachs quoting Justice Frankfurter in his separate opinion, *ICJ Reports* 1986, p. 160. See also Farer (1987), p. 112-116.
25. *ICJ Reports* 1985, p. 104.
26. Akehurst (1984), pp. 1-12. See also Briggs (1987), pp. 78-86.
27. Schwarzenberger (1976), p. 10 and (1986)), pp. 727-728.
28. *ICJ Reports* 1986, p. 153.
29. Tinbergen and Fischer (1987).
30. Röling (1984), 741-743; Verwey (1985), pp. 16-19; Kalshoven (1987), pp. 159-160.
31. The IPPNW colloquium on international law and nuclear weapons was led by a panel of five jurists, viz. the former president of Mexico Luis Echeverría; the minister of justice of the Russian Federation Aleksander Soukharev; the Canadian barrister and solicitor Joseph W. Samuels, former professor of international law at the University of Western Ontario Law School; the assistant dean for international and comparative legal studies at Harvard Law School (US) Frederick Snyder; and the present author who also acted as moderator.
32. See the research programme at the end of this volume.
33. Hayek (1976), pp. 109-111.
34. Schwarzenberger (1986), pp. 731-733.
35. Bedjaoui (1979), p. 244.