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AN EQUITABLE REGIME FOR SEABED AND OCEAN SUBSOIL RESOURCES

THOMAS M. FRANCK*, THOMAS M. KENNEDY** AND CURTIS V. TRINKO***

The purpose of this essay is to outline a strategy for implementing an equitable regime for the allocation of the seabed and the ocean subsoil. The importance and timeliness of the subject is based on the coinciding of three events of landmark historical importance: (1) the convening in June, 1974 of the Caracas Conference to write a new international treaty governing the seas and their resources; (2) the arrival of the long-awaited world resource-and-commodity crunch; and (3) the virtual termination of political support in the West, particularly in the United States, for bilateral aid programs to underdeveloped countries.

The Caracas meetings and other subsequent negotiations will concern themselves with a broad agenda on which the disposition of seabed and subsoil resources is but one item. Freedom of navigation, fisheries, investment guarantees, pollution control, and various other sea-related subjects will also share the agenda. These issues are inevitably related to the question of seabed and subsoil resources if only because the negotiators will be creating a total package in which the various items serve as trade-offs in the search for near-unanimity. The question of seabed and subsoil resources is, nevertheless, of such overriding importance as to warrant separate analysis.

Ocean mineral resources are the world's last great new frontier in an era of massive mineral consumption and predictable mineral shortages. The technological and legal challenge of the opening of this new frontier must be placed in the context of a greater ethical challenge to place the world economy on foundations which permit the

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narrowing, rather than the widening, of the gap between rich and poor nations.

I. THE RUSH TOWARD BROAD SEAWARD EXTENSIONS OF NATIONAL JURISDICTION

The U.N. Seabed Committee has begun work drafting a treaty establishing an international regime for the exploration and exploitation of the seabed beyond national jurisdiction, and on the international machinery to promote such exploration and exploitation for the benefit of mankind. This effort has been closely linked to the problem of defining the area subject to national jurisdiction.

As population expansion, rising standards of living, and the development of deep-sea mining technology have made inevitable man's exploitation of the resources beyond the traditional three-mile limit, different views emerged as to the manner in which this exploitation should proceed. Many coastal states favor more exclusive jurisdiction over their adjunct sea areas, while noncoastal and some coastal states support a sharing of jurisdiction over the off-shore seas by the coastal state and the international community.

While most coastal states have taken the position that their geography entitles them to almost exclusive rights over the resources of the sea area adjacent to their coasts, there are nuances of difference among them. Latin American states, such as Brazil and Uruguay, describe their exclusive claims in terms of "sovereignty" and the area claimed in terms of a "territorial sea" of about 200 miles width.[1] The majority of Latin American, African, and Asian states make a distinction between the territorial sea, which they wish to set at 12 miles, and an "economic zone" or "patrimonial sea" of 188 miles. According to the latter view, the coastal state, in its territorial sea, would exercise the traditional incidents of sovereignty, and, in the other 188-mile band, would enjoy exclusive or "sovereign" functional rights over the area's resources, both renewable and non-renewable, i.e., fishing and minerals.[2] Both the states demanding a 200-mile sovereign territorial sea and those merely demanding exclusive func-

1. *See* 28 U.N. GAOR Supp. 21, Vol. 3, at 23-29, U.N. Doc. A/9021 (1973).

2. *Cf.* the proposals of: Organization of African Unity, *id.* Vol. 2 at 4; Colombia, Mexico and Venezuela, *id.* Vol. 3 at 19; Ecuador, Panama and Peru, *id.* at 30; Argentina, *id.* at 78; Algeria, Cameroon, Ghana, Ivory Coast, Kenya, Liberia, Madagascar, Mauritius, Senegal, Sierra Leone, Somalia, Sudan, Tunisia and United Republic of Tanzania, *id.* at 87; Pakistan, *id.* at 106. *See also* the proposal of Iceland, *id.* at 23; China, *id.* at 71; Australia and Norway, *id.* at 77. Most of the proposals made a provision for landlocked and other disadvantaged states to share in the exploitation of the living resources of the neighboring coastal states. None of the proposals, however, was specific with regard to the exact implementation of such right and some of the proposals speak in terms of "privilege." *Cf.* Canada, India, Kenya and Sri Lanka, *id.* at 83.

tional jurisdiction but not territorial sovereignty over resources—thereby leaving open such matters as navigation—agree that the seabed and subsoil resources, to a distance of 200 miles, should become the exclusive preserve of those states endowed with coastlines. The resultant windfall, based on the length of the coast rather than on need or population, would be further augmented where the ocean off the coast happens to have the configuration of a particularly wide submerged shelf. Five coastal nations have shelves that extend beyond 200 miles at depths of less than 200 meters.[3] Australia, Argentina and Norway have insisted that the coastal state has the right to retain any jurisdiction—including the entire shelf—to which it was entitled under prior international law.

"Jurisdiction" or "functional sovereignty"—even if short of outright territorial sovereignty—is used by coastal states to include the following competences:

> 1. The exclusive national use of the resources of the area and the retention of the revenues derived therefrom;
> 2. The exclusive right to authorize and regulate all activities relating to the exploration and exploitation of the area, which includes the imposition of pollution control measures and supervision of scientific research;
> 3. The prerogative of settling according to national—rather than international—law any dispute arising from such activities.

From an international public-policy point of view, these assertions of wide functional jurisdiction leave much to be desired. Four of the

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3. The five states are Argentina, Australia, Canada, the U.S.A., and the U.S.S.R. OFFICE OF THE GEOGRAPHER, BUREAU OF INTELLIGENCE AND RESEARCH, DEPARTMENT OF STATE, LIMITS IN THE SEAS, THEORETICAL AREA ALLOCATIONS OF SEABED TO COASTAL STATE, INTERNATIONAL BOUNDARY STUDY, Ser. A, No. 46 (August 12, 1972) [hereinafter cited as OFFICE OF THE GEOGRAPHER].

4. Australia and Norway, *supra* note 1, at 78 ". . . the Coastal State has the right to retain, where the natural prolongation of its land mass extends beyond the [economic zone- patrimonial sea], the sovereign rights with respect to that area of the sea-bed and the subsoil thereof which it had under international law before the entry into force of this Convention: such rights do not extend beyond the outer edge of the Continental margin."

It may be worth noting that the U.S., due to the open-ended jurisdictional definition contained within the Outer Continental Shelf (OCS) Lands Act, 43 U.S.C. §§ 1331-43 (1970), can be interpreted as now laying claim to jurisdiction over 2500 square nautical miles of seabed that is more than 200 miles from its coast. See OFFICE OF THE GEOGRAPHER, *supra* note 3. A treaty that included a seaward limitation of 200 miles of national jurisdiction could, therefore, be interpreted as amending the OCS Lands Act. Congressional action conforming the OCS Lands Act jurisdictional definition with the eventual treaty is a preferable alternative.

The total global area involved is only 35,800 square nautical miles, as compared to the 24,632,400 square nautical miles of sea-bed within the 200-mile delimitation. *Id.* The area under dispute is somewhat larger if states, such as Argentina, continue to claim jurisdiction to the edge of the continental margin, as opposed to the 200-meter isobath mark. Argentina, *supra* note 1, at 80. See also Columbia, Mexico, and Venezuela, *supra* note 1, at 21.

principal beneficiaries of such a policy, according to estimates made by the United States Government,[5] would be the United States, the Soviet Union, Australia, and Canada, while the landlocked states, who stand to gain nothing, include sixteen of the world's poorest nations (Bolivia, Paraguay, Afghanistan, Nepal, Bhutan, Laos, Uganda, Chad, Central African Republic, Lesotho, Botswana, Swaziland, Mali, Zambia, Rwanda, and Burundi). Yet the extension of national jurisdiction would not have gained so much favor had the rich coastal nations not been joined enthusiastically by the poor states with substantial coastlines. Their lack of technological know-how makes particularly attractive the idea of claiming an extended and exclusive sea area which could be exploited on their own terms in the future. This approach is certainly more enticing than the acceptance of an international authority which, they suspect, would tend to serve the interests of the economically powerful and technologically advanced nations.[6]

Among both developed and underdeveloped coastal states, there is no complete agreement on the question of jurisdiction. Canada and the Soviet Union maintain that the coastal state should have exclusive jurisdiction over the minerals of the continental shelf. They argue that this position is merely a restatement of what was previously agreed upon in the 1958 Geneva Convention.[7] The Soviet proposal sets a 500-meter isobath or 100 nautical mile limit on the area of exclusive rights over continental shelf resources.[8] The Canadians have set no such limit. Others, such as the U.S. and the Netherlands, have proposed that the coastal states share with an international equitable regime the revenue derived from the exploitation of the resources in the area between the outer limit of the proposed

5. *See* OFFICE OF THE GEOGRAPHER, *supra* note 3.

6. See *Economic Significance, in terms of Sea-Bed Mineral Resources, of Various Limits Proposed for National Jurisdiction*, REPORT OF THE SECRETARY-GENERAL TO THE COMMISSION OF THE PEACEFUL USES OF THE SEABED AND THE OCEAN FLOOR BEYOND THE LIMITS OF NATIONAL JURISDICTION, U.N. Doc. A/AC.138/87 (1973) [hereinafter cited as *Economic Significance*], in which he refers to the "limited and general nature of the existing information available on the extent and location of sea-bed minerals." *Id.* at 5. The disillusioning view of the developing countries *vis-a-vis* an international machinery seems to have developed as a result of the failure of the U.N. to solve their most immediate political and economic problems (decolonization and development).

7. 28 U.N. GAOR Supp. 21, Vol. 3, at 29. U.N. Doc. 4/9021 (1973). The Soviet Union proposal with regard to the limit of the continental shelf does not specify the rights of the coastal state over such area and seems to maintain the traditional concept adopted in the Geneva Convention of 1958 that the area beyond the territorial sea is essentially part of the high sea, excepting only the sovereign rights of the coastal states over the continental shelf for the purpose of exploring its natural resources. This is confirmed by the Soviet proposal on fishing which defines the sea area beyond the territorial sea as part of the high seas. See 27 U.N. GAOR Supp. 21, at 158, U.N. Doc. A/8721 (1972).

8. *See* 27 U.N. GAOR Supp. 21, at 158, U.N. Doc. A/8721 (1972).

economic zone and the 200 meter isobath.[9] In this way, at least some of the benefits derived from the further extension of national jurisdiction would be redistributed in accordance with an equitable principle. The U.S. proposes giving the coastal state exclusive rights over the continental shelf up to a 200-meter depth and favors establishment of a "trusteeship area" of preferential but limited rights for the coastal states up to the edge of the continental margin.[10] The Netherlands has proposed 40 nautical miles or a 200 meter isobath as the outer limit of exclusive jurisdiction and would devote a further 40-mile-wide "intermediate zone" to the exclusive exploitation of the coastal state, but subject to the rules and regulations established by the competent international authority. Under this approach, if the coastal state were classified by the international authority as an "advantaged" state—in terms of the proportion of the intermediate zone to its land area—it would share the exploitation of the intermediate zone with "disadvantaged" states in proportion to the rate of disadvantage.[11]

Similar to the position of the United States, though for different reasons, is that of states which are geographically disadvantaged, i.e., states which are landlocked, shelf-locked, semi-shelf-locked, or which, like Zaire, have trivial coastlines in relation to their population and land-mass. In their view, an equitable share of the benefits of the sea could only be attained through recognizing a limited jurisdiction for the coastal states over the adjacent sea area, while at the same time guaranteeing the geographically disadvantaged states a right to share in the revenue from the exploitation of the non-living resources. In the Kampala Declaration, the landlocked and geographically disadvantaged states have staked out a claim to equal participation in the benefits to be derived from the resources of the seabed and subsoil beyond the territorial waters of coastal states.[12]

II. THE SEARCH FOR AN EQUITABLE PRINCIPLE

An equitable principle applicable to the seabed and subsoil can be formulated as follows:

> No state should be permitted to extend its jurisdiction over seabed and subsoil resources beyond the limits permitted by existing international law without sharing the benefits of such an extension with the rest of the international community in accordance with each member's need.

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9. Draft U.N. Convention on the International Seabed Area. 25 U.N. GAOR Supp. 21, at 130, U.N. Doc. A/8021 (1970); Netherlands proposal concerning an intermediate zone, 28 U.N. GAOR Supp. 21, Vol. 3, at 111, U.N. Doc. A/9021 (1973).

10. *Supra* note 9, at 138-40.

11. *Supra* note 9.

12. The Kampala Declaration, Kampala, Uganda, March 22, 1974, Art. VIII. See also the proposal to that effect of Afghanistan, Austria, Belgium, Bolivia, Nepal and Singapore, 28 U.N. GAOR Supp. 21, Vol. 3, at 85, U.N. Doc. A/9021 (1973).

The rationale for such an equitable principle is that the international legal order ought not to be amended in such a way as to transfer to some states resources previously held in common by all states if the effect of such transfer is unduly to enrich certain states at the expense of others, without rational regard for each nation's economic need. Development of large ocean tracts previously legally or technologically beyond the reach of states ought to be the occasion for greater equalization of benefits among states, not for the creation of new and greater discrepancies.

To gauge how much of the previous *res communis* will now be subject to national jurisdiction, one must begin by determining the present limits. This is not a simple task given the confused state of the law. The Geneva Convention defines the continental shelf, subject to the coastal state's sovereign rights, as "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas."[13] Is the "submarine area" referred to in the definition limited to the shelf, or could it include the slope and the rise to the end of the margin? Could it even go further to the deep sea basin? The legislative history of the definition does not clarify the problem. The text of the International Law Commission draft, from which the Convention developed, was repeatedly altered. In 1951, the Commission adopted the "exploitability" test on the ground that though

> it seems likely that a limit fixed at a point where the sea covering the continental shelf reaches a depth of 200 meters would at present be sufficient for all practical needs; [nevertheless] technical developments in the near future might make it possible to exploit the resources of the seabed at a depth of over 200 meters. Moreover, the continental shelf might well include submarine areas lying at a depth of over 200 meters, but susceptible of exploitation by means of installations erected in neighboring areas where the depth does not exceed this limit.[14]

In 1953, nonetheless, the Commission abandoned the "exploitability" test on the ground that it "lacks the necessary precision and might give rise to dispute and uncertainty."[15] In its final draft of 1956, to compound the problem, the Commission retained the 200 meters criterion, but added to it the exploitability test. And although it recognized the latter criterion to be imprecise, the Commission's special rapporteur now felt, in contradistinction to the Commission's

13. Convention on the Continental Shelf, *done* April 29, 1958, Art. I, 15. U.S.T. 471; T.I.A.S. No. 5578.

14. *Report of the Int'l L. Comm'n*, [1956] Y.B. INT'L L. COMM'N 296, U.N. Doc. A/CN. 4/101 (1956).

15. *Id.*

1951 view, that "the time still seemed to be remote when technical development would allow the exploitation of the seabed at a depth over 200 meters"[16] and that, therefore, no practical difficulties will arise in the foreseeable future. It was this view which prevailed in the final text of 1958.

The Commission's guess of 1951 was better than that of 1956 or 1958. The time for technological advance beyond the 200-meter limit has proven not to be so remote. The industrial capacity to extract non-living resources from the seabed has advanced in sophistication and depthward reach far beyond the expectations of the draftsmen of the 1958 Convention on the Continental Shelf.[17] If that Convention must be read so that the only limit on national jurisdiction expansion is the limit of "exploitability," then the Convention may inadvertently have sanctioned exclusive national jurisdiction over natural resources beyond the flat shelf, past the slope and rise onto the very deep seabed itself. It may have sanctioned the extension of jurisdiction by a technologically advanced state across its own shelf, slope, rise, adjacent ocean bed, and onto the rise and slope near less advanced states. It may even be argued that by virtue of the "exploitability" criterion the whole seabed of the world has been inchoately apportioned among coastal states, to the median line between continents.[18] This, too, invokes a political absurdity, implying that the

16. 11 U.N. GAOR 6, 115th Comm., U.N. Doc. A/C.6/SR.500 (1956).

17. J. ANDRASSY, INTERNATIONAL LAW AND THE RESOURCES OF THE SEA 84-90 (1970). For an example of these expectations, see Mouton, Recent Developments in the Technology of Exploiting the Mineral Resources of the Continental Shelf, U.N. Doc. A/C.13/25 (1958); C. FRANKLIN, THE LAW OF THE SEA: SOME RECENT DEVELOPMENTS 29 (Naval War Coll., Int. L. Studies 1959-60, Vol. 53, 1961); M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 687 (1962). As another author stated:

> "Some including advisors to the Marine Sciences Commission, have stated that it was the intent of the Conference that the definition cover only the geologic continental shelf which normally ends at 200 meters and that the purpose of the exploitability test was to permit the development of nearby adjacent areas." Krueger, *The Background of the Doctrine of the Continental-Shelf and the Outer Continental Shelf Lands Act*, 10 NAT. RES. J. 442, 473 (1970).

Krueger cited to the following as proponents of this theory: COMMISSION ON MARINE SCIENCE, ENGINEERING AND RESOURCES, OUR NATION AND THE SEA: A PLAN FOR NATIONAL ACTION 143-145 (1969); Henkin, *Changing Law for the Changing Seas*, in USES OF THE SEAS 69,79 (E. Gullion ed. 1968); Henkin, *The Outer Limit to the Continental Shelf: A Reply to Mr. Finlay*, 64 AM. J. INT'L. L. 62 (1970); B. OXMAN, THE PREPARATION OF ARTICLE 1 OF THE CONVENTION ON THE CONTINENTAL SHELF 74 (1968). *See also*, A Discussion of the Legislative History and Possible Construction of the Convention on the Continental Shelf, U.N. Doc. A/AC.135/19 (1968).

For additional material, see Henkin, *International Law and "The Interests": The Law of the Seabed*, 63 AM. J. INT'L. L. 504 (1970); *The United Nations and the Oceans—Current Issues of the Law of the Sea*, in TWENTY-THIRD REPORT OF THE COMMISSION TO STUDY THE ORGANIZATION OF PEACE 13 (1973).

18. S. ODA, INTERNATIONAL CONTROL OF SEA RESOURCES 167 (1963).

1958 Convention on the Continental Shelf meant to vitiate the Convention on the High Seas by eliminating the latter's subject matter. This is surely a political as well as ethical absurdity which could not have been intended by the inopportune legal phrase: "limits of exploitability."

Somewhat less easily dismissed is the argument that the Geneva Convention's exploitability test meant to open up to national jurisdiction the subsoil and seabed of the shelf's slope and rise, to the end of the continental margin.[19] A reading of the Convention, however, reveals no reason to depart from the literal meaning of its words: "shelf" means "shelf." In the view of one eminent authority, the intention behind the "limits of exploitability" criterion was not to expose vast additional seabed areas to conquest by national technology followed by national jurisdiction, but only "to admit of sovereign rights in marginal areas beyond the 200 meter isobath, in areas which are not strictly continental shelf but rather depressions, and in areas intersected by crevasses. . . ."[20] In other words, the "limits of exploitability" test was meant to take care of local variances, to allow for instances where the flat shelf was interrupted by incidental breaks, or where the sharp drop which is the "slope" occurs, exceptionally, at a depth slightly more than the usual 200 meters.

Accepting that "shelf" means "shelf," or, with a few exceptions, submerged areas to a depth no greater than 200 meters, it follows that most coastal states would acquire very substantial additional areas of jurisdiction if the international community were to permit the establishment of 200-mile economic zones.[21] Using the 200-meter depth criterion, the average width of the continental shelf is between 30 and 44 nautical miles,[22] although a few states, including the U.S. (off Maine) and Canada (off Newfoundland), have continental shelves extending, in places, even beyond 200 miles.[23] If such an agreement materializes, this additional area ought not to be parceled out without application of equitable economic principles of benefit distribution. Anything less would constitute an encroachment on the

19. Krueger, *supra* note 17, at 473, 475.

20. D. O'CONNELL, INTERNATIONAL LAW 410 (2d ed. 1970).

21. *See* OFFICE OF THE GEOGRAPHER, *supra* note 3. Also, an untitled, multi-colored map prepared by the Office of the Geographer, Dept. of State, illustrates this point. The map's index table is headed "Boundaries separate seabed areas of sharply contrasting topographic gradients." The ocean areas are divided into four differently colored areas designating: shoreline to 200 meter isobath, continental platform greater than 200 meters (with slopes steeper than 1:40), continental rise area beyond 200 nautical miles, territorial seas claims.

22. For a listing of sources, *see* ANDRASSY, *supra* note 17, at 9 n.15. *See also* A. SLOUKA, INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF 41-42 (1968).

23. *See* OFFICE OF THE GEOGRAPHER, *supra* note 3.

res communis[24] without adequate provision to compensate those whose share in the *res communis* is concommitantly reduced.[25]

The stakes in these negotiations are high. Beyond the 200-meter limit lie extensive deposits of petroleum.[26] The immensity of the seabed's hydrocarbon reserve, its relatively minor development at

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24. W. FRIEDMANN, THE FUTURE OF THE OCEANS 14-16 (1971); E. JONES, LAW OF THE SEA—OCEANIC RESOURCES 64 (1972). As Prof. Jones commented at 64:

> "Thus, the unilateral claims of certain nations extending the breadth of the territorial sea constitute a process of encroachment upon the internationally sanctioned doctrine of *res communis* which endangers the future status of the freedom of the seas."

25. This concept of compensation has been raised in discussions of the 200 mile economic zone. As Georges Wehry, of the Netherlands Mission to the U.N. stated:

> "If the zones grow and eventually become accepted as inevitable in the way they are put forward by a number of farthest reaching states, this would inevitably lead to demands, which one can hear clearer and clearer from day to day in these handicapped countries, for compensation—compensation, of course, not only in the international area, as this international area, if the 200-mile zone were accepted, would in fact yield no substantial benefits for many decades or even centuries; so this demand for compensation would mean a demand for compensation also regarding benefits derived from within the areas of national jurisdiction. And there will be no escaping from that demand." Wehry, *Concepts in Sharing of Common Heritage Wealth*, PROCEEDINGS OF THE SEVENTH ANNUAL LAW OF THE SEA INSTITUTE AT UNIVERSITY OF RHODE ISLAND 88 (L. Alexander ed. 1972).

26. Almost all of the petroleum lies on the landward side of the continental margin, but at least 32% is deposited seaward of the 200-meter line. The calculations given below may be proven too modest by the vigorous current explorations.

	Landward	Seaward
40 Nautical Mile Limit	59% of total ultimate reserves— 90% of proved reserves	41% of total ultimate reserves, including 20 billion barrels already discovered
200 Meter Isobath Limit	68% of total ultimate resources including 167.5 billion barrels proved (almost all reserves discovered to date)	32% of total ultimate resources, including some reserves discovered to date, near term prospects on outer shelf and upper slope
200 Nautical Mile Limit	87% of total ultimate resources including *all* of proved reserves and most immediate prospects	13% of total ultimate resource, long term prospect in continental rise
3000 Meter Isobath Limit	93% of total ultimate resource, including all proved reserves and immediate prospects	7% of total ultimate resources, some long-term prospects in continental rise and deeper parts of small ocean basins

present, and the potential shortages and high prices of petroleum from land-based sources have heightened interest in these ocean-based resources. The off-shore hydrocarbon resource is estimated at approximately 2272 billion barrels.[27] Current world production is approximately 50-60 million barrels/day, or 20 billion barrels/year.[28] Current exploration of both the continental margin and the deep seabed has also shown that many minerals, such as manganese, nickel, copper, and cobalt are found in concentrated degrees in nodules lying on the deep seabed at depths of 3,000 meters isobath or more, although there is little evidence of the existence of such nodules on the continental shelf, slope, or rise.[29]

These, then, are the very substantial stakes. Already in the past two decades, first unilaterally, through the Truman Proclamation on the Continental Shelf[30] and, subsequently, through the 1958 Convention, the international community has surrendered to national jurisdiction those areas between the traditional 3-mile limit and the 200-meter isobath boundary. In this area are contained the greatest known mineral and petroleum resources of the seabed and subsoil. Will the international community now agree to a further give-away of most of the earth's remaining non-renewable resources currently still in the *res communis*? Or will the opportunity for a general reordering be used to establish a more soundly equitable system in which coastal states are allowed to exercise the jurisdictional control made

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Source: *Economic Significance, in terms of Sea-Bed Mineral Resources, of Various Limits Proposed for National Jurisdiction*, REPORT OF THE SECRETARY-GENERAL TO THE COMMISSION ON THE PEACEFUL USES OF THE SEABED AND THE OCEAN FLOOR BEYOND THE LIMITS OF NATIONAL JURISDICTION, U.N. Doc. A/AC.138/87 (1973).

Hydrocarbons are generally thought to be most prevalent on the shelf and upper slope, with lesser quantities on the lower slope and continental rise. Almost no deposits are thought to occur on the abyssal plains, ranging in depth from 5,000 to 7,000 meters. The deep-sea trenches may contain deposits, although at such depths that recovery is almost an impossibility. Favorable geographic conditions, including the deposition of sediments and reservoir rocks and possible structural and stratigraphic traps, are also essential to the accumulation of hydrocarbon deposits. *Id.* at 12-13.

Whereas, the manganese nodules occur relatively widely on the sea-bed, most deposits occur below deep water and at substantial distances from the continents, where sedimentation rates are very low. *Id.* at 18.

See JONES, *supra* note 24, at 70-71 (1972).

27. *Economic Significance*, *supra* note 6, Table 1 at 14.

28. These are approximate figures based upon past production and predicted increases in production. *Id.* at 9; ROYAL DUTCH/SHELL GROUP OF COMPANIES, INFORMATION HANDBOOK 1973-74 60 (1973).

29. *Economic Significance*, *supra* note 6, at 18-20; JONES, *supra* note 24, at 70. Some nodules have been found in shallow water, although these deposits are not considered of mineable quality or quantity. *Economic Significance*, *supra* note 6, at 20.

30. Friedmann, *The Law of the Sea: Past, Present and Future*, in THE FATE OF THE OCEANS 101 (J. Logue ed. 1972). For a text of the Proclamation, see Proclamation No. 2667, 3 C.F.R. 67 (1945-1948 Comp.).

inevitable by geography, but as trustees for mankind rather than as windfall exploiters?

Proposals that seek to operationalize the equitable option all turn on a regional or international system of sharing, and envision an allocation either of actual operating rights or of revenues derived from operations. All proposals distinguish between application of equitable sharing in (1) a limited area seaward of the existing limits of national jurisdiction, and (2) the rest of the high seas. In the latter area, all jurisdiction would vest in an international authority and all revenues earned would be subject to redistribution in accordance with an equitable formula based on need. In the former, either jurisdiction and the right to mine would be shared between the coastal state and a regional or international authority, or else the revenues realized by the coastal states from operations in the area would be shared.

III. CALCULATING THE FISCAL BASIS FOR AN EQUITABLE REGIME

Revenue sharing, rather than a division of jurisdiction and multiplicity of operating authorities, has the advantage of simplicity and acceptability to coastal states. In practice, there are a number of bases for calculating the share of revenues derived from the area to be allocated to the regional or international authority:

(1) a quantum tax. In the case of oil, such a tax would be based on a percentage of value per barrel as set by international agreement.[31] Gas would be assessed at 6,000 cubic feet per barrel equivalent.

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31. One problem would be to ascertain the "internationally agreed price" for the products. This could be accomplished by an agreed upon panel of economic experts setting a uniform price level for crude petroleum products on a world market, and then setting a percentage tax. However, due to the energy crisis and the revised price schedules of Canada and the OPEC countries, the price of crude oil and natural gas has rapidly increased since early 1973. As an example of this increase, note the following tables entered into the Congressional Record by Senator Chiles (D. Fla.):

Table 1—*Canadian Oil Prices in Chicago*—Alberta Crude (Pembina)

Date	Wellhead Price	Transport Cost	Export Tax	Total
1/1/73	2.96	0.45	0	3.41
9/1/73	3.81	0.45	.40	4.66
12/1/73	3.81	0.45	1.90	6.16
1/1/74	3.81	0.45	2.20	6.46
1/11/74	3.81	0.45	6.40	10.66

Table 2—*Venezuelan and Arab Oil Prices* [per barrel]

Date	Venezuelan crude, 35 gravity	Arab light crude, 34 gravity
8/31/70	2.34	1.80
1/1/73	4.63	3.07
12/1/73	8.00	11.65

Source: 120 CONG. REC. S592 (daily ed. Jan. 29, 1974).

(2) a percentage tax on the gross revenue derived from the mineral extracted. This would be more difficult to administer than the first method and would be subject to manipulable market variables reflecting time and place of extraction.[32]

(3) a percentage tax on all royalties, taxes, bonuses, leasing fees, etc., derived by the adjacent coastal state from the extracted minerals. This would be simple in theory, but would, in practice, prove the least equitable.[33] Developing nations depend on the taxation of hydrocarbon and other mineral production for a significant portion of their income and themselves consume relatively little of what is produced. Developed nations tend to have alternative sources of taxation and, being the principal consumers of their own primary products, tend to impose relatively lighter taxes on their production, with more allowances and exemptions.

(4) a percentage tax on realized net profits from extraction. The advantage of this approach is that it does not, like a fixed gross production tax, penalize the less-profitable but economically impor-

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It appears that the recent posted prices will decrease due to consumer-nation pressure and increased output. TIME, April 22, 1974, at 49.

If one set a 10% tax rate on petroleum products sold beyond 12 miles and one billion barrels was produced, approximately $1.1 billion of revenue at $11/barrel would be produced. OPEC countries currently sell their production on a posted price system with most of these countries exacting a 55 percent tax. See ROYAL DUTCH/SHELL GROUP OF COMPANIES, INFORMATION HANDBOOK 1973-74, at 52 (1973).

32. For instance, a country may want to differentiate hydrocarbons and minerals extracted in its economic zone and used domestically and those exported by price differentials. Such a system could lead to coastal nation rivalry in bidding for exploitive concerns by raising or lowering its price to suit the companies' interests.

33. Through 1968, 5.8 billion dollars in such revenue had been collected by the U.S. Government on offshore oil. Address by R.D. McCurdy, *Economics of Oil and Gas Operations Offshore, U.S.A.*, Offshore Technology Conference, May, 1969.

A recent book, speaking in terms of U.S. revenue policy, stated:

> "Based on a price of $3.45 per barrel, each one million barrels per day of production will contribute a royalty of 210 million dollars annually to the federal treasury (Recent and anticipated increases in the price of crude will substantially increase this revenue)."

D. KASH, ENERGY UNDER THE OCEANS 222 (1973). For further discussion of these revenues, *see id.* at 228.

In explaining the now-shelved trusteeship proposal of President Nixon, John R. Stevenson indicated that the regime would exact its revenue from royalties, etc. As he stated:

> The trusteeship zone would extend from the 200 meter depth line to beyond the base of the continental slope. The President contemplated that the regime for exploration and exploitation would provide for the collection of substantial mineral royalties to be used for international community purposes, particularly economic assistance to developing countries. Stevenson, *The United States Proposal for Legal Regulation of Seabed Mineral Exploitation Beyond National Jurisdiction*, 4 NAT. RES. LAW. 570, 576 (1971).

tant operations, those, for example, at greater sea depth where costs are much higher.[34] A profits tax would take these expenses into account in calculating the international levy. On the other hand, "profitability" is a notoriously flexible, manipulable term and difficult to enforce without armies of clerical examiners. Moreover, an international revenue-sharing system that does not tax "off the top" invites national governments to reduce the share available to the regional or international authority by increasing their own tax take.

It is safe to assume that, at least in the next decade, the bulk of revenues accruing to an international authority would derive from the area of shared revenue jurisdiction between the existing 200-meter isobath limit and the proposed new 200-mile (or continental margin) boundary, rather than from the further areas that would be wholly within the jurisdiction of the international authority. Nevertheless, it is important that any new international regime for the high seas establish itself both in the areas of mixed (inner) and of absolute (outer) international jurisdiction. Given the world's insatiable need for resources and the speed of technological innovation, this may well be the last opportunity to transfer to direct, effective international administration those outer areas of the seabed and subsoil beyond the 200-mile limit.

Equitable principles should apply not merely to the question of jurisdiction and to the collection of revenues from deep sea mining operations, but also to the income redistributive mechanism and the internal structure of the international authority to which these revenues accrue. An equitable revenue redistribution mechanism is one which recognizes that the poor should get a larger share than the rich. One functional basis would be the formula used by the U.N. in assessing members' dues. Such a "capacity to pay" evaluation would take into account the G.N.P. of each participating state, its population, per capita income, and any recent national disasters affecting economic viability.[35] An inversion of this formula, so that the capacity

34. As the U.N. Secretary General's *Economic Significance Report* stated:

> "The costs of exploitation increase at an exceedingly rapid rate with increasing water depth; for example at 330 metres the cost will be at least four times higher than at 33 metres, where the cost is already twice that of an on-shore field of similar characteristics. Operations under 300 metres or more of water may be so costly that only giant fields will perhaps be profitably exploited. In some off-shore areas today, a 2000 to 4000 barrels a day well might be considered an uneconomic discovery. Distance from shore also influences the economic possibilities of developing off-shore fields, particularly in the case of natural gas, as there are no viable alternatives for transporting to shore installations other than by pipeline (footnotes omitted)." *Supra* note 6, at 17. *See* KASH, *supra* note 33, at 81-90.

35. 28 U.N. GAOR, Report of the Comm. on Contributions, Supp. 11, U.N. Doc. A/9011 (1973).

to pay became the quantum of need, would provide an equitable sliding scale for determining the proportion of the international fund to be distributed to each participant.

Another equitable formula is that currently employed by the U.N. Development Program.[36] This formula would allocate the revenue shares by targeting amounts that each country should receive on the basis of need and a professional assessment of its program of development. Instead of using an automatic sliding scale, this approach substitutes country-by-country analysis of development problems and focuses on the specific needs of each economy.

A third approach would establish an organic process of decision-making by an assembly of participating states. Such an assembly, as well as an international secretariat, would be needed not only for purposes of budgeting revenues, but also in order to administer the areas of the high seas which are the outward zone beyond the proposed 200-mile limit. In this area the international authority would be "sovereign" for purposes of licensing mining, or operating its own mining enterprise, as well as for making all laws applicable to the seabed and subsoil. (This leaves aside, as beyond the scope of this essay, other roles pertaining to pollution control, freedom of navigation, etc., to which such an Authority might be assigned.)

In addition, as the revenues generated by the operations of the Authority increase, it might absorb the burden of supplying, administering and assisting in the technical implementation of international assistance programs which are currently operated on a bilateral basis.[37] If, as seems well within the realm of present contemplation, the international Authority could expect to realize an annual redistributive pool equivalent to 10 billion dollars at present value, the entire bilateral aid program could be subsumed. While this money would—and should—continue to come out of the purses of the well-to-do and go into the world's emptier pockets, the resultant redistributive scheme would have important advantages over the present bilateral aid arrangements. In particular, the system would be less vulnerable to the donor state's internal political vagaries, since no legislative appropriations would be involved. A multilateral system would be less marred by the external political pressures a donor brings to bear on recipients. Most important, once a steady source of income is established to finance development projects, middle and long-range development planning could, at last, become an international reality.

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36. 17 U.N. D.P./26 (1973).

37. This would not be an AID program, but instead have no strings attached and be aimed simply at bringing out national expertise in certain skills and professions. *See* Pardo, *The Law of the Sea: The United Nations and Ocean Management*, PROCEEDINGS, *supra* note 25, at 26.

IV. ADVANTAGES AND POLITICS OF AN EQUITABLE SEA REGIME

There is much in this proposal to commend it to the government and people of the United States and, indeed, something akin to it remains an important ingredient in the U.S. proposals for the law of the sea.[38] Among the advantages are the following:

(1) it would avoid the potential conflict of a wide-open "race for ocean space";

(2) it would multilateralize the giving of aid, ensuring that other developed and rapidly developing states contributed their fair share alongside the United States, Canada and the Western Europeans;

(3) it would establish an international administration capable of forming the self-supporting, independent nucleus of an international regime to protect the freedom of the high seas beyond national jurisdiction.

Unfortunately, there are signs that the U.S. position in support of revenue sharing is being eroded by forces abroad, as well as in the executive branch, and in Congress.

Among the states that might be expected to benefit most from revenue sharing—the landlocked, other geographically disadvantaged, and even underdeveloped countries with substantial coastlines (all of which would expect to get back more than they contributed to an international authority) — there has been little inclination to embrace the American proposal. In part, this is precisely because it is the American proposal. However, this relucantce also reflects to a large extent, an understanding that the U.S. revenue-sharing proposal is linked with other less acceptable measures intended further to reduce the jurisdiction of coastal states in favor of international jurisdiction over pollution, navigation, and investment disputes. Divorced from these other considerations, the revenue-sharing proposal would probably enlist far wider support.

This is not to say that other U.S. proposals may not also be important and worth pursuing, from the American policy perspective. At least the proposal relating to free rights of passage through international waterways stands a relatively good chance of being supported by many other states on the basis of their own navigational self-interest. The revenue-sharing proposal, however, would benefit from being unencumbered by the freight of a "package deal." It

38. See Draft U.N. Convention, *supra* note 9. For additional material on the draft seabed treaty, see Knight, *The Draft United Nations Convention on the International Seabed Area: Background, Description and Some Preliminary Thoughts*, 8 SAN DIEGO L. REV. 259 (1971). For an account of events concerning U.S. policy since the proposal was submitted, see Hollick, *Seabeds Make Strange Politics*, 9 FOREIGN POLICY 148 (1972-73), and Hollick, *United States Oceans Politics*, 10 SAN DIEGO L. REV. 467 (1973).

stands on its own as beneficial, both in the narrower U.S. and broader international interest.

V. THE "UNILATERALIST" ALTERNATIVE

Although the President and the Departments of State and Defense continue to support an internationalist position, there is increasing evidence of a campaign by other federal executive departments—Treasury and Interior in particular—that favors a unilateral U.S. approach. A certain amount of support for this near-sighted effort is being engendered in the Congress. Even as the Caracas Conference gets underway, an equally significant battle appears to be shaping up within the U.S. Government between the "internationalists" and the "unilateralists."

This, of course, has been a battle of long duration. The United States began the modern era of international ocean's policy with a "unilateralist" quantum leap: the 1945 Truman Proclamation, which asserted exclusive U.S. sovereignty over the resources of the seabed of the contiguous continental shelf. In 1953, the U.S. incorporated this proclamation into domestic legislation. Neither the proclamation, nor the Submerged Lands Act[39] and the Outer Continental Shelf Lands Act,[40] specified the seaward limit of U.S. jurisdiction except to the extent that use of the term "continental shelf" implies a geographic limitation. Internally, as well as internationally, debate continues as to the exact location of those limits.[41] In any event, in 1958, the U.S. participated in the formulation of the Geneva Convention on the Continental Shelf and was an early signer.[42] Pleading the "limits of exploitability" provision of the 1958 Convention, the U.S. has continued to permit exploration in depths exceeding 200 meters.[43] Technological limitations, however, have until recently restricted actual mineral exploitation to well within the 200-meter isobath.

While the situation is rapidly changing, the U.S. is still committed to the maintenance of some international jurisdiction over the

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39. 43 U.S.C. §§ 1301-15 (1970).

40. *Id.* §§ 1331-43.

41. *See* text accompanying notes 12-24, *supra*.

42. The 1958 Convention on the Continental Shelf, U.N. Doc.A/Conf. 13/L.55 was signed on April 29, 1958 by a majority of the states attending the conference, including the United States. *U.N. Conference on the Law of the Sea*, 2 OFFICIAL RECORDS 57, U.N. Doc. A/Conf. 13/38. *See* note 13, *supra*.

43. In 1961 the Department of the Interior issued a lease for the recovery of phosphate deposits off the coast of Southern California despite the knowledge that one deposit was 40 miles seaward and in waters as deep as 4000 feet. Krueger, *supra* note 17, at 478 n. 135.

In 1967, Interior interpreted Sec. 4F of the OCS Lands Act to apply to the erection of artificial islands 120 miles off the coast of California. Waters as deep as 6000 feet separated the proposed sites from the mainland. *Id.* at 478-79 n. 136.

seabed beyond the 200-meter depth.[44] This U.S. policy was first expressed by President Nixon in 1970.[45] In that statement, and in draft treaty articles subsequently submitted to the United Nations Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, the U.S. proposed limiting national jurisdiction over resources to depths of no more than 200 meters.[46] Also certain areas beyond the 200 meter depth would be held by the coastal state as a trusteeship zone.[47] As noted, this proposal has disappointingly had little support. Although the appearance of international indifference is more tactical than real, and wide support for the proposal will undoubtedly surface in the hard bargaining at Caracas and beyond, the tactics of the developing states in seeming to prefer their own unilateralist solutions have strengthened the bargaining position of the unilateralists within the U.S. Government.

Thus, pressures for unilateral interim action are growing. The energy crisis has precipitated Project Independence, in which President Nixon has committed the U.S. to achieving domestically sufficient energy supplies by 1980.[48] In the U.S., those who wish to bring about a strong international regime may be forced to recognize the inevitability of some unilateral action. Efforts must, however, continue to make any such action consistent with the future international regime.

The U.S. Government is now considering several unilateral actions. The Deep Seabed Hard Mineral Resources Act (H.R. 9 and S. 1134)[49] would authorize the Secretary of the Interior to lease areas of the deep seabed (i.e., tracts of seabed admittedly in areas beyond the continental margin) to corporate developers. Those sponsoring this legislation hope to begin harvesting metal nuggets from the deep ocean floor. These nodules contain commercially exploitable manganese, copper, nickel, and cobalt. The United Nations Secretary General has estimated that a single nodule mining venture—and several are currently planned by U.S. and foreign companies[50]—could

44. Statement by Ambassador John R. Stevenson, chairman of the U.S. Delegation to the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, Plenary Sess., August 22, 1973, p. 3.

45. United States Oceans Policy, Statement by the President, 6 WKLY. COMP. PRES. DOCS. 677-78 (1970).

46. *See* note 9, *supra*.

47. *Id.* Art. 26-30.

48. "The Energy Emergency," Presidential Message to Congress, Nov. 8, 1973, 9 WKLY. COMP. PRES. DOCS. 1319, 1322 (1973).

49. *See generally Hearings on S. 1134 Before the Subcomm. on Minerals, Materials & Fuels of the Senate Comm. on Interior & Insular Affairs*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *Hearings on S. 1134*].

50. Deepsea Ventures, Inc./Tenneco, Inc., Hughes Tool Co., Kennecott Copper

supply 7.9 percent of the cobalt, 2 percent of the manganese, 1.3 percent of the nickel and .13 percent of the copper needed for global industry by 1980.[51]

While the Department of the Interior has stated that no legislation is in any way necessary to allow U.S. companies to conduct exploitation on the deep seabed,[52] the industry is anxious to secure governmental guarantees on the integrity of its investment. Such a guaranty program would come close to committing the United States to facilitating actions by U.S. firms that are incompatible with the international law the U.S. wants to see established and, arguably, even with existing international laws.

While nominally subservient to a future regime that might emerge from present international negotiations, the bill imposes an obligation on the U.S. to negotiate with other states for recognition of the "grandfather" rights granted under the Act, something the State Department knows it could not succeed in obtaining.[53] Section 10 (a) does make licenses issued under the proposed Act subject to a future international regime, but only if "such regime fully recognizes and protects the exclusive rights of each licensee to develop" its licensed area. This would be quite difficult to accomplish. Failing that, the legislation mandates full restitution to the participating corporations for lost investment in areas not internationally recognized to be open to unilateral U.S. development.[54] Obviously, the legislation, if passed, would place the U.S. hopelessly at cross-purposes with any conceivable international regime. (Another, even worse, pending piece of legislation would unilaterally extend United States exclusive fishing jurisdiction from the present 9 nautical miles beyond our 3-mile territorial sea to a 200-mile zone.[55])

Corp., Ocean Resources, Inc., International Nickel Co. (Canada), Sumitomo Group/MITI (Japan), AMR: Metallgesellschaft/Preussag/Salzgitter (West German), CNEXO-Societe Le Nickel (France). A. Rothstein & R. Kaufman, *The Approaching Maturity of Deep Ocean Mining—The Pace Quickens*, in *Hearings on S. 1134, supra* note 49, at 214.

51. Report of the Comm. on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 27 U.N. GAOR Supp. 21, at 125, U.N. Doc. A/8721 (1972) [hereinafter cited as *Report*].

52. Statement of Leigh Ratiner, Director, Office of Ocean Resources, Dept. of the Interior, *Hearing on Law of the Sea Before the Subcomm. on Oceans and Atmosphere of the Senate Comm. on Commerce*, 92d Cong., 2d Sess., at 24 (1972) [hereinafter cited as *Law of the Sea Hearing*].

53. Sec. 10, entitled "Investment Protection," subjects licenses issued thereunder to a future international seabed regime provided "that the United States fully reimburses the licensee for any loss of investment . . . ." The section further puts the U.S. government in the role of insuring (for an unspecified premium) the licensees against any loss due to (a) interference with the leased tract's development or (b) any unauthorized recovery of hard minerals.

54. *Hearings on S. Res. 82 Before the Senate Foreign Relations Comm.*, 93d Cong., 1st Sess., at 50 (1973).

55. S. 1988, 93d Cong., 1st Sess. (1973), referred to the Committee on Commerce.

Unilateral action by the U.S. will inevitably sink the prospects of a successful international regime's emerging from the international negotiations. Hearings on Senate Resolution 82,[56] which endorsed the objectives envisioned by President Nixon's ocean policy statement of May 23, 1970, were held on June 19, 1973.[57] The Department of State representative, referring specifically to H.R. 9 and S. 1988 stated that their passage "would have potentially disastrous effects on the possibility of achieving a success at the Law of the Sea Conference."[58] His reasoning was clear: "foreign countries that have been roundly criticized—and I feel justly so—by the United States for unilaterally extending their jurisdiction to the detriment, not only of the U.S. but of the international community generally, would believe and feel that the U.S. [in passing H.R. 9 or S. 1988] would be doing exactly that for which other countries have been criticized."[59]

Representative Donald Fraser, a Congressional participant in the United States delegation to the U.N., took part in floor debate over

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The Interim Fisheries Zone Extension and Management Act of 1973 (S. 1988) applies solely to anadromous species, e.g., salmon (Sec. 4(a)). It also strongly exhorts the Secretary of State to initiate and conclude international treaties to promote and conserve coastal fishing (Sec. 5). The Act shall "cease to be in effect on the date the Law of the Sea Treaty or Treaties now being developed regarding fisheries jurisdiction and conservation shall enter into force." (Sec. 10) The treaty language is, however, purely hortatory.

While 12 nations now claim 200-mile fishing zones (Argentina, Brazil, Chile, Costa Rica, Ecuador, El Salvador, Republic of Korea, Nicaragua, Panama, Peru, Sierra Leone, and Uruguay: International Boundary Study, *Limits in the Seas, National Claims to Maritime Jurisdiction*, Ser. A, Pub. No. 36 (1972) (with corrections to March, 1972) issued by the Geographer, U.S. Department of State, reprinted in *Law of the Sea Hearing*, *supra* note 52, at 71-72), the vast majority of coastal states do adhere to a 12-mile limit. *Id.* The present United States fisheries policy utilizes a species approach with preferential rights for the coastal states (see United States of America: Revised Draft Fisheries Article, U.N. Doc. A/AC.138/SC.11/L.9, reprinted in *Report*, *supra* note 51, at 175). S. 1988, in contrast, establishes an exclusive coastal state jurisdictional belt for anadromous species. It is hardly sound policy for the U.S. to espouse contradictory solutions to the fisheries problem. The distinction between preferential and exclusive coastal rights is significant. Under the latter, the U.S. long-distance fishing fleets (comprising 20 percent of the U.S. fishing industry) would be hampered by the almost certain retaliation by virtually every other coastal nation. In 1972 the fish and shellfish landed by U.S. fishing craft in international waters off foreign shores were valued at $155,723,000. The total U.S. catch was valued at $765,500,000. *Hearing on S. Res. 82 Before the Subcomm. on Oceans and Int'l. Environment of the Senate Foreign Relations Comm.*, 93d Cong., 1st Sess., at 29 (1973); [hereinafter *Hearings on S. Res. 82*].

56. S. Res. 82, 93d Cong., 1st Sess., adopted unanimously July 9, 1973, 119 CONG. REC. S 12810 (daily ed. July 9, 1973).

57. *Hearings on S. Res. 82, supra* note 55.

58. *Id.* at 23-24.

59. *Id.* at 24.

H.Res. 330,[60] the House counterpart of S. 82. On April 2, 1973, he asked:

> Well, the United States could unilaterally assert jurisdiction to 200 miles or to a 200-meter depth or to 1,000 or to 10,000 miles, but do we want to? We could make the assertion, but if we did it unilaterally, this would provide a source of conflict with other nations which would take the position that this is not an accepted international standard. We have criticized other nations for making unilateral claims to vast areas of the international ocean, and we have steadfastly refused to recognize such unilateral claims, believing such matters are properly a subject for international agreement in precisely the kind of forum which we have in the forthcoming law of the sea conference.[61]

The Administration continues to resist unilateral congressional action and, instead, has asked Congress to give U.S. negotiators until 1975 to work out an acceptable international ocean regime.[62] Nevertheless, congressional hearings have already been held on H.R. 9,[63] and the Administration is preparing its own version of a seabed mining act should treaty talks stall.[64]

More ominously, the Administration has begun its own program of unilateral encroachment on the seabed despite its opposition to H.R. 9 and S. 1988. On July 3, 1973, the Department of the Interior began issuing oil and gas leases for portions of the outer continental shelf up to a 600-meter depth, pursuant to the procedures and open-ended authority contained in the Outer Continental Shelf Lands Act. Accompanying the July 3rd announcement was a caveat which stated: "Nothing contained in this call for nominations or in the issuance of new leasing maps should be interpreted as being inconsistent with the President's Oceans Policy Statement of May 23, 1970, relating to offshore development beyond the 200 meter depth contour. Leases ultimately issued beyond 200 meters will be subject to the international regime to be agreed upon."[65] That caveat has been superseded by the Interior Department's recent unexplained—and unwarranted—conclusion that "it will not be necessary to insert any additional provisions in leases to be issued beyond the 200 meter isobath to comply with the President's Oceans Policy and to accomodate the international negotiations now in progress regard-

60. H.R. Res. 330, 93d Cong., 1st Sess., adopted by a vote of 303 yeas, 52 nays, 78 not voting, April 2, 1973, 119 CONG. REC. H 2310 (daily ed. April 2, 1973).

61. 119 CONG. REC. H 2312 (daily ed. April 2, 1973).

62. Letter from Charles N. Brower, Acting Legal Adviser and Acting Chairman, Inter-Agency Task Force on the Law of the Sea to Sen. Henry M. Jackson, Ch., Insular Affairs Subcomm. of the Senate Comm. on the Interior, March 1, 1973, in *Hearings on S. 1134, supra* note 49, at 15 [hereinafter cited as Letter from Brower to Jackson].

63. *Hearings on S. 1134, supra* note 49.

64. Letter from Brower to Jackson, *supra* note 62.

65. 38 FED. REG. 9839 (1973); 38 FED. REG. 17743 (1973); similar caveat in 38 FED. REG. 27307 (1973).

ing the law of the sea."[66] The Council on Environmental Quality has recently given qualified approval to deep-sea oil drilling on the outer continental shelf,[67] indirectly endorsing operations further out than 50 miles by stressing the relatively lower environmental risk of such far-out drilling to the shorelands.[68] Although estimates of the reserves of petroleum to be found on the U.S. outer shelf have fluctuated widely, even within the past year, there is little doubt that whatever there is will not much longer go untapped.

The analysis means that if the international community is to benefit from petroleum resources lying even as much as 300 miles off the U.S. Atlantic coast, on the outer continental shelf or slope, it will only be because Caracas or its successor meetings will have produced a generally acceptable package of agreements establishing an international regime and operationalizing a system of revenue sharing.

VI. HOLDING THE LINE AGAINST THE UNILATERALIST OPTION

As yet, the United States remains committed to a multilateral revenue-sharing plan for the windfall of scarce resources that lie beyond the present reach of national jurisdiction. Revenue sharing is the fourth of the five principles pertaining to coastal areas promulgated by the U.S. delegation at the Seabed Committee.[70] On August 10, 1972, the U.S. representative to this committee, noting his "conclusion from previous exploitation patterns that a significant portion of the total international revenues will come from the continental margin off the United States in early years,"[71] nevertheless stated that

> [w]e continue to believe that the equitable distribution of benefits from the seabeds can best be assured if treaty standards provide for sharing some of the revenues from continental margin minerals with the international community, particularly for the benefit of developing countries.[72]

The Draft Articles on the Coastal Seabed Economic Area submitted by the U.S. on July 18, 1973, provided in Article 2, sec. (3): "the coastal state shall make available in accordance with the provisions of Article ____, such share of revenues in respect of mineral resources exploitation from such part of the Coastal Seabed Eco-

66. 38 FED. REG. 30457 (1973).

67. N.Y. Times, March 23, 1974, at 1, col. 6.

68. *Id.* at col. 7.

69. Almost 50 billion barrels were reported in the autumn of 1973, but a revised estimate of less than half that amount was issued by the U.S. Geological Survey in the spring of 1974. *Id.*

70. The U.S. delegation to the Seabed Committee has repeatedly restated its position. See for example, Statement by Hon. John R. Stevenson to the U.N. Seabed Committee, Aug. 10, 1972, reprinted in *Law of the Sea Hearing*, *supra* note 52, at 53.

71. *Id.*

72. *Id.*

nomic Area as is specified in that Article."[73] The statement accompanying the Draft Articles noted that "[r]evenue sharing is, in our view, an important element in an overall comprehensive settlement of the law of the sea issues which . . . could have specific application to resolving the issue of the outer limit of coastal state resource jurisdiction."[74] Remarking that few nations had spoken in favor of revenue sharing, the U.S. delegation concluded that perhaps no real discussion of revenue sharing was possible until other nations "have some better idea of the role which revenue sharing will play in an overall political settlement,"[75] *i.e.*, until other countries recognize that revenue sharing by the U.S. is a *quid pro quo* for their accepting certain positions advocated by the United States. In addition to the suggested standards for coastal areas,[76] the U.S. seeks the protection of scientific research,[77] the conservation and protection of fish stocks,[78] and the freedom of transit through straits.[79] It is these additional caveats to the revenue-sharing proposal which have caused other states to fail to "rise to the bait."

Yet it is handsome bait. While the U.S. is on record as favoring the sharing of a substantial portion of the revenues it receives from exploitation in depths greater than 200 meters,[80] there may even be more to sweeten the pot. Washington has deliberately left open the possibility of sharing revenues from exploitation in the closer-in area between the outer limit of national sovereignty (probably now to be set at 12 miles) and the end of the 200-meter isobath.[81] The State Department's proposal seems to hint that even in this area, which the Continental Shelf Convention has already placed firmly in national

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73. United States of America: Draft Articles for a Chapter on the Rights and Duties of States in the Coastal Seabed Economic Area, U.N. Doc. A/AC.138/SC.II/L.35 (1973).

74. Statement by Hon. John R. Stevenson to Subcomm. II of the U.N. Seabed Committee, July 18, 1973.

75. *Id.*

76. *See* note 73 *supra*.

77. See the Draft Articles for a Chapter on Marine Scientific Research and the accompanying Statement by Ambassador McKernan, Alternative U.S. Rep. to the U.N. Seabed Comm., submitted to Subcomm. III on July 20, 1973.

78. *See* note 55 *supra*.

79. U.S. Draft Articles on the Breadth of the Territorial Sea, Straits and Fisheries, submitted to Subcomm. II of the U.N. Seabed Comm., U.N. Doc. A/AC.138/S.C.II/1.40 reprinted in Report of the Seabed Comm., 26 U.N. GAOR Supp. 21, U.N. Doc. A/8421 (1971).

80. Articles 5 and 29, U.S. Draft Convention, *supra* note 9.

81. Statement by Ambassador Stevenson, *supra* note 74, at 4. "[W]e recognize that allowance may have to be made for the fact that the Geneva Convention on the Continental Shelf already provides coastal States with the sovereign right to explore and exploit the resources of the shelf to the depth of 200 meters with a somewhat different, and in our view, less satisfactory, provision for the protection of other interests in, and uses of, the area than is provided in our draft articles. . . . Hence, there

hands for purposes of resource exploitation, at least some types of international jurisdiction and revenue sharing might be acceptable in the context of a comprehensive new agreement.

But such agreements are some time off, and are only likely to result from some loosening up of the U.S. "package." If revenue sharing, the application of equitable principles to the new territories beneath the sea being opened up by technology, is worth doing at all, then it is intrinsically valuable whether or not the final sea law agreement includes other objectives of U.S. policy. If the effect of revenue sharing is, at last, to place international development assistance on a sounder basis than the present system of "give-what-you-can" hat-passing, then that objective ought not to be lost by being encumbered with other, quite unrelated objectives that make it unacceptable to the very countries that are the potential beneficiaries of a sound system of sharing.

Meanwhile, however, the U.S. may soon lose the capability to negotiate for any system of equitable distribution of ocean exploitation because of the momentum of the unilateralists within the country and abroad. The best way to counter the unilateralists' thrust towards a "grab-what-you-can" system may be for the U.S. to take the initiative by instituting, unilaterally, an interim system of equitable benefit-sharing. The operation of this system should, of course, be limited to those areas which, by existing international law, are clearly within the jurisdiction of the United States or which are within the 200-mile economic "trusteeship" zone which has a preponderant measure of state support. Acting alone, the U.S. could establish the concept of revenue sharing by unilaterally creating a trust fund into which would be placed twenty percent of the assessed value of minerals generated by exploitation off the U.S. shores beyond the territorial sea. In other words, for each barrel of oil or cubic foot of gas extracted from the seabed beyond 12 miles from shore, a certain percentage of the value could be set aside in a government trust fund. To encourage exploration, the government could permit selective, temporary price differentials or tax credits.

The statute under which oil and gas leases are now issued for seabed beyond our territorial sea is the Outer Continental Shelf Lands Act of 1953.[82] This act can be amended to:

(1) create a trust fund to expire at the enactment of a suitable international regime or at the end of a specified renewal term, *e.g.*, 5 years.

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may be some states which will not wish to subject the area between 12 miles and 200 meters to a new legal regime, or they may object to the application, in that area of one or more of the international standards we propose—for example, revenue sharing. . . . We welcome active consultation with other delegations on this question."

82. *See* note 40 *supra*.

(2) direct the Secretary of the Interior to collect and place into such fund a specified portion of the gross revenues generated by exploitation of the seabed beyond 12 miles from shore.[83]
(3) direct the Secretary of the Treasury to allow the affected companies tax credit for those monies paid to the Secretary of the Interior under (2).

A proposed amendment to that effect is included below.[84]

It is perhaps instructive to compare our proposal with the sug-

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83. The four methods for determining the amount of tax due have been discussed previously, see text accompanying notes 31-34, *supra*. Although the U.S. could adopt any of the alternatives, the course best suited for eventual adoption by the international community is a percentage tax of a posted price per barrel.

84. Proposed Amendments:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. These amendments to the Outer Continental Shelf Lands Act may be cited as the International Equitable Sharing of Revenues Act.

Section 2. When used in this Act —

(a) The term 'Commercially extracting party' means any person licensed by the Secretary of the Interior to engage in the recovery of minerals on the outer continental shelf at a substantial rate of production (without regard to profit or loss) for the purpose of marketing or commercial use and does not include recovery for any other purpose such as sampling, experimenting in recovery methods, or testing equipment or plant for recovery or treatment of minerals.

(b) The term 'gross revenue' means all revenues actually received by a commercially extracting party in a fair market sale of the unimproved minerals recovered from the outer continental shelf or, if no such fair market sale occurs, the fair market value as determined by the Secretary of the Interior, of the unimproved minerals recovered from the outer continental shelf by the commercially extracting party.

(c) The term 'person' means any government or unit thereof and any juridical or natural person.

Section 3. There is hereby established in the U.S. Treasury an International Revenue Sharing Fund. The Secretary of the Interior shall collect from each commercially extracting party and deposit into this fund each year an amount equal to 20 per centum of the gross revenues of each commercially extracting party attributable to the recovery of minerals located on a portion of the outer continental shelf whose water depth does not exceed 200 meters. The Secretary of the Interior shall also collect from each commercially extracting party and deposit into this fund each year an amount equal to 35 per centum of the gross revenues of each commercially extracting party attributable to the recovery of minerals located on a portion of the continental shelf whose water depth does exceed 200 meters.

(b) These amendments shall apply to any lease heretofore issued under the Outer Continental Shelf Lands Act. The Secretary of the Interior shall ascertain the depth position of each lease issued heretofore under that Act and so notify each leaseholder. The Secretary of the Interior shall include notification of depth position in each lease issued hence-

gested escrow fund contained within H.R. 9.[85] This rather vague escrow fund, into which the U.S. Government would deposit an unstated percentage of the licensing and taxing revenues it receives

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forth under the Outer Continental Shelf Lands Act.

(c) From time to time the Secretary of the Treasury shall report in the Federal Register on the amount contained in the fund.

Section 4. The fund shall continue until the President of the United States affirms to the Secretary of the Treasury that the international community has reached general agreement on a regime for the oceans or until five years from the date of this enactment, whichever occurs earlier, provided, however, that this act may be extended by appropriate Congressional Act.

(b) If this fund terminates upon affirmation by the President of the United States that the international community has reached general agreement on a regime for the oceans, the monies in the fund shall be paid over by the Secretary of the Treasury to the international body charged with administering the international ocean regime or, if the President of the United States shall find that no such body exists, directly to those developing nations that Congress shall hereafter designate.

(c) If this fund terminates in the absence of an appropriate international regime after the passage of five years from the date of this enactment, the monies therein shall be treated by the Secretary of the Treasury as general revenues.

Section 5. The Secretary of the Treasury shall allow to each commercially extracting party an income tax credit in an amount equal to any monies collected by the Secretary of the Interior pursuant to Section 3 of this Act.

Section 6. Nothing contained in this Act shall be interpreted as an extension by the United States of jurisdiction over the continental shelf or the high seas."

For a useful precedent to this proposal, see the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624. An Alaskan Natives Fund is created, §1605, and, *inter alia*, a specific percentage of the gross value of the minerals thereafter produced or removed from certain lands is placed therein, §1608(b) and (c). The provisions for this Fund are not applicable to the Outer Continental Shelf (§1608 (i)).

85. H.R. 9, 93rd Cong., 1st Sess. §9 (1973) which provides:

ESCROW FUND

SEC. 9. A fund shall be established for assistance, as Congress may hereafter direct, to develop reciprocating States. The United States shall deposit in this fund each year an amount equivalent to-*per centum of all license fees collected during that year by the United States pursuant to section 5(a) and an amount equivalent to-*per centum of all income tax revenues derived by the United States which are directly attributable to recovery of hard minerals from the deep seabed pursuant to licenses issued under this Act: Provided, That the amount deposited by the United States per license issued and per unrelinquished square kilometer under license shall not exceed the amount contributed for assistance to developing reciprocating States by other licensing reciprocating States (except developing States) per license issued by them and per unrelinquished square kilometer licensed by them. For the purposes of this section, "developing reciprocating State" means a reciprocating State designated by the President, taking into consideration per capita gross national product and other appropriate criteria.

*An appropriate amount to be determined by the Congress.

from deep seabed exploitation, is meant to aid developing reciprocating states. This bow toward revenue sharing has been dismissed as "lip service."[86] A percentage of the licensing fee (a mere $5,000 for a block of 40,000 square surface kilometers[87]) would have to be quite large to be at all significant. There is provision for sharing with an international fund an unstated percentage of a tax on revenue "directly attributable to recovery of hard minerals from the deep seabed . . . under this Act."[88] But the escrow fund contributions cannot exceed the rate of contributions of other reciprocating developed states,[89] a "reciprocation" not currently contemplated by any nation in the world. Most importantly, this fund is mere window-dressing for what has already, above, been analyzed as an essentially undesirable unilateralist legislative scheme.[90]

Our proposal carries no such additional baggage. An amendment to the OCS Lands Act would affect operations on the continental shelf where the vast bulk of mineral wealth lies—not, as does H.R. 9, on the deep seabed. Furthermore, the suggested amendments are in no sense an assertion of additional jurisdiction by the U.S.

In sum: the United States' effort to preserve an equitable international co-jurisdiction over coastal waters beyond the 12-mile territorial sea is a laudable one. Actions aimed at preventing unilateral extensions of U.S. jurisdiction that will frustrate that policy must be continued. However, current energy demands ensure that the U.S. will continue to conduct oil and gas exploitation at greater and greater depths. The likelihood of the international community's viewing such exploitation as consistent with a future international regime is significantly greater if measures are taken now to allocate a portion of the revenues generated to a trust fund whose monies will eventually go to such a regime.

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86. Knight, *The Deep Seabed Hard Mineral Resources Act—A Negative View*, 10 SAN DIEGO L. REV. 446 (1973).

87. *Supra* note 85, at Sec. 5 (a).

88. *Id.* at Sec. 9.

89. Sec. 2(i) of the Act provides: " 'reciprocating state' means any foreign state designated by the President as a state having legislation or state practice or agreements with the United States which establish an interim policy and practice comparable to that of the United States under this Act." *Id.*

90. *See* text accompanying notes 52-55, *supra*.

PEREMPTORY NORMS OF INTERNATIONAL LAW: THEIR SOURCE, FUNCTION AND FUTURE

N.G. ONUF* AND RICHARD K. BIRNEY**

Peremptory norms of international law (jus cogens) have been the subject of much recent interest.[1] In light of their extensive and quite unprecedented treatment by the International Law Commission and the Vienna Conference on the Law of Treaties,[2] it may be surprising that attention has not been greater.[3] At the same time, inquiry into the relationship between peremptory norms and the sources and functions of international law has been virtually nonexistent.[4] This is indeed surprising, given the recent substantial interest in these areas as part of a larger "theoretical explosion" in international legal studies.[5]

In the following pages, we propose to examine the conceptual ramifications of the simple question, what is the source of peremptory norms? Further, we propose to use this conceptual examination to shed some light on certain profound but only dimly perceived trends that are presently at work in the international legal order. We do not intend to undertake a systematic examination of purported peremptory norms. Such an exercise is more properly the reserve of publicists who wish to gain credence for their personal visions of the natural order.[6] Instead, our interest is focused on peremptory norms as a

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1. V. Paul regards it as "one of the most discussed and controversial questions in the theory of international law today." Paul, *The Legal Consequences of Conflict between a Treaty and an Imperative Norm of General International Law (jus cogens)*, 22 OSTERREICHISCHE ZEITSCHRIFT FUR OFFENTLICHES RECHT 19 (1971).

2. For an exhaustive set of citations on the relevant deliberations of the International Law Commission and the Vienna Conference, see S. ROSENNE, THE LAW OF TREATIES, A LEGISLATIVE HISTORY OF THE VIENNA CONVENTION 290-93 (1970).

3. Paul's research uncovered approximately a dozen articles on the subject during the last decade. Paul, *supra* note 1, at 22-23, n.13-15. The relative lack of attention is revealed in the failure of a recent major treatise, A MANUAL OF PUBLIC INTERNATIONAL LAW (M. Sorensen ed. 1968), even to mention peremptory norms.

4. The principal exception seems to be Virally, *Reflexions sur le "jus cogens,"* 12 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 19-29 (1966).

5. A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW xii (1971). We share Professor D'Amato's view that "the underlying theory and structure of international law has been given unprecedented attention during the last three or four years." *Id.*

6. A good example is Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55 (1966).

category of norms with an identifiable source and a distinctive function to perform in the international legal order of today's world.

I

Precisely why the source and function of peremptory norms have gained so little attention is a matter that deserves consideration. The idea that some norms are "higher" than other norms in the international legal order has enjoyed a considerable revival in recent decades. Many writers believe that peremptory norms are the concrete form taken by higher law. As a matter of definition, peremptory norms are those which cannot be changed except by norms of a comparable status. All other norms can be changed by subsequent treaty or customary practice. The difference is such as to encourage the inference that peremptory norms have their origin in a higher natural order and that our knowledge of them is received directly. The law-making procedures of the community would simply be one available means for articulating and formalizing norms whose existence is independent of and antecedent to the perception of their existence.

Given the inherent nature of peremptory norms, their status would not be affected by imperfect adherence to established law-making procedures while they are being articulated. Their emanation from such forums as the U.N. General Assembly does not circumvent existing sources of international law or suggest the emergence of a new source. It merely indicates that the General Assembly is one likely place for the collective awareness of such norms to be concretized. Even if there is significant resistance in some quarters to the particular formulation adopted by the community as a whole, such that the emergence of an ordinary rule of law would be prevented, we would assume that either the formulation itself is defective or the capacity of some participants in the legal order to see the higher quality of such norms is blocked by narrow prejudice. The peremptory norm is not actually prevented from existing because of that resistance. This line of reasoning would see any concern for the formal source of peremptory norms as falsely conceived in its reference to the sources of ordinary positive norms, and any concern for their material source as properly a matter of metaphysical rather than legal inquiry.

As in most metaphysical matters, it is impossible to prove that peremptory norms are not the substance of higher law. The inclination to view them in this manner is understandable in view of recent history and certainly helps to explain the fascination that the concept of peremptory norms holds for some scholars. Conversely, it is no easier to demonstrate that peremptory norms are superior because they are part of the natural order. However, even in the strictly positivist view, there is nothing in the logic of law or the structure of legal

orders to prevent some norms from being given a superior status.[7] On the contrary, this is one frequent configuration in a structurally differentiated legal order. Differentiation is an inevitable accompaniment to social complexity. It means that norms are divided into groups that are distinguishable in terms of some attribute, such as source, scope, conditions of bindingness and validity or, most notably, function.[8] Structures differentiated by function promote, but by no means guarantee, improved performance of functions.

Although the identification of peremptory norms of international law as a distinctive category indicates a differentiated legal order, one is not forced to conclude on this basis alone that peremptory norms are superior to ordinary rules. Actually, their differentiated, putatively superior status is not demonstrable by reference to level of compliance or other empirical criteria. Their status must be inferred from the stipulation that peremptory norms are not subject to derogation by ordinary norms. This could be a way of classifying peremptory norms as superior to other norms, but it could also mean that peremptory norms are simply unrelated to other norms. In fact, their status and substance are in no way dependent on changes in the substance of ordinary rules because they are doing something in the legal order upon which ordinary rules have little bearing.

On inspection, then, what appears to be a hierarchically arranged legal order could be something quite different, i.e., a legal order in which different kinds of law seem to be of differing importance because of the functions they perform. Although individual peremptory norms seem to have a *content* intrinsically more important than ordinary rules, it may actually be that they perform a *function* more vital to the workings of the legal order than do the overriding number of individual norms not designated as peremptory. If peremptory norms have nothing to do with ordinary rules in terms of their operation and yet seem to be superior because of their function, this is not to say that either kind is more *legal* in character than the other. Both kinds of norms are equally legal because they arise from a legally designated source of international law and are stated as law, no matter what function they perform in the legal order.

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7. Indeed, H. Kelsen has argued the logical necessity of a hierarchical arrangement of positive norms in the international legal order. H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 408-38 (1952).

8. According to one authority, "[i]ntragroup differentiation represents a division of the group into subgroups that perform different functions in the group without being superior or inferior to each other. When such subgroups become ranked, as 'superior' and 'inferior' then intragroup differentiation becomes intragroup stratification." Sorokim, *Social Differentiation*, 14 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 406 (1968).

Norms in the international legal order can be arranged in different categories to serve different purposes if nation-states, as the major participants in the order, choose to have it that way. Peremptory norms are one category intended to be set apart from the bulk of norms making up the legal order. Furthermore, since nation-states can and do decide what the law shall be, the creation of peremptory norms is subject to the same rules of lawmaking as any valid norm. Finally, the process of acquiring legal status is identical to the process of acquiring a peremptory nature. The two processes may take place independently, as in cases where long-standing norms become peremptory at a later date, but they operate in the same way. This means simply that they operate in conformity with the requirements of one of the several modes in which the international community creates its norms. In short, peremptory norms, whether in becoming norms or in becoming peremptory or both, must be considered in terms of the sources of international law.

II

For our purposes the most salient feature of peremptory norms is their *general* nature. Their status as general international law is not a logical necessity so much as a compelling psychological association of normative superiority with universality.[9] What is decisive is the fact that the Vienna Convention on the Law of Treaties as well as the literature treats peremptory norms as general in character. In the language of Article 53 of the Vienna Convention:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of international law is a norm accepted and recognized by the community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[10]

One of the stock assertions of international law texts is that general international law has its source in custom, whereas conven-

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9. It is frequently argued (e.g., by Virally, *supra* note 4, at 13-17) that peremptory norms must be general because only the international community as a whole can create norms that are inalterable in the eyes of community members when they are not acting as a whole. Without altering the logic, the metaphor "international community" works to reinforce the psychological association.

A further argument, exemplified by Verdross, *supra* note 6, is to associate peremptory norms with the notion of a public order of the international community. We regard this municipal law analogy as inviting unnecessary criticism of the concept of peremptory norms by treating the international legal order as more advanced than it is. This was the nature of G. Schwarzenberger's famous attack on peremptory norms, cited and summarized in Verdross.

10. Convention on the Law of Treaties, *done* May 22, 1969, conveniently found in 8 INT'L LEGAL MATERIALS 698 (1969).

tions yield particular international law, that is, law whose binding effect is restricted to the parties. Of course, a convention with a great many parties may well be regarded as expressing rules of general international law, but what has happened is that the terms of the convention are co-extensive with customary law. Such law may have already existed, with the convention merely a declaratory expression of it, or it may have arisen in response to wide adherence to the convention and a community-wide appreciation of its salience in the relations of all states.[11]

It should also be noted that the source identified in the Statute of the International Court of Justice as "general principles of law recognized by civilized nations"[12] would by definition yield rules of general international law. Without entering into the perennial doctrinal disputes over general principles as a source of international law, we might observe that there are very few specific norms actually attributable to this source and those few seem generally to be *procedural* guidelines for international tribunals.[13] As such, it is unlikely that they would be viewed as having a peremptory character. Insofar as norms relating to the *substance* of interstate relations may be identified with general principles of law, the operative source is likely to be custom, doubtless structured by community responsiveness to the relevant general principles. Certainly in the instance of peremptory norms customary factors will have been brought to bear in their formation.

One might conclude, then, that peremptory norms are necessarily customary in character. The fact that those actual norms commonly asserted to be peremptory typically find their definitive formulation in the provisions of such conventions as the United Nations Charter does not mean that those provisions are themselves peremptory. It means only that there exist identical customary norms that are peremptory. The moment at which such norms come into existence or acquire full cogency is not something that can be determined by reference either to the convention or the manner of its conclusion. Thus when we are told that "a new norm of the character of *jus cogens* may appear in the form of a treaty or custom,"[14] we would be inclined to regard this as a convenient shorthand description of a more subtle process in which the terms of a convention can codify norms that have

11. The relation of conventions to customary law formation is thoroughly presented in Baxter, *Treaties and Custom*, 129 HAGUE ACADEMY RECUEIL DES COURS 31-104 (1970); and D'AMATO, *supra* note 5, at 103-66.

12. I.C.J. STAT. art. 38.

13. A typical treatment is Virally's in A MANUAL OF PUBLIC INTERNATIONAL LAW, *supra* note 3, at 143-48.

14. Paul, *supra* note 1, at 42.

already acquired a peremptory nature or are in the process of doing so. The process of codification, by focusing community attention on the importance of the norms in question, may be empirically related to the process of acquiring cogency, but the two are analytically separable.

The principal difficulty with this position arises in connection with the concluding words of Article 53: ". . . a peremptory norm . . . can be modified only by a subsequent norm having the same character." This entirely reasonable proposition indicates that peremptory norms are subject to alteration only through the emergence of new norms with the same overriding character but a different content.[15] Yet in the instance of norms that emerge by way of custom, such a development is hardly conceivable. In order for any established peremptory norm ever to be changed through subsequent contrary practice, there would have to be a full display of cogency in what is only a nascent, just discernible normative pattern. Without manifest cogency, legal effect would be denied as a matter of course. If, nonetheless, the normative pattern persisted and gathered cogency over time, it would have to be admitted that the prior norm was not peremptory after all but merely mistaken as such. As one writer put it: "to change a valid norm of *jus cogens* by means of a custom seems to be impossible in most cases, as any act, contrary to *jus cogens*, would be incompatible with it and unlawfull [sic]."[16]

On the few occasions in which anyone has addressed this problem, the proffered solution is simple enough. The International Law Commission, in its commentary on the draft articles on the law of treaties, noted that ". . . a modification of a rule of *jus cogens* would today most probably be effected through a general multilateral treaty . . ."[17] Similarly, Paul observed that changing a peremptory norm "seems to be possible only by a subsequent treaty."[18] This is, however, a bogus solution, since conventions do not create peremptory norms in their own right. If we accept the usual understanding of the term, "general international law," this conclusion is inescapable.

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15. One writer, S.A. Riesenfeld, would disagree. "Certainly a peremptory norm might be subject to replacement by a non-peremptory norm. The rule accomplishing this change in status would itself be non-peremptory. The essential question is, how widespread the international acceptance of such a *capitis diminutio* would have to be." Editorial Comment, *Jus Dispositivum and Jus Cogens in International Law: In Light of the Recent Decision of the German Supreme Constitutional Court*, 60 AM. J. INT'L L. 511, 514 (1966).

16. Paul, *supra* note 1, at 43.

17. Report of the International Law Commission on the Second Part of its Seventeenth Session, January 3-28, 1966, and on its Eighteenth Session, May 4-July 19, 1966, reprinted in 61 AM. J. INT'L L. 411 (1967).

18. Paul, *supra* note 1, at 42.

This line of reasoning, with its logically unacceptable outcome, should cause us to re-examine the initial premise that custom alone can yield norms of general international law. There has in fact been a minor flurry of discussion on this very issue, revolving around the apparent fact that at least some provisions of some multilateral conventions become general norms very rapidly, even "instantaneously," or indeed may be general norms from the outset.[19] Calling such norms customary, as is usually done, distorts the concept of custom almost beyond recognition. Alternatively, one of the present writers has argued the conceptual utility of viewing these norms as products of a new and distinctive source of international law.[20]

The putative new source is identified with certain outcomes of community-wide forums like the U.N. General Assembly and ad hoc international conferences called to conclude multilateral conventions. When these outcomes—whether resolutions or convention provisions—are set apart from other outcomes of the same forum by being formal in language, distinctively labeled or not susceptible to reservation, and when they are overwhelmingly supported, they reflect an intent of the participants to create direct and immediate obligations for all members of the community. At a more abstract level, we are suggesting that an increasingly complex and institutionalized international system has, or will soon have, both the need and the means for a more nearly legislative form of law-making than presently exists.

Two things prevent this new source from becoming a reality: (1) the resistance displayed by Western statesmen, who see it as a threat to their historic control over international law, and (2) its concomitant lack of expression in a legal vehicle, which would establish its formal validity.[21] Western acquiescence would surely result in

19. Much of this discussion is occasioned by the 1969 judgment and other opinions of the International Court of Justice in the North Sea Continental Shelf Cases, conveniently found in 8 INT'L LEGAL MATERIALS 340-433 (1969). In addition to the several opinions in that case, see Baxter, *supra* note 11, at 57-74; D'AMATO, *supra* note 5, at 103-12; D'Amato, *Manifest Intent and the Generation by Treaty of Customary Rules of International Law*, 64 AM. J. INT'L L. 892 (1970); Notes & Comments, *Further Thoughts on a New Source of International Law; Professor D'Amato's "Manifest Intent,"* 65 AM. J. INT'L L. 774 (1971).

20. Notes & Comments, *supra* note 19, at 776-778.

21. Notes & Comments, *Professor Falk on the Quasi-Legislative Competence of the General Assembly*, 64 AM. J. INT'L L. 349, 349-55 (1970); D'Amato, *On Consensus*, 8 CANADIAN YEARBOOK INT'L L. 104 (1970). *See also* Goldie, *The North Sea Continental Shelf Cases—A Ray of Hope for the International Court?*, 16 N.Y.L. F. 327, 344 (1970) for a critique of the concern for formal validity, as displayed in this essay, and a brilliant characterization of processes that exceed in density and self-consciousness the processes whereby practice consolidates into customary law. To Goldie, they yield a

rapid validation of the new source through expression in a rule arising from an existing source. Continued resistance of the West makes validation highly unlikely in the short run, since the embodiment of a new source in general law implies a supportive consensus that includes all major groups of states. Nonetheless, pressure for legal expression can build up gradually, with the point being conceded piecemeal by states unwilling to accept it outright. This has always been the way customary law emerges in situations of mixed or inconsistent practice and, barring a major change of heart in the West, must be the specific method by which a rule providing for the formal validity of a new source will arise. It should be emphasized, however, that it is a process involving a lengthy, if indeterminate, passage of time.

There are scattered signs of the first tentative movement toward legal expression of such a new source. Simply in their perception of it, certain publicists are contributing to that movement. More importantly, at the public level the International Court of Justice in its 1969 Judgment on the *North Sea Continental Shelf Cases* gave some support, however ambiguous, to the idea.[22] Some of the dissenting opinions in those cases did so less ambiguously.[23] Further, the formulation of Article 53 of the Vienna Convention on the Law of Treaties can be adduced to support the notion that a new source of general norms is emerging. The important thing here is that a large number of states, including many Western states, have joined in an authoritative statement whose terms can be seen to imply the operation of a new source in what is admittedly a restricted context.[24] That context is of course the production of peremptory norms. While the source of peremptory norms where none existed previously is not delimited in this fashion, it seems quite likely that they too will arise from this new source.

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law different enough from anything we have had until now to be called "international common law." This of course is the law whose source is described here in briefer, more general terms.

22. 8 INT'L LEGAL MATERIALS 340, 373-77 (1969). *See* Notes & Comments, *supra* note 19, for elaboration.

23. Significantly, these were the opinions of the Socialist Judges, Koretsky and Lachs. 8 INT'L LEGAL MATERIALS 340, 400-03 and 417-21 (1969).

24. R.D. Kearney and D.E. Dalton, from their perspective as members of the U.S. delegation to the Vienna Conference, have commented that "there was no substantial attack on the concept of *jus cogens*." Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 536 (1971).

On the roll call vote on art. 53, Canada, Denmark, Federal Republic of Germany, Greece, Holy See, Italy, Netherlands, Spain, Sweden, and the United States were among those states voting in favor. Australia, Belgium, France, Liechtenstein, Luxemburg, Monaco, and Switzerland voted against. Ireland, New Zealand, Norway, Portugal, and the United Kingdom abstained. On the roll call vote for the convention as a whole, only France voted against, while Australia and Switzerland were among nineteen nations which abstained. U.N. Doc. A/CONF.39/11/Add. 1 (1969).

More specifically, either new peremptory norms are generated or existing norms are made peremptory. In either case, that *process* is conveniently described as a "source" of international law. Note that the term "source" refers not simply to the named thing, like custom or customs, but to a dynamic, if structured, process of law coming into being through the agency of whatever that thing happens to be. In the instance at hand, the process is novel and not well-delineated. To the extent that it exists, it is a *new* source, one that manifestly involves an intent of the community, as expressed in a community-wide forum, to create general norms directly.[25]

III

The concept of peremptory norms originated in the thinking of Western publicists. Their faith in Western culture and institutions shaken by the convulsions of recent decades, these individuals were prompted by a desire to strengthen the international legal order as a vehicle for justice and order. Yet the concept was embodied in the Vienna Convention at the insistence of Asian, African, and Latin American states for altogether different purposes—purposes which looked to the future rather than the past. Specifically, these states saw the concept of peremptory norms as both an immediate symbol and eventual instrumentality for restructuring the international legal order.[26]

It would be instructive at this point to view peremptory norms as a subset of "general principles" of international law, which is something they would seem to be almost as a matter of definition.

25. Editorial Comment, *supra* note 15, at 514, may well have come to the same conclusion about *non*-peremptory norms that change existing peremptory norms. At least in principle such a change is possible "when there is widespread international consensus to such a change." *Id.* Riesenfeld did not elaborate on this suggestive proposition.

26. As early as 1963, comments in the General Assembly's Sixth Committee on the International Law Commission's draft articles on peremptory norms reveal the affirmative orientation of Asian, African and Latin American states toward the concept. U.N. Doc. A/CN.4/175, at 267-279 (1963). Socialist states also displayed a favorable though more particularized view of the concept. They also saw peremptory norms as reinforcing the fundamental position of the principles of peaceful coexistence in the international legal order, because the content of peremptory norms could be ascertained by reference to such principles, known in the context of the United Nations as the principles of friendly relations. In general, Western states were much less enthusiastic about the whole idea of peremptory norms. They tended to view the ILC's formulation as not legally operationalized, on the grounds that there was neither a definitive list of peremptory norms nor the means for determining when a treaty was in conflict with such norms.

See also the comments of I.M. Sinclair, a member of the British delegation to the Vienna Conference, to the same effect. Sinclair, *Vienna Conference on the Law of Treaties*, 19 INT'L & COMP. L. Q. 47, 66 (1970).

Non-Western states have demonstrated an active concern for establishing the importance and defining the content of these general principles.[27] The latter task has proven exceedingly difficult and where successful has been undertaken at a level of considerable generality. Inasmuch as general principles are inefficient for identifying individual instances of deviant behavior, we might conclude that their function is not specifically constraint-oriented. The major alternative is that they perform a symbolic function. Concretely, this could mean that such principles stand as generally understood and accepted characterizations of the abiding concerns of the international community. Apparently, general principles perform a service comparable to myth in any culture. A substantial change in the thematic content of such symbols signals the emergence of new concerns in the community including particularly the concerns of its newer, more restless members.

The ability to shape the content of prevailing symbols is usually an important psychological value in its own right. Beyond that, the expectations of members of the community are continuously being conditioned by these symbols. Ultimately, control over symbols yields a cumulatively significant element of control over behavior. The value in having such control is material as well as psychological.

All this helps to explain why the general principles of international law have engaged so much interest among non-Western states in the forum of the General Assembly.[28] Equally, it helps to explain why peremptory norms, as the paramount category of norms with a symbolic thrust, have been so important to those same states. Thus far the relative lack of concern for the content of peremptory norms indicates that their existence as a category, however devoid of content, is itself a substantial change in the structure of the international legal order. Furthermore, non-Western states see themselves as eventually being able to specify the content of peremptory norms along lines of their choice.

These observations lead to a second general factor in explaining why non-Western states have become so concerned about peremptory norms. These states are deeply resentful of the grip that Western states have on the content of existing international law through their

27. For elaboration, *see* Onuf, *The Principle of Nonintervention, the United Nations, and the International System*, 25 INT'L ORG. 209 (1971).

28. An alternative explanation, usually offered in reference to Latin Americans, simply assumes that an enthusiasm for rhetoric over substance is a cultural artifact, unrelated to significant social function or even dysfunctional. For an example, see Dreier, *The Special Nature of Western Hemisphere Experience with International Organization*, in INTERNATIONAL ORGANIZATION IN THE WESTERN HEMISPHERE 12 (R.W. Gregg ed. 1968).

control over its traditional sources. Manipulation of symbols will eventually expedite a change in the content of specific norms, but non-Western states would like to hurry that process. The existence of a new source, having the attributes discussed in these pages, would be indispensable for this purpose. The process of renovating the legal order is further hastened if, instead of changing the content of myriad existing norms one by one through such a new source, attention were focused on a smaller number of norms which are designated as peremptory and thus central to the emerging legal order. The consequence would be to enormously amplify the amount of change actually undertaken. Effectively, the designation of some few new norms as peremptory obviates the need to change everything at once to accomplish great change. It recognizes that some norms, especially those called peremptory, are *constitutive* of the legal order, while the rest are merely *declaratory* of the effect of the legal order in stipulated circumstances.[29]

Conceived this way, generally stated peremptory norms are simultaneously the decisive symbols of the international legal order and its constitutive propositions. Moreover, these two roles are powerfully and reciprocally reinforcing. If this is an accurate representation of the situation, then the struggle over peremptory norms first as a category, and then as items whose content is to be elaborated, and the emergence of a new source of international law are related developments which are integral to the future of the international legal order.

With so much ultimately at stake, it is hard to believe that the participants in the Vienna Conference never really thought about the implications of the way they worded Article 53. Obviously, they could have been careless or simply absorbed in other concerns.[30] At least on the surface, it does seem to be true that the matter was never faced; one Western spokesman raised a series of unanswered questions about the source and nature of peremptory norms, only to be completely ignored in subsequent debate.[31] Yet statesmen are generally

29. The distinction between constitutive and declaratory effects, long familiar in recognition theory, also brings to mind the work of Myres McDougal and associates in connection with constitutive as opposed to public order decisions. The similarity is more apparent than real. *See* the succinct statement in McDougal, Lasswell, & Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188, 297 (1968).

30. Kearney & Dalton, *supra* note 24, thought that "the real problem was how to define the test for recognizing a rule of *jus cogens*." This concern, focused by an amendment of the United States, did dominate debate, as summarized in *id.* at 536-38.

31. M. Bindschedler (Switzerland) asked: "First, how did a new peremptory norm of international law emerge? Secondly, was a peremptory norm engendered by custom,

careful not to acquire unwanted obligations by being absent-minded. Alternatively, there may have been a tacit agreement not to raise these issues, knowing full well what their implications were, because doing so would merely expose sensitivities unnecessarily. The desired result may possibly have been to intentionally obscure the intent of Article 53.

In contrast to the generation of norms through the new source in question, where intent is decisive, custom as a source is ultimately dependent on behavior, to which intent is contributory along with many other factors. Obviously, where intent is clear, its impact is heightened. Although no such clarity of intent surrounds the drafting of Article 53, the very act of drafting it in such a way as to imply the existence of a new source is indicative behavior. It promotes, however modestly, the emergence of a *customary* rule expressing that new source. Much more in the way of germane behavior is required, particularly if the new source is not to be restricted to the narrow domain of peremptory norms. Some of that behavior may even come in the form of responses to Article 53 as a significant expression of a new source, regardless of whether that was even the intention.

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by a treaty, or by both? Thirdly, to become a peremptory norm, did a rule have to be accepted by all States of the international community, or only by a majority of those States, and, in the latter case, by what majority? Fourthly, must a new peremptory norm contain an express declaration concerning its peremptory character, or did that character follow from the content of the new norm? Fifthly, was a peremptory norm valid only for the parties to a treaty or for all States? The Swiss delegation believed that the former presumption was correct." United Nations Conference on the Law of Treaties, 22d Plenary Meeting, U.N. Doc. A/CONF.39/11/Add. 1 (1969).

REFLECTIONS ON EDUCATION IN INTERNATIONAL LAW IN AFRICA

HENRY J. RICHARDSON, III*

Any inquiry into the aims and purposes of teaching international law in Sub-Saharan Africa, and even into the extent to which this area of law is taught and its importance in African legal education, will confront an apparent general absence of specific consideration and gaps in goal-formulation relative to Africa and international law. The definition of these goals and objectives of legal education invariably draws in broader policy questions concerning African states and their participation in both the international legal process and in the African continental legal process. Discussions of these questions are limited *inter alia* by the important issues of vantage point for recommending policy decisions which will be explored initially. These are the necessary prelude to the discussion which follows on strategies of African legal education in international law, the current state of the art on the Continent, and the influence of U.S. aid.

At this point, important gaps in thinking about objectives of legal education for producing international lawyers are apparent. Such gaps are confronted by the need for Sub-Saharan Africa generally to produce more international lawyers, for reasons involving two major policy considerations: (1) the need for available international legal expertise to meet problems arising between African states and the outside world community; and (2) the need for similar training of lawyers to meet problems arising in Pan-African relationships. Equally important is the interaction between these two objectives. Both will be discussed here along with some projected ramifications for legal education in moving toward developing African perspectives on international law, all in the context of present trends and expectations for educating African lawyers and scholars. New African initiatives and potential give promise that this need for international lawyers will be met sometime in the not so distant future.

Vantage Point

Since the early years of this century in the legal community of the United States, more recently in Britain,[1] and doubtless in other

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1. *See* Stevens, *American Legal Education: Reflections in Light of OMROD*, 35 MODERN L. REV. 242 (1972).

countries as well, there has been an on-going debate over the degree to which legal education should have as its primary objective the *training* of students in "lawyer skills"—the techniques of moving a case through the courts—as against the objective of *educating* lawyers not only with the above skills but especially with the knowledge to mobilize the legal process to serve the cause of intelligent authoritative policy-making.[2] The controversy has traveled to Africa, sometimes in rather intense form.[3] A variant of this debate is central to an inquiry into education in international law in Africa,[4] an area that has been uncommonly muted up to this point. Here, the aim is to spotlight issues that appear ripe.

Upon first reflection it would seem sensible that the more industrialized, "developed," and internally specialized a particular society is, the more that society could be content with a compartmentalized system of legal education, i.e. educating lawyers in increasing depth to perform legal skills growing increasingly narrower in scope. Yet this seems not to be so in the United States, for at least two reasons: (1) lawyers (and therefore legal education) are inevitably concerned with policy-making issues by reason of the extensive interactions of community social processes with legal process;[5] and (2) lawyers emerged some time ago as the generalists of America to whom expectations of policy-making and dispute-resolving competence attach, even as somewhat more superficially they divide themselves into "specialities."[6] The specialties, however, continue to get more "generalized" in that each one of them tends to encompass a progressively wider scope of human behavior over time from its narrow beginnings, thus continuing to require the generalist lawyer's knowledge of *other* areas of the law and human behavior in order to successfully pursue the "specialty." The upshot may well be that specialization becomes increasingly unreal.

Not only are lawyers in the United States, and arguably in some

2. A milestone inquiry in the voluminous literature on this topic, which retains its significance today, is Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interests*, 52 YALE L.J. 203 (1943) (reprinted, as cited here, in MCDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER (1960), at 42-154).

3. *See* W.B. HARVEY, LAW AND SOCIAL CHANGE IN GHANA vii-xi, 369-371, 378-381 (1966).

4. *See* Proceedings, Conference on Legal Education in Africa, Addis Ababa, Oct. 20-24, at 4 (1968) [hereinafter cited as Proceedings].

5. Lasswell and McDougal, *supra* note 2, at 46-47.

6. *Id.* at 49-52. Corporate law is an example: in the United States the corporate form of organization with its accompanying legal problems has spread from the domain of entrepreneurs both upward into public and governmental corporations, and sideways into ghetto marketing cooperatives and rural shareholders cooperatives.

other countries, "concerned" with policy-making, but they become, if only through default, inevitably involved with decisions about the fundamental values of the society and their realization,[7] notwithstanding the attempts of many law schools to conceal such questions.[8] This is the situation in a society like the United States, whose basic outlines have been more or less in place for 200 years under the same constitution. Those recognized as the best and most influential lawyers tend to be those who have a keen appreciation for the interrelationship of law, social change, public order and other fundamental goals. Many of these lawyers were educated in those law schools that took the lead in orienting themselves towards exploring these societal interrelationships. Beginning in the 1920's, restrictive educational practices and curricula began to be battered by the winds of legal realism with its emphasis on process and existential and empirical verification of doctrine. This battering continues, to the extent that we can now hazard a suggestion that legal education in this "settled" country, with legal institutions and processes relatively continuous over time, has become, generally speaking, more policy and value-oriented.[9]

Let us turn now to African states as developing countries, with well-founded caution as to any implied comparisons with the United States. However else a "developing country" may be defined, it is clearly a country in the process of more or less rapid social change. Basic institutions are being restructured, and custom and tradition are being re-evaluated to determine their relevance to developmental progress and the country's needs. Fundamental social questions about the quality of life, the configuration and allocation of authority, the desired pattern of distribution of resources, and similar questions have sometimes been only recently settled, or often not yet settled at all. It would seem to follow, therefore, that in a developing society where proportionately fewer lawyers must do more work, those lawyers must be even more sensitive to the interrelationships among legal process, social change, public order, and human dignity than their rich-country counterparts, just to be able to meet on their merits the challenges facing them.[10]

This necessity of orientation is probably even more true for the international lawyers in African countries, for several reasons.[11] First, the decentralized nature of the international legal process requires

7. *Id.* at 59-78.

8. *Id.* at 78-91.

9. For an implied critique of the restrictive aspects of even legal realism, *see* Lasswell & McDougal, *supra* note 2 at 42-59.

10. L.C.B. GOWER, INDEPENDENT AFRICA: THE LEGAL PROFESSION 102-03 (1967).

11. *Cf. id.* at 40.

earlier recourse by lawyers to "non-legal" (in the technical, procedural sense) considerations and decision-makers than would be true if operating in a more centralized "command" national legal system. Second, the international community itself is in the grip of intense social and public order changes, in substantial part due to the emergence of African and other third world countries.[12] Third, developing countries, especially relative to their economic needs for development and their struggle to maintain an adequate level of sovereignty, may have a more continuously intensive relationship with international organizations, particular foreign countries, and with the international community generally than might more industrialized, relatively self-sufficient nations. This has arguably been the case for all weak states since the 19th century. Modern developing countries attempt to mobilize, often collectively, international law and organizational resources to exercise influence against great powers and other states, in partial compensation for their lack of great power self-sufficiency and of effectively utilizable resources. Thus, relationships with selected sectors of the international community, e.g. the United Nations and through it, other states, are significant in maintaining and advancing third world interests and protecting the sovereignty of each state. Lastly, processes of social change in the international community and social change in individual nation-states intersect at key junctures, in ways favorable and unfavorable to the state, not the least of which is the intersection of domestic and international legal processes through, for example, national constitutions, or earlier, colonially-imposed legal arrangements.[13]

If the above observations are valid, then *one* goal of African legal education might be to produce international lawyers who can uphold their countries' interests, Africa's interests, and larger world community interests in the midst of these complex intersecting trends.[14] As subsequently discussed, the upholding of these interests is closely tied to the development of explicitly African perspectives on international law which reflect the special mixture of Pan-African and wider international considerations binding on the Continent. That goal might well be refined into an imperative, since these trends, and therefore the need for such lawyers, seem irreversible in the foreseeable future.

The question of goals raises the issue of the vantage points of those who inquire, and who consequently recommend policies on the objectives, strategies, resources and outcomes of African interna-

12. *See generally* R.P. ANAND, NEW STATES AND INTERNATIONAL LAW (1972).

13. *See generally* McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968).

14. GOWER, *supra* note 10.

tional legal education. Scholar-observers from Africa, more intimate participants in her aspirations, legal processes and arrangements for legal education, have special responsibilities and insights not fully shared by those from other countries joined to Africa only by interest, concern, academic career, nor perhaps even by Afro-Americans joined by ties of blood. To persons from Africa fall the final decisions *to realize* those goals; we who perforce speak from an outside position forget this crucial truth at the peril of all. Notwithstanding these limitations, outside vantage points may be useful to those within to describe the shape of the forest so that the plenitude of trees gives neither false hope nor despair. Also, as the history of African legal education has shown, some outside resources may be necessary to realize these goals,[15] necessitating coordination among differing vantage points of diverse legal educators, and therefore putting a premium on clear and empathetic communication.

STRATEGIES OF AFRICAN LEGAL EDUCATION IN INTERNATIONAL LAW

The Current State of International Legal Education

To somewhat anticipate a conclusion from this discussion, the training of international lawyers in Africa seems to be either a nonstarter and therefore a problem, or else a problem to which solutions might be underway but are so far largely buried by circumstances. If the training of adequate numbers of qualified international lawyers is taken as one possible objective of African legal education, substantial ambiguity arises in tracing the trends of inquiry in this area.

On October 20-24, 1968, the Conference on Legal Education in Africa was held in Addis Ababa to discuss objectives and strategies of producing African lawyers.[16] Participants included both academics (who predominated) and those holding official legal positions in African government; owing *inter alia* to difficulties of scheduling, Anglophonic Africa was more widely represented than the Francophonic states.[17] That Conference, a major top-level Africawide assembly in legal education, is notable for a more or less general omission of references to a need to train international lawyers in Africa. This was especially true regarding the main trends of discussion. However, there were *some* references to the desirability of lawyers in Africa. This was especially true regarding the main trends of discussion. However, there were *some* references to the desirability of lawyers

15. I refer here primarily to the apparent necessity, now diminishing, for African lawyers to be trained abroad in their countries' initial post-independence years, and for the heavy expatriate staffing in many African law schools.

16. Proceedings, *supra* note 4.

17. States represented were: Somalia, the United States, Malawi, Tanzania, Cameroons, Egypt, Uganda, Zaire, Nigeria, Sudan, Kenya, Ghana, Faculty of Law-University of Botswana, Lesotho & Swaziland, Liberia, Zambia, Ethiopia.

being available to confront certain international problems, and these can be mentioned under two categories: (A) Pan-African relationships; and (B) relationships with the larger international community.

The references under (A) were closely linked with a clear Conference trend toward increasing regional cooperation among law schools to maximize resources, and toward increasing regional focus in legal education planning in regard to the availability of research materials, research priorities and the desirability of working towards unification of African national legislation in specific areas. These references were stronger and more numerous than those that referred to category (B) activities.

Thus the Minister of Justice from Ethiopia stated, "we should direct our efforts to the search for rules which can be applied through the whole Continent."[18] More specifically, Dr. Jacques Vanderlinden, Rapporteur of the Conference, discussed research needs towards unification of African law. He noted that the *national* differences among legal systems that were being asserted stemmed largely from the stresses of decolonization, but that such assertions conflict with Pan-African efforts in other fields and with a growing trend towards unification of laws at the international level. In this connection, comparative research to discover similarities in law is a possible pathway towards unification.[19] These sentiments were echoed in a more precise context by Recteur Mabika Kalinda of the National School of Zaire. His final priority in discussing research and publications priorities in African law, on a list of three was:

> Comparative study on the pan-African level of a) traditional legal orders, especially the customary law of persons, property and obligations; b) study of the impact of acculturation of family and society in both urban and rural conditions.[20]

These proposals were closely followed by that of Professor Max Rheinstein to establish a Pan-African law research center to act as a clearing house for research done anywhere on the Continent in printed or unprinted form, needed because of the Continental scope of many African problems which require coordinated study. The Rheinstein proposal was subsequently adopted as one of eight proposals made by the Conference for Pan-African and regional cooperation among law schools, and was the nearest mention made to the formulation of objectives for international legal training in the context of such cooperation.[21] However, Dean Zaki Mustafa of the Faculty of Law, University of Khartoum, a strong advocate of regional law school cooperation, linked that concept with that of international

18. Proceedings, *supra* note 4, at 9.
19. *Id.* at 97.
20. *Id.* at 117.

legal education in spelling out a proposal to expand existing limited cooperation among law faculties at Addis, Khartoum and Dar. He projected the benefits of such cooperation might include "establishing regional training programs in law, with special reference to such matters as Economic Development, Foreign Investment, some areas of International Law, etc."[22]

This connection returns us to category (B), the need to train international lawyers to deal with problems in African relationships with the outside international community. As was noted, there were a few such references over the course of the Conference, but they seemed to be almost peripheral asides and were not given the extensive consideration received by subjects such as the incorporation of customary law into statutory legislation. For example, in the course of a general discussion of goals of African legal education, Dean James Paul noted:

> Lawyers are needed for . . . vital roles in the process of national development. . . . Development means expanded economic activity, and that means an increasing amount of contractual negotiations with foreign business concerns and foreign governments. . . .[23]

There was a passing notation in discussion of some movement of law school graduates into Ministries of Foreign Affairs.[24] Professor Harrison Dunning, in discussing possible new problem-areas for courses in organizing a law school curriculum, noted that one such problem-area might be "foreign assistance."[25] Further, Dean Mustafa proposed that law schools might give "service courses" to respond to the wish of government departments and business concerns to give members of their staffs legal training in a special field to raise their efficiency or to enable them to be promoted. A Special Diploma in Commercial Law was already being offered at the University of Khartoum. And a Diploma in International Law and Relations or a Course on the Legal Problems of Economic Development and Foreign Investment were examples of what might be done.[26]

However, in group discussion, the other side of this issue appeared. The general sentiment was that promotion criteria (for members of African law faculties) and publication priorities must be made more relevant to African legal development. In this connection, "[A]n elementary textbook on national contract law may be far more desirable than a not-specifically-African international law trea-

21. *Id.* at 101-102, 140-41.
22. *Id.* at Appendix, 26.
23. *Id.* at 14.
24. *Id.* at 60.
25. *Id.* at 66.
26. *Id.* at Appendix, 43.

tise, or even than field research that does not have currently relevant objectives."[27] Relatively little consideration then is being given at the Pan-African level to the goal of training international lawyers. Additionally, there is seemingly even less consideration of this subject by those formulating policy for the American aid process as it relates to legal education in Africa, a process with major inputs into African legal education at the Pan-African level.

The foregoing is not meant as a criticism of the 1968 Conference which reflected the priorities in legal education as expressed by those most directly involved, and seems an accurate indicator of trends of thinking on the Pan-African level about African legal education. However, this relative omission does indicate that formulating goals and objectives and then implementing strategies to produce international lawyers in sufficient quantity and quality to meet both Pan-African needs and national African state needs might be a task of some magnitude. Having said this, we must note that there remains considerable ambiguity about attitudes regarding international law training in Africa at a more local level.

In contrast to the implications of the Pan-African attitudes, a considerable amount of attention has been paid in individual African law schools to international law, at least in terms of courses in their curricula. Higher educational facilities in Africa have expanded greatly during the past decade and legal education has shared in this expansion. There are now 31 African universities with faculties of law, excluding the 12 in South Africa.[28] Of these, 24 offer international law or international organization courses in three year degree programs. Within this group 14 make at least one course in international law a requirement for graduation, while 14 offer one or more international law courses as electives. The subject-matter of these courses includes public international law, private international law, international institutions, international trade, and the law of foreign investment.[29]

The conclusion seems sensible that some degree of importance is attached to international legal training by individual deans and faculties throughout sub-Sahara Africa. These curriculum decisions may represent, at least in part, a local level response to a general Africa-wide need for international legal training and international lawyers, though it is uncertain how intensely this need is felt.[30] An

27. *Id.* at 104.

28. Johnstone, *American Assistance to African Legal Education*, 46 TULANE L. REV. 657 (1972).

29. Compiled from J. BAINBRIDGE & T. WOOD STUDY AND TEACHING OF LAW IN AFRICA 181-342 (1972).

30. However, relevant also is the absence of data indicating whether the inclusion

accompanying partial reason for the presence of international law courses in curricula may be that they are holdovers from European-derived curricula. However this would seem a diminishing probability for law schools relatively long in existence.

African International Legal Education and Outside Aid

Most aid to African legal eduation from outside governments has been provided by former metropolitan European states, especially Britain and France, and by the United States.[31] Little aid has been provided by international organizations,[32] and this absence would seem to be an area for inquiry towards increasing available resources. The attitudes involved in donors' policies for providing such aid are germane to our discussion here, if only because of the often close interaction between those policies and the final local policies formulated that employ such aid. This inquiry will concentrate, with admitted selectivity, on aid from the United States as it relates to international legal education in Africa.

In a major article in 1972, Professor Quintin Johnstone argued generally that the focus of American aid to African legal education should change its emphasis from teaching to research.[33] It is noteworthy that this article, which includes a comprehensive review of aid programs and recommendations for future policies, makes virtually no reference to education in Africa in international law.[34]

The two references which do appear are passing and indirect.[35] The omission of substantive discussion of this topic may illustrate: (1) a lack of identification of international law as a manpower-training priority in African legal education by those involved in the American aid process; or (2) a covert rejection by the same decision-makers of a similar African-formulated priority. It is suggested, however, that such non-identification of international legal education as

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of international law courses in curricula across Africa is a trend that has gained or lost momentum since the Conference of 1968, since the above statistics were compiled as of 1972.

31. Johnstone, *supra* note 28, at 662.

32. *Id.* at 663.

33. Former Dean of the Faculty of Law, Haile Sellassie I University, Addis Ababa.

34. It is also noteworthy that the fairly comprehensive bibliography on African legal education that he sets out at the beginning of his article, *supra* note 28, at n.1, contains no reference to even one article about the teaching of international law in Africa. This lack, I believe, is in no way attributable to Professor Johnstone's scholarship but is an accurate reflection of the state of the current literature. Further, Professor Johnstone has wide experience in African legal education and has been a key participant in American aid to African legal education over the last decade. In this major review of trends, his questions and concerns would seem indicative of those of academics and decision makers in this area.

35. Johnstone, *supra* note 28, at 689, 691.

a possible priority might do a disservice to apparent needs of each African country and those of Continental Africa generally, as indicated in part by the above discussion of local law school curricula.

We can speculate that this absence connotes either a lack of identification of a real priority or a rejection of the same priority. Professor Johnstone is seemingly writing out of a primarily Anglophonic African experience.[36] The English tradition of providing international legal advice to government, as it has generally been transposed to Africa, is that such advice should be of a limited non-policy-making nature, and should flow from the Office of the Attorney-General, at least in principle, as part of his responsibility to advise all government ministries on legal problems. This tends to mean centralization of legal advice, actually and organizationally, and the provision of "technical" rather than more policy-oriented advice. This may be contrasted to an alternative system of providing to individual government ministries specialized legal advisers who become more involved with the policy concerns of their ministries, which is generally the American pattern.[37] There is some conflict within African governments over these alternatives. The impression is that the English tradition remains predominant in Anglophonic Africa, though undoubtedly being modified by individual governmental arrangements.

If the above is generally valid, it may follow as a consequence that the demand for foreign aid to develop specialized international legal talent would be perceived by the donor's aid officials as relatively slight. The demand instead would generally be for assistance in training *lawyers*, some of whom might eventually become involved in international legal matters. Further, the demand would be slight because international law needs, under this administrative system especially, tends to be seen as *competing*, in the context of a limited amount of legal talent, with domestic legal needs of demonstrated priority. Finally, an additional legacy of British colonial administration is the rotation of administrative personnel on an assumption of "generalists" competence, irrespective of subject area, and a consequent eschewing of the development of in-depth specialties, attitudes that dovetail with administrative expectations of centralized legal advice to the entire government from the Attorney-General. It is suggested that all of these factors taken together, plus others which doubtless exist, might combine to "bury" both African and donor governments' perceptions of a need for identifying international law-

36. Language, distance, remnants of differing colonially-imposed cultures have created gaps in communication between Anglophonic and Francophonic Africa that remain wide enough, relative to legal education, to be troublesome.

37. *See* H. MERILLAT, LEGAL ADVISERS AND FOREIGN AFFAIRS 4-7, 19-22 (1964).

training as a *separate*, and not a *competing*, priority of African legal education. The former concept would imply developing a separate pool of lawyers to combat international legal problems, as opposed to pulling them from a general national pool of legal talent.

Even if aid policies are not involved, the impression is that the above factors would continue to constitute somewhat of a barrier within several Anglophonic African governments to designating the training of international lawyers as a separate priority drawn from a separate manpower pool. These factors may well be reinforced by aid programs, but their genesis would seem to lie in the colonial and recent history of each country. In this sense, donors' aid officials are merely sharing local perspectives about international lawyers.

AN OUTSIDER'S OBSERVATIONS OF AFRICAN NEEDS FOR ADDITIONAL INTERNATIONAL LAWYERS

It seems clear that African law schools are steadily becoming more and more "nationalized" with respect to their teaching personnel. In other words, more and more Africans are joining law faculties and fewer expatriates are to be found in the same positions. It also is apparently the case that those international law courses[38] offered in law curricula have been largely taught by expatriates.[39] To this extent, a first "need" for designating the production of international lawyers as a manpower-priority would seem to be that of ensuring enough future teachers of international law for present and evolving requirements, unless, that is, African governments are willing to carve out a significant "exception" to the Africanization of law faculties and continue to desire expatriates to teach these subjects. The latter would seem unlikely. This need for teachers and scholars would appear basic to meeting the other long-term needs of individual African states for internationally-trained lawyers.

To explore further needs, it is convenient to return to our earlier categorization of international legal problems differentiating those arising in relationship between individual African states and the extra-African world community, from such problems arising in a Pan-African context.

The World Community

In discussing the legal profession in Africa, Professor L.C.B. Gower has indicated that Africa has an urgent need for international lawyers, commensurately greater perhaps than that of industralized countries, in regard to both the above categories.[40] The problem of international relations with the outside international community can

38. Johnstone, *supra* note 28, at 674-75.

39. *See id.* at 665.

40. GOWER, *supra* note 10, at 40-41, 102-103.

be specifically discussed in terms of four areas. First, references at the 1968 Conference on African Legal Education to the need for lawyers to handle growing problems of foreign investment and contractual negotiations stemming from expanded economic activities with foreign business concerns and foreign governments have already been noted. More specifically, increasing state participation in entering foreign business enterprises, whether on a large scale, such as the Zambian copper industry nationalizations in 1969, or on a smaller scale, creates a need for international lawyers who are also expert in the areas where domestic corporate and financial regulations intersect international law, as well as for corporate lawyers knowledgeable in international legal process.[41] Additionally, international lawyers are needed, in conjunction with economists and other relevant specialists, to spearhead the drive to institute African control over a larger share of the invisible costs of African trade now largely in European and American hands, such as shipping insurance, not to mention to advise in the ongoing effort through UNCTAD, GATT, and other forums to gain African products the equitable share of the world's markets that now escapes them. Expectations are being generated through the O.A.U. on the pan-African level that common African negotiating positions should be established on these questions.[42] This latter would seem to imply programs of education in transnational law, dealing with a wide range of international and domestic legal expectations. Of crucial importance would be the adaptation and rewriting of educational materials (reflecting legal problems from elsewhere than Africa) to the circumstances and imperatives of the African constituency served by each educational center or law school.

Even following such adaptation, problems in the following areas might be predicted as generally pertinent to African circumstances: aliens in the context of the national legal system, including especially their access to economic activities and the choice of law problems arising therefrom; the intersection of the international legal process with domestic legal processes, including alternatives of outside states to protect within African states their individual access to economic activities and the choice of law problems arising therefrom; questions concerning the exhaustion of remedies, treaty interpretation, domestic jurisdiction; the development and validity of minimum international standards, especially regarding expropriation of alien property

41. *See* Thomas, *Legal Education in Africa: With Special Reference to Zambia*, 22 No. IRELAND LEGAL Q. 3, 22-23 (1971).

42. *See, e.g.*, the O.A.U. *African Declaration on Co-operation, Development and Economic Independence*, CM/ST.11 (XXI) 1973, Abidjan, esp. at ¶¶ A.24, A.25, A.34, A.36, A.39, B.2, B.3 (iii, v, ix), C.3(i), C.4(i).

and breaches of concession agreements; questions concerning the validity of pleading customary international law before national courts; questions presented by international agreements under national law, and the promulgation of national legislation for transnational purposes on a reciprocal basis.

Other areas covered in such a program of study would include questions concerning the appearance of foreign sovereigns before local courts, including those of sovereign immunity and act of state, questions of practice and procedure such as the service of summons in foreign countries, the enforcement clauses, and procedures for obtaining evidence in foreign countries. Finally, of particular and increasing importance would be questions concerning the transnational reach of national economic regulation and criminal legislation, plus transnational reach of national economic regulation and criminal legislation, plus transnational aspects of income taxation including double taxation agreements, as well as questions of economic regulation through international organizations such as G.A.T.T., the I.M.F., the E.E.C., and UNCTAD.[43]

A second area, relative to African relationships with the outside world community, is the need for adequate numbers of international lawyers and supporting staff to ensure that African states have an equivalency of legal talent at the bargaining table in negotiations where international legal claims are useful to gain or preserve leverage. Usual sources of leverage in international negotiations include the traditional indicia of state power, such as large standing armies, a highly educated cohesive population, a rich and growing manufacturing economy, a highly efficient managerial sector, and long experience in international affairs and the use of power. When one nation party to bilateral negotiations lacks some or most of these usual sources of leverage, as is often the case of African states vis-a-vis rich industrialized countries or even the larger multinational corporations, the capacity of the weaker party to exercise leverage in such a situation tends to depend more on the wits in the heads of the negotiators and on their ability to quickly mobilize their personal skills

43. The foregoing discussion relies heavily on Steiner & Vagts' excellent casebook, MATERIALS ON TRANSNATIONAL LEGAL PROBLEMS (1968). It and other similar texts could well serve as points of departure for devising curricula to inquire into problems of transnational law, but it must be emphasized that the content of such curricula will depend peculiarly on whether the curriculum is serving a *national* law faculty or an institution that is pan-national in orientation. To be most effective in producing lawyers and scholars with the most useful skills, the curriculum materials dealing with transnational problems must be prepared reflecting the current and projected categories of legal problems facing the governments and institutions whom the lawyers' products of the curriculum are most likely to serve.

of persuasion around agreed principles. In such a situation the skill of an international lawyer in identifying agreed principles and expectations binding on *both* sides, and effectively framing claims advantageous to his government around such principles becomes invaluable. The impression is that African states and organizations may yet be short in the numbers of such lawyers available.

A third area concerns the value of international lawyers advising on the maximum utilization for the needs of his country of resources available from international organizations, and simultaneously, advising on the most efficient route that his government may take to secure such resources. This latter is written having in mind the unfortunate competition for aid resources from international organizations (and state donors) that exists among developing countries.[44] With the increased multilateralization of aid resources through international organizations, these problems promise to grow in complexity. We may also again mention here the growing volume of trade negotiations, through UNCTAD, GATT and other bodies, especially the competition for major markets for African products. Further the drive to combat pollution and introduce ecology controls, symbolized by the recent Stockholm Conference, is now giving rise to a new group of international organizations, and these concerns promise to overlap and interact with those of aid, trade and more traditional development factors.[45] The frontier question of the utilization of resources from the oceans' floor, crucial especially for the majority of African states which do not sit on a coastline, is already generating proposals for organizational structures of varying jurisdiction in which African states must play an equitable role.[46] There is a new consciousness of the relationship of world monetary policy to the development of African and other third world states, and a consequent need for African expertise and for international lawyers skilled in financial matters to monitor and more effectively participate in these organizations, formerly the nearly exclusive domain of the rich countries, such as the International Monetary Fund.[47] And last, of continuing importance, there is the need for additional international lawyers to advise on mobilizing and protecting African interests in the United Nations General Assembly, Security Council and related agencies. The African Caucus in the Assembly in conjunction with the Afro-Asian bloc has been quite effective, but always more can be done, in line

44. *See generally* Asher, *International Agencies and Economic Development: An Overview*, 22 INT'L ORG. 432 (1968).

45. *See* O.A.U. CM/Res (XIX) 1972.

46. *See* O.A.U. Resolution on the Law of the Sea, CM/Res. 291 (XIX) 1972; CM/Res. 238 (XVI) 1971.

47. *See* CM/Res 213 (XIV) 1971.

with previous observations on the need of African states to mobilize the international community. For all of the above tasks, one problem has been that the posting of an international lawyer abroad or his assignment at home exclusively to these tasks has created a pinch in manpower of scarce legal talent needed for other development-related assignments. The training of additional international lawyers would alleviate this pinch.

The reference to the General Assembly brings us to a fourth area: the advocacy and formation of doctrines and principles of international law favorable to African states. International lawyers, most likely those in law faculties in coordination with their counterparts in government, with an understanding of the law-formation processes in the international community (especially as this occurs in major international organizations), are needed to advise their governments on accelerating these processes in directions favorable to national development by recommending modification of international law principles to reflect African interests, as opposed to great power and European interests.[48] This modification represents a phenomenon already underway; the emergence of third world states as a group has had a visible impact on the international legal process.[49] Some evolution has occurred from stimuli largely African, such as in revising the doctrine of treaty succession by legitimizing a system of notification to other parties in order to give African states a leeway period to evaluate colonially-concluded treaties without the risk of being bound thereby in perpetuity, and with arguably diminished obligations thereunder during the evaluation period.

A more significant example concerns expectations of international protection of human rights, especially as such rights relate to the situations of apartheid in South Africa. Through a combination of actions over two decades in the International Court of Justice, the Security Council and the General Assembly principles of the protection of human rights were released from their bondage to that of domestic jurisdiction in Article 2(7) of the United Nations Charter, and finally joined to the responsibility of all states under the Charter to maintain international peace and security.[50] The consequent increase in legal leverage thus acquired for the protection of human rights in a racial context, both domestically and internationally, can be traced largely to African efforts. In this connection, an emerging

48. *See* R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THRU THE POLITICAL ORGANS OF THE UNITED NATIONS, 1963.

49. ANAND, *supra* note 12.

50. *See generally*, Bleicher, *The Legal Significance of Re-Citation of General Assembly Resolutions*, 63 AM. J. INT'L L. 444 (1969); McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1, (1968).

frontier appears from current African efforts to affect the amendment of the Geneva Conventions, during the forthcoming Diplomatic Conference on Humanitarian Law, in a manner most advantageous to the liberation movement. The O.A.U. has set in motion measures to identify African interests for that Conference.[51] Further, a major continuing objective would seem that of mobilizing similar strategies to achieve international economic equalization, a task requiring the detailed attention of African international lawyers.[52]

These five areas of need have confronted each African state since its independence, obviously in varying degrees, in its attempt to realize development objectives while maintaining a viable international posture. All African governments have recognized the general need for international legal advice and moved to acquire it, with varying degrees of success. However, capacities among them in this respect vary: from the government's international lawyers being able only to provide intelligence to their government about international legal trends, all the way up to the capacity to participate in meaningful recommendation, prescription, appraisal, and termination of significant international legal policies. The capacity of each African state and the extent to which each has adopted the easing of these needs as objectives to be implemented must be ascertained by detailed inquiries of each government, beyond the scope of this essay. It may be desirable, however, for each state or cooperating group of African states to develop through their international lawyers the greatest possible ability to affect the intelligence-gathering, recommending, prescribing, invoking, and application of policies in the international legal process, as well as to influence the authoritative appraisal of ongoing policies and the termination of those not in the best interests of Africa or the world community.

The need to develop such a capacity exists even under the most pessimistic appraisal of the potential for Pan-African cooperative action by sustained international strategies during the foreseeable future. If more optimism is allowed, this capacity along with a maximum of trans-African coordination would seem crucial in order to develop *African* positions on major international issues. The realism of such optimism, however, depends heavily on coordinating the realization of the five areas of need for international lawyers with policies of African legal education on both the Pan-African and the national levels, to which we now turn.

PAN AFRICAN CONSIDERATIONS

From the 1968 Conference was noted a growing Pan-African con-

51. O.A.U. CM/Res. 307 (XXI) 1973.

52. *See* Richardson, *Speculations on the Relevance of International Law to the Needs of Black Southern Africa*, 1 UFAHAMU 22 (1970).

sciousness with respect to African legal education as manifested in proposals for projects to unify and harmonize bodies of national law, for comparative law studies useful as a basis for sharing legal solutions to development-related dilemmas, and for increased regional and continental cooperation in legal education and research. On that basis, a few additional observations are pertinent here.

The rationale for comparative law studies is generally that they will and have served as a basis to unify national legal rules in various subject-areas on a regional or continental basis, and as a basis on which African legal communities can share with each other legal strategies for similar problems.[53] Much of the push behind this move towards comparative law is provided by the Pan-African ideal that the differences on the Continent among nations should be minimized by developing similar legal responses to similar problems. These perceived similarities, in turn, are then available to African legal scholars and decision-makers to assist in developing an *African* position on crucial legal doctrines with transnational and international significance. One example would be the extent to which the act of state doctrine would be recognized as doctrine of deference within African national courts. Some distinction, for example, might ultimately wish to be made between act of state claims arising from transactions occurring in other African states, as against transactions from outside states. In any case, such African positions on these doctrinal questions, from a vantage point of relative unity, may be either coordinated with other views of the same questions in the world community, or used to confront them, or both. In this sense our two categories—African relationships with the international community and Pan-African relationships—merge.

The pursuit of this rationale, these similarities and this basis of unity would seem to require lawyers with a particular set of perspectives. It would be advantageous were he trained in international law, because the unrolling of this Pan-African scenario involves (1) transnational concerns—those problems that must be solved across state boundaries, and (2) international concerns of Africa as separate states and increasingly as a Continent—that is, the legal problems involved in maintaining Africa's world position. The same lawyer, however, would also need to be trained in comparative law research and have some knowledge of problems such as the relative advantages of pursuing a solution by concluding a treaty versus by legislating unification of laws.[54] The advantage conferred by identity of personnel in a context of overlapping objectives is another point at which Pan-African and international concerns merge. A few such

53. Proceedings, *supra* note 4. And *see* GOWER, *supra* note 10, at 94-95.

54. *Cf. id.* at 40.

lawyers have undoubtedly appeared, some by training and some by accident plus their own initiative. To ensure sufficient talent to pursue Pan-African objectives, it would seem that their training should be an explicit priority.

Expectations of Pan-African legal cooperation generally, and implicit expectations of inter-African communication on matters of international law, are emerging from the Organization of African Unity. Arguably a political consensus on the importance of these kinds of cooperation is evolving which will buttress whatever institutional initiatives are taken in this area of legal education and research. The O.A.U. Council of Ministers has reaffirmed the importance of and the need for legal cooperation between African States, especially on the necessity of concluding a treaty or treaties on inter-African legal cooperation between member states. Consultation on this subject is currently underway, and a nine member committee of experts is studying the problem and drafting a convention. The impression is that the alacrity among member states in submitting suggestions on such a treaty could be greater.[55] Further, the idea of publishing an African Yearbook of International Law, unanimously welcomed by all member states, is under consideration in both the O.A.U. Secretariat and the Council of Ministers.[56]

There appear to be organizational initiatives, beyond those noted in connection with the 1968 Conference, being taken to establish research centers which would provide, *inter alia*, research facilities, university-government coordination facilities, and opportunities for problem-solving to African international lawyers. The Legal Research Center in Dar-es-Salaam (whose activities were suspended in 1970), the proposed West African Legal Research Center in Accra, the Law Development Center at Kampala, the Center of Islamic Legal Studies of Ahmadu Bello University, and the Center for Documentation and Research of the National School of Administration at Kinshasa all appear to focus on research on domestically-oriented problems of law and development and on possibilities of Pan-African cooperation in their solution.

On the other hand, the Institute of Advanced Legal Studies at the University of Lagos seems to offer more promise of providing a research capacity in international law.[57] It was founded subsequent to the 1964 Conference of Nigerian Law Teachers, with the aim of providing a single institute for postgraduate research and supervision which would be fed by the undergraduate Nigerian law schools and

55. CM/Res. 107 (IX) 1967, CM/Res. 198 (XIII) 1969, CM/Res. 226 (XV) 1970.
56. CM/Res. 228 (XV) 1970.
57. BAINBRIDGE, *supra* note 29, at 100-107.

would be a joint enterprise of all the universities involved. The individual law schools would grant their own doctoral degrees, but the research would be done largely at the Institute where appropriate facilities, including an extensive library, would be centered. By-products of such an arrangement would include avoidance of duplication of library facilities on the advanced level and the bringing of the four Nigerian faculties of law into closer harmony. The establishment of the Institute was suspended by the Biafran War, but the Federal Government has now agreed to provide the necessary funds and opening is reported ready for late 1973 or early 1974. The program of the Institute is reportedly to conform to the original aims and purposes and will be interdisciplinary in approach.[58] It is significant that the Institute will most probably have a deliberately organized international law research capacity which could stimulate international legal studies at each of the law faculties.[59] Its interdisciplinary focus should facilitate the training of the international lawyer with comparative law skills necessary to integrate solutions to problems encompassing legal issues of both Pan-African and world community relationships. One question, however, is the realistic availability of these facilities to scholars from other parts of Africa.

A second recent initiative in international legal studies is the recent proposal by Dean Toye Barnard of the Louis Arthur Grimes School of Law, University of Liberia, Monrovia. Dean Barnard proposes the establishment of a Pan-African Research Institute of International Law, to be located in an African country (Liberia, perhaps) "and financed principally by all the African states where scholars could converge periodically either on sabbatical leaves or under a grant to pursue legal research in the area of International Law."[60] Similar to the Nigerian Institute of Advanced Legal Studies, the Institute here proposed would complement and not replace various national law schools, and would not only serve as a research center, but also provide technical services and advice to African governments

58. *Id.* at 41-42.

59. This was indicated by remarks made by Chief Justice T.O. Elias of the Nigerian Supreme Court at the recent World Peace through Law Conference at Abidjan, Aug. 26-31, 1973. The Chief Justice was a principal initiator and supporter of the Institute. In the course of the same remarks he also indicated that the Organization of African Unity had by recent resolution endorsed the idea of an African research institute for international law, and that the international legal research capacity of the Institute was closely related to the spirit of that resolution. The text of the resolution is yet unavailable to this writer.

60. Barnard, The African Challenge in International Legal Education 13-14 (paper presented to the Panel on Legal Education in Africa, World Peace through Law Conference, Abidjan, Aug. 30, 1973, under the auspices of the Section of Legal Education).

when requested, in addition to serving as a source of information on education in international law to African states and to the wider international community.[61]

The Barnard proposal, if implemented, is wider in scope than the Nigerian Institute in that (1) it aims to serve the needs in this area of not one but several African states; and (2) it aims to serve not only the needs of scholars but also to provide technical assistance to several African governments for international legal problems as well as to provide information on legal education in the field. But, this proposal appears narrower in that that Institute is to concentrate on international legal studies as opposed to a focus including, e.g., comparative law and research towards legislative unification. However, such comparisons must be placed in context. The Nigerian Institute will almost certainly be in operation first and for that reason, plus the cumulative influence of the Nigerian Bar, may serve as a model for other similar institutes. Its practice may influence the procedures of the Liberian Institute and subsequently organized facilities elsewhere. We may recall from the 1968 Conference that there is already momentum towards Pan-African cooperation in establishing research arrangements to explore problems of comparative law, incorporation of customary law, conflicts of law and harmonization of legal procedural rules. The aims and arrangements, to the extent they are known, of the Nigerian Institute seem well within the flow of this momentum which implies (1) that there may be potential within the Institute to train scholars in combination international-transnational-comparative law specialties; and (2) that there may be some pressure on the directors of the Institute to admit scholars from a wider interstate pool than that provided by the four Nigerian law faculties, and that the Institute may in time respond affirmatively. On the other hand the Liberian Institute may well (1) begin or accelerate a trend towards specialized *international law* research institutes; but (2) also feel the pressure to expand its scope somewhat to produce scholars with, as above, international-transnational-comparative law combination specialties. The pre-existing Pan-African momentum in the area of legal education and research and resulting expectations ought to provide a substantial basis for cooperation between these two Institutes if such is desired.[62]

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61. *Id.* at 14-15.

62. The timetable for the realistic implementation of the Barnard proposal is unknown. A discussion at the World Peace through Law Conference between Chief Justice Elias and Dean Barnard, in which the writer was privileged to participate, indicated the real possibility of substantial cooperation between two such Institutes, with such a nexus then creating expectations of success and other supportive resources to establish additional institutes for research in international law elsewhere in Africa where feasible.

The lawyer-scholars produced by such institutes are also needed to advise in situations where the Pan-African ideal of interstate cooperation on a functional basis is already somewhat closer to actuality, as well as for problem-areas previously mentioned. Law school regional cooperation promises to be one such area insofar as joint international-comparative law curricular offerings are realized. Further, such lawyers are needed to advise African regional organizations of economic cooperation, such as the East African Community,[63] and to buttress the Organization of African Unity in terms of increasing the coordinating and support role that it is attempting to play relative to development problems across the Continent.

Finally, there is the emerging possibility of coordinating trends in African legal education towards international lawyers with various specialties with new Afro-American initiatives in the United States to use international law both in aid of the pursuit of liberation in South Africa and liberation in the United States. Substantial expectations exist, on several levels, with historical validity, that policy coordination and reciprocal inspiration between Afro-America and Black South Africa will increase rather than diminish in the near future.[64] And some American law schools are beginning to directly participate in the effort to enforce United Nations resolutions on South Africa.[65] This general direction would seem especially promising on a research basis, at least, for law faculties in those countries most directly involved in the South Africa struggle.[66]

Conclusion

African legal education has a role to play in producing African lawyers trained in international and transnational law. It is suggested that this role could be larger than it appears at present in that, particularly, legal education priorities could be set and strategies mapped on national, regional and pan-African levels aimed at training such lawyers, quite possibly as an extension of other Pan-African-oriented legal education programs. This would complement and expand current local efforts in international law training, as illustrated by the widespread presence of such courses in law school curricula.

63. *See* T. JACKSON, GUIDE TO THE LEGAL PROFESSION IN EAST AFRICA 83-84 (1970).

64. *See generally* Gwendolen Carter, Black Initiatives for Change in Southern Africa (The Eleventh Melville J. Herskovits Memorial Lecture, Centre of African Studies, Edinburgh University, March 9, 1973).

65. For instance, selected faculty and students at New York University Law School played a key initial role in the effort, ultimately unsuccessful, to block the importation of Rhodesian chrome ore into the United States in violation of Security Council Resolutions 232, 253, and 314. See *Diggs v. Schultz*, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1972).

66. *See* Thomas, *supra* note 41, at 32.

Such an approach would seem to promise the training not only of African lawyers capable of *applying* international law to African circumstances, but who, more importantly, are capable of developing an *African standpoint* in the international legal process.

OPEC IN THE CONTEXT OF THE GLOBAL POWER EQUATION

JAHANGIR AMUZEGAR*

I. INTRODUCTION

The name of the Organization of Petroleum Exporting Countries has been on thousands of lips around the globe in recent months. The Organization's initials—OPEC—have filled thousands of newspaper pages the world over. To the people in the oil-importing countries, the word OPEC is a frightening one, reminding them of high oil prices, gas station lines and fuel shortages. OPEC has been called many names, the nicest of them being "international cartel;" it has been accused of many things, the mildest of them being "monopoly pricing."[1] Yet few of OPEC's critics, and fewer of its followers, know what OPEC really is or what its purposes are. Briefly, OPEC is an association of twelve full-member plus one associate-member countries, dedicated to the protection of their national interests in the production and export of oil. OPEC was originally established by five oil-producing countries as a "mouvement de resistance" (defense league) against arbitrary and unilateral decisions of the major oil companies.

At this point, a bit of oil price history is highly illuminating. In 1947 the "posted price," or the price on which royalties and taxes are based, of a barrel of Persian crude was $2.17. During the 1950's, while other prices were rising, the oil price was stable or on the decline. In February 1959, the "posted price" of Persian Gulf crude was officially lowered by the major oil companies, who gave as their reason a glut in world oil supply, to $1.90 a barrel. The oil exporters, who were economically poor and politically divided, could not and did not do anything to stop these losses per barrel. Instead, the exporters strove for increased output to maintain their total income. The companies, in turn, lowered the price to $1.80 in August 1960. Of this, 80 cents was the exporter's share.[2] Since most of the exporters were depending principally on oil income for their foreign exchange needs, the companies' disregard of these needs and the exporters' other aspirations resulting from repeated reduction of oil prices served as the turning point in the history of OPEC.

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1. For the history and background of OPEC see Z. MIKDASHI, THE COMMUNITY OF OIL EXPORTING COUNTRIES (1972).

2. *Hearings on S. Res. 40 Before the Senate Subcomm. on Antitrust and Monopoly*, 91st Cong., 1st Sess., pt.1, at 437 (1969). Another source puts oil prices at $2.22 per barrel for 1947. H. FRANK, CRUDE OIL PRICES IN THE MIDDLE EAST 30 (1966).

The five countries involved (Iran, Iraq, Kuwait, Saudi Arabia and Venezuela) formed OPEC in September 1960. Later, Algeria, Ecuador, Indonesia, Libya, Nigeria, Qatar and the United Arab Emirates joined the group. Gabon was recently accepted as an associate member. OPEC's victories were hard and long in coming. Despite the members' resolve to prevent an oil price decline, the countries' policy of unrestrained production to obtain larger revenues and foreign exchange kept pushing prices down. These policies were imposed on the countries by the companies against the exporters long-term interests, and against technical requirements for prudent and efficient exploitation. Although the official posted price, under OPEC pressure, remained at $1.80 a barrel throughout the 1960's, significant discounts (of 40 cents to 55 cents a barrel from the posted price on the producers' own offtake) were not unusual. A barrel of offtake crude was often sold by the Persian Gulf producers at $1.25 in the world markets—with the prospects of the blissful "$1.00 a barrel" gleefully contemplated by the companies and net oil-importers.[3]

Then, success came suddenly. Following the Caracas Resolution of December 1970,[4] a conference was held in Tehran between OPEC representatives and those of the oil majors in February 1971. After a series of long and difficult negotiations, an agreement was reached whereby the posted price was increased to $2.30, and provisions were made for (a) small annual increases in that price, and (b) allowance for inflation in the major oil importing countries.[5] With this significant triumph in hand, other successes followed. In January 1972, a new concession was obtained by the oil exporters in terms of adjustment allowances in their incomes (received in U.S. dollars) against dollar devaluations.[6] In March 1972, the principle of "participation" by producer-governments in the operation of the oil companies was accepted.[7] In October 1973, after weeks of unsuccessful negotiations with the companies, the oil-exporting governments declared their intention to establish oil prices among themselves, free from the obstructionist tactics of the companies in bilateral bargaining.[8] The

3. FRANK, *supra* note 2, at 116.

4. OPEC Resolution XXI. 120 Calling for Negotiations and Forming Three-Member Negotiating Committees, Dec. 1970, 10 INT'L LEGAL MATERIALS 240-42 (1971).

5. Tehran Agreement Between Six Gulf States and Oil Companies Operating in Their Territories, Feb. 14, 1971, 10 INT'L LEGAL MATERIALS 247-54 (1971). Thus between 1947 and 1972 the posted price of crude oil in the Middle East rose only from $2.17 to $2.30. When inflation is taken into account, the real price was actually fifteen percent lower over twenty-five years.

6. Organization of Petroleum Exporting Countries: Agreement Between Oil Companies and Six Persian Gulf States on Increased Payments, Jan. 20, 1972, 11 INT'L LEGAL MATERIALS 554-60 (1972).

7. *See* L. MOSLEY, POWER PLAY: OIL IN THE MIDDLE EAST 388-411 (1973).

8. N. Y. Times, Oct. 17, 1973, at 16, col. 1.

posted price was raised to $5.11,[9] and finally, in December 1973, when the crude oil auction price in the free market had risen to over $22 a barrel, the posted price in the Persian Gulf was raised to $11.65 a barrel.[10]

II. Reasons for the Rise of OPEC

The intriguing question is: How could OPEC, which for ten long years had been largely helpless in promoting the interests of its members, suddenly succeed in bringing the oil majors to their senses, so to speak, and in making the whole world take notice of the Organization's aims and strengths? The answer lies in a multitude of forces, long in the making, which have suddenly converged on the scene. Eight interrelated factors can be distinguished as contributing to OPEC's recent rise in prominence.

The first factor relates to a change in the world's basic balance of politico-economic power. The nature and source of OPEC's bargaining strength in dealing with the major oil consuming nations and the oil majors are a part of this change in the global power equation—a reflection of the growing power and independence of the Third World. The essence of world power in the last two decades has undergone two fundamental changes: (a) away from originally bipolar, and later triangular, hegemony of the Super Powers; and (b) in favor of the less-developed countries (LDC's). International bargaining, a dynamic process, has thus undergone significant changes in its participants, its scope, and its dimensions. The bargaining leverage possessed by OPEC is a manifestation of the emergence of the Third World as a Third Force.[11]

Several basic features of this new global power equation can be easily underlined. The new U.S.-U.S.S.R. detente, for example, has ushered in greater tolerance by both major powers of neutralism, non-alignment, and the pursuit of political independence; non-alignment no longer necessarily connotes hostility toward the left or the right. Then, there has been a multilateralization of power bases, following the rise of Japan and the EEC to the position of Super Powers in the world. Furthermore, new international politico-economic alliances have been formed on the basis of functional and geographical rather than political and ideological considerations. For example, the Soviet Union and the United States have entered into a number of technical, cultural, scientific and even economic treaties and relationships with countries possessing different political ideologies. The membership

9. N. Y. Times, Oct. 19, 1973, at 61, col. 1.

10. N. Y. Times, Dec. 24, 1973, at 1, col. 8.

11. For a succinct analysis of the new developments see S. Brown, The Changing Essence of Power (1973) and G. Bergsten, The Threat From the Third World (1973).

composition of such international bodies as UNCTAD, GATT, the Arab League, and the Organization of African States, groupings in the International Monetary Fund and the World Bank, and other similar mixtures present vivid examples of pragmatic and apolitical coalitions.

These criss-cross coalitions have been stimulated and fostered by the Super Powers' need for votes in various international forums which, in turn, have stimulated and nurtured the emergence of the Third World as a significant force favoring cooperation rather than coercion in international relations. "Gunboat diplomacy" has been gradually replaced by relatively polite official debates and skillful informal lobbying in the corridors of international agencies. Finally, the emergence of the People's Republic of China as the new champion of the Third World has significantly strengthened the LDC's hand in their bargaining with the richer countries.

The second factor responsible for OPEC's rising power and influence has been the geopolitical strength of the OPEC members. For example, six major OPEC countries are located around the Persian Gulf, a strategic area for all Super Powers. The Soviet Union's historic desire for access to the warm waters of the Gulf and the Indian Ocean,[12] the United States' special commitments to the State of Israel plus her vast investments in the Middle East oil fields, and Sino-Soviet rivalry in this part of the world for its own sake and as a gateway to Africa—all have given the Persian Gulf region its geopolitical significance.

The third factor operating in OPEC's favor has been the Organization's control over oil reserves and exports on the one hand, and the industrial countries' dependence upon imported petroleum on the other. By 1985, more than half of world energy consumption (estimated at 145 million b/d of oil equivalent) will be supplied by crude petroleum. Considering that more than sixty per cent of the world's proven oil reserves and about eighty-five per cent of world oil exports are in OPEC's hands, the Organization's actual and potential clout is not difficult to recognize.[13]

The fourth factor accounting for OPEC's mounting significance and power is solidarity among the exporting countries. History records many exporting organizations of bygone days which faded away in a short span of time due to short-sightedness, secretive competition, and the pursuit of "beggar-my-neighbor" policies. In the case of OPEC, however, in spite of differences in ideology and political

12. In this connection see L. LANDIS, POLITICS AND OIL: MOSCOW IN THE MIDDLE EAST (1973).

13. R. MILLER, THE ECONOMICS OF ENERGY: WHAT WENT WRONG AND HOW WE CAN FIX IT (1974).

philosophy among member countries, there has been a strong harmony of economic action among members, a harmony which has remained largely immune to countervailing maneuvers of both the big oil companies and the consuming nations.[14] Above all, OPEC's leadership has remained in the hands of moderate countries which have succeeded in avoiding useless and unproductive confrontations with the consuming nations.

The fifth element underlying OPEC's success has been the existence of conflicting interests among certain major consuming countries, despite their similar political philosophies and orientations. OPEC members, notwithstanding their dissimilar political regimes, have found it advantageous to follow certain common economic goals. Western Europe, the United States, and Japan, on the other hand, continue to follow what they themselves call "cannibalistic competition" in the economic arena. The United States, primarily relying on its own relatively rich domestic oil resources,[15] has recently vowed to follow a policy aimed at self-sufficiency by 1980. The United States' policies and prospects are thus vastly different from Japan's, a country which is totally dependent on foreign oil. In case of an emergency, the United States can maintain her levels of employment, income, and living reasonably well by adopting energy-saving policies which might necessitate only small sacrifices on the part of her people. But without foreign oil the Japanese economy would be in total chaos. The economic interests of EEC members also vary. England hopes to attain self-sufficiency and an exporting position in oil by 1980, a hope which cannot be shared by her other partners in the Community. Italy, France and Germany have thus found it necessary to follow their own national self-interest in attempting to obtain long-term supplies of foreign petroleum.[16]

The sixth element contributing to OPEC's strength has been the greater self-confidence among members as a result of a series of consecutive successes in the international economic scene. The expression "nothing succeeds like success" has never been more clearly manifested than in this case. OPEC members had endeavored to

14. *See* MOSLEY, *supra* note 7, at 388-411; Mikdashi, *Cooperation Among Oil Exporting Countries with Special Reference to Arab Countries*, 28 INT'L ORG. 1, 9-10 (1974). For examples of discord among OPEC countries see Mikdashi, *supra* note 1, at 12-17 and Note, *From Concession to Participation: Restricting the Middle East Oil Industry*, 48 N. Y. U. L. REV. 774, 791-93 (1973).

15. Even during the economic boom of 1972-73, only one-third of the United States' oil consumption was imported, but the figure for Japan was close to 100 percent.

16. The virtual abandonment of the Netherlands by other EEC countries in the face of the Arab oil embargo after October 1973 is another example of European disunity when national interests are at stake.

obtain their due shares since 1960, but their early setbacks in negotiations with oil companies repeatedly weakened their hand. Then they had their first success in February 1971 under the guidance and leadership of Iran's Shahanshah. From then on, one success led to another. The 1971 victory provided not only the psychological self-confidence needed by OPEC negotiators, but also the politico-economic underpinnings for future bargains. Once assured of their annual foreign exchange needs, the oil producers could negotiate from a position of financial strength and ultimately political power.

The seventh factor leading to OPEC's successful negotiations with the oil companies' skilled and sophisticated negotiators has been the ample supply of indigenous talent from the oil-producing countries. The exporter's representatives today are a group of well-informed and experienced individuals who fully match their Western counterparts in political skill and bargaining ability. They are equipped not only with their own courage and their governments' full support, but with reams of statistics and a number of arguments carefully selected and meticulously worked out by their technical and professional deputies. Oil bargaining sessions are no longer an exercise in favors humbly requested by the producers and magnanimously bestowed on them by the oil majors. The relationships are now conditioned by sovereign states bent on optimizing returns from their exhaustible resources and their customers. The West and the oil companies have come to understand these facts, and their relations with the Third World and the oil producers have significantly changed.[17]

The eighth factor responsible for OPEC's remarkable recent achievements has been the developing governments' success in following independent national policies free from the insidious influences of the oil companies or their governments. The majority of the people in the Third World have obtained greater confidence in their leaders now, and are willing to endure greater sacrifices to ensure the attainment of their national goals. At the same time, the political and administrative influence of the oil majors over both their own governments and those of the producing countries has considerably diminished.[18]

The success in oil negotiations and the acquisition of substantially vast sums of revenues have enabled national leaders in the oil-producing nations not only to give their people greater material amenities and increased economic welfare, but to prove to them their leadership ability and governing capacity. The rank and file, in turn, have not only become relatively more comfortable and thus more

17. R. VICKER, THE KINGDOM OF OIL/THE MIDDLE EAST: ITS PEOPLE AND ITS POWER (1974).

18. MOSLEY, *supra* note 7.

content; they have come to believe, more and more, their leaders' promises of higher material standards of living and enhanced national political prestige for their countries. This increased popular support has, in turn, strengthened the leadership's hand, allowing them to stand up to foreign politico-economic pressures and to resist oil company dictates.

III. The Weapons of OPEC

Having discussed the foundations of OPEC's economic strength and political power, we may consider the means through which this politico-economic power can be used in negotiating with international oil companies and Western consuming countries. The so-called "weapons" in OPEC's hands can be classified into two categories: (1) negative sanctions, and (2) positive stiumuli, which can be used alternatively vis-a-vis foreign interests. In resisting intolerable demands or intransigences of the oil-importing countries or companies, OPEC members may retaliate by resorting to such negative sanctions as:

1. Withholding part or all of the oil supply from all or selected customers through (a) nationalization or threat of take-over of oil and/or other foreign investments, and (b) temporary embargoes on exports;
2. Using its "embargo" power to demand and receive increasingly higher prices for crude oil—naturally to the extent that consumer resistance, the development of substitutes, and retaliatory measures by the oil importing countries (e.g., import quotas, foreign investment restrictions, denial of aid, and other retaliation) may permit;
3. Regulating domestic operation by foreign oil companies through such requirements as greater local participation in production and/or distribution; further changes in internal "value-added" in oil production and marketing; and increased local purchases, restricted company imports, etc.;
4. Switching huge export earnings from some foreign currencies and countries to others depending on type of cooperation and attitude, or denying foreign investment in "hostile" countries;
5. Making discriminatory price concessions, or engaging in unfavorable price discrimination vis-a-vis selected customers, or dumping other export products in "unfriendly" countries;
6. Retaliating against industrialized creditors by the repudiation or re-scheduling of foreign debts; and
7. Shifting alliances and coalitions in trade, investment and military agreements between cooperative and

non-cooperative nations (including threats of withdrawing from membership of regional pacts or closing military bases).

The possibility of using these negative sanctions is only part of OPEC's strength. Part of its power also resides in the offer of positive stimuli or incentives for cooperation. These incentives may include such things as:

1. Giving special concessions to foreign private investors for the purpose of exploiting domestic national resources which are outside the scope of existing contracts;
2. Promising cooperation in the reform of international monetary, fiscal and trade systems; and
3. Investing in joint ventures for the development of energy sources and/or other investment projects with cooperative and accommodating partners.

These positive and negative "weapons" have been used in the past and are more likely to be used in the future when circumstances warrant. Like all destructive weapons, however, the significance of the negative sanctions lies, partly at least, in their potential deterrence rather than actual use.

IV. CONCLUSION

In the final analysis, the very existence and occasional use of these weapons—even those which are retaliatory in nature—are not only in the interest of the Third World, but also to the advantage of the whole international community. The possibility of using the negative weapons will ensure greater economic justice among the rich and poor; reduce inferiority complexes of the developing nations (particularly the previous colonies) when dealing with the industrial countries; enhance their self-reliance and self-confidence; narrow existing political, psychological and economic gaps between the large and small countries; and pave the way for a better world. The productivity and beneficial prospects of the positive stimuli, in turn, open up vast horizons of cooperative endeavors between oil producers and oil consumers in efficient use of fuel supplies and in the search for newer sources of energy.

FACULTY COMMENT

WEAPONS REGULATION, MILITARY NECESSITY AND LEGAL STANDARDS: ARE CONTEMPORARY DEPARTMENT OF DEFENSE "PRACTICES" INCONSISTENT WITH LEGAL NORMS?

JORDAN J. PAUST*

Editors Note:

On January 18, 1974, Leonard Niederlehner, Acting General Counsel of the Department of Defense, responded to Representative Donald M. Fraser's letter of November 14, 1973, concerning the "appropriateness under international law of the M-16 rifle."[1] In that response, which addressed itself to the propriety of the M-16, Mr. Niederlehner cited as authority paragraph 4 of Article 23 of the 1907 Hague Convention No. IV., which provides, in part, that it is forbidden "to employ arms, projectiles, or materials calculated to cause unnecessary suffering . . . ." The following article is a comment on Mr. Niederlehner's interpretation of that language.

Pentagon representatives have recently made statements about the law and legal criteria utilized for decisions concerning the legality of weapon systems or their actual use in a particular context which do not adequately reflect previous U.S. or international legal standards. Whether there has been an inadvertent use of ambiguous words, a deliberate attempt to shift the standard, or something in between these two poles of subjectivity, is not known.

What is readily discoverable, however, is that recent Pentagon statements to the House Subcommittee on International Organizations and Movements are inconsistent with a complete map of U.S. and international legal policies as reflected in the authoritative U.S. Army Field Manual, *The Law of Land Warfare*.[2] And what is at stake in this inquiry is not merely the inconsistency, but the dangers to a proper serving of legal policy through use of the phrases disclosed below. On the one hand, there is a danger that acceptance of these phrases will contribute to a wider use of violence, death and destruction. And on the other, there is a danger that certain phrases may push the subjective standard of criminal culpability to an extreme

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1. Department of Defense, OSD Corres. 17018. Pertinent excerpts of Mr. Niederlehner's letter can be found in Rovine, *Contemporary Practice of the United States Relating To International Law*, 68 AM. J. INT'L L. 504, 528-30 (1974).

2. U.S. DEPT. OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE (1956) [hereinafter cited as FM 27-10].

level of specific intent to do something which is unnecessary—an intent which has never been the threshold and which, if adopted as the level of criminal culpability, could substantially thwart efforts to discipline soldiers or sanction violations of the law.

Here, several statements and implications contained in Mr. Niederlehner's letter to Representative Fraser, Chairperson of the House Subcommittee, about the "appropriateness under international law of the M-16 rifle"[3] are used as a focus. There is no attempt to refute Mr. Niederlehner's conclusions about the legality, *per se*, of the M-16, since no detailed analysis of relevant legal policies and ballistics and medical effects has been completed by the Department of Defense.[4] His letter is merely used as a widely publicized example of recent Pentagon thinking about weapons regulation, and comments on his actual or inferable misstatements of law are offered to avoid a public confusion in regard to actual U.S. and international legal standards.

The first discrepancy involves subjective standards and criminal culpability. Mr. Niederlehner states that the phrase "calculated to cause," as contained in the English version of Article 23(e) of the Annex to the Hague Convention No. IV (1907), will place within the content of the prohibition of the use of weapons which cause "unnecessary suffering" some "element of intent."[5] This is an erroneous interpretation if, by that, Mr. Niederlehner means to create some new "element of intent" beyond an intent to do an act which causes unncessary death, destruction, injury or suffering in a circumstance where one of "reasonable" make-up could reasonably foresee that such an act could cause such a death or injurious outcome.

It is by no means clear what Mr. Niederlehner actually meant. He qualifies his requirement of an "element of intent" with the following language: "such that members of the Armed Forces cannot justify the use of weapons inconsistent with attaining a legitimate military objective."[6] But even this language is insufficient for clarity. One does not know whether he subscribes to a *mens rea* standard of the "calculated to cause" or "inconsistent with" variety.[7] This writer feels that something in between the two is the proper test, and it hinges upon the proverbial "reasonable man" and the actual condi-

3. See Rovine, *supra* note 1, at 528-30.

4. In regard to possible illegality *see* INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), REPORT ON THE WORK OF EXPERTS ON WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS (1973) [hereinafter cited as ICRC REPORT OF EXPERTS].

5. Rovine, *supra* note 1, at 529.

6. *Id.*

7. See also *id.* ("intentionally superfluous").

tions of decision.[8] What is clear, however, is that no higher subjective standard (i.e., commission of an act or adoption of a weapon system "calculated" to cause unnecessary injury or which is "intentionally superfluous") is contained in this prescription.

The French text of the 1907 Hague prohibition does not contain the word "calculated," and the French wording is the only authoritative wording.[9] The French text, moreover, retained the exact wording of the earlier 1899 Hague Convention No. II, Annex, Article 23(e) prohibition. The relevant language is as follows: ". . . of a nature to cause superfluous injury" (" . . . propres a causer des maux superflus"). Custom has also retained the original meaning and textwriters now merely refer to the principle of unnecessary suffering.[10] This writer feels, however, that although weapon illegality must substantially hinge upon effects, not upon subjectivities, a criminal prosecution for design, adoption or use of illegal weapons must address the common *mens rea* standard of culpability which is based upon a "reasonable man," foreseeability and actual circumstance. But Mr. Niederlehner is plainly wrong if it is his contention that Article 23(e) has been violated only when a weapon or conduct causes suffering or injury which is "intentionally superfluous."[11] Since he uses this language along with an exposition of the postulated "element of intent" theory, one must infer that it is his standard and, then, denounce it as unsupportable by proper legal analysis.

There is another misstatement of law implied in Mr. Niederlehner's letter. It is the implication that the Department of Defense now subscribes to the repudiated "Kriegsraison" theory of the German war criminals. At the outset it must be emphasized that it has never been an accepted international legal standard in modern times that armed forces can employ any form or intensity of violence which is consistent with or helpful in the attainment of a legitimate military objective. Such an approach is far too broad. It amounts to a military "benefit" test as opposed to a military "necessity" test,[12] and the military benefit or "Kriegsraison" theory was expressly repu-

8. *See* Paust, *The Nuclear Decision in World War II—Truman's Ending and Avoidance of War*, 8 INT'L LAW. 160 (1974).

9. See FM 27-10, *supra* note 2, at i.

10. See ICRC REPORT OF EXPERTS, *supra* note 4, at 14, para. 21; and *infra* note 11.

11. Rovine, *supra* note 1, at 529. For a contrary DOD/DA view *see* FM 27-10, *supra* note 2, at 3 (paras. 2a and 3a), 18 (paras. 34b and 36), 19-20 (para. 41) and 23-24 (para. 56); see also *id.* at 178 (para. 501) and 182 (para. 509).

12. *See* Paust, *supra* note 8, at 163-66, 168-69 n.31; Comment, 26 NAVAL WAR COLL. REV. 103 (1973); Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 149-53 (1972). *See also* the remarks of Aldrich in Proceedings of the American Society of International Law, 67 AM. J. INT'L L. 148 (1973); the remarks of Paust, *id.* at 162; the remarks of Rubin, *id.* at 165.

diated at Nuremberg in the *Von Leeb* case.[13] One could infer that Mr. Niederlehner adopts the military benefit test through use of the phrase "use of weapons inconsistent with attaining a legitimate military objective" by implying that he feels that any weapon usage which is merely consistent with attaining a legitimate military objective would be lawful. But it is not clear that he subscribes to such an implication, although, for clarity, such an implication must be emphatically denounced.

What is also disturbing, however, is that this sort of implication (of a new DOD "Kriegsraison" theory) seems consistent with recent statements made before the same Congressional body by Major General George Prugh, the Judge Advocate General, U.S. Army. General Prugh stated that "loss of life and damage to property must not be out of proportion to the military *advantage* to be gained" (emphasis added).[14] Actually, the rule is that loss of life must not be out of proportion to what is militarily "necessary" under the circumstances, and damage to property must not be out of proportion to what is "imperatively demanded by the necessities of war."[15] Although it is true that General Prugh's words reflect a partial reading of paragraph 41 of the U.S. Army Field Manual,[16] that paragraph also reiterates the "necessity" test through the phrase: "demanded by the exigencies of war," and paragraph 3 of the Army manual makes it clear that the military benefit or "advantage" test is not the legal standard. That paragraph states that the law of war "requires that belligerents refrain from employing *any kind or degree* of violence which is *not actually necessary* for military purposes . . ." (emphasis added). The same paragraph states that military necessity also involves the use of measures "which are *indispensable* for securing the complete submission of the enemy as soon as possible" (emphasis added). In regard to property, "[t]he measure of permissible devastation is found in the *strict necessities* of war."[17] It is clearly not enough that the measure is advantageous to, beneficial to or consistent with military needs. The test is "necessity," not "Kriegsraison."

Another implication in Mr. Niederlehner's letter is that the prohibition of "dum-dum" bullets only applies to bullets which are not

13. *See also* II U.S. DEPT. OF THE ARMY, PAMPHLET NO. 27-161-2, INTERNATIONAL LAW 248 (1962), quoting from United States v. Von Leeb, XI TRIALS OF WAR CRIMINALS 541 (1948) and rejecting the "right to do anything that contributes to the winning of a war."

14. Statement of Major General Prugh, *Hearings Before the Subcomm. on Int'l. Organization and Movements of the Comm. on Foreign Affairs*, 93d Cong., 1st Sess., at 102 (1974).

15. See FM 27-10, *supra* note 2, at 3 (para. 3a), 19 (para. 41), 23 (para. 56) and 24 (para. 58).

16. *Id.* at 19.

17. *Id.* at 23 (para. 56) (emphasis added). See also *id.* at 24 (para. 58).

"fully jacketed."[18] Such an implication would also be clearly erroneous, since the very purpose of the customary 1899 Declaration on Expanding Bullets[19] was to prohibit certain effects of any bullet within the human body and not merely certain specific configurations of bullets.[20] That declaration prohibited "bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions."[21] The listing of partially-jacketed bullets and bullets pierced with incisions was merely illustrative. Moreover, it is clear that the proscribed effects can be caused by partial-jacketing, a flat top (bullet tip), cutting off of the tip of a bullet, scoring the surface of the jacket, a hollow-point, soft lead, a weak jacketing and/or a tremendous increase in velocity.[22] As the Army Field Manual sets forth, usage has established the illegality of "irregular-shaped bullets . . . and the scoring of the surface or the filing off of the ends of the hard cases of bullets."[23] More recent Army publications reiterate these prohibitions. Army Subject Schedule No. 27-1 states that these principles "have established the illegality of the use of irregular-shaped bullets such as dum-dum bullets. . ."[24] And Department of the Army Pamphlet No. 27-200 states:

> . . . irregular shaped bullets (dum-dum) and projectiles filled with glass are examples of weapons considered to be illegal *per se*; that is, they may never be used . . . Misuse of a legitimate weapon, such as cutting of the points of issued ammunition, is a violation of the law of war.[25]

An older United States Naval War Code (1900) had also declared that:

> it is forbidden . . . (2) To employ arms, projectiles, or materials calculated to cause unnecessary suffering. Entering especially into this category are . . . bullets with a hard envelope which does not cover the core entirely or is pierced with incisions.[26]

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18. See Rovine, *supra* note 1, at 529, "The M-16 projectile is fully-jacketed and does not, therefore, violate the prohibition on 'dum-dum' bullets."

19. Declaration on Expanding Bullets, Dec. IV, 3, July 29, 1899, Reprinted at 1 AM. J. INT'L L. 155 (Supp. 1907).

20. *See, e.g.*, Paust, *Does Your Police Force Use Illegal Weapons?—An Approach to Decision-Making About Weapons Regulations*, (forthcoming article); ICRC REPORT OF EXPERTS, *supra* note 4. *See also* Connecticut Civil Liberties Union News Release, July 26, 1974; *Controversy Swirls Over Use of Bullet*, The Middletown Press (Connecticut) Aug. 3, 1974, at 1; *The First DumDum Use Stirs Connecticut Controversy*, N.Y. Times, Sept. 26, 1974 at 33, col. 1.

21. Declaration, *supra* note 19.

22. See *supra* note 14; FM 27-10, *supra* note 2, at 18 (para. 34b); U.S. Dept. of the Army, Pamphlet No. 27-161-2, *supra* note 13, at 45.

23. FM 27-10, *supra* note 2, at para. 34.

24. The Geneva Conventions of 1949 and Hague Convention No. IV. of 1907, at 6 (1970) (unpublished material).

25. The Law of Land Warfare—A Self Instructional Text 5 (1972) (unpublished material).

26. See VI G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 455 (1943).

The U.S. position at the 1899 Hague Conference was that it should be forbidden to use "bullets inflicting wounds of useless cruelty, such as explosive bullets, and in general all kinds of bullets which exceed the limit necessary for placing a man *hors de combat* . . .",[27] but the U.S. position was not adopted by the Conference.[28] What was clearly adopted, however, was a focus on the effects of bullets within the human body rather than upon specific bullet configurations. Moreover, it is because of the basic prohibition of unnecessary suffering, cruelty, torture, unusual injury, aggravation of wounds beyond what is necessary, the rendering of death inevitable and other such outcomes that legal guidance in this matter must necessarily consider an interrelated set of norms that are generally referred to as human rights.

A fundamental norm of human rights which is relevant to this sort of inquiry is Article 5 of the 1948 Universal Declaration of Human Rights.[29] It states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This prohibition applies in time of armed conflict or in time of relative peace—through all levels of human violence and circumstances of state or public need and military necessity. Moreover, the fundamental prohibition contained in Article 5 of the Universal Declaration significantly matches the legal policies that are articulated in Geneva law. Common Article 3 of the 1949 Geneva Conventions, applicable in time of an internal armed conflict, also prohibits summary execution (the denial of a right to a fair trial), inhumane treatment, murder, mutilation, torture, and cruel treatment.[30] To the extent that these policies are relevant in any given inquiry into the legality of a weapon system or weapon usage, they should be considered by legal decision-makers so as to maximize the serving of legal policy. And these legal policies are certainly going to be relevant in most cases. In regard to norms contained in the law of war, the author agrees with Mr. Niederlehner that these norms apply to "all weapons" and all bullets, and that the U.S. is bound by each of these norms.

On a related matter, I also feel that Mr. Niederlehner's letter about the effects of the U.S. M-16 and the Soviet AK-47 is unduly kind to the Soviet Union's position. It is alleged, prior to completion

27. This was General Crozier's amendment. See Davis, *Amelioration of the Rules of War on Land*, 2 AM. J. INT'L L. 75, 75-77 (1908). The U. S. and Great Britain also expressly intimated accession to the 1899 Declaration during the 1907 Hague Conference. See J. SPAIGHT, WAR RIGHTS ON LAND 79 (1911); A. HIGGINS, THE HAGUE PEACE CONFERENCES 495-97 (1909). See also *supra* note 18.

28. See U.S. DEPT. OF THE ARMY, PAMPHLET No. 27-161-2, *supra* note 13, at 44.

29. U.N. G.A. Res. 217, U.N. Doc. A/810, at 71 (1948).

30. *See, e.g.*, 75 U.N.T.S. 287, 6 U.S.T 3516 (1955). See also J. BOND, THE RULES OF RIOT—INTERNAL CONFLICT AND THE LAW OF WAR (1974).

of comprehensive tests, that "the lethality—or wounding impact—of the [M-16] does not differ from weapons such as the Soviet Union's AK-47."[31] It is also stated that the "wounds inflicted" are "not substantially different." However, the International Committee of the Red Cross report of experts discloses the fact that although the muzzle velocity of the Soviet AK-47 projectile is slower than that of the U.S. M-16, the kinetic energy is much greater for the Soviet projectile.[32] Since the Soviet AK-47 projectile has almost 23 percent more energy for transfer to the human body, it seems that it can cause greater death, injury and suffering. Thus, it would seem to differ from the U.S. M-16 projectile in terms of effects within the human body. But actual tests may prove that although the Soviet AK-47 has more energy for transfer it actually transfers about the same amount of energy to the body as the M-16. We await further tests.

In conclusion, what should be stressed is that the test for permissibility or impermissibility in regard to a weapon system or a weapon usage hinges upon military "necessity" and not some "benefit," "advantage," "consistency" or "Kriegsraison" theory. Since I do not seriously believe that there has been a change in U.S. or DOD policy, or that Mr. Niederlehner's letter fairly expresses that policy, I continue to regard as violative of international law the employment of "any kind or degree of violence which is not actually necessary for military purposes . . ."[33]

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31. Rovine, *supra* note 1, at 529.

32. See ICRC REPORT OF EXPERTS, *supra* note 4, at 42 (Table III.1 Ballistic features). The muzzle velocity of the AK-47 is 720 m/sec., and that of the M-16 is 980 m/sec. But the kinetic energy for transfer to the body is 2100 for the AK-47 at point of release and 1700 for the M-16 at point of release; or 1600 for the AK-47 at 100 meters and 1300 for the M-16 at 100 meters. Thus, the AK-47 has over 23 percent more kinetic energy for transfer.

33. FM 27-10, *supra* note 2, at para. 3a.

STUDENT COMMENTS

LEGAL IMPLICATIONS OF INDIAN NUCLEAR DEVELOPMENT

On May 18, 1974, India detonated a nuclear explosive device in the desert area of Rajasthan, about forty miles from the Indo-Pakistani border. This development has caused grave concern not only among India's neighbors, but also among many other nations of the world.[1] It is the purpose of this comment to assess the legality of India's actions under present standards of international law. In so doing it shall be necessary to examine: 1) the status of nuclear non-proliferation as an international legal norm, 2) other principles of international law that are applicable to India's nuclear explosion, 3) the Indian position on the legality of the development of nuclear explosive devices by non-nuclear weapon states, and 4) conclusions regarding the legality of India's actions and their impact upon the international legal system.

I. NUCLEAR NON-PROLIFERATION AS AN INTERNATIONAL LEGAL NORM

The Nuclear Non-Proliferation Treaty[2] entered into force on March 5, 1970.[3] The treaty represents the most advanced and comprehensive attempt yet made to control the spread of nuclear weapons.

The obligations of the treaty are divided between two categories of states: nuclear weapon states and non-nuclear weapon states.[4] Nuclear weapon states are prohibited from transferring "to any recipient whatsoever nuclear weapons or other nuclear explosive devices."[5] They are also bound not to assist or encourage any non-nuclear weapon state from manufacturing or otherwise acquiring such de-

1. *See* 27 PAKISTAN AFFAIRS No. 11, June 1, 1974, at 3; *Id.* No. 12, June 16, 1974, at 2; *Id.* No. 13, July 1, 1974, at 2; *Id.* No. 14, July 16, 1974, at 3.

2. Treaty on the Non-Proliferation of Nuclear Weapons, *done* July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839 [hereinafter cited as NPT].

3. The treaty entered into force with 97 signatures and 47 ratifications. Smith, *NATO Nuclear Information Sharing Arrangements and the Non-Proliferation Treaty: Collective Defense Confronts Arms Control*, 13 ATOMIC ENERGY L.J. 331, 341 (1972). As of January 1, 1974, ratifications, accessions, or notifications of successions had been deposited by 82 states. TREATIES IN FORCE, Jan. 1, 1974, at 366.

4. Under the treaty, "a nuclear weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967." NPT, art. IX, para. 3.

5. *Id.* art. I.

vices.[6] In addition to these two specific prohibitions, nuclear weapon states are generally obligated to facilitate the development of nuclear energy throughout the third world[7] and to make available to the non-nuclear weapon states "the potential benefits from any peaceful applications of nuclear explosions."[8] Finally, nuclear weapon states are obligated to negotiate in good faith on measures designed to end the nuclear arms race with the eventual goal of complete disarmament.[9]

In contrast, the non-nuclear weapon states are bound not only to refrain from acquiring or manufacturing nuclear explosive devices,[10] but also to accept international safeguards and controls on their peaceful nuclear programs.[11] The requirement is designed to prevent the diversion of source or special fissionable material to the manufacturing of a nuclear explosive device. Under the treaty the safeguards are to be administered by the International Atomic Energy Agency (IAEA).[12]

Thus, India's actions as a non-nuclear weapon state were clearly violative of the two most critical provisions of the treaty: 1) the prohibition against the fabrication of a nuclear explosive device, and 2) the application of international controls to peaceful nuclear programs.[13]

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6. *Id.* The Non-Proliferation Treaty makes no distinction between nuclear weapons and "peaceful" nuclear explosives. From a technological point of view there is no meaningful difference between a bomb and a "plowshare" device. In order for the Non-Proliferation Treaty to be effective, therefore, controls must be applied to all nuclear explosive devices. M. WILLRICH, NON-PROLIFERATION TREATY: FRAMEWORK FOR NUCLEAR ARMS CONTROL 69-70 (1969); Firmage, *The Treaty on the Non-Proliferation of Nuclear Weapons*, 63 AM. J. INT'L L. 711, 722 (1969); Bunn, *Nuclear Non-Proliferation Treaty*, 1968 WIS. L. REV. 766, 772; 27 PAKISTAN AFFAIRS, *supra* note 1, at 3. See generally, Gorove, *Distinguishing "Peaceful" from "Military" Uses of Atomic Energy, Some Facts and Considerations*, 30 O.S.L.J. 495 (1969).

7. NPT, art. IV, para. 2. The obligation to aid the nuclear development of the third world also applies to advanced non-nuclear weapon states such as Canada.

8. *Id.* art. V.

9. *Id.* art. VI.

10. *Id.* art. II.

11. *Id.* art. III.

12. *Id. See generally* Questor, *Nuclear Non-Proliferation Treaty and the International Atomic Energy Agency*, 24 INT'L ORG. 163 (1970). The treaty does not set forth specific safeguard requirements. It merely requires that non-nuclear weapon states conclude safeguard agreements with the IAEA. The agreements must be designed so as to provide effective monitoring of the use and production of source (natural uranium) or special fissionable material (enriched uranium).

13. India has consistently resisted international controls over the peaceful nuclear programs of the non-nuclear weapon states. In the Indian view:

> Institution of international controls on peaceful reactors and power stations is like an attempt to maintain law and order in a society by placing all its law-abiding citizens in custody while leaving its law-breaking elements free to roam the streets.

Since India has never signed or ratified the Non-Proliferation Treaty, the legality of India's nuclear explosion hinges on whether the Non-Proliferation Treaty represents customary international law to such an extent that its provisions are binding even upon states that are not a party to the treaty.

Treaties, especially multilateral treaties, are commonly cited by writers, judges, and lawyers as evidence of customary international law.[14] A treaty may be either declaratory of customary international law as it already exists, or it may, in itself, be the formulation (*fons et origo*) of a new legal norm.[15] The validity of a declaratory treaty as evidence of customary international law can be tested by examining the practice of states prior to the formulation of the treaty. Conversely, a treaty which attempts to create a new legal norm must achieve a high level of adherence before that norm can be considered a part of customary international law. The Non-Proliferation Treaty deals with an uncertain area of international law and thus contains elements of both types of treaties. It is necessary, therefore, to examine both state practice prior to the formulation of the Non-Proliferation Treaty and the degree of adherence to the treaty.

Also, the subject matter of a treaty has a significant effect upon how quickly that treaty becomes a part of customary international law. Accordingly, the purposes of the Non-Proliferation Treaty and the motives of its chief proponents, the U.S. and the U.S.S.R. must be considered.

A. *State Practice*

State practice as evidence of customary international law in the area of nuclear non-proliferation must be weighed carefully. The decision to go nuclear has been in the past and, for the foreseable future, will be a decision that is based upon economic, military, and political factors rather than upon legal analysis. The practice of the large majority of nations which have no nuclear capability whatsoever must be discounted accordingly. Nevertheless, state practice before and after the Non-Proliferation Treaty came into force indicates that there may be an emerging norm of international law against the development of nuclear weapons by non-nuclear weapon states. The practice has generally taken the form of 1) unilateral declarations, 2)

Statement by the Representative of India to the Eighteen Nation Disarmament Conference, Aug. 12, 1965, ENDC/PV. 223, at 5-21; quoted in M. WILLRICH, *supra* note 6, at 124.

14. On multilateral treaties as sources of international law, *see* W. COPLIN, THE FUNCTIONS OF INTERNATIONAL LAW 8-10 (1966); Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275 (1965-66).

15. Baxter, *supra* note 14, at 277.

the de-nuclearization of certain geographic areas, and 3) limitations upon the testing of nuclear weapons.[16]

1. *Unilateral Declarations*

The most significant renunciations of the right to manufacture nuclear weapons have been made by West Germany and India. The West German pledge was made in connection with that country's entry into the North Atlantic Treaty Organization in 1954.[17] The pledge, however, prohibits only the manufacturing of nuclear weapons. It does not prevent their acquisition by other methods. Also, the continued legal validity of the pledge has been open to question in recent years.[18]

The Indian renuncation of nuclear weapons has taken the form of general pronouncements by various government leaders.[19] The primary thrust of these statements is that India will develop nuclear energy for exclusively peaceful purposes. It is true, however, that such promises cannot be taken as irrevocable commitments that are legally binding upon future Indian governments.[20] Also, India makes a distinction between peaceful nuclear explosives and nuclear weapons, a distinction not generally made by the great majority of nations.[21] Nevertheless, India's declarations had created expectations among the nations of the world and to ignore these expectations is a serious breach of trust, if not of international law, by India.[22]

2. *Nuclear Free Zones*

Another important development in the area of nuclear nonproliferation has been the emergence of "nuclear free zones." The zones have been created by multilateral treaties which have received widespread support. The first such area was created by the Antarctic

16. *See generally* M. WILLRICH, *supra* note 6, at 53-66; G. DELCOIGNE & G. RUBINSTEIN, NON-PROLIFERATION DES ARMES NUCLEAIRES ET SYSTEMES DE CONTROLE 57-80 (1970).

17. M. WILLRICH, *supra* note 6, at 53.

18. *Id.* See also Willrich, *West Germany's Pledge Not to Manufacture Nuclear Weapons*, 7 VA. J. INT'L L. 91 (1966).

19. See India News, June 14, 1974, at 3, col. 1 for comments on the development of nuclear weapons by Prime Minister Nehru (1957), President Prasad (1958), Prime Minister Shastri (1964), and Prime Minister Gandhi (1968). *See also* STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, THE NEAR-NUCLEAR COUNTRIES AND THE NPT 22-23 (1972); S. WILLIAMS, THE U.S., INDIA AND THE BOMB 39 (1969).

20. Kapur, *Nuclear Weapons and Indian Foreign Policy: A Perspective*, 27 WORLD TODAY 379, 380-81 (1971).

21. India insists that its development of a nuclear explosive device is for peaceful purposes and therefore cannot be considered a weapon. India News, June 14, 1974, at 3, col. 3. Most countries contend that given the state of nuclear technology no such distinction can reasonably be made. See note 6 *supra*.

22. Wall Street Journal, May 31, 1974, at 10, col. 2.

Treaty of 1959 which prohibited all nuclear explosions in that region.[23] A second nuclear free zone was established by the Treaty Governing the Use and Exploration of Outer Space, which entered into force in 1967. The treaty prohibits the placement of nuclear weapons in orbit around the earth, on celestial bodies, or on space stations.[24] The third nuclear free zone was created by the Treaty Prohibiting the Placement of Nuclear Weapons or Other Weapons of Mass Destruction on the Seabed.[25] The treaty entered into force in 1972 and differs from the other two treaties in that it was specifically designed as an arms control agreement.

Each of the three multilateral treaties deals with areas generally considered to be international in character. They represent the joint efforts of the two countries who have the technology and resources to carry out nuclear activities, the United States and the Soviet Union. The almost universal acceptance of the three treaties by nuclear and non-nuclear weapon states alike has probably already elevated the treaties to the status of customary international law.

There have also been significant attempts to create nuclear free zones in Latin America and Africa. The Latin American effort can be traced to a working resolution concerning the de-nuclearization of Latin America that was introduced in the United Nations General Assembly by Chile, Bolivia, Brazil, and Ecuador in 1962.[26] Following a General Assembly resolution endorsing the de-nuclearization of Latin America,[27] negotiations among the Latin American states produced the Treaty of Tlatelolco which was opened for signature on February 14, 1967.[28] The provisions of this treaty are stricter than those of the Non-Proliferation Treaty in that the parties to the Treaty of Tlatelolco may not permit the deployment of nuclear weapons by other states on their territory. Also, parties to the Treaty of Tlatelolco may not aid any other state (nuclear weapon state or non-nuclear

23. The Antarctic Treaty, art. V, para. 1 [1961] 1 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71 (1961). *See also* G. DELCOIGNE, *supra* note 16, at 61-63.

24. Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies, *done* Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347. *See also*, G. DELCOIGNE, *supra* note 16, at 63-64; M. WILLRICH, *supra* note 6, at 57.

25. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor, *done* Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337. *See also* G. DELCOIGNE, *supra* note 16, at 64-65.

26. G. DELCOIGNE, *supra* note 16, at 58.

27. G.A. Res. 1911, 18 U.N. GAOR Supp. 15, at 14, U.N. Doc. A/5515 (1963).

28. G. DELCOIGNE, *supra* note 16, at 59. As of 1970, the treaty had been signed by 22 states and ratified by 15. *Id.* at 183-84. The text of the Treaty of Tlatelolco may be found in 22 U.S.T. 762, T.I.A.S. No. 7137.

weapon state) in the manufacturing of nuclear weapons.[29] The Non-Proliferation Treaty permits the deployment of nuclear weapons on the territory of non-nuclear weapon states and allows a non-nuclear weapon state to aid a nuclear weapon state in the manufacturing of nuclear weapons.[30]

The provisions under which the Treaty of Tlatelolco will come into force, however, are almost impossible to fulfill.[31] The treaty cannot enter into force for the entire zone until it is ratified by all states of the region.[32] Similarly, the treaty cannot enter into force until all nuclear weapon states ratify Protocol II, whereby these states pledge not to use nuclear weapons against parties to the treaty nor to encourage or participate in any violation of the treaty.[33]

The Treaty of Tlatelolco, however, recognizes that signatory states "have the imprescriptable right to waive, wholly or in part," the conditions under which the treaty comes into force.[34] Fourteen states of Latin America have exercised this right and for these states the treaty is now in force.[35]

Efforts have also been made to create a nuclear free zone in Africa. At first, these efforts centered around African concern over French nuclear testing in the Sahara desert.[36] With the passing of French Algeria, the focus moved toward a general de-nuclearization of Africa. As a result, two resolutions were passed by the United Nations General Assembly which called upon all states to respect Africa as a nuclear free zone.[37] Despite these efforts, no further prog-

29. Treaty of Tlatelolco, *supra* note 28, art. I.

30. M. WILLRICH, *supra* note 6, at 57; G. FISCHER, THE NON-PROLIFERATION OF NUCLEAR WEAPONS 60 (1971).

31. M. WILLRICH, *supra* note 6, at 56. The conditions under which the Treaty of Tlatelolco takes effect are set forth in Article 28 of the treaty.

32. Treaty of Tlatelolco, *supra* note 28, art. XXVIII, para. 1a. The requirement that ratifications of the treaty be unanimous implicitly acknowledges that the treaty cannot be imposed as customary international law upon non-consenting states.

33. Treaty of Tlatelolco, *supra* note 28, art. XXVIII. The treaty defines a nuclear weapon as "any device which is capable of releasing nuclear energy in an uncontrolled manner and which has a group of characteristics that are appropriate for use for warlike purposes." *Id.* art. V. Under this definition India's device is a nuclear weapon. India, therefore, must sign Protocol II before the treaty can come into force.

34. *Id.* art. XXVIII, para. 2.

35. G. DELCOIGNE, *supra* note 16, at 183-84.

36. *Id.* at 59.

37. *Id.* at 59-60, 161-162. The resolutions are G.A. Res. 1652, 16 U.N. GAOR Supp. 17, at 4, U.N. Doc. A/5100 (1961) and G.A. Res. 2033, 20 U.N. GAOR Supp. 14, at 9, U.N. Doc. A/6014 (1965). The former resolution passed by a vote of 55-0 with 44 abstentions. The latter resolution also passed without opposition, 105-0, with 3 abstentions. The change in the voting pattern reflects the change in attitude of the United States and the Soviet Union with respect to nuclear non-proliferation. G. DELCOIGNE, *supra* note 16, at 60-61.

ress has been made toward the de-nuclearization of Africa. The failure probably reflects African concern over the policies of the Union of South Africa in regard to nuclear non-proliferation.[38]

3. *Limited Test Ban Treaty*

A final element of state practice in regard to nuclear non-proliferation is the Limited Test Ban Treaty.[39] Although the treaty is primarily an arms control measure with environmental overtones, it has served to restrain the proliferation of nuclear weapons by making their development much more costly.[40] The treaty is also significant because, unlike the outer space and seabed treaties, it is applicable to several states who have the capability and motivation to conduct the proscribed activities. The inability of the international legal system to prevent French defiance of the treaty indicates the necessity of complete adherence to such treaties. In this respect, Indian disregard of the Non-Proliferation Treaty is analogous to French violations of the Limited Test Ban Treaty.

B. *Adherence to the Non-Proliferation Treaty*

The Non-Proliferation Treaty can be traced to a United Nations General Assembly resolution on the "Prevention of the Wider Dissemination of Nuclear Weapons" which was unanimously adopted on December 4, 1961.[41] After several years of U.S.—U.S.S.R. negotiations under the auspices of the Eighteen Nation Disarmament Conference,[42] the final draft of the treaty was presented to the General Assembly for consideration. The Assembly approved the treaty on June 12, 1968 by a vote of 95 to 4, with 21 abstentions.[43] The treaty was opened for signature on July 1, 1968 and entered into force on March 5, 1970 with 97 signatures and 47 ratifications.[44] At the present time 82 states have acceded to or ratified the treaty.[45] To date, only India has violated the treaty's ban on the manufacturing of nuclear explosives by a non-nuclear weapon state. The widespread acceptance of the treaty must be considered persuasive evidence that the

38. The Union of South Africa has not ratified or acceded to the Non-Proliferation Treaty. TREATIES IN FORCE, Jan. 1, 1974, at 366.

39. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, *done* Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43.

40. M. WILLRICH, *supra* note 6, at 55.

41. *Id.* at 61.

42. For a legislative history of the treaty see M. WILLRICH, *supra* note 6, at 61-66; PREVENTING THE SPREAD OF NUCLEAR WEAPONS 52-62 (C.F. BARNABY ed. 1969).

43. G.A. Res. 2373, 22 U.N. GAOR Supp. 16A, at 5-7, U.N. Doc. A/6716 (1968).

44. See note 3, *supra*.

45. TREATIES IN FORCE, Jan. 1, 1974, at 366.

treaty has attained at least some measure of independent juridical status as customary international law.

Many of the non-adherents to the Non-Proliferation Treaty, however, are those nations which have the technology and resources to go nuclear in a relatively short period of time. Countries such as Brazil, India, Japan, South Africa, Pakistan, West Germany, Egypt, and Israel have refused to give up their nuclear option by ratifying the Non-Proliferation Treaty.[46] The People's Republic of China and France have not become parties to the treaty, although both have indicated that they will abide by its general terms.[47] Since the success of the Non-Proliferation Treaty is dependent upon near unanimous adherence to its provisions, the practice of these states is crucial. The decision of India to exercise its nuclear option will put political pressure on other states, particularly Pakistan, to go nuclear. At the same time, India's actions have made it easier for other states to argue in favor of the legality of the development of nuclear explosives by non-nuclear weapon states. India's nuclear blast is therefore a serious blow to the formation of nuclear non-proliferation as a norm of customary international law.

C. *Purposes of the Treaty*

Humanitarian treaties, because of their universal nature, become norms of customary international law more quickly than do those treaties which are based upon political or economic bartering.[48] Although the non-proliferation of nuclear weapons is certainly beneficial to all mankind, it would appear that the driving force behind the Non-Proliferation Treaty was primarily political and not humanitarian. The main proponents of the treaty, the United States and the Soviet Union, see the treaty as a means of freezing the nuclear status quo.[49] The failure of the United States and the Soviet Union to reach meaningful agreement on disarmament measures brings into question their motives in proposing the Non-Proliferation Treaty. It is unlikely, therefore, that the near-nuclear states that are not parties to the Non-Proliferation Treaty will feel bound by its provisions as long as the expansion of nuclear arsenals by the nuclear weapon states continues.

II. OTHER PRINCIPLES OF INTERNATIONAL LAW

In addition to arguments based upon a general legal norm

46. *Id.*

47. Smith, *supra* note 3, at 341-42 n. 40.

48. Baxter, *supra* note 14, at 286.

49. G. FISCHER, *supra* note 30, at 67; Ehrlich, *The Non-Proliferation Treaty and Peaceful Uses of Nuclear Explosives*, 56 VA. L. REV. 587, 588-89 (1970).

against nuclear proliferation, India's nuclear explosion has been attacked on several other grounds. It has been suggested that India: 1) violated bilateral agreements with Canada concerning nuclear aid, 2) violated the Limited Test Ban Treaty by allowing radioactive fallout to enter Pakistan, and 3) disregarded universal humanitarian principles by expending large amounts of money on nuclear explosives while a great number of Indians live in poverty.

A. *Canadian Agreements*

Canada has been the most important contributor of foreign aid toward the development of Indian nuclear technology. The agreements under which this aid was made available to India were concluded several years prior to the Non-Proliferation Treaty. They do not provide for strict controls over Canadian supplied materials. India has merely agreed that the materials shall be used for exclusively peaceful purposes.[50]

India asserts that it has not violated the aid agreements for two reasons: 1) the materials used for the nuclear explosive device were completely indigenous,[51] and 2) the explosion was conducted for peaceful purposes. While it is technically correct that the materials for the device were totally indigenous, the plutonium used in the blast was produced by CIRUS, a 40 megawatt research reactor jointly built by Canada and India.[52] Also, it is indisputable that India was aware of Canada's position that there is no difference between a nuclear explosive device and a nuclear weapon.[53] Canada's position was made clear in a letter from Prime Minister Trudeau to Prime Minister Gandhi:

> The use of Canadian supplied material, equipment and facilities in India that is at CIRUS, RAPP I and RAPP II or missile material from these factories, for the development of a nuclear explosive device would inevitably call on our part for a reassessment of our nuclear co-operation arrangement with India, a position we would take with any other non-

50. Sullivan, *Indian Attitudes on International Atomic Energy Controls*, 43 PACIFIC AFFAIRS 353, 358 (1970); *See generally*, Gorove, *Control over Atoms-for-Peace under Canadian Bilateral Agreements with other Nations*, 42 DENVER L. CEN. J. 41 (1965).

51. Press Release No. 5/74, Information Service of India, May 21, 1974, at 3; Press Release No. 7/74, Information Service of India, May 31, 1974, at 1; Press Release No. 8/74, Information Service of India, June 17, 1974, at 2 (text of Ambassador Kaul's address to the National Press Club); *Id.* at 5 (text of the question and answer session following Ambassador Kaul's speech).

52. NEWSWEEK, June 10, 1974, at 45.

53. *See* the remarks of Canadian Foreign Minister Mitchell Sharp reprinted in FOREIGN AFFAIRS PAKISTAN at 38-40 (unpublished material available from the Embassy of Pakistan).

> nuclear weapons State with which we have co-operation arrangements in the nuclear field.
>
> There is, of course, the possibility (contemplated in the Non-Proliferation Treaty) that arrangements acceptable to the international community will be developed for the provision of peaceful nuclear explosive devices. In such an event we would of course have no cause for concern if such service (without the transfer of technology relating to the nuclear explosive device itself) were made available to India by existing nuclear weapons States using their own nuclear material or plutonium provided by India for this purpose.[54]

Prime Minister Gandhi's reply evaded the issue of nuclear explosive devices by stating:

> The obligations undertaken by our two Governments are mutual and they cannot be unilaterally varied. In these circumstances it should not be necessary now in our view to interpret these agreements in a particular way based on the development of a hypothetical contingency.[55]

Nevertheless, the beginnings of this "hypothetical contingency" occurred less than a year later when, in the summer of 1972, Mrs. Gandhi ordered scientists to begin work on India's first nuclear explosive device.[56] It must be concluded, therefore, that India has at least violated the spirit, if not the letter of the agreements with Canada. This evaluation is borne out by Canada's swift suspension of nuclear aid to India following the detonation of India's nuclear device.[57]

B. *Limited Test Ban Treaty*

The Limited Test Ban Treaty, to which India is a party, prohibits underground nuclear tests that would cause "radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted."[58] India claims that the test was "clean" and that no radioactivity was detected by a helicoptor flying 100 feet above ground zero thirty minutes after the blast.[59] The assertion has been challenged by Pakistan and United States intelligence sources.[60] Thus, the facts are in dispute. However, even if it could be conclusively shown that India had violated the Limited Test Ban Treaty in this instance, such a result would not bar India from detonating other nuclear explosive devices. Only if India

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54. *Id.* at 41-42.

55. *Id.*

56. NEWSWEEK, *supra* note 52, at 42.

57. FOREIGN AFFAIRS PAKISTAN, *supra* note 53, at 38; New York Times, May 21, 1974, at 1, col. 2; *Id.* May 23, 1974, at 1, col. 4.

58. Limited Test Ban Treaty, *supra* note 39, art. I, para. 1.

59. NEWSWEEK, *supra* note 52, at 45; Press Release No. 7/74, *supra* note 46, at 1-3.

60. FOREIGN AFFAIRS PAKISTAN, *supra* note 53, at 56; 27 PAKISTAN AFFAIRS No. 12, *supra* note 1, at 4; NEWSWEEK, *supra* note 52, at 45.

were unable to provide adequate safeguards against radiation leakage would the Limited Test Ban Treaty be a significant legal deterrent to India's development of nuclear explosive devices.

C. *Humanitarian Principles*

The humanitarian argument against the Indian nuclear blast is based upon the incongruity of developing nuclear explosives in a nation that has so many economic and social problems.[61] Translated into legal terms, the argument would require that a nation expend its resources to fulfill the basic human needs of its populace before any of those resources could be allocated to other areas. Although humanitarian principles of international law have made great progress in the past few years, a norm governing the expenditure of internal resources has not yet emerged. The concept is too far-reaching in that it would prevent a nation from allocating its resources to those projects which that nation, through its own decision making process, concludes must be undertaken. The level of military expenditures in the world is ample proof that such a norm of customary international law does not exist.

The argument is particularly weak when it is applied to India's nuclear program. India spends only about one percent of its national budget on nuclear research. The cost of developing the nuclear explosive was less than $400,000.[62] In addition, as early as 1968 opinion polls showed that over 75 percent of the Indian public was in favor of making the decision to go nuclear.[63] In view of these facts, the expenditure of $400,000 must be regarded as a conscious national decision to pursue the possible benefits of nuclear explosive devices. However the logic of the decision may be criticized, the legality of the act in regard to humanitarian principles of international law cannot be questioned.

III. THE INDIAN POSITION

India's defense of its nuclear explosion is based on three arguments: 1) the Non-Proliferation Treaty is discriminatory and therefore has no legal effect on states not a party to that treaty, 2) the

61. For a good sampling of this attitude in the American press, see AMERICAN MEDIA AND INDIA'S BOMB, a series of six pamphlets published by the Embassy of Pakistan.

62. Press Release No. 8/74, *supra* note 51, at 7-8. The figure of $400,000 reflects only the cost of building the explosive device. The research and development was a "free spin-off" of the Indian nuclear power program. The hole for the nuclear device was dug by hand. Malloy, *Critical for the Masses*, The National Observer, August 24, 1974, at 16, col. 2.

63. Kapur, *supra* note 20, at 381.

Indian nuclear program is for peaceful purposes only, and 3) India, as a matter of self-defense, has a right to retain a military option in conjunction with its nuclear program.[64] Each of these points will be discussed in turn.

A. *Discriminatory Nature of the Non-Proliferation Treaty*

It has been a long-standing position of the Indian government that any nuclear non-proliferation treaty must embody an acceptable balance of mutual obligations between the nuclear and non-nuclear powers, be a step toward the achievement of general and complete disarmament, and be void of any loopholes which might permit nuclear or non-nuclear powers to proliferate nuclear weapons in any form.[65] In the Indian view, the Non-Proliferation Treaty is discriminatory because it fails to meet any of the three requirements.

Concerning the mutuality of obligations, India's greatest objections are to the international controls over the peaceful nuclear programs of the non-nuclear weapon states.[66] The objection is merely one in a long line of Indian objections to any system of international nuclear controls that does not encompass all countries, including nuclear weapon states.[67] India opposed the formation of the International Atomic Energy Agency and has consistently attempted to make its own nuclear program as independent as possible from foreign assistance and safeguard measures.[68] This attitude is reflected in India's preference for loose bilateral agreements concerning nuclear foreign aid.[69]

Also, the vast amount of inspection experience is in the West.[70] The emerging nations of the third world are distrustful of such agencies as the International Atomic Energy Agency which might easily be dominated by inspectors from the developed countries.[71] In addition, keeping the proper records and maintaining nuclear facilities in such a manner that inspections can be thorough and effective are very costly to the host nation.[72] The cost of the safeguard program is not dealt with directly in the Non-Proliferation Treaty and therefore pro-

64. *See* S. WILLIAMS, *supra* note 19, at 45.

65. These provisions are part of G.A. Res. 2028, 20 U.N. GAOR Supp. 14, at 7-8, U.N. Doc. A/6014 (1965). Prime Minister Gandhi has stated that the Non-Proliferation Treaty is unacceptable to India because it does not conform to the mandate of Resolution 2028. S. WILLIAMS, *supra* note 19, at 44.

66. Sullivan, *supra* note 50, at 355-56.

67. *Id.*

68. *Id.* at 356-58.

69. *Id.*; S. WILLIAMS, *supra* note 19, at 61.

70. Questor, *supra* note 12, at 167.

71. *Id.* at 165.

72. *Id.* at 164-65.

vides a legitimate cause for concern among nations such as India that are trying to develop their nuclear industries as quickly as possible.

A second aspect of the mutuality of obligations problem is that the Non-Proliferation Treaty imposes a policy of non-armament on the non-nuclear weapon states while allowing nuclear weapon states to continue the arms race.[73] From the Indian viewpoint, the provisions of the Non-Proliferation Treaty concerning disarmament by the nuclear weapon states are too vague to be considered a *quid pro quo* for India's relinquishment of its nuclear option.[74] It is the Indian position that for a disarmament provision to be effective it must have a specific time limit within which all nuclear weapon proliferation will be halted. The wording of the provision must be sufficiently clear to create a definite juridical obligation for the nuclear weapon states.[75] In this respect, the Indian position inextricably links nuclear non-proliferation with disarmament on the part of the nuclear weapon states.[76]

B. *Peaceful Nuclear Explosive Devices*

The second major Indian objection to the Non-Proliferation Treaty is the treaty's failure to distinguish between peaceful nuclear explosive devices and nuclear weapons.[77] India views the failure as an attempt by the nuclear weapon states to extend their monopoly on nuclear weaponry to the peaceful uses of nuclear energy.[78] At the present time, peaceful nuclear explosives are still experimental.[79] Article V of the Non-Proliferation Treaty which guarantees that nuclear explosive devices for peaceful purposes will be made available to non-nuclear weapon states could be thwarted simply by the foot-dragging of the nuclear weapon states in the area of nuclear explosives research. In effect, the non-nuclear weapon states' access to the possible benefits of peaceful nuclear explosives would be dependent upon the willingness of the nuclear weapon states to allocate funds for nuclear explosives research.[80] This type of technological subservience

73. Sullivan, *supra* note 50, at 366; S. WILLIAMS, *supra* note 19, at 50.

74. S. WILLIAMS, *supra* note 19, at 46-48.

75. *Id.* at 47-48.

76. *Id.* at 46. India's disarmament proposal includes 1) a comprehensive test ban treaty that provides for the international control of peaceful nuclear explosives, 2) a freeze on the production of nuclear weapons and their delivery systems, and 3) a reduction in existing stockpiles of nuclear weapons. *Id.*; Press Release No. 8/74, *supra* note 51, at 6-7.

77. STOCKHOLM PEACE INSTITUTE, *supra* note 19, at 21; S. WILLIAMS, *supra* note 19, at 57-60. *See also* note 6, *supra*.

78. S. WILLIAMS, *supra* note 19, at 59.

79. Brooks & Myers, *Plowshare Evaluation*, in NUCLEAR PROLIFERATION: PROSPECTS FOR CONTROL 87, 101 (B. Boskey & M. Willrich ed. 1970).

80. G. FISCHER, *supra* note 30, at 117-18.

is particularly distasteful to nations such as India, which have already developed an advanced nuclear industry.[81]

The Indian position on the distinction between peaceful nuclear explosives and nuclear weapons has been joined by several other non-nuclear weapon states.[82] In their view, the use of nuclear energy for economic development is an inalienable right.[83] Any derogation of this right, therefore, must be non-discriminatory in order to have the force of customary international law.

C. *Nuclear Military Option*

The third Indian objection to the Non-Proliferation Treaty is that there are inadequate security guarantees for the non-nuclear weapon states.[84] Because of India's insistence that its nuclear program is for exclusively peaceful purposes, the objection is rarely raised in connection with India's refusal to sign the Non-Proliferation Treaty. Nevertheless, national security considerations have played an increasingly greater role in decisions concerning India's nuclear development.[85]

The problem of security guarantees for the non-nuclear weapon states was recognized at an early stage in the negotiations on the Non-Proliferation Treaty.[86] The United States successfully resisted incorporation of security guarantees into the treaty itself.[87] To remedy the deficiency, the Security Council passed the following resolution on June 19, 1968:

> *The Security Council,*
>
> *Noting with appreciation* the desire of a large number of States to

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81. Sullivan, *supra* note 50, at 355. In assessing this attitude it must be remembered that India views nuclear energy as the key to its economic development. *See* India News, June 7, 1974, at 1, col. 1; Malloy, *supra* note 62, at 16, col. 1. The energy crisis has hit India particularly hard. *See* Malloy *supra* note 62, at 1, col. 2; *Crippling Shortage*, TIME, April 29, 1974, at 88; Press Release No. 8/74, *supra* note 51, at 7.

82. Comment, *Non-Proliferation Treaty and Peaceful Applications of Nuclear Explosives*, 20 STAN. L. REV. 1030, 1031 (1968).

83. *See* the Final Document of the Conference of Non-Nuclear Weapon States, Resolution J in U.N. Doc. A/Conf. 35/10,at 16-17. The Treaty of Tlatelolco also makes a distinction between nuclear weapons and nuclear explosive devices as long as these devices are under strict international control. Treaty of Tlatelolco, *supra* note 28, art. XVIII.

84. *See generally*, Kapur, *supra* note 20; Kapur, *Peace and Power in India's Nuclear Policy*, 10 ASIAN SURVEY 779 (1970); S. WILLIAMS, *supra* note 19, at 50-56; Coffey, *Nuclear Guarantees and Non-Proliferation*, 25 INT'L ORG. 836 (1971); Coffey, *Threat, Reassurance, and Nuclear Proliferation* in NUCLEAR PROLIFERATION: PROSPECTS FOR CONTROL, *supra* note 79, at 119.

85. Sullivan, *supra* note 50, at 369; Kapur, *supra* note 20, at 381; Kapur, supra note 84, at 783-784; NEWSWEEK, *supra* note 52, at 42.

86. M. WILLRICH, *supra* note 6, at 166-67.

87. *Id.* at 167.

subscribe to the Treaty on the Non-Proliferation of Nuclear Weapons, and thereby to undertake not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices,

Taking into consideration the concern of certain of these States that, in conjunction with their adherence to the Treaty on the Non-Proliferation of Nuclear Weapons, appropriate measures be undertaken to safeguard their security,

Bearing in mind that any aggression accompanied by the use of nuclear weapons would endanger the peace and security of all States,

1. *Recognizes* that aggression with nuclear weapons or the threat of such aggression against a non-nuclear-weapon State would create a situation in which the Security Council, and above all its nuclear-weapon State permanent members, would have to act immediately in accordance with their obligations under the United Nations Charter;

2. *Welcomes* the intention expressed by certain States that they will provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act or an object of a threat of aggression in which nuclear weapons are used;

3. *Reaffirms* in particular the inherent right, recognized under Article 51 of the Charter, of individual and collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.[88]

India immediately rejected the resolution as being nothing more than a restatement of the nuclear weapon states' obligations under the U.N. Charter.[89] As such, it does not constitute a reasonable *quid pro quo* for a non-nuclear weapon state's renunciation of nuclear weapons.[90] Also, the resolution is so ambiguous that it is almost useless as an effective legal obligation. It does not, for instance, define aggression or the threat of aggression.[91] It does not assure immediate action, since the guarantees are to be enforced through the mechanism of the Security Council.[92]

88. S/Res./255, 23 U.N. SCOR 1430th meeting in U.N. Doc. S/PV 1430 (1968).

89. S. WILLIAMS, *supra* note 19, at 44; Coffey, *Nuclear Guarantees and Non-Proliferation*, *supra* note 84, at 837.

90. S. WILLIAMS, *supra* note 19, at 44.

91. Lenefsky, *U.N. Security Council Resolution on Security Assurances for Non-Nuclear Weapon States*, 3 N.Y.U. J. INT'L L. & POLITICS 56, 61 (1970). The recent U.N. paragraph defining aggression may remedy the deficiency.

92. *Id.* at 62-63. The point is particularly relevant since China became a permanent member of the Security Council. China could prevent the Security Council from taking any action in a dispute between itself and India through the use of its veto power.

The inadequacies of the resolution, coupled with the inability of India to obtain effective unilateral guarantees,[93] has placed India in a precarious military situation. India is flanked by two hostile neighbors, Pakistan and the People's Republic of China. Indian military planners regard Pakistan as a significant but short term threat.[94] From the Indian point of view, the most disturbing aspect of the Pakistani threat is that nation's membership in SEATO.[95] The Indian concern was shown to be justified by the United States support of Pakistan during the 1971 Indo-Pakistani war.

The long term threat to Indian security is posed by China.[96] China has the ideology and the military capability to seriously threaten the independence of India. The war between India and China in 1962, Chinese nuclear development since 1964, and Chinese support of Pakistan have caused India to re-evaluate its position with respect to a nuclear weapons program.[97] Fear of Chinese nuclear blackmail and the probability that within a short time India will have fallen far behind China in the development of nuclear explosives have gradually increased pressure upon the Indian government to make the decision to go nuclear.[98] Indeed, an opinion poll conducted after the Indian nuclear blast indicates that almost two-thirds of the educated Indian populace want to use India's nuclear technology to manufacture nuclear weapons.[99] It is also interesting to note that India has been developing a modest space program in recent years.[100] The technology from the space program could be used as a basis for developing a nuclear weapons delivery system.[101] In view of the fact that the feasible use of peaceful nuclear explosives is probably many years away,[102] it must be concluded that Indian technological development has been designed to give India an effective nuclear military option that can be utilized in a relatively short period of time. India's neighbors are justified in regarding India's nuclear blast with suspicion, despite the pronouncements of Prime Minister Gandhi.[103]

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93. Noorani, *India's Quest for a Nuclear Guarantee*, 7 ASIAN SURVEY 490 (1967).

94. Kapur, *supra* note 84, at 784.

95. W. Wentz, NUCLEAR PROLIFERATION 97-98 (1968).

96. Kapur, *supra* note 84, at 784; Kapur, *supra* note 20, at 382; W. Wentz, *supra* note 95, at 97.

97. Kapur, *supra* note 20, at 381.

98. STOCKHOLM PEACE INSTITUTE, *supra* note 19, at 21; Kapur, *supra* note 20, at 380-381.

99. Rocky Mountain News, Aug. 3, 1974, at 38, col. 4.

100. STOCKHOLM PEACE INSTITUTE, *supra* note 19, at 19; India News, July 5, 1974, at 5; Malloy, *supra* note 62, at 16, col. 6.

101. Malloy, *supra* note 62, at 16, col. 6.

102. Brooks & Myers, *supra* note 79, at 101.

103. Pakistan regards the verbal assurances of the Indian government as

IV. CONCLUSIONS

A. *Legality of Indian Development of Nuclear Explosive Devices*

There is substantial evidence of a slowly developing norm against nuclear proliferation. Prior to the enactment of the Non-Proliferation Treaty, significant steps had been taken toward the creation of nuclear free zones and against the indiscriminate testing of nuclear explosive devices. The Non-Proliferation Treaty itself has received a wide measure of support, both through formal ratifications and state practice. The provisions of the Non-Proliferation Treaty must be presumptively considered as part of customary international law.[104] The legality of India's actions, therefore, rests on the validity of its objections to the Non-Proliferation Treaty.

The objection to the discriminatory nature of the treaty is well founded. The Non-Proliferation Treaty places no burden whatsoever upon the nuclear weapon states. The United States and the Soviet Union never had any intention of transferring nuclear weaponry to other nations.[105] Also, the ineffectiveness of the treaty's provisions on disarmament have been demonstrated by the failure of the nuclear weapon states to achieve meaningful progress in the area of arms control. There is no adequate compensation given to the non-nuclear weapon states by the treaty for the obligations which they are required to undertake.[106] As a result, the control provisions of the Non-Proliferation Treaty cannot be considered a part of customary international law. The requirements are violative of a basic, peremptory norm of international law that all nations are equal in the international legal system.[107] A conclusion to the contrary would institutionalize in juridical form the inherent inequality between the nuclear weapon states and the non-nuclear weapon states.

The objection to the Non-Proliferation Treaty's failure to distin-

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unpersuasive of that country's peaceful intentions. *See* 27 PAKISTAN AFFAIRS No. 12, *supra* note 1, at 1. In the Pakistani view, "it is a question not only of intentions but of capabilities." Press Release, Embassy of Pakistan, text of the reply of the Prime Minister of Pakistan to the letter of the Prime Minister of India, June 5, 1974, at 1.

104. Baxter, *supra* note 14, at 290, 299. The Non-Proliferation Treaty is both declaratory of existing customary international law and legislative in that it adds to the law of nuclear non-proliferation. The writer has chosen to treat the Non-Proliferation Treaty as presumptively representative of customary international law (i.e., as a declaratory treaty) because it is for the most part a continuation and extension of previous efforts in the area of nuclear non-proliferation.

105. G. FISCHER, *supra* note 30, at 67.

106. Sullivan, *supra* note 50, at 369.

107. The concept that any non-proliferation treaty must respect the sovereign equality of the non-nuclear weapon states was articulated in Resolution A of the Conference of Non-Nuclear Weapon States, *supra* note 83, at 5-6.

guish between peaceful nuclear explosives and nuclear weapons is not convincing. It is a simple technological fact that there is no difference between such a device and a bomb.[108] Nuclear capability is just as destabilizing as actual possession of nuclear weapons.[109] It must be concluded that a non-discriminatory non-proliferation treaty which placed all nuclear explosive devices under international control would be binding upon states not a party to that treaty.

However, it must also be concluded that India's objection to the nuclear weapon states' monopoly on nuclear explosives is valid. Given the right of states to use nuclear energy for economic development, any restriction on the use of nuclear explosives must be universal in order to have binding legal effect.[110]

The most important objection to the Non-Proliferation Treaty is the one based on national security grounds. The basis of the objection lies in the Indian desire to retain a military nuclear option. The argument, therefore, does not challenge the narrow discriminatory provisions of the Non-Proliferation Treaty but rather confronts the assertion that there exists a general international legal norm against the development of nuclear weapons. It does not apply to the recent Indian nuclear explosion, which was for allegedly peaceful purposes. Instead, it is limited to the possibility that India may some day make the decision to develop nuclear weaponry.[111]

It is a peremptory norm of international law that all nations have the right of self-defense.[112] No multi-lateral treaty, therefore, which leaves a state not a party to that treaty bereft of reasonable security guarantees can be legally binding upon that state. The security guarantees accompanying the Non-Proliferation Treaty are inadequate with respect to such states as India.[113] Also, after a reasonable attempt, India found that it could not obtain satisfactory unilateral guarantees without sacrificing its non-aligned status.[114] There can be no doubt that China represents a legitimate nuclear threat to India.[115] Given the military situation in which India finds itself today, India

108. See note 6, *supra*.

109. See note 97, *supra*. The maxim that the threat is often more powerful than its execution is quite applicable to this situation.

110. See note 83, *supra*.

111. In concluding that states not a party to the Non-Proliferation Treaty have the right, as of the present time, to develop peaceful nuclear explosives as their economic needs warrant, the writer has limited the argument to nuclear weapons only.

112. U.N. Charter art. LI.

113. Pakistan also considers the security guarantees embodied in the Security Council resolution inadequate. 27 PAKISTAN AFFAIRS No. 12, *supra* note 1, at 4.

114. *See* Noorani, *supra* note 93.

115. S. WILLIAMS, *supra* note 19, at 29; W. Wentz, *supra* note 95, at 97.

would be justified under present standards of international law in building a nuclear weapons force designed to counter the Chinese threat.[116]

B. *Legal Impact Upon Pakistan*

It is the saddest and most dangerous aspect of nuclear proliferation that the acquisition of nuclear capability by one state, even for legitimate reasons, leads inevitably to the need of another nation to acquire that same capability. Just as India was pressured to go nuclear by the Chinese nuclear development, so too is Pakistan now being pressured to explore a nuclear option.

Pakistan, however, has a much less developed nuclear industry than India.[117] As a consequence, Pakistan has taken a positive attitude toward the Non-Proliferation Treaty[118] (although it is not a party to the treaty) and has actively sought security assurances from the United States and China.[119] Given Pakistan's membership in CENTO and SEATO, and its cordial relationship with the United States and China, the security assurances of these two countries against Indian nuclear aggression should be adequate at the present time. Nevertheless, by applying the same rationale to Pakistan as was applied to India in the above arguments, it is difficult to see how Pakistan can be legally restrained from developing a nuclear explosive device. In view of India's hostile attitude toward Pakistan in the past thirty years, Pakistan would be legally justified in maintaining nuclear parity with India.

C. *Future of the Non-Proliferation Treaty*

The Non-Proliferation Treaty does not represent customary international law to such an extent that its provisions are binding upon states not a party to that treaty. The reason for this unhappy result probably lies in the fact that the concept of non-proliferation cuts across the conflicting political and economic goals of the nations of the world. Translated into legal terms, the Non-Proliferation Treaty as it is now constituted is basically incompatible with two peremptory norms of international law: the equality of states in the international legal system and the inherent right of self-defense. If the Non-Proliferation Treaty were made to work it would in effect create a two tiered international system in which there would be no movement between the two levels.[120] The handful of nuclear weapon states would

116. *See* Coffey, *Nuclear Guarantees and Non-Proliferation*, *supra* note 84, at 844.

117. STOCKHOLM PEACE INSTITUTE, *supra* note 19, at 25-26.

118. *Id.* at 26.

119. *Id.* at 25. *See also* 27 PAKISTAN AFFAIRS No. 12, *supra* note 1, at 4; *Id.*, No. 13, at 3.

120. Sullivan, *supra* note 45, at 366.

dominate the entire system. In view of Secretary of State Kissinger's recent successes in Moscow and Peking, such a possibility is not so far-fetched in the eyes of the third world. In this scenario the Non-Proliferation Treaty would work because the basic international legal concept of the equality of states would be discarded in favor of a legal system that reflected and legitimized the political, economic, and military inequality of states in the late 1960's.

A second alternative would be complete and total disarmament in regard to nuclear weapons. In this way a new legal norm of nuclear non-proliferation could be formulated. The norm would be binding upon all states in that it would be universal in application and would eliminate the need for security assurances. In contrast with the first alternative, military reality would be changed so as to allow the Non-Proliferation Treaty to function within the peremptory norms of state equality and national self-defense.

A final alternative would be the development of multilateral regional nuclear forces throughout the world.[121] The need for general disarmament by the nuclear powers would be eliminated and at the same time credible security assurances would be available to all the non-nuclear weapon states. International stability would be enhanced in that the number of nuclear actors would remain low and relatively constant.

Since none of the above alternatives are likely to come about in the near future, it must be concluded that nuclear non-proliferation is a problem that will be handled within the political arena.[122] International law and the system of nuclear weapons control put forth in the Non-Proliferation Treaty are basically incompatible. The prevention of nuclear proliferation will, for the foreseeable future, depend upon the ability of our political leaders to find a just and equitable solution to this problem.

James R. Walczak

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121. Kahn & Dibble, *Criteria for Long Range Nuclear Control Policies*, 55 CAL. L. REV. 473, 479-81 (1967).

122. For other predictions of the Non-Proliferation Treaty's fate *see* Kaplan, *Nuclear Non-Proliferation Treaty: Its Rationale, Prospects, and Possible Impact on International Law*, 18 J. PUB. L. 1, 10 (1969); Kahn, *supra* note 121, at 479.

IMMIGRATION LAWS, PROCEDURES AND IMPEDIMENTS PERTAINING TO INTERCOUNTRY ADOPTIONS*

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I. INTRODUCTION

Adoption in America has long been a basic resource for establishing a permanent home for a child. However, recent years have

* This paper could not have been written without the substantial cooperation of the Immigration Service, the Foreign Adoption Center, and Friends for All Children, who provided information and technical assistance. The author is indebted to them and to friends who willingly helped with some of the most onerous aspects of this project.

brought a growing concern with overpopulation and a continuing decline in the number of caucasian babies available for adoption. This situation, in combination with an increased awareness of the plight of orphaned children in other countries, has led to a greater demand for intercountry adoptions.

Intercountry adoptions pose all the problems common to domestic adoptions. For example, the family's suitability for adopting a child must be determined; a child fitting their general desires must be found; legal and documentary requirements must be met; and a new family must be created. In addition, because the child is coming from a foreign country, he or she must enter the United States in accordance with its immigration laws.

The realm of immigration which pertains to foreign adoptions can be most complex and perplexing. Statutes, regulations and procedures are imposed and interpreted by the foreign countries, the United States, the Immigration and Naturalization Service (INS), the United States consulates overseas, the individual states, and the various state and county departments of welfare. At every level, the officials involved are vested with great discretionary power and can interpret rules in a myriad of ways to suit the individual official or case. These authorities may be most helpful and sympathetic, as the vast majority are, or they may be indifferent, unavailable, and excrutiatingly slow.

A further difficulty may arise as a result of the reluctance of many countries to give their children up to an alien country. Sometimes this is due to a lack of understanding of our culture and motives for adopting foreign children, or to an understandable fear that the relinquishment may be interpreted as an unwillingness or inability adequately to care for their own children. Sometimes it is due to an ethnocentric bias, a reaction little different from that which most Americans would display upon seeing our own orphaned children taken away to be raised in a non-American society.

These regulations, interpretations and feelings can occasionally result in difficult problems whose speedy solution can be crucial in determining whether a child will live long enough to get to the adopting parents. Unfortunately, overcoming these difficulties may not be easy, because the necessary information is not readily available.[1] This article will aggregate the present laws involved in the immigration-adoption process, delineate the more pervasive pitfalls, and indicate

1. Perhaps the most complete and up-to-date reference on the subject of immigration is the two-volume treatise, C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE (1971, Cum. Supp. 1973) [hereinafter cited as GORDON & ROSENFIELD]. The reader may also wish to consult F. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES (2d ed. 1961, Cum. Supp. 1964). However, this text is now out of date in some respects.

some possible solutions. It will focus primarily on United States immigration laws and procedures and, to a lesser extent, on the effects of selected state requirements.

Adoptions initiated and completed through a licensed agency are generally thought to be more protective of the best interests of both the child and the adopting parents than are private adoptions. Furthermore, private adoptions by parents going abroad to select the child they want are actually contrary to policy in many countries, including Vietnam, where the practice was once quite prevalent.[2]

Major problems affecting intercountry adoptions may also arise out of regulations concerning severance and release of the child, and out of immigration and procedural requirements prescribed by the foreign state. These issues will be covered by this paper only in passing, because adequate coverage is far beyond the scope of this comment.

Two caveats should be kept in mind: (1) Some of the content of this article is not the official viewpoint of the Immigration Service or the Department of State; rather, it is based upon the working experience of many people who have been very active in foreign adoption. Their experiences may not always reflect the official policy. (2) Some sections may be incomplete and, therefore, misleading, as a result of modifications imposed by state or foreign requirements and interpretations. Since it is beyond the scope of this paper to cover all these modulations, it is suggested that the state laws be read carefully, and that the welfare and adoption agencies be consulted regarding any questions.

A. *Adopting a Child from Another Country*[3]

An overall summary of the adoption process may help the reader to understand how and where immigration problems can arise. The procedure outlined below was chosen primarily because it is the most

2. Interview with Wendy Grant, Director of Adoption, Friends for All Children. A theme recurrent in several letters received by the author from state departments of welfare (*e.g.*, Indiana, North Carolina, Wisconsin) is that procedural problems arise only very rarely when the placement is made through a licensed agency. Problems are quite common, however, when the parents attempt to secure a child through a private individual, or to complete the processing themselves without agency help. *See infra* notes 140, 141.

3. This section is based mainly upon unpublished material provided through the courtesy of the Foreign Adoption Center of Boulder, Colorado; J. Oltragge, Steps in Foreign Adoption, March, 1974; A. Renzo, I-600 Filing Procedure, April, 1974; Checklist of Steps in a Guatemalan Adoption Through the Foreign Adoption Center. A letter received from the Holt Adoption Program, Incorporated, July 16, 1974, in response to questions concerning procedures was also most helpful in analyzing the step-by-step procedure.

common.[4] Slight variations will occur with the use of other avenues of adoption.

A family seeking to adopt a child from abroad first applies to a licensed international adoption agency working in the country in which the family is interested.[5] The agency, or in some cases the state welfare department, conducts a "home study" of the potential adoptive parents and family;[6] on the basis of this home study, the agency may or may not approve the couple for adoption.

If it does approve the couple, the agency contacts them, as soon as it learns of the availability of a child who meets their general desires, and provides them with a social and medical history of the child. If the parents determine that they want to accept this child, they must agree to accept and care for the child as their own and must sign a power of attorney, which is sent to the United States consulate in the child's country.[7] They must satisfy all the preadoption requirements of their state, the United States and the foreign country[8] and should file an I-600 preliminary visa application as soon as possible, so that INS can begin processing them.

During this time, the agency, working in conjunction with the foreign attorney who has been given the power of attorney, obtains

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4. These procedures are for the I-600 Petition to Classify Orphan as an Immediate Relative (*i.e.*, to grant the orphan the status of a child of the adopting parents for purposes of adoption). The petition is currently available only to married United States citizens, although this may be changed shortly. *See infra* note 61.

5. Most international adoption agencies are licensed in only a few foreign countries and American states; in those states in which they are not licensed, they work through local agencies. The majority of these agencies are most active in Korea and Vietnam. Only the Foreign Adoption Center works actively in Latin America. A very few of the agencies which may be consulted are:

a. Pearl S. Buck Foundation, Incorporated, 2019 Delancey Place, Philadelphia, Pennsylvania 19103;

b. Foreign Adoption Center, Incorporated, P.O. Box 2158, Boulder, Colorado 80302;

c. Friends for All Children, 445 South 68th Street, Boulder, Colorado 80303;

d. Holt Adoption Program, Incorporated, P.O. Box 2420, Eugene, Oregon 97402;

e. WAIF, Children's Division, Travelers Aid International Social Service of America, 345 East 46th Street, New York, New York 10017.

6. If the state preadoption requirements do not include a home study, the Immigration Service will conduct one.

7. The power of attorney is given to an attorney in the foreign country and to the agency director or representative in that country. These people "stand in" for the parents. Interview with Suzanne Johnson, Assistant Director of Adoption, Friends for All Children.

8. Immigration and Naturalization Act §101(b)(1)(F) (1965) [hereinafter cited as I.N.A.], 8 U.S.C. §1101(b)(1)(F) (1965). These preadoption requirements are discussed briefly in III *infra*.

the child's birth certificate and forms releasing the orphan for adoption.[9] These documents, translated and notarized by the United States consulate, are sent to the adoptive couple. The couple takes the birth certificate, release form, and whatever supporting documents were not submitted with the I-600 petition to the INS office. The Service runs a criminal check on the parents, completes the processing, and sends all the documents to the consulate. The formal adoption process begins when these documents are received.

It should be pointed out that in most cases the child is actually adopted twice:[10] the foreign country usually requires that the child be adopted in the home country, before he or she will be issued an exit visa. This adoption is for the purposes of the foreign state and has little relationship to the subsequent adoption (or "readoption") in the United States.[11] Nevertheless, this requirement of an initial adoption overseas can greatly delay the child's trip to the United States, if the necessary forms are not sent early. Therefore, it will help if the parents send second originals of the notarized support documents directly to the foreign country, rather than waiting for the Immigration Service to process and send these papers.

In order to receive the visa necessary for entry into the United States, the orphan must undergo an "overseas check," including a medical examination, to determine whether he or she is admissible. This check was formerly conducted by an Immigration officer, who made only infrequent trips to some countries. However, it may now be made by a United States consular official in the country in which the child is living and, consequently, takes much less time.[12] In addition, the state of proposed residence must certify to Immigration that its preadoption requirements have been met and that the home has been approved for this particular child.

Once the visa is issued, the child's escort takes it and the child's passport and accompanies the child to the United States, where the visa is surrendered in exchange for a "border crossing identification card," designating the place of final destination. The stateside adoption or readoption takes place in the child's new state of domicile, according to its laws, and may be finalized in one month to one year,

9. The person having legal custody of the child (the natural parent(s) or the orphanage) must sign a document transferring the child into the custody of the agency, before the child can be adopted for emigration purposes.

10. This paragraph is based upon the Foreign Adoption Center paper on Guatemalan Adoption, *supra* note 4. *See* text at note 56 *infra*.

11. Upon finalization of this foreign adoption, the adoption papers are translated, notarized, and sent to the adoptive parents.

12. *See* text at note 2 *infra*; *see also* II(B)(2) *infra*. Form I-604, Request for and Report on Overseas Orphan Investigation, is filled out by the consular or Immigration officer in conjunction with this overseas examination.

depending on the state involved.[13]

This is the normal procedure and usually takes from two to five months from the time the home study is approved until the child arrives.[14] Complications will, of course, lengthen this time period.

B. *Visas and Visa Applications*

A brief discussion of the entry visa will obviate the necessity of mentioning these general steps and comments in each of the following sections.

Although a nonimmigrant visa may sometimes be used in certain emergency situations,[15] for adoption purposes the entry visa is nearly always an immigrant visa. In either case, the alien must submit a formal application for the visa.[16] Careful compliance with all the documentary requirements prescribed by the statutes and regulations is essential,[17]

> [f]or an alien who comes without documents or with defective documents may find the gates shut when he seeks entry. And if such a person succeeds in passing the portals, his right to continued residence may be undermined, and he may be amenable to expulsion.[18]

The primary responsibility for obtaining the necessary information and materials, maintaining the file, and completing the applications rests with the adopting parents.[19] The agency and Immigration will render whatever aid may be necessary, but the burden of proving facts and relationships claimed in the application is on the petitioner.[20]

As was noted earlier, the Immigration Service, or the consulate acting in its behalf, conducts an investigation of the child, to determine whether the child qualifies for the claimed status, whether he or she has any ailments or handicaps which will require special care or treatment, and whether there are any mental or physical afflictions which may make the child inadmissible. If it finds any problems, the Service notifies the petitioners, so that they can decide whether they still wish to continue their petition for this particular child.[21]

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13. Interview with Susan Evans, International Coordinator, Foreign Adoption Center.

14. *Id.*

15. *See* II(D) *infra*.

16. I.N.A. §222(a), (c), 8 U.S.C. §1202(a), (c) (1965).

17. It is impossible to present a detailed review of all these requisites within the limited confines of this paper. An applicant or a person seeking further information should consult the Immigration Service, the adoption agencies, and treatises on immigration, especially 1 GORDON & ROSENFIELD, *supra* note 1, §§2.29-.36.

18. 1 GORDON & ROSENFIELD, *supra* note 1, §2.29.

19. *Id.* §§3.7, 3.10, 3.11.

20. *Id.* §3.5g.

21. 1 GORDON & ROSENFIELD, *supra* note 1, §3.5e, at 3-27. The parents are usually apprised of any such problems by the agency before this time, however.

In many cases, the child may be in generally poor health, due to an inadequate diet and a lack of proper care and attention.[22] Usually the parents understand this and decide to accept the child, despite the problem. However, because the grounds for exclusion cannot be disregarded by executive officers or the courts,[23] the child may be excluded, regardless of the parents' willingness to take him or her "as is." Grounds for exclusion include mental retardation,[24] "dangerous contagious diseases,"[25] and an INS determination that the petitioners have not demonstrated that they will be able adequately to care for a child with this particular mental or physical handicap.[26]

One final comment: A child will not be granted a visa, unless it has been released by the foreign state, the natural parent, or the orphanage, and unless the applicable laws and procedures prescribed by the adoptive parents' state of domicile have been observed.[27]

II. AVENUES AVAILABLE FOR ADOPTION

The visas available for use in intercountry adoptions are commonly classified as "immediate relative" (the two kinds of immediate relative visas are the I-130 and the I-600), "nonpreference," "visitor," and "parole." The terms refer to both the visa itself and the preliminary visa application.

An I-130 petition to have an alien classified as a child of the adoptive parents is filed by petitioners who have legally adopted the child, while residing overseas. They may bring the child in under a simplified procedure. The usefulness of this petition is somewhat limited, however, due to custody and residency requirements.

The most often used petition for foreign adoptions is Form I-600. It is usually the most predictable method, results in the fewest delays and risks, covers the greatest number of cases, and provides the greatest safeguards for the child, the parents, and the agency. For these reasons, adoption agencies deal almost exclusively with it and resort to the following three types of visas only when they have no other choice.[28]

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22. It must be stressed that this poor health is in no way due to a lack of effort by the orphanage staff, who really do all they possibly can. However, they are greatly hampered by a lack of funds, by insufficient staff, and by a perennial shortage of even the most rudimentary "medicine cabinet" supplies.

23. 1 GORDON & ROSENFIELD, *supra* note 1, §2.32.

24. I.N.A. §212(a), 8 U.S.C. §1182(a) (1965).

25. *Id.*

26. 1 GORDON & ROSENFIELD, *supra* note 1, §3.5e, at 3-27. The basic reason behind these exclusionary provisions is a desire to avoid the spreading of disease or the bringing in of someone who will simply become a ward of the state.

27. *See* II(B)(2) *infra*.

28. E. Ratliff, Types of Visas Used in Intercountry Adoptions at 6 (unpublished paper provided courtesy of the Foreign Adoption Center, Inc.) [hereinafter cited as Ratliff].

Parents and children who do not qualify for an immediate relative visa must usually rely upon the nonpreference visa. The greatest single drawback of this method is the limited availability of such visas; extremely long waiting periods can thus be expected.

In an emergency, when speed is especially important, a parole or visitor visa may constitute the only practical or satisfactory method of bringing the orphan into this country. However, because both of these are nonimmigrant avenues, their use for purposes of adoption creates substantial risks for everyone involved. Consequently, the agencies are very reluctant to use them.

The following sections will analyze the five previously mentioned visa types, the circumstances under which each may or must be employed, and the risks and procedures involved in their use.

A. *Children Adopted by Parents Residing Abroad* (I-130)

Parents residing overseas may bring in a child whom they have adopted abroad, if that child has been adopted in accordance with the laws of the foreign state and meets the statutory requirements imposed by the Immigration and Naturalization Act.[29]

The Act provides that:

> immediate relatives, including the children of a citizen of the United States . . . who are otherwise qualified for admission as immigrants shall be admitted as such without regard to the numerical limitations in this Act.[30]

It further states that:

> [a]ny citizen of the United States claiming that an alien is entitled to . . . immediate relative status . . . may file a [preliminary visa] petition for such classification.[31]

The phrase "otherwise qualified for admission" means that, although immediate realtives do not have to wait for a visa number before applying for a visa, they still must satisfy the qualitative and documentary requirements found elsewhere in the Act, unless modifications are specifically prescribed.[32] Thus,

> a child adopted while under the age of fourteen years, if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years,

may be accorded immediate relative status as a child of a United States citizen.[33]

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29. 1 GORDON & ROSENFIELD, *supra* note 1, §2.18b. The form most commonly used is Form I-130, Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa.

30. I.N.A. §201(b), 8 U.S.C. §1151(b) (1965).

31. I.N.A. §204(a), 8 U.S.C. §1154(a) (1965).

32. 1 GORDON & ROSENFIELD, *supra* note 1, §2.18a (Cum. Supp. 1973).

33. I.N.A. §101(b)(1)(E), 8 U.S.C. §1101(b)(1)(E) (1965).

Administrative decisions have interpreted this statutory language as meaning that the two-year residency does not have to *follow* the adoption. The requirement is satisfied, if the child lives with the adoptive parent or parents for such time prior to the adoption.[34] "However, the requisite two years of legal custody must follow the adoption."[35] This means that, where the parents must leave the foreign country before the custody requirement has been met, the child must remain behind for a period of time. However, because the legal custody tolls whether or not the child is in residence with the parent, he or she may come here, as soon as two years have elapsed from the date of the adoption.[36]

This avenue is available to single, as well as married parents;[37] and "where there are two adoptive parents, it is unnecessary that the child reside with both for two years."[38] Thus a divorce or separation does not preclude the use of this petition.

It is significant that, despite the statutory provision that the person using the immediate relative visa must be a United States citizen, the I-130 petition may also be filed by a "lawful permanent resident alien" of this country.[39] This is one of the few avenues available to non-citizens for intercountry adoption. Furthermore, the parents need not meet the preadoption requirements of the state of intended domicile,[40] since the child has already been legally adopted in accordance with our laws. A certified copy of the adoption decree must accompany the petition.[41]

The major disadvantages of this I-130 petition are: (1) except where the petitioner wants to keep a sibling group together, he or she may not file more than two such petitions;[42] and (2) this avenue is unavailable to parents of children over the age of fourteen at the time they were adopted,[43] or over twenty-one or married at the time the petition is filed.[44] However, the parents have several rather unsatisfactory options in cases like these.

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34. 1 GORDON & ROSENFIELD, *supra* note 1, §2.18b, n. 71.

35. *Id.*

36. Interview with Robert B. Neptune, Supervisory Immigration Examiner, Denver, Colorado, District Office, United States Immigration Service.

37. *See* text at note 33 *supra*.

38. 1 GORDON & ROSENFIELD, *supra* note 1, §2.18b, n. 71.

39. 8 C.F.R. 204.2; Form I-130, Instruction No. 1.

40. *See* text at note 33 *supra* (this provision makes no mention of preadoption requirements; *See* text at note 53 *infra*); North Carolina Department of Human Resources, Division of Social Services "Newsletter," August, 1973, at 8.

41. 8 C.F.R. 204.2(d)(F); Form I-130, Instruction No. 4(b)(6).

42. I.N.A. §204(c), 8 U.S.C. §1154(c) (1965).

43. *See* text at note 33 *supra*.

44. 1 GORDON & ROSENFIELD, *supra* note 1, §2.18b, at 2-92; 8 U.S.C. §1101(b)(1) defines "child" as "an unmarried person under twenty-one years of age . . . ."

If the adopted child was under the age of fourteen at the time of the adoption, and if the custody-residency requirement has been met,[45] the parents may file an I-600 petition.[46] However, in order to use this petition, they must meet the further requirement of having gone abroad and personally seen the child.[47] Alternatively, if the child is a native of the Eastern Hemisphere, they may apply for a preference visa:[48] either first preference for "unmarried sons or daughters of citizens of the United States"; or second preference, for "unmarried sons or daughters of an alien lawfully admitted for permanent residence"; or fourth preference, for married sons or daughters of American citizens.[49] If the child was born in the Western Hemisphere, the parents may use the alternative avenue of a special immigrant (nonpreference) visa. In cases where the child was over fourteen years of age at the time of adoption, the parents have no alternative but to apply for a nonpreference visa.[50]

B. *Children Coming to the United States for Adoption* (I-600)

1. *Statutory Provisions Concerning an "Adoptable Child."*

The statutory provision granting American citizens special privileges for bringing their immediate relatives to the United States[51] applies not only to children adopted abroad, but also to children coming to America for adoption. However, to gain any real benefits under the 1965 Act by reason of adoption, the alien must qualify as a "child" within the statutory definition of that Act. This requirement is rather easily satisfied under the present statute, since "child" now includes an orphan who is:

> under the age of fourteen at the time a petition is filed in his behalf to accord a classification as an immediate relative . . . and who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from both parents, or for whom the sole or surviving parent is incapable of providing the proper care which will be provided the child if admitted to the United States, and who has in writing irrevocably released the child for emigration and adoption;[52] who

45. 1 GORDON & ROSENFIELD, *supra* note 1, §2.27e; interview with Robert B. Neptune, *supra* note 38.

46. This petition is discussed in detail in II(B) *infra*.

47. *See* text following note 52 *infra*; interview with Robert B. Neptune, *supra* note 36. Some foreign states, such as Greece, require that the adopting parents go abroad to see and adopt the child, before they will allow the child to emigrate. Letter to the author from Elizabeth C. Taylor, Supervisor, Maryland Resource Exchange, Maryland Social Services Administration, September 23, 1974.

48. Preference categories are available only to non-Western aliens; Western Hemisphere natives fall into one large "special immigrant" category.

49. I.N.A. §203(a), 8 U.S.C. §1153(a) (1965). The other preference categories are inapplicable to children coming to the United States for adoption.

50. *See* II(C) *infra*.

51. *See* text at notes 29-31 *supra*.

52. However, the laws of the foreign state can significantly modify this require-

> has been adopted abroad by a United States citizen and his spouse who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse who have complied with the preadoption requirements, if any, of the child's proposed residence.[53]

Gordon and Rosenfield point out that, where a child is coming to this country for adoption:

> the United States citizen and spouse must furnish assurances satisfactory to the Attorney General that they will care for the orphan if he is admitted to this country and will [legally adopt the child]. It is the administrative view that the child can be adopted only by a United States citizen and spouse; [and] that both parents must be living and validly married . . . .[54]

As was noted previously,[55] if the parents do not go abroad to adopt the child themselves, the agency representative adopts the orphan for them by proxy. This proxy adoption is helpful in several ways. In addition to satisfying the exit visa requirements, it also gives the parents legal custody of the child during the months before the stateside adoption is finalized; without it, the child would be in a "legal limbo" during this iterim period.[56] The proxy adoption also provides the evidence of legal custody required by many states, before they will allow the child to enter the state. It alone is sufficient to get the child a social security number.[57]

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ment. For example, some countries (*e.g.*, Vietnam) provide that "a child placed in an orphanage will be regarded as abandoned, if the parents do not contribute to its support, or otherwise indicate that they have terminated their parental obligation to the child." 1 GORDON & ROSENFIELD, *supra* note 1, §2.18b (Cum. Supp. 1973). In a case such as this, the orphanage has legal custody of the child, and a release by the orphanage is all that the foreign country requires; a release signed by the natural mother is unnecessary. Furthermore, many countries do not accord the natural father any rights with respect to the abandoned orphan. In Vietnam, for example, the father's name does not even appear on the birth certificate, unless the parents were married at the time of the child's birth; otherwise, the birth certificate is simply marked "father unknown." Interview with Wendy Grant, *supra* note 2.

These foreign laws should be accepted as binding upon American courts in an adoption proceeding. Nevertheless, several states still require that the adoptive parents obtain a declaration of release from the natural parent, as well as from the orphanage, before they will finalize an adoption decree. *See also* III *infra*.

53. I.N.A. §101(b)(1)(F), 8 U.S.C. §1101(b)(1)(F) (1965).

54. 1 GORDON & ROSENFIELD, *supra* note 1, §2.18b, at 2-98.

55. *See* text at note 10 *supra*.

56. Interview with Susan Evans, *supra* note 13.

57. Interview with Wendy Grant, *supra* note 2. This type of proxy adoption is not the same as the "pure" proxy adoption, which is forbidden by Federal law. The Immigration Act, §101(b)(1)(F), 8 U.S.C. §1101(B)(L)(F) (1965), requires that the parents physically see the child prior to or during the adoption proceedings. Therefore, where an agency representative stands in for the parents during the overseas adoption, the parents must readopt in their state; an adoption without this subsequent readoption is a pure proxy adoption. This requirement means that the couple must first demonstate that readoption is permissible in their state. 8 C.F.R. 204.2(e)(3).

The child is then "readopted" in its new state of domicile, in a totally separate and unrelated proceeding. The primary purpose of the readoption is to gain a United States birth certificate and certain additional protection for the child, such as guarantees of inheritance rights. The child is then protected by the adoption laws of its new state and by the "full faith and credit" clause.[58]

There are two major shortcomings to this otherwise most helpful petition. The first is an arbitrary proviso that it may not be used by either a widowed or a single person.[59] They must fall back on the nonpreference visa, with its protracted waiting period, as their only legitimate avenue of adoption. This predicament is made even more vexacious by the fact that some states will rarely place foreign children with a single parent, because single parents do not qualify for immediate relative visas.[60] However, legislation is now pending in Congress to give single parents the same adoptive rights under I-600 as are available to married parents.[61]

The second deficiency is the equally arbitrary provision that:

> no more than two petitions may be approved for one petitioner in behalf of a child . . . unless necessary to prevent the separation of brothers and sisters.[62]

The restriction holds even if one of the two orphans dies immediately following entry into the United States.[63] A resolution now in Congress would grant immediate relative status to foreign orphans, regardless of the number of I-600 petitions previously submitted by the prospective parents, provided the state preadoption requirements have been met.[64] However, until such time as this restriction is properly interred, couples seeking to adopt their third foreign child must rely upon one of the following methods: (1) Use a nonpreference or other visa type which does not carry this restriction;[65] (2) have a private bill submitted in Congress to gain the privilege of bringing in the third

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58. Interview with Anne K. MacLaughlin, Esq., Colorado Springs, Colorado.

59. 1 GORDON & ROSENFIELD, *supra* note 1, §2.18b, at 2-98. This restriction is especially unfortunate, because it is aimed at those people who most often adopt the older and handicapped children. Interview with Susan Evans, *supra* note 13.

60. Letter to the author from Martha Schurch, Agency Services Supervisor, Department of Health and Social Services, Division of Family Services (Adoption), Madison, Wisconsin, August 9, 1974.

61. The bill, H.R. 7555, 93d Cong., 1st Sess. (1973), is in the Senate Judiciary Committee. Letter to the author from Senator William Proxmire, August 13, 1974.

62. I.N.A. §204(c), 8 U.S.C. §1154(c).

63. 1 GORDON & ROSENFIELD, *supra* note 1, §2.18b, n.84.

64. J. Buchmeier, Immigration Processing Time Cut in Half (unpublished paper provided courtesy of Organization for United Response, Minneapolis, Minnesota). The bill is H.R. 8096, 93d Cong., 1st Sess. (1973).

65. *See* II(C),(D) *infra*.

child.[66] Because of the amount of time involved, neither of these methods is really satisfactory.

Several unsuccessful attempts have been made to use a third method. Because the I-600 form provides for signatures by "petitioner" and "petitioner's spouse," in cases where both adoptive parents are United States citizens, it would seem possible that the husband could be the petitioner for two children, and the wife be the petitioner for two more. However, the Immigration Service has plugged this loophole by requiring that the petitioner be able to support the child himself or herself.[67] A subsequent attempt by two working parents who answered this requirement was thwarted by the interposition of the rule that the petitioner and spouse are considered to be one unit and cannot switch.[68] Thus it seems that this apparent loophole is really a mirage.

2. *Procedure for Filing the I-600 Form.*

It is appropriate to discuss in some detail the procedure for filing this important petition. The adopting parents should submit the Petition to Classify Orphan as an Immediate Relative to the district office of the INS as soon as possible after accepting a child.

The Petition supplies the Immigration Service with basic information regarding the residence, citizenship, and financial capabilities of the parents, the orphan's name, history and condition, and prior adoptions by the parents. A number of supporting documents must also be submitted. These include:

1. proof of United States citizenship of petitioner;
2. proof of marriage of petitioner and spouse;
3. proof of age of the orphan;
4. evidence that petitioner and spouse are able to support and care for the orphan;
5. certified copy and translation of adoption decree, if the child has been lawfully adopted abroad; or if the child is coming to the United States for adoption, evidence that any preadoption requirements have been met, and a statement that the couple will adopt the child in the United States.
6. evidence that the natural parent has irrevocably released the orphan for emigration and adoption, or that the child has been unconditionally abandoned to an orphanage which has so released him or her.
7. completed fingerprint cards, one for the petitioner and one for petitioner's spouse.[69]

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66. Ratliff, *supra* note 28, at 3,8 (includes instructions for applying for a special bill).

67. Interview with Arden Buck, Director, Foreign Adoption Center; interview with Suzanne Johnson, *supra* note 7.

68. Interview with Karen Ratliff, International Liaison, Foreign Adoption Center.

69. 8 C.F.R. 204.2(e); Form I-600 Instructions; A. Renzo, I-600 Filing Procedure, April, 1974 (unpublished material provided courtesy of the Foreign Adoption Center). *See also* III(A) *infra*.

It should be noted that the new form (revised April 1, 1974) does not require a "biographic data form" for criminal and employment checks on the applicants. Furthermore,

> The INS can now begin the criminal check prior to receiving all the supporting documents for the I-600, but needs as a minimum the form, the fees and as many supporting documents as possible. Minimum documents could be (for example) fingerprints, proof of citizenship and marriage, and [evidence of] ability to support the orphan. In cases where the parents must go to the foreign country personally to adopt the child, the INS will conduct this check in advance, given only the fingerprints and a letter of explanation.[70]

Because of these changes, once all the required documents have been submitted, the ideal processing time (the time needed for a case with no special problems) may be decreased from two months to three or four weeks.[71]

Once the petition has been approved the Immigration Service forwards it to the consulate in the child's country, where it is used as a part of the visa application.

C. *Nonpreference and Special Immigrant Visas*

Every immigrant is presumed to be a nonpreference or special immigrant, until that person establishes to the satisfaction of the immigration and consulate officers that he or she is entitled to an immediate relative or preference status.[72] Alien minors who do not qualify as "children" within the statutory definition of that term (because they are to be adopted by a single parent, or because they are already over fourteen years of age, for example) cannot be brought here as immediate relatives and thus must come in via another method, either immigrant or nonimmigrant. The immigrant avenues are the "nonpreference" and "special immigrant" visas, usually covered by the single term "nonpreference."[73] The nonimmigrant child enters the United States via a visitor, a student, or a parole visa.

Alien minors coming to the United States on a nonpreference visa are governed by the same rules which apply to the immigration of any other immigrants. They must, therefore, meet the general admissibility requirements of filing documents and taking mental and physical examinations. They are subject to no controls, restrictions, or requirements which do not apply to all other general immi-

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70. J. Buchmeier, *supra* note 64, Immigration Processing Time Cut in Half. *See also* note 166 *infra*.

71. *Id.*

72. I.N.A. §203(d), 8 U.S.C. §1153(d) (1965); 1 GORDON & ROSENFIELD, *supra* note 1, §2.27i.

73. Technically, however, the term "nonpreference" applies only to visas for natives of the Eastern Hemisphere; natives of the Americas are classified as "special immigrants."

grants.[74] "The special safeguards designed to protect the 'adopted child' and the 'eligible orphan' do not apply in these cases,"[75] and there is no requirement of prior adoption or even of intent to adopt.[76]

Preliminary visa applications are not required for special or nonpreference immigrants, since they are not trying to prove a relationship to a citizen or lawful resident alien. Thus the parent or agency deals directly with the Department of State and the United States consulate in the child's country in seeking these visas, rather than with the Immigration Service.[77] Early application for these visas is vital, because the number of visas available is limited, and the order in which the applications are processed is governed by the rule of "first come, first served."[78]

The use of a nonpreference visa may be preferable or even essential in situations:

1. where little or no waiting list exists,
2. where no home study exists,
3. where single parent adoption is anticipated,
4. where the child is over fourteen years of age,
5. where both adoptive parents are alien
6. where the allotted two "immediate relative petitions" have already been used.[79]

The adoptive parent or parents are required to submit an affidavit of support, in duplicate, accepting the full financial responsibility for the child; a notarized statement, also in duplicate, from the parents' employer(s), setting forth work and salary prospects; a statement from a recognized school indicating that the child can be accepted as a full-time day student; and a financial statement from the applicants' bank.[80] The special and nonpreference visas do not require a home study; however, the inclusion of one may well increase the chances of a favorable review of the application, as well as speed up the process. "The application may be further fortified with letters of recommendation, especially if there is no home study,"[81] and with a statement showing that the parents' insurance policies will fully cover the child.[82]

The parents must also obtain papers showing that the child's

74. F. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES, ch. 12, §6(a) (2d ed. 1961, Cum. Supp. 1964); Z. Jackson, *America's Changing Immigration Policy*, 4 LINCOLN L. REV. 72,74 (1969).

75. F. AUERBACH, *supra* note 74, ch. 12, §6(b).

76. Ratliff, *supra* note 28, at 4.

77. 1 GORDON & ROSENFIELD, *supra* note 1, §3.5a; Ratliff *supra* note 30, at 1.

78. 1 GORDON & ROSENFIELD, *supra* note 1, §3.7a.

79. Ratliff, *supra* note 28, at 6.

80. *Id.* at 4.

81. *Id.*

82. Interview with Doris Besikof, Friends for All Children. It is important that the

surviving natural parent or parents, and/or the orphanage to which the child has been surrendered, have released him or her for emigration and adoption.[83] Full compliance with these requirements and suggestions can prevent much anxiety and delay.

Once the consulate has approved the application, the child is issued a visa, if there is no waiting list. However, since there are usually more applicants than available visa numbers, the applicant must await his or her turn in accordance with the date of filing the visa.[84] This waiting period may last from twelve to twenty-seven months, depending largely on the hemisphere of the child's origin —the Western Hemisphere visa usually takes much longer.[85]

1. *The Eastern Hemisphere and Nonpreference Visas.*

The 1965 Immigration and Naturalization Act provides that no more than 170,000 immigrants, exclusive of immediate relatives, may be admitted into the United States during any fiscal year from nations other than the independent countries of the Western Hemisphere. Although the number of immigrants from any single country is limited to 20,000, the annual quota of 170,000 is otherwise established on a worldwide, rather than a country-by-country basis.[86]

The Act sets up seven "preference categories" for these immigrants, based on special relationships to American citizens or permanent residents, or on special skills. Visa numbers for Eastern Hemisphere applicants are made available in the order of preference class and in the order of application within each class.[87]

However, even qualification as a member of a certain category does not assure the immigrant of immediate consideration, since within a category or country the demand for visas may be greater than the supply.[88] Such a class or country is deemed to be "oversubscribed." The "cut-off date" for an oversubscribed category is the filing or "priority" date of the first applicant who was unable to get a visa. Only those who have a priority date earlier than the cut-off date may be issued visas. All others are put on a waiting list. Visas are made available in the lower preference categories only after the

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parents actually read the policies, to determine whether they will cover the child and, if so, when that coverage begins; they should not rely upon the word of their insurance agent. *See* text at note 161 *infra*.

83. Ratliff, *supra* note 28, at 4; *see supra* note 52 and accompanying text.

84. 1 GORDON & ROSENFIELD, *supra* note 1, §§2.27i, 3.7a.

85. Interview with Robert B. Neptune, *supra* note 36. *See infra* note 93.

86. I.N.A. §§201(a), 202(a), 8 U.S.C. §1151(a), 1152(a) (1965); 1 GORDON & ROSENFIELD, *supra* note 1, §2.27a. The limitation of 20,000 immigrants per country per year applies to the Western Hemisphere, as well.

87. I.N.A. §203(a)-(c), 8 U.S.C. §1153(a)-(c) (1965).

88. 1 GORDON & ROSENFIELD, *supra* note 1, §3.7a.

demand in the higher categories has been satisfied.[89]

Nonpreference applicants are those who have no claim to a preference and thus do not fall into any of the seven preference categories. Eastern Hemisphere children who do not satisfy the statutory definitions of "adopted child" or "eligible orphan" must, consequently, come in as nonpreference immigrants. They must simply wait their turn, in the chronological order in which they qualify, for any portion of the "worldwide annual quota" which is not used by the preference groups.[90]

The problem confronting the parents and agencies is that this worldwide quota is all too often fully used by the preference categories. Nothing is left for those who were forced into the nonpreference category by rules prohibiting prospective single or alien parents from filing immediate relative petitions, and limiting otherwise eligible parents to only two such petitions. The long waiting period inherent in the nonpreference method can lead to much anxiety, frustration, and trauma, especially if the child dies before getting here. This problem is also felt to an even greater extent by parents seeking a child from this hemisphere.

2. *Western Hemisphere Special Immigrants.*

Aliens born in any independent country of the Western Hemisphere or in the Canal Zone are given special immigrant status, and fall within an annual quota of 120,000 which is entirely separate from the worldwide annual quota prescribed for all other immigrants.[91]

The statute imposes no preferences or priorities on applicants for special immigrant visas. All applicants, including children, are simply considered in the order of their registration for visas.[92] Because of the vast number of Mexican, and Central and South American natives who seek entry into the United States each year, parents seeking to adopt a child from this hemisphere can expect to wait as long as two years before their child can obtain an entry visa.[93]

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89. Department of State Bureau of Security and Consular Affairs, Availability of Immigrant Visa Numbers for December 1973 (provided courtesy of the Foreign Adoption Center). The current waiting period is about eighteen months. Interview with Robert B. Neptune, *supra* note 36.

90. I.N.A. §203(a)(8), 8 U.S.C. §1153(a)(8) (1965); 1 GORDON & ROSENFIELD, *supra* note 1, §§2.27i, 3.7a. Normally, a nonpreference immigrant is required to obtain from the Secretary of Labor a certification stating that the immigrant's coming to the United States will not adversely affect American labor. However, this certification need not be filed for a child, as he or she will be supported by the adoptive parents.

91. 1 GORDON & ROSENFIELD, *supra* note 1, §2.20. The alien must actually be born in the Western Hemisphere; special immigrant status is not acquired by naturalization.

92. *Id.* §3.7a.

93. Interview with Robert B. Neptune, *supra* note 36. Any advantage which may otherwise have accrued from the absence of any preference categories has been offset by the lower number of immigrant visas available in a fiscal year.

Once established, a Western Hemisphere priority date, like a nonpreference priority date, is retained by the alien even after he or she makes a formal visa application by some means other than that by which the priority date was originally established.[94] This means that parents may apply for a nonpreference visa and, subsequently, for a nonimmigrant or immediate relative visa. Since the child's "rightful place in line" is retained despite this second petition, he or she may still come in on a nonpreference visa, if one suddenly becomes available.[95]

D. *Nonimmigrant Visas.*

According to the Immigration and Naturalization Act, every alien is:

> presumed to be an immigrant, until he establishes to the satisfaction of the consular officer . . . and the immigration officers . . . that he is entitled to a nonimmigrant status

within one of the ten nonimmigrant classes provided by this statute,[96] or until the alien is "paroled" into the United States via a special dispensation which grants no legal resident status.[97]

The major advantage of the nonimmigrant avenues is that there are no restrictions on the number of nonimmigrants that may enter this country each year;[98] thus getting such a visa is relatively easy, if the documentary requirements are met. In several instances they have been successfully used in intercountry adoptions. However, there are several significant drawbacks: The visas are temporary, rather than permanent; they are not issued in accordance with normal INS procedure and are subject to the interpretation of individual State Department and Immigration Service officials; and most important, they are not designed for purposes of adoption—they skirt the boundaries of illegality and, consequently, should be used in emergencies only.[99]

However, because of the long waiting periods that are often entailed in the use of nonpreference visas, in cases where getting the child into America as quickly as possible is the most important consideration (for example, an actual or potential medical emergency),

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94. Department of State Bureau of Security and Consular Affairs, Availability of Immigrant Visa Numbers for December 1973 (provided courtesy of the Foreign Adoption Center).

95. Interview with Robert B. Neptune, *supra* note 36.

96. I.N.A. §§101(a)(15), 214(b), 8 U.S.C. §§1101(a)(15), 1184(b) (1965). Unless a different meaning is indicated, the term "nonimmigrant" contemplates a visitor, student, or parole status; the term "visitor" generally includes both student and "visitor for pleasure" visas.

97. 1 GORDON & ROSENFIELD, *supra* note 1, §2.54.

98. *Id.* §2.56.

99. Ratliff, *supra* note 28, at 1,7.

it may be best to use a visitor, or parole visa. Once here, the child's status can be adjusted by petition to an immigrant visa. The parent or parents should apply for a nonpreference visa number, as soon as the child arrives.[100] Thus these two avenues may, under certain circumstances, present an alternative means of adoption for prospective parents who cannot submit an immediate relative petition.

All nonimmigrants must conform to certain prescribed conditions. They are limited in the time they are allowed to stay and must depart within the authorized time period, or when the Attorney General determines that the reason for their parole no longer exists. (Of course, they may generally be granted extensions of their stay). They must maintain their nonimmigrant status and may not engage in any activities (such as employment) which are inconsistent with that status. And they may be required to post a "departure bond," to insure that they will leave when required.[101]

1. *Visitor Status.*

Of the ten statutorily prescribed nonimmigrant categories, only two can be made applicable to purposes of adoption. A visitor visa may be granted to "an alien . . . who is visiting the United States temporarily for pleasure."[102] This visa is issued by the consul at his or her discretion. A student visa is available to:

> an alien . . . who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States solely for the purpose of pursuing such a course of study at an established institution of learning . . . approved by the Attorney General.[103]

In both cases, the visitor must be the resident of a "foreign country which he has no intention of abandoning."[104] Both these visa types are issued by the United States consul abroad at his or her discretion.

Getting a standard visitor's visa requires little time or documentation. The procedures for getting a student visa are slightly more involved. Both the school and the student must file petitions and supporting documents.[105] However, the Act sets no age limitation,

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100. Interview with Anne K. MacLaughlin, *supra* note 58. Applying before the child arrives will result in a denial of the petition for parole status. *See* text at notes 107 and 114 *infra*.

101. 1 GORDON & ROSENFIELD, *supra* note 1, §§2.6b, 2.54.

102. I.N.A. §101(a)(15)(B), 8 U.S.C. §1101(a)(15)(B) (1965).

103. I.N.A. §101(a)(15)(F), 8 U.S.C. §1101(a)(15)(F) (1965).

104. 8 U.S.C. §1101(a)(15)(B),(F) (1965).

105. 1 GORDON & ROSENFIELD, *supra* note 1, §2.12b,d. The school must file a petition for approval of the student; the prospective student (or the parents) must demonstrate that he or she is entitled to the status, is otherwise admissible, has been accepted by the school and has sufficient resources to attend, and that he or she has whatever language skills are deemed necessary. *See also* 7 C.F.R. 214.3; 22 C.F.R. 41.45; Form FS-257.

does not prescribe any minimum number of semester hours, and does not elaborate on what is meant by "a full course of study." Furthermore,

> the school itself normally determines and certifies whether a full course of study is being undertaken, and this determination will not be questioned, unless it is manifestly unrealistic.[106]

Thus a student visa may also be obtained fairly easily.

However, because of the strong temptation to use these visas, it must be reiterated that neither is legally available to a child who is really coming here to be adopted. The visa applicant must necessarily misrepresent the reasons for the entry and the lack of any intention to abandon the native country, as the actual purpose is to immigrate. Thus there is a certain degree of risk involved in the use of a visitor visa, since the misrepresentation may constitute the ground for denial of a request for adjustment of status, for the deportation of the child, and for the bringing of criminal charges against the parents.[107] Nevertheless, the visa may be obtained in an emergency situation, if the consular officials are sympathetic.[108]

2. *Parole Visas.*

Parole status may be granted a child in emergencies or for humanitarian reasons, such as to enable the child to receive medical treatment which is unavailable in the child's native country. Although the child is able to enter the country, it is important to note that he or she receives no immigrant or legal resident status.[109] In rare cases, the period of parole may be extended to a full two years; the parents will then be able to fulfill the residency and custody conditions required for filing an immediate relative petition. Otherwise the adjustment of status must be completed by means of a nonpreference visa.[110]

The power to grant parole and to fix appropriate conditions is discretionary and is vested in the Attorney General, who usually delegates it to the INS district directors. The power is broad but not unlimited, and where it appears that it was arbitrarily exercised or withheld, it may be subjected to judicial review.[111]

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106. 1 GORDON & ROSENFIELD, *supra* note 1, §2.12c.

107. *See* II(D)(3),(4) *infra*.

108. K. Sreedhar, Immigration Laws Concerning Adoption, November, 1973 (unpublished paper provided courtesy of the Foreign Adoption Center); interview with Robert B. Neptune, *supra* note 36.

109. 1 GORDON & ROSENFIELD, *supra* note 1, §2.54; K. Sreedhar, Immigration Laws Concerning Adoption, *supra* note 108. Polio does not constitute a ground for exclusion; parole visas are generally available to polio victims. Interview with Doris Besikof, Friends for All Children. *See* text at note 26 *supra*.

110. Interview with Robert B. Neptune, *supra* note 36.

111. 1 GORDON & ROSENFIELD, *supra* note 1, §2.54.

Parole must be granted in advance of the child's departure for the United States, since any carrier bringing an alien to a port of entry without a proper visa is subject to a penalty.[112] Form I-512, Authorization for the Parole or Conditional Entry of an Alien into the United States, setting forth the reasons parole is being requested and the reasons a nonimmigrant visa cannot be obtained, must be submitted as a petition for parole status. Upon approval, the child is issued Form I-94, which states the method and period of admission.[113]

It is important to note that a child may not legally use a parole visa to come in for the purpose of a subsequent adjustment. The same risks discussed in reference to visitor visas are applicable here, as well.[114] So if the only problem is an anxious, frustrated parent or couple, the parole avenue should not be used. The legislation pending in Congress should soon eliminate most of the need for these nonimmigrant visas, although it will do nothing to improve the situation of prospective adopting parents who are both aliens.

3. *Adjustment of Status.*

According to §245(a) of the Immigration and Naturalization Act,[115] a nonimmigrant child may adjust his or her status to that of an alien lawfully admitted for permanent residence, if the child meets certain prescribed qualifications. Natives of the Eastern Hemisphere may complete the adjustment during their nonimmigrant residence in the United States. This privilege is not available to Western children, who must physically leave this country and return on an immigrant visa. However, they may arrange to obtain the visa in Canada or some other adjacent country.[116]

An alien seeking adjustment must file a formal application. He or she must be "eligible to receive an immigrant visa" and "admissible for permanent residence" in the same way as any other immigrant.[117] In addition, an immigrant visa must be "immediately available" at the time the application is approved.[118] In practice, this means that the child must be eligible for immediate relative status, or that a preference or nonpreference visa will be available within 90 days of approval. Where the child must apply for a preference or nonpreference visa, he or she must receive an immigrant visa number from the Department of State, before the application will be ap-

112. Interview with Robert B. Neptune, *supra* note 36.

113. 1 GORDON & ROSENFIELD, *supra* note 1, §2.54 at 107 (Cum. Supp. 1973).

114. Interview with Robert B. Neptune, *supra* note 36; *see* II(D)(3),(4) *infra*.

115. 8 U.S.C. §1155(a) (1965).

116. *Id.* §1155(c); 2 GORDON & ROSENFIELD, *supra* note 1, §7.7b; Z. Jackson, *America's Changing Immigration Policy*, 4 LINCOLN L. REV. 72,79 (1969).

117. I.N.A. §245(a), 8 U.S.C. §1155(a) (1965); 2 GORDON & ROSENFIELD, *supra* note 1, §7.7b, at 7-61.

118. I.N.A. §245(a), 8 U.S.C. §1155(a) (1965).

proved.[119] Thus the parents should wait until just before a number is available to file the petition for adjustment.

The procedure for adjusting a non-Western child's status is essentially the same as that involved in any other application for an immigrant visa. The application is submitted on Form I-485, Application for Status as Permanent Resident. A preliminary visa application for immediate relative or preferred status must be approved, before a visa will be made available. The parents must also submit all the supporting documents usually required for admission as an immigrant.[120] If the child has not previously been inspected in conjunction with the issuance of the nonimmigrant visa, he or she must be given a medical examination by an officer of the United States Public Health Service.[121]

A Western Hemisphere child must go to a United States consulate in a foreign country and make formal application for readmission as an immigrant. The procedural and documentary requirements for either immediate relative or special immigrant status are otherwise similar to those outlined for a non-Western child.

4. *Discretion, Misrepresentation and Deportation.*

The mere fact that the child meets the qualifications discussed in the preceding subsection does not entitle him or her to an automatic change of status. Adjustment is at the discretion of the Attorney General (ie, the Immigration Service)[122] and is granted only in meritorious cases; but it will not ordinarily be denied in the absence of adverse factors. The burden of proving merit is on the petitioner.[123]

The case of a child coming here on a nonimmigrant visa for purposes of adoption raises many difficult issues. The statute provides that:

> [a]ny alien who seeks to procure or has sought to procure a visa or other documentation, or seeks to enter the United States, by fraud or by willfully misrepresenting a material fact,

shall be barred from admission.[124] The provision applies to both im-

119. 2 GORDON & ROSENFIELD, *supra* note 1, §7.7e. Lists of quota availability are issued monthly by the Visa Office of the United States Department of State. The parents may obtain the current priority date and waiting period from the Immigration Service, in order to determine when a visa will be available.

120. 2 GORDON & ROSENFIELD, *supra* note 1, §7.7e; Form I-485, Instructions. Required documents include passport, temporary entry permit (Form I-94), birth certificate, fingerprint chart, affidavit of support, and Biographic Information Form G-325A, if the child is over fourteen years of age.

121. 2 GORDON & ROSENFIELD, *supra* note 1, §§7.7b, at 7-56.

122. I.N.A. §245(a), 8 U.S.C. §1155(a) (1965).

123. 2 GORDON & ROSENFIELD, *supra* note 1, §7.7d.

124. I.N.A. §212(a)(19), 8 U.S.C. §1182(a)(19).

migrants and nonimmigrants.[125] Because misstatements concerning a child's purposes in coming obviously have a direct bearing on his or her admissibility, they could well lead to the deportation of the child and the prosecution of the parents and the adoption agency. In fact, official U.S. immigration policy dictates that nonimmigrant visas may never be used for intercountry adoptions. A child coming to the United States in this manner will be here illegally from the very beginning and, therefore, will not be granted an adjustment of status.[126]

However, "the Attorney General is given broad discretionary power to waive the substantive grounds for the exclusion of nonimmigrants,"[127] and extenuating circumstances will be taken into account in a review of the child's case. Such things as the child's health (past, present and predicted), the need for immediate medical attention at the time the nonimmigrant visa was obtained, the very long waiting period involved with nonpreference visas, and the humanitarian intention of giving a good home to an orphaned child, may weigh heavily in favor of allowing the child to remain permanently in the United States.[128] At the same time, deliberate and repeated violations by the parents or agency will also be taken into account[129] and may operate to exclude the child; and continued use of these nonimmigramt avenues may result in the elimination of the sympathetic consular officials who are necessary to their successful utilization.

III. THE EFFECT OF STATE LAWS ON INTERCOUNTRY ADOPTIONS

A. *State Laws as Impediments to Immigration*

Most foreign adoptions initiated and completed through a licensed agency go very smoothly and without any significant problems or delays. The occasional difficulties that do arise are rarely ascribable to the laws themselves.[130] Usually they result from the varied administrative interpretations of these laws and procedural requirements.[131] For example, although United States immigration law determines which documents must be submitted before the processing of an I-600 petition can be completed, it is the INS district offices

125. GORDON & ROSENFIELD, *supra* note 1, §§2.32b, 7.7d. A fact is "material" if disclosure of the truth would have required the denial of the visa.

126. Letter from Walter V. Edwards, District Director, United States Immigration Service, to Susan Evans, International Coordinator, Foreign Adoption Center, August 27, 1974.

127. 1 GORDON & ROSENFIELD, *supra* note 1, §2.53b.

128. Interview with Robert B. Neptune, *supra* note 36.

129. 2 GORDON & ROSENFIELD, *supra* note 1, §7.7d.

130. Two notable exceptions to this statement are the provisions restricting the use of the I-600 petition to married American citizens, and restricting the number of such petitions to two.

131. Interview with Wendy Grant, *supra* note 2.

that determine which documents must be submitted before they will begin processing the application. Some of these officials impose very minimal requirements. Others, despite the new policy,[132] may require the submission of most or even all the documents before they will initiate the investigation. This can delay the child's entry by as much as two to three weeks.[133]

Similar delays can occur in areas which have no INS office. If Immigration for some reason (perhaps because the office has had insufficient dealings with a particular welfare department) refuses to accept an otherwise valid home study, they will not approve the visa application, until they have sent a representative to interview the family.[134] This may take several additional weeks. However, problems resulting from actions of the Immigration Service are extremely rare.

The major problems encountered by the international adoption agencies concern the release of the child for adoption and the consent of the state to the adoption. If these problems arise before the child enters the United States, they delay the immigration; if they arise afterward, they affect the finalization of the adoption decree. This section is concerned only with the former situation.

The ease with which the documents are obtained by the adopting parties depends largely upon how the individual state department of welfare[135] construes the United States immigration laws and the state preadoption requirements. The state will not consent to the adoption, and the child will not receive an entry visa, until welfare is satisfied that the appropriate requirements have been met.

Wisconsin for several years provided an almost classic example of how a state law and the construction of a federal law can delay an orphan's entry for want of a consent to adopt. Federal law provides that the state preadoption requirements must be met in the case of an orphan "who is coming to the United States for adoption."[136] The parents and the Wisconsin Department of Health and Social Services were in a dilemma: Welfare felt unable to certify that the preadoption requirements had been met, since if the child had already been lawfully adopted abroad, it could not be coming here for adoption, and there were no longer any such requirements to meet. Since Wisconsin had no provision allowing the readoption of a child adopted in another country, it held that the parents would have to be licensed as

132. *See* text at note 70 *supra*.

133. Interview with Arden Buck, *supra* note 67.

134. Interview with Suzanne Johnson, *supra* note 7.

135. In states which require a preadoption court hearing, the construction given by the presiding judge is determinative. *See* note 149 *infra* and accompanying text.

136. I.N.A. §101(b)(1)(F), 8 U.S.C. §1101(b)(1)(F) (1965); *see* text at note 53 *supra*.

foster parents. Immigration said that if the overseas adoption was valid, that was enough for them; but the parents wanted to readopt, in order to better protect themselves and their child.[137]

The impasse was finally resolved when Social Services realized that, since the overseas adoption is not consummated until long after the child arrives in the United States, there really is no adoption abroad, and the parents would be adopting, rather than readopting, in Wisconsin.[138] This change in policy was facilitated by an amendment to the Wisconsin Children's Code, which reads:

> A child whose adoption would otherwise be valid . . . may be readopted . . . if such readoption is necessary under Federal law to permit the child to enter this country.[139]

Preadoption requirements are imposed in order to insure that the necessary documents are in order, that adoption will be possible, and that the parents will have "the capacity to parent a child not born to them."[140] Nearly all states who have preadoption requirements require a home study, a medical and social report on the child, the child's birth certificate, proof that the child is free for adoption, and the consent of the state department of welfare (or of an agency acting in its behalf) for the adoption of the child in question.[141]

The home study is intended to verify that the parents will be able properly to care for the child. The specific documentary requirements vary from state to state and county to county;[142] home study documentation may include a physical examination of the parents,[143] information on the parents' finances,[144] and an indication that the parents will be able to accept the child's culture and help the child

137. Interview with Martha Schurch, Agency Services Supervisor, Wisconsin Department of Health and Social Services, Division of Family Services (adoption).

138. *Id.*

139. Wisconsin Children's Code §48.97, WIS. STAT. ANN. §48.97 (1971).

140. Letter to the author from Jane Stepich, Social Services Consultant, Indiana Department of Public Welfare, July 29, 1974; letter to the author from Ava Snook, Adoption Consultant, Colorado Department of Social Services, September 9, 1974.

141. This section is based primarily upon letters to the author from: Jane Stepich, *supra* note 140; Sue Howard, Adoption Specialist, Kentucky Department for Human Resources, July 25, 1974; Robin Peacock, Supervisor of Adoptions, North Carolina Department of Human Resources, August 9, 1974; Martha Schurch, *supra* note 60.

142. Interview with Karen Ratliff, *supra* note 68. Because of economic and personnel considerations, the adoption agency will rarely conduct the home study itself. In Colorado, as in many other states, the investigation is usually completed by either a county department of social services, or by a voluntary agency, such as the Lutheran Service Society. However, some states (*e.g.*, California) permit only the state department of welfare to conduct the study. Interview with Ava Snook, Adoption Consultant, Colorado Department of Social Services.

143. Letter from Jane Stepich (Indiana), *supra* note 140.

144. Letter from Sue Howard (Kentucky), *supra* note 141.

"retain or obtain a knowledge of and pride in that culture."[145] A few states still make some efforts to match the child's and the parents' religious faiths.[146]

Several states have child importation laws, with or without the provision that a "bond of indemnity" be posted by the parents or agency.[147] However, these laws usually cause few problems in agency adoptions, since the bond either does not apply or may be waived in the case of licensed child-placing agencies.[148] A few states hold a "preadoption court hearing," designed to ascertain the family's fitness to adopt, in cases where a preadoptive home study has not been completed by an approved agency.[149]

Delays may result from a judgment by the state department of welfare that the agency report on the child's medical and social history is incomplete; the department will not send its certification to the Immigration Service, until it gets more information. However, in many cases this is impossible, because so little is known about the child's origin or early history. The state must then be satisfied with the agency and consulate evaluation of the child's present state of health and prospects for the future. Almost all the states now understand this, and the problem is far less acute than it was even a year ago.[150]

Recently, the major problems surrounding immigration have centered around the question of whether the child has been properly released for adoption. Sometimes a declaration of release for emigration and adoption has been obtained from the natural mother and the orphanage, but the state wants a release from the child's father, as well.[151] As was noted earlier, this is often impossible to obtain.[152]

The more common problem involves satisfying the state department of welfare that the declaration of release is valid, or that the person signing it has the proper authority to release children for adop-

145. Letter from Robin Peacock (North Carolina), *supra* note 141; letter from Sue Howard (Kentucky), *supra* note 141.

146. *See e.g.*, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, NEW YORK STATE LEGISLATION ON ADOPTION, Social Services Law §373, at 38 (3d ed. 1972).

147. *See e.g.*, Wisconsin Children's Code §48.98(2)(a), WIS. STAT. ANN. § 48.98(2)(a) (Supp. 1974), *amending* WIS. STAT. ANN. § 48.98(2)(a) (1957); KEN. REV. STAT. §199.350 (1972).

148. *See e.g.*, Wisconsin Children's Code §§48.63, .98, WIS. STAT. ANN. §§48.63, .98; KEN REV. STAT. §199.370 (1972).

149. *See e.g.*, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, *supra* note 146, Domestic Relations Law §112, at 13. Ohio and Michigan have similar procedures. Interview with Wendy Grant, *supra* note 3.

150. Interview with Karen Ratliff, *supra* note 68; interview with Suzanne Johnson, *supra* note 7.

151. Interview with Karen Ratliff, *supra* note 68.

152. *See supra* note 52.

tion. This difficulty can usually be overcome by a statement, signed and sealed by a government or consular official, attesting that the person named therein has the authority to sign these declarations.[153]

The underlying source of most of these problems is an unwillingness on the part of some states to apply to foreign adoptions, standards and criteria different from those prescribed for domestic adoptions. These states may want complete histories on the child or releases signed by all who have an interest in the child. Two approaches have been employed to avoid the delays and frustration that often result from these stiff demands: either the states have reformed their laws or modified their construction of the laws to take into account the needs and capabilities of the agencies and parents; or the agencies have somehow satisfied the states that they have met at least the essential requirements of the state laws, so that the states can feel justified in giving their consent to the adoption.[154]

B. *Eliminating Obstacles, Delays and Frustrations*

The time required for the transfer and completion of paperwork varies greatly from state to state and even from county to county, and is dependent upon such factors as laws, policies, the amount of money and number of personnel available for adoption work, and the degree of interest exhibited by these personnel.[155] This section represents a brief survey of the Colorado welfare and adoption system.[156] It is designed only to outline some of the elements which have helped to eliminate past problems and to make Colorado a state in which foreign adoptions are readily accomplished. It is not meant as an alchemical formula for success.

An obvious first requisite is the presence of "good" laws. In Colorado there are few problems with release and consent, because the law imposes no significant barriers on the courts' or the department of welfare's acceptance of legal documents from foreign jurisdictions. In addition, the absence of a child importation law means that Colorado requires no extensive written report on the child; children who are otherwise admissible are not kept out for want of a detailed life history.[157] However, it also means that virtually anyone may bring a child into the state. Therefore, it is essential that the Colorado De-

153. Interview with Martha Schurch, *supra* note 137.

154. Interview with Arden Buck, *supra* note 67; interview with Suzanne Johnson, *supra* note 7.

155. Interview with Wendy Grant, *supra* note 2.

156. This section is based upon a series of interviews with: Wendy Grant, *supra* note 2; Suzanne Johnson, *supra* note 7; Burr Ringsby, Foreign Adoption Center and Supervisor of Substitute Care, Boulder County Department of Social Services, Colorado; Ava Snook, Adoption Consultant, Colorado Department of Social Services.

157. The Interstate Compact on the Placement of Children has augmented or replaced the importation laws of about one-half the states. It is designed to assure

partment of Social Services work very closely with the Immigration Service and the international adoption agencies, in order to insure good placements. The following discussion will explain how this cooperation is achieved.

Even more important than the laws themselves, in determining the ease with which foreign adoptions are completed, is the role played by those people who interpret the laws and formulate the policy. As suggested in the preceding section, this function is most often performed by the state welfare department.

Colorado has a rather unique system which can best be described as a "state-supervised, county-administered" program. Two "adoption consultants" serve in a dual capacity as supervisors of child placement policy, and as liaisons between the state and county departments of social services, the intercounty adoption agencies, and the Immigration Service.

Under this arrangement, the Colorado Department of Social Services sets the fundamental policy but leaves most of its implementation to the county departments who, in turn, strive to keep their involvement in the actual adoption process to a minimum.[158]

The adoption consultants also serve as conduits for complaints and questions from the agencies and county departments to the district INS office in Denver. This reduces the number of individual communications and helps to maintain the Immigration Service's great willingness to facilitate adoptions, by keeping at a tolerable level the increased immigration workload which has resulted from the burgeoning demand for foreign children.

It may be said with some accuracy that the Colorado program recognizes that intercountry adoptions pose unique problems which often intertwine two distinct legal and cultural systems, and that it actually creates a separate legal and procedural system, designed to eliminate what are recurrent difficulties in certain other states. The adoption process moves smoothly, because major responsibilities are placed in the hands of experienced, competent agencies, and because interdepartmental overlap and tension are minimized. At the same time, the system incorporates the safeguards which are so essential, if the parents, the child, and the state are to be adequately protected.

IV. RELATED NOTES AND COMMENTS.

This section will deal very briefly with several issues raised by the foregoing discussion. The treatment given these topics is by no

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uniformity in child placement laws from state to state and to protect and keep track of children, as they cross state lines. The Compact is effective only in dealing between two or more Compact states; it has not yet been adopted in Colorado.

158. *See supra* note 142.

means exhaustive; much may depend upon the state, the foreign country, and other circumstances involved in each case.

A. *Legal Responsibility*

The question of who has legal custody of and responsibility for the child during the trip to the United States is of some concern to all parties involved. The child remains a citizen of its home country until such time as he or she is naturalized as an American citizen.[159] However, legal custody of the child is transferred from the orphanage to the agency, and then from the agency to the parents. Generally, the agency will "pick up the tab," if anything happens to the child between the time he or she leaves the foreign country and the time the parents take custody at the airport.[160] After that, the child is the responsibility of the adopting parents. Because the child will almost always require medical treatment, it is important that the couple determine whether their insurance policies will protect the child from the time he or she first arrives, or only after the adoption is completed.[161]

B. *Unidentified Children*

"Unidentified child" can have two connotations. In its broader context, it refers to almost all foreign-born orphans, because many are abandoned and have no name or early history. These children are examined by an orphanage or village official, who guesses at the date of the child's birth and makes up a name. The name and "birthdate" are then entered in a "birth judgment," the equivalent of a birth certificate.[162] If the parents want a United States birth certificate for the child, or if their state requires one, they must apply to Immigration for a search of INS records. Immigration has the birth judgment in its files and uses it to draft and certify a new birth certificate.[163]

The term can also refer to instances where one or both of the adopting parents go abroad to select and adopt a child. Before leaving the United States, the parents submit the usual I-600 supporting documents to the Immigration Service, which processes them and sends the results of its investigation to the American consulate in the foreign country. After selecting and adopting an orphan according to the laws of that country, the parents complete the Form I-600 by filling in the child's name and any remaining information.[164] The

159. Interview with Robert B. Neptune, *supra* note 36.

160. Interview with Suzanne Johnson, *supra* note 7. Of course, acceptance of this liability depends on the agency involved.

161. *See supra* note 82.

162. Interview with Susan Evans, *supra* note 13.

163. Interview with Robert B. Neptune, *supra* note 36. Form N-585, Application for a Search of the Records of the Immigration and Naturalization Service, is used to obtain both a new birth certificate and a verification of birth status.

164. Ratliff, *supra* note 28, at 9.

child's visa is then issued at the discretion of the American Consul or an Immigration official.[165] This avenue is available only to parents who actually go overseas, since only they can enter the child's name and file the petition.[166]

C. *Naturalization*

Because most parents want their children to become United States citizens, it should be pointed out that citizenship is never conferred by adoption; it is acquired only by blood, place of birth, or formal naturalization proceedings. Therefore, the child must be naturalized according to United States law. The Immigration and Naturalization Act[167] provides that the child must be a permanent resident alien in the full legal custody of its parents for two years, before it can be naturalized. This means that the stateside adoption must be finalized two years prior to the filing of the petition; and if the child came here as a nonimmigrant, the two years is tolled from the date his or her status is adjusted to permanent resident status. At least one of the parents must be a United States citizen.[168]

If the child is under the age of fourteen, its good moral character is presumed; if the child is over fourteen, such character must be demonstrated. Furthermore, regardless of the child's age, certain documents must be submitted, the child must appear for an interview, two witnesses must appear in behalf of the child, and the child must wait thirty days after the fulfillment of all other requirements before he or she can be sworn in as an American citizen.[169]

D. *Costs and Tax Rebates*

The cost of an intercountry adoption can range from as little as $250.00 to as much as $1200.00 exclusive of transportation, depending upon the country and the agency involved.[170] Federal tax laws and the tax laws of many States consider adoption to be a personal expense. Consequently, there are no deductions for legal fees, medical and transportation costs, or any other expenses incurred during the adoption process.[171]

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165. *Id.*

166. Interview with Robert B. Neptune, *supra* note 36. An interesting question might be whether this is not violative of equal treatment provisions, since only those wealthy enough to afford the trip can take advantage of this law.

167. I.N.A. §323(a), 8 U.S.C. §1434(a) (1965); interview with J. Patrick Vandello, General Attorney (Naturalization), United States Immigration and Naturalization Service. The parents sponsor the child and take the oath for him or her.

168. Interview with J. Patrick Vandello, *supra* note 167.

169. I.N.A. §323(b),(c), 8 U.S.C. §1434(b),(c) (1965).

170. Current Information on Foreign Adoption, January, 1974 (unpublished material provided courtesy of the Foreign Adoption Center).

171. Letter to the author from Sue Howard, *supra* note 141.

V. CONCLUSION

The growing interest in foreign adoptions and the humanitarian concerns expressed by parents and by general United States immigration policy are resulting in an easing of the requirements imposed upon both parents and children. Not only are the laws themselves being liberalized (for example, the Wisconsin readoption law and the I-600 restrictions), but the administrative interpretations of these laws are increasingly taking account of the different laws and customs prevalent in the foreign countries.

Nevertheless, problems still arise, either because the relevant laws are too restrictive, or because an individual state or court applies a too narrow construction to a law or procedural regulation. It is hoped that this article will help to alleviate both types of difficulties.

Paul K. Driessen

BOOK NOTES

Editor's note: Beginning in this issue, the DENVER JOURNAL OF INTERNATIONAL LAW & POLICY *will feature BOOK NOTES, short summaries of books recently received. The goal of BOOK NOTES is to inform our readers of new books of international interest, and to provide information on ordering a desired book. Although most books listed in BOOK NOTES are available through local book dealers, to facilitate ordering we will provide, wherever possible, the complete address of the publisher, the cost of the volume, and ISBN and Library of Congress book numbers. Subsequent issues will feature BOOK REVIEWS, books selected from books listed in the BOOK NOTES section, based on their significance in their respective fields. Publishers are invited to submit newly published books which they feel would be of interest to our readers. All books so received will be listed in BOOK NOTES, and will be considered for a full review at a later date.*

Bibliography

CLAGETT, H.L. & VALDERRAMA, D.M., A REVISED GUIDE TO THE LAW & LEGAL LITERATURE OF MEXICO; Library of Congress (1973), Latin America Series #38; available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402; Stock # 3001-0049; ISBN 0-8444-0047-5; LC 72-12763; xii, 463 p., index of persons, footnotes, foreward by C.W. Kenyon.

The work is a revision of a 1945 edition by J. Vance & H. Clagett. The book provides a guide to the history, texts, and literature of Mexican law, and is broken down by subject area. Also included is a section detailing the literature on the public and private international law of Mexico.

KITTER, A., THE U.S. & THE EEC: AMERICAN REACTION TO & INVOLVEMENT IN THE 'COMMON MARKET'; Center for the Study of Armament & Disarmament, California State Univ., Los Angeles, CA 90032, (1973), $1.50, ix, 62 p.

Bibliography concerning the U.S. and the EEC covering early U.S. reactions, overall economic relations, legal difficulties, U.S. foreign policy and the EEC, and other related topics.

MEEKER, T.A., THE MILITARY INDUSTRIAL COMPLEX: A SOURCE GUIDE TO THE ISSUES OF DEFENSE SPENDING & POLICY CONTROL; Center for the Study of Armament & Disarmament, *supra*, (1973), $1.50, vi, 23 p.

Bibliography provides sources dealing with the military industrial complex in terms of current issues, historical background, and defense economics.

MEEKER, T.A., THE PROLIFERATION OF NUCLEAR WEAPONS & THE NON-PROLIFERATION TREATY (NPT): A SELECTIVE BIBLIOGRAPHY AND SOURCE LIST; Center for the Study of Armament & Disarmament, *supra*, (1973), $1.50, vi, 25 p.

A selective bibliography covering issues relating to the NPT including the proliferation issue, negotiations and source documents, safeguards, and sources from various countries (Japan, Australia, India, W. Germany, and Israel).

NATIONAL BUREAU OF ECONOMIC RESEARCH, PUBLICATIONS 1920-1974; available from the National Bureau of Economic Research, 261 Madison Ave., New York, New York 10016; 111 p., subject index, author index, title index.

List of publications of the National Bureau of Economic Research. Special attention should be given to their series *Studies in International Economic Relations.*

PARKER, J. & MEEKER, T., SALT II: A SELECTED RESEARCH BIBLIOGRAPHY; Center for the Study of Armament and Disarmament, *supra*, (1973), $1.50, xv, 36 p., footnotes.

Bibliography with a detailed introduction to SALT II. Topics covered include historical comparisons, initial agreements, strategic issues, related political issues, the arms race, the Soviet view, and strategic theory.

ROBINSON, J.P., CHEMICAL-BIOLOGICAL WARFARE: AN INTRODUCTION & A BIBLIOGRAPHY; Center for the Study of Armament & Disarmament, *supra*, (1974), $1.50, xiv, 34 p.

List of sources concerning chemical and biological warfare, with a detailed introduction by the compilers. Topics include: general studies of chemical and biological weapons (CBW), technological and medical aspects, use of CBW in the past, CBW and international law.

ROSWELL, J., ARMS CONTROL, DISARMAMENT & ECONOMIC PLANNING: A LIST OF SOURCES; Center for the Study of Armament & Disarmament, *supra*, (1973), $1.50, x, 26 p.

List of sources dealing with the economics of disarmament, defense economics, and civil-military economics.

UNESCO, BIBLIOGRAPHY OF PUBLICATIONS ISSUED BY UNESCO OR UNDER ITS AUSPICES, THE FIRST TWENTY-FIVE YEARS, 1946-1971; available from UNESCO Publications Center, P.O. Box 433, New York, N.Y. 10016, or from UNESCO, 7 Place de Fontenoy, 75700 Paris, France, (1973), $9.90, ISBN 92-3-001037-5; xviii, 385 p., title index, author index, list of national UNESCO distributors, table of abbreviations, guide to obtaining UNESCO publications and subscription services; English and French text.

Useful reference tool showing the size and scope of UNESCO's publishing activities.

WESTING, A., HERBICIDES AS WEAPONS: A BIBLIOGRAPHY; Center for the Study of Armament & Disarmament, *supra*, (1973), $1.50, vi, 36 p.

General bibliography concerning military use of herbicides, including the Viet Nam experience. A listing of limited circulation publications is also provided.

Human Rights

SOHN, L.B. & BUERGENTHAL, T., BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS; The Bobbs-Merrill Co., Inc., 4300 West 62nd Street, Indianapolis, Ind. 46206 (1973), $4.25, vi, 244 p.

Companion volume to INTERNATIONAL PROTECTION OF HUMAN RIGHTS, *infra*. Includes U.N. Charter, major human rights instruments of the U.N. and regional organizations, along with rules of procedure of the institutions established under these instruments. A final section contains documents of historical interest.

SOHN, L.B. & BUERGENTHAL, T., INTERNATIONAL PROTECTION OF HUMAN RIGHTS; The Bobbs-Merrill Co., Inc., *supra*, (1973), $19.50, ISBN 0-672-81873-5; LC 73-8424; xlv, 1402 p., footnotes, index, list of abbreviations, table of cases, table of treaties, declarations, and resolutions.

As the field of international protection of human rights has grown, so has the need for a comprehensive resource book containing the materials of the area. The authors have produced an outstanding textbook or reference book covering human rights. Subjects treated include a historical background, the role of the U.N., humanitarian intervention, rights of aliens, and international protection of minorities.

International Trade

AMERICAN CHAMBER OF COMMERCE IN SWITZERLAND, SWISS CORPORATION LAW (English translation of official text), distributed in the U.S.A. by Fred B. Rothman & Co., 57 Leuning St., S. Hackensack, N.J. 07606, (1974), $18.00, 79 p.

English translation of selected Swiss statutes relating to corporation activity. Included are excerpts from the Swiss Code of Obligations and the Swiss Civil Code.

INGRAM, G., EXPROPRIATION OF U.S. PROPERTY IN SOUTH AMERICA: NATIONALIZATION OF OIL & COPPER COMPANIES IN PERU, BOLIVIA & CHILE; Praeger Special Studies in International Economics & Development, 111 Fourth Avenue, New York, N.Y. 10003, or 5 Cromwell Place, London SW7 2JL, England (1974), $25.00, LC 73-18871; xx, 394 p., footnotes, tables, bibliography.

Political-economic studies of Peru, Bolivia and Chile, showing the effects of expropriation on related industries, future investments, foreign aid, and foreign investments. The author examines some of the reasons why U.S. investment has grown slowly in Latin America and has become almost stagnant in resource-extracting countries.

JACKSON, R. (*editor*), THE MULTI-NATIONAL CORPORATION & SOCIAL POLICY: SPECIAL REFERENCE TO G.M. IN SOUTH AFRICA; Praeger Special Studies, *supra*, (1974), $11.00, ISBN 0-275-08280; LC 73-18872; xx, 108 p., foreward by A. Loos & J. Finn, Introduction by C. Powers, index.

This book is a compilation of presentations made to the second seminar on corporate responsibility and the multi-national corporation held by the Council on Religion & International Affairs. Some of the items in this volume include: T. Hanold, *The Corporate Manager: A Businessman's View*; R. Murray, *The Institutional Stockholder as Investor & Owner*; E. Estes, *General Motors & South Afraica.*

KREININ, M., TRADE RELATIONS OF THE EEC: AN EMPIRICAL INVESTIGATION; Praeger Publishers, *supra*, (1974), $13.50, LC 73-10957; xvi, 128 p., tables, chapter endnotes.

A compilation of empirical studies concerning the international trade relations of the European Economic Community (EEC). The author discusses the history of the EEC, its theoretical framework, EEC effects on manufactured imports, economic consequences of reverse preferences and direct preferences, and the effect of EEC enlargement on preferences for developing countries.

LAMONT, D., MANAGING FOREIGN INVESTMENT IN SOUTHERN ITALY: U.S. BUSINESS IN DEVELOPING AREAS OF THE EEC; Praeger, *supra*, (1973), $15.00; LC 73-3673; xix, 169 p., maps, index, chapter endnotes, chapter bibliographies, glossary. With special assistance of R. Purtschert; foreward by E. Baklanoff.

This book uses the experiences of American investment attempts in southern Italy as a guide for American businessmen who may be seeking to expand their operations into some of the less-developed areas of Europe. By analyzing the history of the region, the special problems of Southern Italy, and the successes and failures of American businessmen in the area, Lamont presents a useful guide for businessmen and government officials concerned with foreign investment.

LEES, F., INTERNATIONAL BANKING & FINANCE; A Halsted Press Book, John Wiley & Sons, 605 Third Ave., New York, N.Y. 10016, (1974), $18.50; ISBN 0-470-52273-9, LC 73-11884; xv, 419 p.; index, endnotes, tables.

Lees presents a detailed guide for banks desiring to expand their operations to the international level, based on the experiences of large U.S. banks. The book also discusses foreign banking operations in the U.S., relevant laws and regulations, and the possibilities for banking operations in developing states.

MANSER, W., THE FINANCIAL ROLE OF MULTI-NATIONAL ENTERPRISES, Wiley, *supra*, (1973), $10.00, ISBN 0-470-56766-X, LC 72-12259; 176 p.; footnotes, tables, index.

As the role of international business increases, their activities become more visible and subject to scrutiny. The author examines their effect on developed and developing countries, and analyzes the conditions of their worldwide posture and integrated structure that may provide financial advantages.

MIKSELL, R. & FURTH, J., FOREIGN TRADE BALANCES & THE INTERNATIONAL ROLE OF THE DOLLAR; National Bureau of Economic Research, *supra*, distributed by Columbia University Press, 136 S. Broadway, Irvington-on-Hudson, N.Y., 10533, (1974), $7.50; Studies in International Economic Relations No. 8; ISBN 0-87014-262-3; LC 73-8544; xiv, 125 p.; tables, footnotes, glossary, index.

The authors review the record with respect to foreign holdings of U.S. dollars, and reconcile the two conflicting trends in thinking about the international monetary and payments problem. The authors conclude that the desire for use of the dollar both as an "intervention currency" (buying or selling dollars against other currencies in the exchange market) and as a *de facto* standard of value requires a restoration of confidence in the stability of the dollar in terms of special drawing rights (SDR).

MURRAY, A., DEPRECIATION; International Tax Program, Harvard Law School, Cambridge, Massachusetts 02138, (1971) $4.00; xii, 122 p.; LC 74-172243; tables, bibliography, footnotes. Tax Techniques Handbook series.

Examines the basic rules and guidelines for computing annual depreciation deductions: identification of depreciable property, the determination of its depreciation base, the estimation of its service life, and the selection of a method of depreciation, among others. This book is part of the Tax Techniques Handbook series which provides information on the experiences of countries around the world in drafting effective tax legislation. Each handbook focuses on the basic structural problems of designing an income tax, presenting alternative solutions and their policy implications.

NORR, M., RESERVES FOR FUTURE INVESTMENT: A SWEDISH TAX INCENTIVE; International Tax Program, Harvard Law School, *supra*, (1974) $12.50; 114p.; footnotes. Also available from International

Bureau of Fiscal Documentation, Muiderpoort, Sarphatistraat 124, Amsterdam-C, Holland; Selected Monographs on Taxation series.

The Swedish investment reserve system induces industry to build up, out of retained profits, a pool of private capital which will be available for use when increased business investment is deemed appropriate. The study presents a technical analysis of the system and a discussion of how Swedish businessmen and the government have used it.

POPKIN, W., THE DEDUCTION OF BUSINESS EXPENSES & LOSSES; International Tax Program, Harvard Law School, *supra*, (1973) $4.00; ix, 102 p., foreward by O. Oldman; index, bibliography, footnotes. Tax Techniques Handbooks series.

Popkin analyzes expenses and losses in terms of the various rationales underlying their deductibility: ability to pay, economic productivity, social utility, and administrative feasibility.

RAVENSCROFT, D., TAXATION AND FOREIGN CURRENCY; International Tax Program, Harvard Law School, *supra*, (1973) $50.00; xxiii, 861 p.; foreward by O. Oldman; glossary, tables, bibliography, index, footnotes.

An exhaustive study of the methods allowed by current law for translating the income derived in foreign currency into a dollar taxable income. The volume considers significant problems encountered when foreign income, expenditures, and losses must be valued in U.S. dollars, including the treatment of unrepatriated income, income restricted by exchange controls, creditable foreign taxes, and hedging transactions. The author also presents a digest of all relevant judicial decisions, administrative rulings and provisions of the Internal Revenue Code and Regulations.

SZOKOLOCZY-SYLLABA, A., EFTA: RESTRICTIVE BUSINESS PRACTICES; Verlag Stampfli & Cie. AG, Bern, Switzerland, (1973) approx. $20.00; ISBN 3-7272-0077-4; 270 p., footnotes, bibliography.

The author describes the work of the European Free Trade Association in the field of restrictive business practices, and considers possible future uses for the formerly dormant Art. 15 of the Stockholm Convention of the EFTA. Legislation of member countries and their individual interpretations of Art. 15 are also examined.

UNITED NATIONS, COMMISSION ON INTERNATIONAL LAW, REGISTER OF TEXTS OF CONVENTIONS & OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW; U.N., New York, N.Y.; (Vol. I, 1971; Vol. II, 1973) $4.00 per volume; U.N. Publication, sales no. E.71.V.3 and E.73.V.3; Vol. I: v, 285 p.; Vol. II: iv, 193 p.

A convenient source of international agreements relating to trade. Vol. I covers international sales of goods and international

payments. Vol. II. contains the texts of agreements relating to international commercial arbitration and international legislation on shipping. Every businessman or attorney who engages in international work should obtain the set.

YUDKIN, L., A LEGAL STRUCTURE FOR EFFECTIVE TAX ADMINISTRATION; International Tax Program, Harvard Law School; (1971) $4.00 LC 78-172244; xi, 110 p.; footnotes. Tax Techniques Handbook series.

The basis for a complete administrative tax code is presented in this book. The author discusses the establishment of tax liability, tax collection, tax offenses, and means for helping the public to understand and deal with the tax system.

International Law

BISHOP, W., INTERNATIONAL LAW: CASES & MATERIALS; Little, Brown & Co., 34 Beacon St., Boston, Mass. 02106, (3d. Ed. 1971) $17.50, LC 75-87780; xlvi, 1122 p.; footnotes, appendices, index, table of cases, bibliography.

Exhaustive text of international law presenting coverage of the nature of international law, international agreements and organizations, states, recognition, jurisdiction, and war and peace.

CHAYES, A., EHRLICH, T. & LOWENFELD, A., INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE; Little, Brown & Co., *supra*, (1968) $25.00 (2 volume set); LC 68-25009; Vol. I: xxiii, 704 p.; Vol. II: vi, 693 p., footnotes.

The authors of this set present a slightly different approach to the teaching of international law. Part I, *Limits of Adjudication*, covers international law in national courts, sovereign immunity, and the I.C.J. Part II, *Economic Affairs*, discusses international trade, bilateral trade agreements, regulation by international organizations, the international monetary system, and international investments. Part II analyzes bilateral and multilateral treaties, the Cuban Missile Crisis, intervention, U.N. peacekeeping, and U.N. sanctions.

CLARK, G. & SOHN, L., INTRODUCTION TO WORLD PEACE THROUGH WORLD LAW; World Without War Publications, 7245 S. Merrill Ave., Chicago, Ill. 60649 (as revised by L. Sohn, 1973) $1.50; x, 118 p.; footnotes, bibliography, table of related organizations.

In addition to the newly revised *Introduction to World Peace Through World Law* by Clark & Sohn, this volume also contains *Five Approaches to World Order* by R. Pickus & R. Woito; *A First Step: A Constitution for the Oceans* by E. Borgese; *Towards Consensus: The Institute for World Order's Model World Orders Project* by S. Mendlovitz & T. Weiss; and *Towards Consensus: Unilateral Peace*

Initiatives to Demonstrate Commitment and Induce Agreement, edited by R. Woito.

DELUPIS, I., INTERNATIONAL LAW & THE INDEPENDENT STATE; Crane, Russak & Co., Inc., 347 Madison Ave., New York, N.Y. 10017, (1974) $23.00; xi, 252 p.; ISBN 0-8448-0317-0, LC 73-94048; index, endnotes by chapter.

The author discusses the current need to modify the traditional tenet of international law that a state could do anything it wanted within its own borders. International concern over human rights, pollution, and the need for adequate communication and trade between nations has modified a state's right to act "independently," according to Delupis.

KREPP, E., SECURITY & NON-AGGRESSION: BALTIC STATES & U.S.S.R. TREATIES OF NON-AGGRESSION; Estonian Information Center, Box 45030, S-10430, Stockholm 45, Sweden, (1973) 63 p.

The author discusses various attempts to create multi-lateral non-aggression agreements between World War I and World War II. The author cites numerous instances where norms of international law were violated, and includes the texts of the relevant conventions in a documents section.

SAHOVIC, M. (*editor*), PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS & COOPERATION; Oceana Publications, Inc., Dobbs Ferry, N.Y. 10522; (1973) $15.00; ISBN 0-370-00020-2, LC 73-8985; 450 p.; footnotes, appendices, index.

This volume, published in cooperation with the Institute of International Politics & Economics, Belgrade, presents a series of studies by Yugoslav scholars concerning the *Declaration of the Principles of International Law Concerning Friendly Relations and Cooperation*, adopted by the 25th General Assembly. Among the articles are K. Obradovic, *Prohibition of the Threat or Use of Force*; A. Magarasevic, *The Sovereign Equality of States*; and O. Sukovis, *Principle of Equal Rights and Self-Determination of Peoples*.

International Organizations

HAAS, M. (*editor*), BASIC DOCUMENTS OF ASIAN REGIONAL ORGANIZATIONS; Oceana Publications, Dobbs Ferry, N.Y. 10522 (1974), 4 volumes, $140 per set; ISBN 0-379-00177-2, LC 74-2248; xxxi, 1544 p.; tables, bibliographies.

This set parallels BASIC DOCUMENTS OF AFRICAN REGIONAL ORGANIZATIONS, compiled by L. SOHN. The tendency of Asian organizations to develop around functionally specific lines is examined by Haas, noting the emphasis on economic objectives and a decided downplaying of political ramifications. The contradiction between the need for outside capital to finance the organizations' projects and the desire for political and economic autonomy is also cited. In addition

to the basic documents, Haas also provides conference proceedings, annual reports, a listing of periodicals, technical publications, and research studies for each organization.

EVERTS, P., UNESCO, INTERNATIONAL REPERTORY OF INSTITUTIONS FOR PEACE & CONFLICT RESEARCH; UNESCO Publications Center, P.O. Box 433, New York, N.Y. 10016; (1973) $3.30; ISBN 92-3-101120-0 (English), 92-3-209920-4 (French), LC 73-281022; 91 p.; tables, bibliography; Reports & Papers in the Social Sciences Series, No. 28. Revision of earlier edition by Galtung & Ruge.

List of institutions and groups devoted to peace and conflict research, with an introduction, *Towards a Definition of Peace Research & Criteria for the Selection of Institutions to be Included in the Repertory (1966) & Postscript*, by J. Galtung, and *Developments & Trends in Peace & Conflict Research*, by P. Everts.

International Politics

ABBOUSHI, W., THE ANGRY ARABS; The Westminster Press, Witherspoon Building, Philadelphia, Pa. 19107; (1974), $8.95; 285 p.; foreward by D. Alloway; maps, endnotes.

The author provides an Arab view of Arab-Western relations from the time of Mohammed to the present. Abboushi suggests that the Western world's inability to understand the Arab position is due to the fear of Western journalists of charges of anti-semitism, and because of the difficulty of a non-Western culture in presenting its case in terms the West can understand.

HALPERIN, M., *with* CLAPP. P. & KANTER, A., BUREAUCRATIC POLITICS AND FOREIGN POLICY; The Brookings Institution, 1775 Massachusetts Ave. N.W., Washington, D.C. 20036; (1974) $8.95 ($3.50 pa.); xvii, 340 p.; footnotes, bibliography, index; ISBN 0-8157-3408-5, LC 73-22384.

The interplay of various interest groups and their effect on the making of U.S. foreign policy is analyzed with the example of the policy decisions relating to the ABM deployment. The authors clearly indicate that a government should not be viewed as a single individual with a single purpose in the international arena. Various examples of bureaucratic maneuvers are shown, such as the "leak", or the concept of "over-zealous implementation" used to irritate a foreign government to the point where an official will be told to back off from a position he secretly wished to avoid in the first place.

IONESCU, G. (*editor*), BETWEEN SOVEREIGNTY & INTEGRATION; A Halsted Press Book, John Wiley & Sons, 605 Third Avenue, New York, N.Y. 10016; (1974) $11.95; ISBN 0-470-42800-7, LC 19586; 192 p.; footnotes, index.

A set of nine papers presented at the 9th World Conference of the International Political Science Association. The papers include:

G. Ionescu, *Between Sovereignty & Integration: Introduction*; M. Beloff, *The Political Crisis of the European Nation-State*; L. Dion, *Anti-Politics & Marginals*; I. Ceterchi & K. Pomaizl, *Two Views from Eastern Europe*; K. Deutsch, *Between Sovereignty & Integration: Conclusion*.

KREPP, E., THE BALTIC STATES: A SURVEY OF THE INTERNATIONAL RELATIONS OF ESTONIA, LATVIA & LITHUANIA; Estonian Information Center, *supra*; (1968), 20 p.; bibliography.

Historical survey of the international relations of the Baltic states, from the Middle Ages to the present.

RODNEY, W., HOW EUROPE UNDERDEVELOPED AFRICA; Howard University Press, 2400 Sixth St. N.W., Washington, D.C. 20001; (1974) $10.50; x, 288 p.; ISBN 0-88258-013-2, LC 73-88974.

The author examines the relations of Europe and Africa from the fifteenth century to the end of the colonial period, discussing African growth before and after the coming of the Europeans. The slave trade is cited as a basic factor in African underdevelopment and technical stagnation.

ROSEN, S. & JONES, W., THE LOGIC OF INTERNATIONAL RELATIONS; Winthrop Publishers, Inc., 17 Dunster St., Cambridge, Mass. 02138; (1974) $6.95; ISBN 0-87626-507-7, LC 73-22385; x, 390 p.; footnotes, index.

International relations textbook that approaches international politics in terms of the perspectives (or perceptions) of the Soviets, Americans, Chinese, and Third World. The authors also discuss various power approaches and concepts of world order.

SNETSINGER, J., TRUMAN, THE JEWISH VOTE, & THE CREATION OF ISRAEL; Hoover Institution Press, Stanford University, Stanford, California 94305; (1974) $6.95; ISBN 0-8179-3391-3, LC 70-187267; xv, 208 p.; index, endnotes, bibliography. Hoover Institution Studies No. 39.

Snetsinger points out that Truman initially had an ambivalent policy regarding the establishment of a Jewish state in Palestine, and it was the political power of the American Jewish community that overcame the advice of the Departments of State and Defense and finally determined his ultimate position. Decisions regarding foreign policy are subject to the same pressure as other decisions of political leaders, and in this case, the author asserts, domestic politics overcame the pressures of the oil lobby, and idealism was nowhere to be seen.

SPANIER, J., AMERICAN FOREIGN POLICY SINCE WORLD WAR II; Praeger Publishers, *supra*; (6th Ed. 1973) $8.50; LC 72-91350; xii, 305 p.; index, bibliography.

In the sixth revision since its first publication in 1960, Spanier

has brought his analysis of American foreign policy up to the beginning of the second Nixon term. He extensively discusses the balance of power concept, upon which he believes the ultimate stability of the international state system depends.

International Protection of the Environment

ORGANIZATION FOR ECONOMIC COOPERATION & DEVELOPMENT, THE EXPLORATION FOR AND EXPLOITATION OF CRUDE OIL AND NATURAL GAS IN THE OECD EUROPEAN AREA, INCLUDING THE CONTINENTAL SHELF; MINING & FISCAL LEGISLATION; OECD, 2 rue Andre-Pascal, 75775 Paris Cedex 16, France; distributed in the U.S. by OECD Publications Center, Suite 1207, 1750 Pennsylvania Ave. N.W., Washington, D.C. 20006; (1973) $3.50; 71 p.; tables.

Introduction to and summary of relevant European laws regarding legal and financial aspects of developing oil and gas resources.

TECLAFF, L. & UTTON, A. (*editors*), INTERNATIONAL ENVIRONMENTAL LAW; Praeger Publishers, *supra*, (1974) $13.50; LC 73-15198; viii, 270 p.; index, footnotes.

The volume consists of various articles reprinted from law journals. The scope of the book is such that it would be excellent as a text for a seminar in International Environmental Protection or as a reference for libraries and businessmen. Included are: I. Brownlie, *A Survey of International Customary Rules of Environmental Protection*; L. Caldwell, *Concepts in Development of International Environmental Policies*; M. Hardy, *The U.N. Environmental Program*; L. Teclaff, *International Law & the Protection of the Oceans from Pollution*; and A. Utton, *The Arctic Waters Pollution Prevention Act & the Right to Self-Protection.*

International Tribunals

STARKE, J., THE NEW RULES OF THE INTERNATIONAL COURT OF JUSTICE; Institute of Advanced Studies, Australian National University, Canberra, Australia, (1973) $1.00; 19 p.; footnotes.

Analysis of the rules adopted May 10, 1972 by the I.C.J., set to come into force on September 10, 1972. The author feels that the rules may eliminate some procedural delays, although it is unclear at this time whether the new rules will actually encourage more states to use the I.C.J.

Law of the Sea

WENK, E., THE POLITICS OF THE OCEAN; University of Washington Press, Seattle, Washington 98105; (1972) $14.95; xviii, 590 p.; ISBN 0-295-95240-7, LC 72-5814; tables, endnotes, general index, index of names, appendices.

The author describes, based on extensive personal experience in the area, the disorganized evolution of policies and programs that

attempt to use science and technology to exploit the seas. In addition to recommendations on such specific concerns as managing the coastal zones, conserving fisheries resources, eliminating pollution, and promoting international cooperation, Wenk offers significant proposals to improve the governmental process of making decisions relating to science and the seas.

Miscellaneous

COMMITTEE ON LEGAL SERVICES TO THE POOR IN THE DEVELOPING COUNTRIES, LEGAL AID & WORLD POVERTY: A SURVEY OF ASIA, AFRICA, & LATIN AMERICA; Praeger Special Studies, *supra*; (1974) $18.50, ISBN 0-275-08350, LC 73-15182; xvii, 309 p., tables, statutory appendix, bibliography.

A general exploration of the alternative purposes which legal service programs for the poor can serve, and of the possible relationship of such programs to national development goals in the developing countries. Includes: Metzger, *Legal Services to the Poor & National Development Objectives*; Dunning, *Legal Systems & Legal Services in Africa*; Knight, *Legal Services Projects for Latin America*; and Singhvi & Friedman, *Free Legal Services in Delhi & Bombay, India*.

SHEARES, R. & ONIKI, S., NEXT STEPS TOWARD RACIAL JUSTICE; United Church Press, 1505 Race St., Philadelphia, Pa. 19102 (1974) $2.95; ISBN 0-8298-0278-9, LC 74-4035; 127 p.; bibliography, footnotes.

Text designed for religious schools covering various aspects of racial discrimination and religion.

Transnational Law

COUNCIL OF EUROPE, EXPLANATORY REPORT ON THE EUROPEAN CONVENTION ON CIVIL LIABILITY FOR DAMAGE CAUSED BY MOTOR VEHICLES; Council of Europe, 67006, Strasbourg, France; (1973); available in the U.S. through Manhattan Publishing Co., 225 Lafayette St., New York, N.Y. 10012, $4.00; 44 p., English or French editions.

Includes introduction and background to the convention, discussions relating to fault, strict liability, and risk theories of liability, the text of the convention, and resolutions regarding insurance and the position of foreigners.

COUNCIL OF EUROPE, EXPLANATORY REPORT ON THE EUROPEAN CONVENTION ON THE CALCULATION OF TIME-LIMITS; Council of Europe, *supra*; (1973), $4.00, 19 p.; available in English or French editions.

Includes general considerations of the European Committee on Legal Cooperation, comments on the convention, and the text of the convention. "Time-limit" was the neutral term chosen by the Committee to represent the French term *delai*, as there is no exact word

in English (deadline, statutory period, limitation, limit of action being some possible alternatives).

TEREBILOV, V., THE SOVIET COURT; Progress Publishers, Moscow, U.S.S.R., translated from the Russian by Murad Saifulin; available in the U.S. from Four Continents Book Corp., 156 Fifth Avenue, New York, N.Y. (1973) $3.00; LC 73-181250; 182 p., index.

Description of the current Soviet judiciary system, and a historical survey from 1917. In addition to legal institutions, government agencies and mass organizations (e.g., "Comrades' Courts") are also explained, along with the rights of Soviet citizens and aliens.