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CRISIS AND CONFLICTS IN INTERNATIONAL LAW: WHICH WAY FOR THE DEVELOPING COUNTRIES

AN INAUGURAL LECTURE
BY
PROFESSOR EBERE OSIEKE

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INAUGURAL LECTURE

ON THE OCCASION OF THE 7TH CONVOCATION AND 10TH ANNIVERSARY OF THE UNIVERSITY OF JOS

ON JANUARY 18, 1985.

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INTRODUCTION

Honourable Chancellor Designate,
Pro-Chancellor and Chairman of the Governing Council of the University of Jos,
Vice-Chancellor,
His Lordships,
Members of Council and Senate of the University of Jos,
Deans of Faculties,
Honourable Members of the Bar,
Members of Congregation,
Distinguished Ladies and Gentlemen.

It is a great honour to the Faculty of Law of this University, and to myself, to have been called upon by the Committee of Deans to deliver an Inaugural Lecture at this most important occasion, marking not only the 10th Anniversary Celebrations of this University, but also the installation of His Royal Highness, Edidem Bassey Eyo Ephraim Adam III, Obong of Calabar, Paramount Ruler of Efikland, as the Third Chancellor of this University. We accept this invitation with humility, albeit not without some trepidity.

This is of course the first Inaugural Lecture from the Faculty of Law. Coming at a period when Law appears to be facing its most critical tests in our society, when our legal system appears to be at the cross-roads, when the country has only recently had another constitutional breakdown, it was rather tempting to embark on an examination of the role and significance of law, and its triumphs and tribulations in our society over the past two decades. But that is a task which will fall outside the scope of an Inaugural Lecture from an international lawyer. An Inaugural Lecture, as many of you appreciate, presents the new incumbent of a chair in the academic community an opportunity to assess and evaluate in public some of the views and opinion relating to his area of specialization, as well as his own contributions. As the present occupant of the chair of International Law in this University, my Inaugural Lecture should of necessity focus essentially on international law. I have, therefore, decided to share with you this evening some of my experiences over the past 15 years, both as a researcher and a practitioner in international law. I intend, within the time at our disposal, to look at some of the issues that have generated some crisis and conflicts in international law and the options, if any, available to the developing countries.

THE STAGE: THE STRUCTURE OF THE INTERNATIONAL COMMUNITY

Every human drama has a stage or forum. Plays, music, boxing, wrestling, all take place on a pre-determined platform. Even human wars are fought at the battle field. This is also true of the cirsis and conflicts in international law. They take place on a stage - the international community. It is, therefore, essential to examine the structure of this community in order to better appreciate the sources and nature of the crisis and conflicts in international law.

Originally, what we call the international community consisted of a small club of European nations, which were the active participants in articulate international relations. These European nations were joined in the 19th Century by the newly emerging nations of the American continent. The rest of the other states which now compose the international community were either not in existence, or formed part of the territory of the colonial powers

and were, consequently, objects rather than subjects of international law.

A significant feature of the original structure of the international community was that the traditional rules and principles of international law were formulated by the Club of European nations, to the exclusion of most of the present members of the international community. Indeed, when the nations of the world met at San Francisco in the United States of America in 1945 to create the United Nations Organisation, only four African countries, Egypt, Ethiopia, Liberia, and Union of South Africa, were invited to participate at the Conference. The rest of the present states in the African continent were still under colonial domination and lacked the necessary ingredients of statehood in international law which would have enabled them to interact with other sovereign independent states on the international plane.

Considerate changes have, however, taken place during the past four decades concerning the structure of the international community. The most important transformation resulted from the attainment of political independence in the fifties and sixties by many of the countries of Africa, Asia, and Latin America, and their emergence as members of the international community. One significant feature of this phenomenon is that because of their numbers, these developing countries - united as it were by a bond of poverty and economic deprivation - became the numerical majority in the international community.

Having taken their rightful place in the community of nations, the developing countries were immediately faced with the stark realities of the international system. They discovered that some of the traditional rules and principles of international law were based purely on the cultural and social traditions of their formulators - the Club of European nations - and did not adequately protect their interests. They found that the traditional rules and principles relating to the Law of the Sea, Decolonisation and Self-Determination, Sovereignty and control over a state's natural resources, succession by the newly independent states to treaty obligations concluded on their behalf by the colonizing powers, the structure of the United Nations Organisation, the International Monetary Fund, the International Labour Organisation and other international organisations, etc. were detrimental to their interests and aspirations.

Dissatisfaction was also felt by the developing countries with the structure and workings of the international economic system in general, and the rules governing international trade in particular. The existing legal framework for international trade produced results which were detrimental to the developing countries. For instance, from 1952 to 1972, the total gross product of the industrialized market economy countries rose from $1,250 billion to about $3,070 billion, the increase alone ($1,810 billion) being three-and-half times the aggregate gross product of the developing countries in 1972 i.e. $520 billion.

In terms of per capita real income, the contrast was even greater. Real income in the industrialized market economy countries rose by $2,000 per head of population from 1952 to 1972, to a figure of about $4,000 in 1973. The corresponding real per capita income for the developing countries in 1972 was about $300, the increase since 1952 being only $125. By 1976, the industrialized market economy countries, with 20 per cent of the world population, enjoyed about two-thirds of total world income, while the developing countries with about 50 per cent of world population, received only one eighth of the total world income.

These gross inequalities constituted a dilemma for the developing countries. They could not reject the rules and structures which constituted the basis for their victory in the struggle for self-determination, and the attainment of state sovereignty and political independence. And they could not accept absolutely the rules and structures that were detrimental to their interests. Consequently, the developing countries had no option than to accept the existing system, and then insist that the unfavourable and obnoxious traditional rules and institutional structures should either be discarded, or should be reformulated to take account of the interests of all the members of the international community, and the realities of the contemporary world; and to call for the creation of a new International Economic Order. In order to strengthen their bargaining power with the industrialized countries, they constituted themselves some years ago into the *"Groups of 77"* which was originally composed of 77 states, but which now has a membership of about 140 states made up mainly of states from the three developing regions of Africa, Asia, and Latin America and the Carribean, as well as the Arab states.

The industrialized market economy countries have, however, resisted all the demands and attempts of the developing countries for the reformulation of many of the traditional rules and principles of international law, and the modification of the structures of some of the international organizations. And they have been paying no more than lip-service to the idea of the creation of a new and equitable International Economic Order.

For the industrialized countries, the existing structures and rules constitute a factual reflection of the realities of the international system. And in order to counteract the influence of the *"Group of 77"*, the industrialized market economy countries have also constituted themselves into the *"IMEC Group"* which include the countries of Western Europe, the United State of America, Canada, Japan and Australia.

The other important group in the international community is made up of the socialist countries of Eastern Europe. Although this group consists of industrialized countries, the members have political and developmental ideologies which are very different from those of the IMEC countries. More importantly, the socialist groups have often dissociated themselves with the *"IMEC Group"*, and have continuously supported the demands and aspirations of the developing countries for a more equitable international system.

The picture which thus emerges of the structure of the international community should perhaps be briefly recapitulated. It is a community composed of sovereign and independent states but in which some states are more sovereign and independent than others. The developing countries possess the numerical majority, but the political and economic powers remain firmly in the hands of a few industrialized nations which consequently dominate and control the system.

The rules of the game were formulated by, and based on the social and cultural traditions of, a few of the members, who tenaciously hold on to their *"acquired rights"*, and fiercely resist any attempts by the *majority"* to change or modify the existing rules. The international community is made up of states, and groups of states, with different, and sometimes conflicting or diametrically opposed, social and political ideologies, and economic interests. This, therefore, is the stage on which international law performs. It does not require any serious logical deductions to see the basis of the crisis and conflicts in international law; but our purpose may be better served by considering some of the main areas of conflict.

THE INSTRUMENT: CONFLICTS ON WHETHER OR NOT INTERNATIONAL LAW EXISTS.

One of the early controversies among legal and political commentators was whether international law really existed, or whether it was just a myth. Hobbes, and Pufendorf, gave a negative answer to the question, and during the 19th and 20th Centuries, Austin, Kelsen, and their followers, who regard the sanction as an indispensable element of the legal norm, maintain that international law cannot be real unless it is equipped with sanctions.

There has, however, been a marked change in the attitude of international lawyers on the issue over the past few decades. The preponderance of opinion among contemporary international lawyers appears to be either that the character of international law as law is not effected by the absence of a centralized system of sanctions, or that international law does in fact possess some sanctions. However, doubts persist on the existence of international law from articulate laymen, such as political scientists, and even from municipal lawyers. As a result, the first task of any international lawyer who is addressing a mixed audience of non-international lawyers appears to be to justify the existence of international law.

The protagonists of the crusade that international law does not exist maintain that there can be no such law in the absence of a recognized law-making body, such as a legislature, as well as effective sanctions to deter breaches of the law, and of course, law enforcement agencies. In support of their contentions, they point out, inter alia, that the United Nations is nothing but a *"toothless bull-dog"*, because its decisions and resolutions are contemptuously disregarded by states.

That the organization is helpless in the face of these illegal acts because it has no power to take punitive action against the offending states. And that the so-called international law provides no effective means of checking the illegal acts of states, such as the violation of the principle of state sovereignty and the right to self-determination of peoples, as was manifested in the recent invasion of Grenada by the United States of America.

There is obviously some truth in some of these assertions. It is true that the international community does not possess a world government or world legislature. It is also true that there is no centralized system of law enforcement: there is no international police force which is charged with the responsibility of enforcing the breaches of international law.

But the absence of these important features of national governmental processes cannot be considered to be detrimental to the existence of law in the international community. Law exists only in a society, and there can be no society without a system of law to regulate the relations of its members with one another. So, if it is accepted - and there is no doubt or dispute on the matter - that there is an international community, it follows *a priori* that law exists in that community. The nature and characteristics of such law, and its essential elements, do not have to be the same as those in the national state.

The common mistake that is made by those who refuse to accept the existence of international law is that they try to equate that law with municipal law. Yet they forget that the two communities have fundamentally different characteristics. The international community is made up of sovereign and independent states which number about 165 at the present time, while the national state is made up of individuals numbering several millions in most states.

and up to one billion in China.

Becuse of their numbers, it is still possible for all the members of the international community to get together and adopt rules and decisions that will govern the relationship between them.

But the period of the Greek City States when the people gathered in the market place to take decisions on the running of their affairs has long gone in the national community.

So far as the application of sanctions is concerned, it should be remembered that a state cannot be physically arrested, tried, and sentenced to prison, in the same way as an individual. Thus, the concept of *"sanction"* in international law must be different from its traditional national sense as a form of punishment against a law breaker. The primary goal of sanctions in international law is to *"reform"* rather than to *"punish"*, that is, to compel a State to fulfill its international obligations, and to refrain from actions which constitute breaches of the law, rather than to pronounce the State *"guilt"* and subject it to some punishment.

In this regard, international law cannot be said to lack any sanctions. The threat of collective use of force, and the possibility of suspension and expulsion from international organizations have helped to restrain states from common place violations of international law. As I remarked in a recent article *"the powers of international organizations to apply sanctions against sovereign states and the use that has been made of these powers have gone some way to fill one of the lacuna which has for so long been a major weakness of international law and relations, and which has generated considerable concern to national and international lawyers, as well as to some members of the international community. Obviously the present system of sanctions in international organizations is far from perfect, but bearing in mind the complex political and legal nature of the international community, it may have to do for now."* **(Osiebe, "Sanctions in International Law: The Contributions of International Organizations," Netherlands International Law Review, Vol. 3, 1984, P. 198).**

Nor is it true that law in the national state has reached such a state of perfection that all violations of the law are effectively dealt with. It is a well-established principle of the Common Law that the enforcement of the breaches of the law is still left entirely at the discretion of the law enforcement agencies. The police, in many Common Law countries, still has the discretion to decide whether or not to prosecute and individual for the breach of the law. In the exercise of this discretion, many breaches of the law are not brought before the courts either because of insufficient evidence or due to various other considerations. This does not mean that there is no longer any law in these Common Law countries.

It is an accepted principle of British Constitutional and Public Law that the *"Queen can do no wrong"*, and that she cannot be sued in a court of law for any legal wrong. That does not mean that there is no law in England, or that English law is now a myth. Even here in Nigeria, Section 267 of the 1979 Constitution stipulated that *"no civil or criminal proceedings shall be instituted or continued"* against the President or Vice-President, Governor, or Deputy Governor; that no process of any court requring or compelling their appearance shall be applied for or issued; and that they *"shall not be arrested or imprisoned"* during the period of their office, either in pursuance of the process of any court or otherwise. The effect of these provisions was to place the President, and Vice-President of the Republic, as well as the state governors and their Deputies above the law of the land. That did not mean that law became a myth during the Third Republic, or that Nigeria had no law.

It should also not be forgotten that it was the law that allowed the politicians, the present political refugees, and many public officers to perpetrate unimaginable economic crimes against the state and the people of this country during the civilian administration of 1979-1983. If the army had not taken over, these politicians, the public officers and their business allies will still be basking in the glory of leadership in contemptuous disregard and violation of the fundamental principles of our Public Law. And the Law would have stood helplessly by, watching them, as it did for over four years from 1st October 1979 to 31st December 1983.

The point which is being emphasized here is that international law is not perfect; and that it has its defects. But the municipal or national law is not perfect either. International law has witnessed considerable developments since the last century, and particularly in the last three decades. It has become possible for international bodies to adopt decisions or instruments which give rise to binding obligations for states even without their consent; machinery now exist in some of these bodies for the enforcement and implementation of their decisions; and in certain circumstances, a state may be compelled to appear before an international judicial organ on basis of the provisions of a multilateral treaty or the constitutive instrument of an international organization in which it is a member.

Action can be taken in certain cases against a state which fails to fulfil its international obligations or violates the accepted rules and principles of international law. The present situation is by no means perfect, but it is not hopeless.

Those who still doubt the existence of international law should perhaps note the pertinent remarks of an eminent British international lawyer, Professor Ian Brownlie, the *"doubting is that fashionable, and in the context of international relations doubting often takes some unhealthy forms. Doubts based upon ignorance and strong suppositions about the conduct of states lead not to healthy inquiry but to a neurotic nihilism. A much-paraded desire for order and justice is transformed into glib assertions of anarchy and into luddite attacks on international institutions, and this on the excuse that the international order is imperfect.* ***(Brownlie, The Reality and Efficacy of Internationa Law, 52 BYIL, 1981, p. 1).***

To accept that international law exists and that it is a reality rather than a myth is not the same thing as accepting that the traditional rules and principles of international law are perfect or adequate. The developing countries and their international lawyers have accepted the existence of international law, but they continue to insist on the reformulation of the rules and principles that run counter to their interests and aspirations.

THE BINDING FORCE OF U.N. GENERAL ASSEMBLY RESOLUTIONS

There has been considerable controversy during the past three decades on whether resolutions and decisions of the General Assembly of the United Nations are binding on the member states of the Organization. Some of the industrialized Western countries and a few of their international lawyers have consistently maintained that the General Assembly is not, and was not intended to be, a legislature.

That the authority of the General Assembly is limited to the adoption of resolutions which are mere recommendations having no legally binding force for member states. That no phrase of the Charter of the United Nations suggests that the General Assembly is em-

powered to enact or alter international law. That Solemn Declarations adopted either unanimously or by consensus by that organ have no different status from recommendations, although their moral and political impact will be an important factor in guiding national policies.

These commentators maintain that the only binding resolutions of the General Assembly are those that relate to *house-keeping,* or *internal matters,* namely, approval of the budget, appointment of expenses, adoption of the rules of procedure, establishment of subsidiary organs, the various elections, admission and suspension of a member state, etc.

These opinions have been recently re-affirmed not only by the representatives of the Western block in the United Nations, but also by eminent international lawyers such as Professor Ian McGibbon, Professor of International Law at the University of Edinburgh; United Kingdom; Professor Stephen M. Schwebel of the United States of America, formerly Professor of International Law at Yale University, and now a Judge of the International Court of Justice at The Hague; Professor Rene-Jean Dupuy, Professor of International Law and Organization that the University of Nice, France, and Secretary-General of The Hague Academy of International Law, The Hague, Netherlands, and Dr. Eric Suy, of Belgium, until recently, the Legal Counsel of the United Nations. *(See McGibbon, "Means for the Identification of International Law", in Cheng (Ed.), International Law: Teaching and Practice (London, Stevens & Sons, 1982), p. 10; Schwebel, "The Effect of Resolutions of the U.N. General Assembly on Customary International Law", Proc. of the American Society of International Law, 1979, p. 301; Dupuy, as Sole Arbitrator in the case of Texaco Overseas Petroleum Co., and Carlifonia Asiatic Oil Co. v. The Govt. of the Libyan Republic, in 17 International Legal Materials 1, (1978), p. 27.*

Similar views have also been expressed by the USSR and some of the other socialist contries of Eastern Europe, and a number of their international lawyers, including Professor G.I. Tunkin, Professor of International Law at Moscow State University, and for many years the Legal Adviser to the Ministry of External Affairs of the USSR, who concluded, after examining the issue in the light of the writings of Soviet jurists that *Soviet international legal doctrine basically adheres to the view... that United Nations General Assembly resolutions are of recommendatory character*

The position of the Government of the USSR was clearly set out in the *"Memorandum of the Government of the USSR on the Procedure of Financing the Operations of the Emergency United Nations Forces in the Middle East and the United Nations Operations in the Congo",* sent to the International Court of Justice on 15 March 1962 where it was stated:

... U.N. General Assembly resolutions as it provided for in Article 10 of the Charcter, have the character of recommendations and are not binding upon states. Members States of the United Nations themselves define their attitude toward such resolutions. All measures which arise out of General Assembly resolutions also bear only a recommendatory character and cannot create legal obligations for member state of the Organization . (See Tunkin, Theory of International Law, (London), George Allen & Unwin, 1974, pp. 169-171).

The general attitude of the developing countries and their international lawyers has been that although Article 10 of the Charter of the United Nations provides that the General Assembly *may make recommendations to the Members of the United Nations* , that does not mean that its resolutions have no binding effect, and cannot constitute the sources of in-

ternational law. Important studies have been undertaken by international lawyers from the developing countries, such as Dr. Obed Y. Asamoah, Professor T.O. Elias, Professor J. Castenada, and Professor R.C. Hingorani, as well as a number of Western international lawyers, among them, Professor Rosalyn Higgins, Professor Bin Cheng, and Professor S.A. Bleicher, to illustrate the various ways in which the resolutions of the General Assembly can constitute the sources of law for the members States. (See generally, Asamoah, *The Legal Significance of the Declarations of the General Assembly, The Hague, Nijhoff, 1966;* Elias, *"Modern Sources of International Law"* in W. Friedman, L. Henkin, and O. Lissitzyn, eds.; *Transnational Law in a Changing Society:* Essays in Honor of Phillip C. Jessup (New York, Columbia University Press, 1972, p. 46; Castenada, ***Legal Effects on United Nations Resolutions,*** New York, Columbia University Press, 1969; Hingorani, *International Law Through United Nations,* Bombay, N.M. Tripathi Private Ltd., 1972; Higgins, *The Development of International Law through the Political Organs of the United Nations,* London, Oxford Univ. Press, 1963; Cheng, *United Nations Resoltuions on Outer Space: 'Instant' International Customary Law* , 5 Indian J.I.L. (1965), pp. 23-48; and Bleicher *The Legal Significance of Re-Citation of General Assembly Resolutions* , 69 AJIL, 1969, pp. 444-479.

The controversy regarding the normative value and binding effect of General Assembly resolutions is not only of academic interest, but a matter of fundamental importance for the developing countries. Since the creation of the United Nations, the General Assembly has been playing a significant role in the various areas of concern to the developing countries, such as the maintenance of international peace and security, decolonization and self-determination, human rights, social and economic affairs, sovereignty and control over natural resources, etc.

Some important Resolutions and Declarations have been adopted by the General Assembly on these various matters, laying down equitable rules and principles that should govern and regulate the action of states. Mention may be made of the Declaration of 24th October 1974 on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations; the Universal Declaration of Human Rights of 10th December 1948; the Declaration of 14th December 1960 on The Granting of Independence to Colonial Countries and Peoples; the Resolution of 1962 on Permanent Sovereignty over Natural Resources; the Charter of Economic Rights and Duties of States of 1974, and the various resolutions and declarations concerning the apartheid policy of the Government of South Africa, self-determination for Namibia; as well as those relating to the reform and restructuring of the existing structures of some international organizations, such as the International Monetary Fund, the World Bank, and the other monetary institutions, and the creation of a new International Economic Order.

Some of these resolutions were adopted against the wishes and strong opposition of many of the industrialized countries and they are determined to ensure that they will never become efficacious and constitute the basis for inter-state relations.

As a result, the consequence of the contention that the resolutions and declarations of the General Assembly have no binding force, is that the states members of the United Nations are not under a legal obligation to observe the various rules and principles embodied in these important resolutions and Declarations, and the industrialized countries can, therefore, disregard them or even forget their existence.

Another significant point is that it is only in the General Assembly that the developing countries have the opportunity to participate effectively in the activities of the United Nations Organization. The Security Council which is supposed to have the powers to take binding decisions is composed of only 15 members, with the United States, the USSR, China, the United Kingdom, and France, as permanent members, with the right to *"veto"* any proposed decisions of that organ.

The exercise of the *"veto"* power by these permanent members has seriously hampered and frustrated not only the activities of the Security Council, but that of the world organization as a whole and the developing countries have been consistently calling for the abolition of the veto, but the permanent members hold firmly to it. The General Assembly remains, therefore, the only forum in which decisions can be adopted on the basis of the principle of the sovereign equality of the Members of the Organisation as laid down in Article 2, paragraph 1 of the Charter of the United Nations, that is, by *one state, one vote.*

Because of their numerical majority, the developing countries have been able to influence the direction of the activities of the United Nations, and to safeguard and protect their legitimate interests. To accept, therefore, that the resolutions and declarations of the General Assembly are not binding is to deprive the developing countries the only opportunity available to them to participate effectively in the formulation of rules and principles which regulate the relations between members of the international community, and in the determination of questions that affect their destinies.

It should also not be forgotten, as I emphasized in a recent arcticle, that *a decision of an international organization is consensual in character and once it is approved by a majority of the members, it constitutes some form of understanding or agreement among the sovereign states that participated in its adoption.* It is difficult to maintain, therefore, that a decision accepted by a majority of states in the proper exercise of their rights of membership in an international organization does not have legal force, unless that is manifest from the text of the resolution or decision. *(Osieke, "The Legal Validity of Ultra Vires Decisions of International Organizations", 77 AJIL 1983, p. 249).*

Similarly, the non-acceptance of at least some of the resolutions of the General Assembly as a source of international law can no longer be sustained. I have already pointed out that this contention stems, unfortunately, from the over-zealous and even romantic attachment of some writers to the so-called traditional sources of international law, and the tests for their identification. However, this approach ignores the role which international organizations are presently called upon to play in the international community. It ignores the fact that law must develop apace with the society in which it operates. No principle of law can be regarded as sacrosanct for all times, and this applies to all laws whether municipal or international. We can no longer hide under the cloak of the traditional sources of international law embodied in Article 38 of the Statute of the International Court of Justice to evaluate the sources and content of the international law of today. **(Osieke, "Programme for Teaching International Law in Africa."** Paper presented at the Meeting of African Experts of International Law, organized by UNESCO, in Yaounde, Cameroon, December 1983, p. 9).

Fortunately, the same concern is now being manifested by some eminent international lawyers from the Western world, such as Professor Robert Y. Jennings, formerly Whewhel

Professor of International Law at the University of Cambridge, United Kingdom, and now a Judge at the International Court of Justice at The Hague who has observed:

> "And one of the first things to do is to acknowledge that we cannot reasonably expect to get very far if we try to rationalise the law of today solely in the language of Article 38 of the Statute of the International Court of Justice, framed as it were in 1982. It too needs urgent rethinking and elaboration. I am not asking, of course, for an amendment of the Statute of the Court. Article 38 will have to do. But it needs elaboration. To use Article 38 as it stands, as we constantly do still, for the purposes of analysing and explaining the elements and categories of the law today, has a strong element of absurdity". "The Identification of International Law" in Cheng, (Ed.), Stevens 1982, p. 9.)

On the whole, it is submitted that the role of the General Assembly of the United Nations in the community of Nations can no longer be ignored in order to safeguard purely national interests. Its decisions cannot be classified entirely as recommendations. They have legal force, and can create binding legal obligations for the member states. Some of the resolutions can also provide the basis for the development of international law, and so constitute an important source of the law.

THE SO-CALLED "AUTOMATIC MAJORITY" DECISIONS OF INTERNATIONAL ORGANISATIONS

Another controversy which has engaged the attention of both states and international lawyers in recent years relates to the legal validity of some decisions of international organizations. From time to time the developing countries have voted as a *block* when matters which affect their interests come up for decision in the main organs of international organizations, and because of their numerical majority they have been able to cause the relevant decisions to be adopted or defeated, according to their wishes.

In most cases the decisions that attract these *block* votes relate to matters of self-determination, such as the apartheid policies of the Government of South Africa, its activities relating to Namibia, or the Arab - Israeli conflicts, or even the creation of a new International Economic Order.

The industrialized countries, supported by some of their international lawyers, have criticized the *block voting* practice of the developing countries in international organizations over what they regard as *political* matters, and have indeed asserted that such *politically motivated decisions* adopted on the strength of the *automatic* majority of the developing countries are *ultra vires,* without legal validity whatsoever.

Indeed, one American International lawyer, Professor Engleton, has maintained that if a political action taken by a majority vote in an international organization were to be regarded as proof that the organ was competent under its Constitution to take the action, the result would be anarchy from a constitutional or legal viewpoint. (See ILA, Report of the 46th Conference, 1954, p. 80).

This contention has, however, been rejected by the developing countries, and their international lawyers who maintain, inter alia, that the *automatic* majority merely reflects complex power balances; that although the developing countries vote together to create the *automatic* majority, it should not be forgotten that the real power of decision-making remains the prerogative of a small group of states which are *more equal than others;* what has

in fact happened as a result of the emergence of the new majority is that *for the first time, the real political and economic power in the world, still held by the West, no longer finds juridical expression embodied in the same way as it was a few years ago, for example in the resolutions of the United Nations, the International Labour Organisation, UNCTAD, or UNESCO. What has happened are merely the accidents of history and setbacks of a former majority.* (See generally, Bedjaoui, Towards a New International Economic Order, UNESCO 1979, p. 147).

The contention that the decisions of international organizations adopted on the strength of the *automatic* majority of the developing countries are *ultra vires* and invalid because they are politically motivated has no legal basis or validity whatsoever. The Constitutions of international organizations stipulate that the decisions of these bodies may, in most cases - there are a few instances where unanimity is still required - be adopted by the majority of the votes cast, and no reference is made in these Constitutions to the motives or influences which led member states to cast their votes one way or the other.

To argue, therefore, that certain votes are not valid because they are based on extraneous factors - political or otherwise - is to introduce into the Constitutional Law of these bodies something that is not there, and something that runs counter to the accepted and recognized rules of the game.

It is also not possible to justify the contention by reference to rules of general international law outside the international organizations. There is no rule of customary international law or in any multilateral treaty of general application which invalidates majority decisions of international organizations on the ground that the votes of the majority of the members were based on political or other considerations extraneous to the Organization. As I pointed out in a recent article, what appears necessary, from a legal point of view, is that decisions of international organizations should be *"adopted in accordance with the prescribed rules and procedure,and once the required conditions have been fulfilled, the legal validity of the decision will not depend on the wishes or the desires of the minority of the members of the Organization. To accept otherwise would be to undermine the principle of 'majority rule' on which the operations of contemporary international organizations are predicated."* (Osieke, "The Legal Validity of Ultra-Vires Decisions of International Organizations", 77 American Journal of International Law, April 1983, pp. 252-253).

The attack on majority decisions of international organizations is yet another example of the determination of the industrialized countries to frustrate the efforts of the developing countries towards the reformulation of the traditional rules and principles and the creation of new and equitable norms to govern inter-state relations in the international community. They formulated the rules of the game, and should abide by them. As has been aptly pointed out by Gaston Thorn, the Prime Minister of Luxenbourg:

> *"What has happened recently are the accidents and set-back of a former majority. So they should play the game! In the United Nations the problem is every bit as much one of the new minority that has not accepted its new position."*
>
> Statement made during a Broadcast Debate, in E. Laurent, Un Monde a Refaire, Debats de France Culture. Trois Jours pour la Planete, Paris: Editions Meges, 1977, pp. 120-121.

THE EXPULSION OF SOUTH AFRICA FROM INTERNATIONAL ORGANIZATIONS

During the past two decades various attempts have been made in the United Nations and the other international organizations by the member states from the developing countries, particularly the African states, to get South Africa expelled from membership of these bodies because of the apartheid policies of its government.

But these attempts have been resisted by some of the industrialized countries, especially, the United States of America, the United Kingdom, and France, on the grounds, inter alia, that expulsion of a member state would be contrary to the principle of universality on which contemporary international organizations have been based.

In the international organizations where the constitutive instruments do not contain provisions on expulsion, it has been further maintained that expulsion is not legally possible, and that any decision to expel South Africa in such an organization would be unconstitutional, illegal and *ultra varies.*

The contention of universality has surprinsingly been accepted by some eminent international lawyers among them Dr. Wilfred Jenks, former Director-General of the International Labour Office who stated that *"world organisations are differently placed by reason of their having been established as world organisations aspiring to universality of membership, influence and function. For them any proposal for expulsion, however provoking the circumstances, inevitably raises the question of its compatibility with their universal nature and function..."* (Jenks, "Due Process of Law in International Organisations" 19 Int. Orgn. 1965, p. 167).

The argument that expulsion is not legally possible in the absence of express constitutional provisions to that effect has also been supported by international lawyers from both the industrialized countries, and some of the developing countries. Thus, Professor Ago of Italy (now Judge of the International Court of Justice) speaking on the proposal from the African States that South Africa should be expelled from the International Labour Organisation whose constitution is silent on the matter argued *that both expulsion and suspension were foreign to the Constitution* of the ILO; and *...although it might be argued that the Constitution said nothing on the subject, there was a firm legal precedent...for the view that silence could be construed only as excluding expulsion. In the exceptional case where expulsion had been permitted in an international organization of universal character, express constitutional provision for it was made, as in the Charter of the United Nations... If the possibility of expulsion had been desired... it would have been expressly provided for in the Constitution. But no such provision had been made.* (G.B., 156th Session, 1963, Minutes, p. 17). Judge Nagendra Singh of India (now also a Judge of the International Court of Justice) was equally of the view that *It is a well-established principle of international law that where a constituent instrument is silent... there is no inherent right vested in the organization to expel or suspend a member state.* (Singh, Termination of Membership of International Organizations, 1958, p. 79).

The legal argument of non-expulsion in the absence of constitutional provisions is not acceptable to international lawyers from the African continent and cannot be supported by either general international law or by the general practice of international organizations.

Firstly, the fact that expulsion is not expressly provided for in the Constitution of an international organization does not mean that it is absolutely prohibited. It may be argued with some justification that what is not expressly prohibited is permitted, and that if the Constitution had wanted to prohibit expulsion, express provisions would have been made to that effect. The non-prohibition of expulsion in the Constitution of an international organization could mean, therefore, that the Organization is left with the discretion to decide whether or not a member should be expelled in the particular circumstances of the case.

Secondly, as I have pointed out recently, (Osieke, Constitutional Law and Practice in the International Labour Organisation, Nijthoff, 1985, pp. 44-45) it should not be forgotten that the Constitution of an international organization is a multilateral treaty and that persistent violations of the obligations of membership by a member state giving rise to a material breach of the Constitution will entitle the other member states to suspend or terminate the relationship in the organization between themselves and the defaulting member in accordance with Article 60 of the Vienna Convention of the Law of Treaties, 1969 - a proposition which finds support in the statement of the International Court of Justice in its Advisory Opinion in the Namibia Case that *the silence of a treaty as to the existence of such a right of termination on account of fundamental breach cannot be interpretated as implying the exclusion of a right which has its source outside of the treaty in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded.* (A.O. on the Legal Consequences of States of the Continued Presence of South Africa in Namibia, ICJ Reports, 1971, pp 46-47).

There is no doubt that the apartheid policies of the Government of South Africa and its denial of basic human rights and the right to self-determination to the blacks in South Africa constitutes a clear and fundamental breach of the Constitutions, and contrary to the objects and purposes, of all the international organizations, and consequently, the other members possess the right in general international law to act in unison to expel South Africa from membership of these bodies.

The practice of some international organizations also shows that members have been expelled in the absence of express constitutional provisions. In Janunary 1962, Cuba was expelled from the Organization of American States (O.A.S.), at the instigation of the United States of America; and in September 1979, South Africa was expelled from the Universal Postal Union, amid protest from the Nine-Member States of the European Community.

The contention that the expulsion of South Africa from international organizations will be contrary to the principle of universality cannot also be supported by either the Constitution of these bodies, or by the practice of the industrialized countries themselves. The Constitution of some international organizations, such as the United Nations Charter, (Article 6), contain express provisions which authorize the body to expel a member in certain specified circumstances.

Most of the Constitutions also contain provisions which expressly permit members to withdraw from membership when they feel like doing so. It may be recalled in this respect that the United States of America withdrew from the International Labour Organisation on 6th November 1977 (it rejoined the Organisation on 18th February 1980), and it has just withdrawn from UNESCO on 31st December 1984 on the grounds, inter alia, that these Organizations had become too *politicized* and were moving away from their fundamental

objectives, and adopting *politically motivated* policies and decisions, under pressure from member states, which tended to serve the political purposes of a few member states.

The United Kingdom and Singapore have also recently given notices of withdrawal from UNESCO. (See letter of 6th November 1975 from the U.S. Secretary of State, Dr. Henry Kissinger to the Director-General of the ILO; and the letter of 28th December 1983 from Mr. George P. Shultz, U.S. Secretary of State to the Director-General of UNESCO).

The fact that some constitutions expressly provide for the expulsion of members, and that member states are allowed to withdraw at will in most international organizations shows that the so-called principle of universality is not a generally accepted principle which could be relied upon to frustrate the aspirations of the African countries.

Why should it be contrary to the principle of universality for South Africa to be excluded from international organizations because of its obnoxious apartheid policies; yet nobody mentions the breach of that principle when important members like the United States of America, and the United Kingdom, voluntarily withdraw from an international organization merely because they are unhappy with some properly and legally adopted decisions and policies.

Universalism is an ideal, rather than a reality. It is a sword which the industrialized countries dangle at the developing countries when their interests are threatened, but which quickly disappears into its sheathe when the interests of the developing countries are at stake. So far as the African countries are concerned, the expulsion of a member state from an international organization for persistent fundamental breaches of its obligations of membership is possible and permissible whether or not express provisions are contained on the matter in the Constitution.

Such expulsion is not and cannot be contrary to the so-called principle of universality. South Africa should not be allowed to remain in any international organization so long as it continues with its apartheid polices, and refuses to recognize the rights of the black majority to self-determination.

THE INDEPENDENCE OF NAMIBIA

I now come to a question which I believe is of interest to everybody in this hall and a question that has generated considerable discussion and conflicts both in the national and the international community. I am referring of course to the question of the Independence for Namibia.

I am sure many people have been shocked at the contemptuous disregard of all legality by South Africa over the issue, I am sure many people, this time, not only political scientists, see the question of Independence for Namibia as a clear manifestation of the impotence of the United Nations, the International Court of Justice, and international law generally. What is resposible for these failures, and what are the remaining options for Namibia? In order to better understand the problem and the possible solutions, it may be useful to give a short background history of the problem.

At the end of the First World War, Germany renounced all her rights and titles over its overseas possessions in favour of the Principal Allied Associated Powers, in accordance with Article 119 of the Treaty of Versailles, 1919. As a result, the territory of South West Africa which was previously under the sovereignty of Germany was placed under the Mandates

system in accordance with the provisions of Article 22 of the Covenant of the League of Nations, and was to be administered by South Africa on behalf of the United Kingdom.

Although the Mandate stipulated that the territories such as South West Africa and certain of the South Pacific Islands could because of *the sparseness of their population, or their small size, or their remoteness from the centres of civilization, or their geographical contiguity to the territory of the Mandatory,* be administered *under the laws of the Mandatory as an integral portions of its territory, subject however to principle that the well-being and development of such peoples form a sacred trust of civilization,* South Africa tended to treat the territory of South West Africa as a veiled annexation, and repeatedly sought to annex it during the inter-war years.

After the demise of the League of Nations, and the creation of the United Nations, all mandated territories were brought under the trusteeship system of the United Nations with the exception of South West Africa because of the refusal of South Africa to comply with the provisions of the United Nations Charter on the subject. International pressure was mounted against South Africa to prevent it from annexing the territory and to submit it to the trusteeship system, but South Africa rebuffed all the pressures, and ignored the various resolutions of the General Assembly urging it to submit the reports and petitions on the territory under the Trusteeship system.

Rather, South Africa continued with its plans to incorporate the territory as part of the Union of South Africa. Consequently, Ethiopia and Liberia applied to the International Court of Justice in 1962 to hold that South Africa had violated its obligations under the Mandate through, inter alia, introducing apartheid, establishing military bases in South West Africa, and refusing to submit reports or transmit petitions. South Africa objected to the jurisdiction of the Court, and contested the legal rights of Ethiopia and Liberia to bring the action.

But the Court over-ruled the objections. However, when the merits of the case came to be determined in 1966, the Court did an *about-turn*, and concluded that neither Ethiopia nor Liberia had shown any special national interest in the matter, and that the Court could not, therefore, decide the merits of the case.

The decision of the Court caused dismay among the developing countries, and on 27th October 1966, the General Assembly of the United Nations adopted Resolution 2145 (XXI) by which it terminated the Mandate of South Africa over South West Africa, later renamed Namibia, and placed it under the direct responsibility of the United Nations. The following year, on 19th May 1967, the General Assembly created the United Nations Council for Namibia to, inter alia, administer the territory until independence, with the maximum participation of the inhabitants; and to establish a Constituent Assembly with the object of drawing up a Constitution.

Subsequently, the Security Council of the United Nations adopted Resolution 276 (1970) which declared the continued presence of South Africa in Namibia to be illegal and called upon states to act accordingly.

South Africa insisted that both the resolutions of the General Assembly terminating the Mandate and that of the Security Council declaring its presence in Namibia as illegal, were *ultra vires* and invalid. In 1971, the Security Council referred the matter to the International

Court of Justice for decision. In an Advisory Opinion on the legal consequences for states of the Continued Presence of South Africa in Namibia, dated 21st June 1971, the Court held, inter alia,

a) that the continued presence of South Africa in Namibia is illegal, and that South Africa is under obligation to withdraw *immediately* and thus put an end to its occupation of the Territory; and

b) that member states of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to **refrain from any acts and in particular any dealings** with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration.

Despite the decisions of the General Assembly, the Security Council, and the International Court of Justice, South Africa stubbornly and with impudence continues its illegal occupation of Namibia, aided and abetted by some of the industrialized countries.

Instead of the United Nations to take decisive steps to flush South Africa out of Namibia, it succumbed to the manouvres of the big powers and accepted the formation of the so-called *Contact Group* which was designed purely to delay constructive action and use of force by the United Nations and the National Liberation Movements. It is indeed surprising that the developing countries, particularly African countries, fell for the delaying tactics of the United States and its allies.

The conclusion of the International Court of Justice is clear and unambiguous that member states should *refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of its presence and administration in Namibia* . That is exactly the implication of the *Contact Group* or any other Group that may be set up to enter into any kind of negotiations with South Africa. It is also unfortunately the implication of the proposed talks between Sam Nujoma, the President of SWAPO, and the South African authorities.

The administration of Namibia by an international organ - the United Nations Council for Namibia is equally unsatisfactory. At the end of 1979, the Council was composed of eight African countries (Algeria, Botswana, Burundi, Egypt, Liberia, Nigeria, Senegal, and Zambia); six Asian countries (Australia, Bangladesh, China, India, Indonesia, and Pakistan); five Latin American countries (Chile, Colombia, Guyana, Haiti, and Mexico); four socialist countries of Eastern Europe (Poland, Roumania, USSR, and Yugoslavia); and two European countries (Finland, and Turkey).

No doubt, all these states fully support the inalienable rights of the Namibian people to self-determination, but they cannot fully undersand or appreciate the aspirations of the Namibian people. Furthermore, while it is possible that the Council will always act in the interest of Namibia, its work may sometimes be hampered by the ideological differences or the special interests of its members.

The time seems opportune now for the Namibians to take over the mantle and channel their destinies. The Mandate of South Africa over the territory was terminated over 18 years ago, but South Africa is still illegally occupying Namibia. The United Nations Council for Namibia was established over 17 years ago to foster the way for Namibian independence, but

its efforts have been frustrated by South Africa. Thus, the only alternative left is immediate Independence for Namibia whether South Africa likes it or not.

The General Assembly should unilaterally declare the Independence of Namibia immediately. The African countries should sponsor the resolution, which will undoubtedly be supported by all the developing countries, the socialist countries, and even some of the industrialized countries. In fact the United States, the United Kingdom, France and other South African allies will find it extremely difficult to oppose the resolution. The action should be initiated and completed in the General Assembly, without the involvement of the Security Council where the proposal will definitely be vetoed by the permanent members. If the General Assembly fails to declare Namibia Independence, then the South West Africa Peoples' Organization (SWAPO) which has been recognized by both the United Nations, and the Organization of African Unity (OAU) as the *sole and authentic* representatives of the Namibian people, should transform that verbal status into reality by proclaiming Unilateral Declaration of Independence (U.D.I.) for Namibia and forming a government in exile. The O.A.U. and friendly countries such as Nigeria could provide the necessary facilities and infrastructure for the Namibian Government in exile.

It could be argued that so long as South Africa remains in effective occupation of the territory, the granting of Independence to Namibia by the United Nations or the Unilateral Declaration of Independence (U.D.I.) by SWAPO would have no advantage whatsoever. However, this argument ignores a number of important factors.

First, the immediate Independence of Namibia will transform the territory from a colony of South Africa into a fully sovereign state. This will have tremendous symbolic and psychological effect on the people. They will know that they are free and independent and will regard South Africa's presence as a mere temporary situation. Their struggle will no longer be for self-determination, and independence, but to regain their territory which is illegally occupied by South Africa.

Secondly, the Government of an Independent Namibia will be able to call on the assistance of friendly powerful governments to assist it in the struggle to regain its territory. It can enter into defence pacts and agreements with any other sovereign country. At the present time, neither the United Nations nor the South West Africa Peoples' Organization (SWAPO) which is a National Liberation Movement can call for the assistance of any powerful country in order to dislodge South Africa from the territory.

Finally, a Unilateral Declaration of Independence will bring it home to the Government of South Africa that the writing is on the wall, and that its days in the territory are numbered.

CONCLUSIONS

The various points that have been made may be briefly recapitulated by way of conclusions.

The doubts concerning the existence of international law are misplaced and misconceived. International law exists. It is the law that governs relations in the international community between the members, i.e. states, and between them and other legal entities, such as international organizations, and between these entities.

The contention of some of the industrialized countries and their international lawyers that Declaration and Resolutions of the General Assembly of the United Nations are without binding force is not tenable and, therefore, unacceptable. Such Declarations and Resolutions consitute a source of law for the member states and they are bound to respect them. Similarly, some of the Declarations and Resolutions form the basis for the development of international law. The overzealous and romantic attachment to the traditional sources of international law, as contained in Article 38 of the Statute of the International Court of Justice, is unacceptable. The sources of international law should now include declarations, resolutions, and decisions of the major international organizations.

The contention that the so-called *automatic majority* decisions of international organizations are *ultra vires* and invalid because they are motivated by political or other considerations extraneous to the organizations is unacceptable, and cannot find support either in the Constitutions of the international organizations themselves or in general international law. All majority decisions adopted by an iternational organization in accordance with the prescribed rules and procedure are legal and binding. The motive for the votes of the member states are irrelevant for the purpose of determining the legality of the decisions.

South Africa must be expelled from membership of all international organizations, including the United Nations, because the aparthied policies of its government constitute a fundamental breach of the Constitutions, Objects and Purposes of these organizations, as well as of international law. The contention of the industrialized countries that it is illegal to expel South Africa in the absence of express provisions in the Constitution on expulsion is not acceptable and cannot be supported by either general international law or the practice of international organizations. Also the expulsion of South Africa cannot be contrary to the principle of universality in international organizations which has in any case not been generally applied in the practice of these bodies.

The right of the Namibian people to self-determination and independence can no longer be prevented by legal technicalities and the machinations and manouvres of South Africa and its allies. The General Assembly of the United Nations should not declare the Independence of Namibia and, if it is not prepared to do so, the SWAPO which is recognized as the *sole and authentic* representative of the Namibian people should proclaim a Unilateral Declaration of Independence (U.D.I.), and form a government in exile, which should be supported by the O.A.U., and friendly countries.

Finally, the point should be made that the developing countries and their international lawyers have accepted the existence of international law as the basis for peaceful co-existence in the international community, but have insisted nevertheless on the reformulation of the traditional rules and principles which do not provide sufficient safeguards and protection for their interests and aspirations.

Considerable progress has been made in this respect. New and equitable rules and principles have been adopted with respect to the Law of the Sea, International Human Rights, Diplomatic Relations; Economic affairs etc., but as is clear from the present lecture, a lot remains to be done. The crisis of confidence and conflicts between the industrialized and the developing countries show no signs of abating.

In these circumstances, the question should now be put *which way for the developing countries?* I believe that there is only one answer. The developing countries have no alter-

native than to continue the struggle for social and economic justice in the international community. Like *Andrew* of the Campaign on War Against Indiscipline, the developing countries *cannot check out.*

Ladies and Gentlemen,

Thank you for listening to me!

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