The important conclusion to be drawn from this history is that the Syrian Arab Republic of today is, from the international standpoint, the same state as the pre-1958 Republic of Syria, and possesses in general the same rights and obligations.

RICHARD YOUNG

THE CHANGING SCIENCE OF INTERNATIONAL LAW

Πάντα ῥεῖ.
Heraklitos.

I

Half a century ago this writer began his life-long studies of international law at the Vienna University Law School under the great scholars, Heinrich Lammasch and Leo Strisower. Looking back for a moment at these fifty years, it is amazing to compare international law and its science as they then were and as they are today.[1] Then, in 1911 international law was at the peak but also close to the end of its "classic" period. Now, in 1961 the "new" international law, which by 1920 had entered a turning-point of its history without undergoing a revolutionary break with its past, has seen a first era of change during the League of Nations period, followed by a period of much more far-reaching change since 1945. There can be no doubt that international law at present is not only in an era of full transformation, but is also in a profound crisis.

Corresponding to this changing law of nations, of course, is a changing science of international law. It reflects this crisis, all the progressions and retrogressions of international law, all its hopes and disillusion, all its contradictions, its uncertainty, inadequacy, its often experimental and sometimes ephemeral character. It is the science of an international law in a period of transition from the "classic" law of nations, which is definitively gone, to some "new" international law which has not yet arrived and the exact shape of which we do not yet know.

Hence the great changes and very different patterns of the science of international law everywhere. There are some particularities in this country because of the legal and political background, because of world-wide contacts and because the leadership of the democratic world has fallen upon the United States. The present international law of transition has influenced the science of international law in every scientific and technical aspect. The question of what the scientific character of this science consists is again under full discussion. Is its first duty objectivity and the impartial search for truth? There are today, more than ever, the dangers of wishful thinking, of a confusion of methods, by presenting one's own wishes, mere proposals *de lege ferenda,* as the law actually in force. The whole question of the correct methods of this science is again under debate. The continuous expansion of international law as to its

[1] Compare, *e.g.,* in German, the then celebrated treatise on international law by Franz von Liszt with the 1959 treatise by Alfred Verdross, or, in English, the first edition of Oppenheim's treatise with the latest edition by Lauterpacht.

subjects and to the objects it governs has had its influence on the systematic problem of the science of international law.[2]

Yet, in one respect, we believe, there is scientific progress. The permanent and growing publication of all types of international law materials, sources and documents has made it possible for scholars to know much more about the actual law than was the case fifty years ago. This development has also brought about a rapprochement, so long advocated by this writer, between the so-called "Continental" and "Anglo-American" methods. International lawyers of the "Common Law" countries no longer rely exclusively on "cases," but take other materials, particularly the literature, into consideration. International lawyers of the countries of the "Civil Law" duly continue their theoretical investigations, continue to use all the literature in the principal languages, but they also use "cases" more and more; and thus modern continental works on international law are very different from the earlier literature.[3]

II

By 1945 we saw everywhere a disillusionment with international law. Outstanding writers and faithful adherents of international law gave us perhaps too somber a critique.[4] The whole Occidental idea of international organization, an idea according to which it is possible to maintain international peace by a mere loose union of sovereign states—an idea developed since the fourteenth century in Western European utopian writings, and on which the League of Nations was based and the United Nations is still based—is being critically analyzed and found ambiguous and unsatisfactory.[5] This disillusionment finds different reactions in different men. Some are simply in a state of despair, like the late Professor Marcel Sibert; others begin to lose their interest in the study of international law; a great scholar like the late Professor Edwin Borchard tried to cling to the "classic" law of nations and to stem with all his forces and with all his learning the "new" international law—in vain; for the wheel of history cannot be turned back.

There always had been "deniers" of international law, that is, those who did not deny the existence of the "materials, commonly known as international law," but who denied their legal character. Such deniers are again numerous at the present time. The denial today is based primarily[6] on the insufficient structure of international law as shown by an analytical critique.[7]

[2] See this writer's editorial in 53 A.J.I.L. 379–385 (1959).

[3] See, as a recent example, the abundance of international and municipal "cases," quoted from the original sources, in Georg Dahm, Völkerrecht, Vol. I (1958).

[4] See, *e.g.*, Edwin D. Dickinson, "International Law: An Inventory, " 33 Calif. Law Rev. 506–549 (1945).

[5] Walter Schiffer, The Legal Community of Mankind (1954).

[6] Hegel, for whose dialectic philosophy the sovereign state was "the reality of the ethical idea," came to the conclusion that international law cannot even be thought, that it is "*denkunmoeglich.*" The influence of Hegel's glorification of the sovereign state finds expression in recent decades in the science of international law of the

The modern "neo-realists" go farther. They[8] cast international law aside as "sterile," as "largely irrelevant in international affairs"; they condemn the "moralistic-legalistic" approach in foreign policy and emphasize the "national interest." It is hardly necessary to state that this approach is untenable. As history has shown from the beginning, law is indispensable for the living together of men; and this is true, too, on the international level.

Theoretically it is easy to state the conditions for a strong and vigorous international law: centralization of the now primitive, highly decentralized legal order, an international legislature, international courts with compulsory jurisdiction, and so on. But an international community, thus relatively strongly centralized, would constitute what we call today a sovereign state. This is the ultimate goal of the adherents of the idea of the world state. It is not to be wondered that the number of adherents of the world state has recently relatively increased. They tend also toward the end of international law, although in a very different way from that of the "neo-realists"; they would replace international law by "world law," that is, by the municipal law of the world state. This tendency is now prominently represented by the book of Clark and Sohn.[9] The authors propose complete disarmament by stages and under strict inspection, the establishment of an International Peace Force and certain other World Authorities. The guiding star is the maintenance of international peace; that is why the powers of this World Federal State shall be "strictly limited" to make possible the carrying out of this one goal—peace. From a technical point of view the book is excellently done, even if some fallacies in basic presuppositions can be shown;[10] it has had many laudatory reviews and will be published in a number of translations. But has it any chance of being accepted by the whole world now, within the foreseeable future? We do not believe that there are many who are convinced of that. It is exactly with regard to a certain minimum chance of realization that the dividing line between proposals *de lege ferenda* and utopias can be drawn.[11]

III

The disillusionment in 1945 led to widespread dissatisfaction not only with the international law then in force, but with the whole "traditional" international law. The phrase was coined that what was necessary was a "re-thinking of international law," a "complete reconstruction of inter-

totalitarian states, whether Fascist or Communist. But there were always deniers, whose denial was based merely on an analytical critique: *e.g.*, Austin.

[7] Likewise, the doubts of the Neo-Thomist scholar, Jean Dabin, as to whether international law is really law in the full sense, stem from an analytical critique.

[8] See Hans Morgenthau, Politics among Nations (1948).

[9] Grenville Clark and Louis Sohn, World Peace through World Law (2nd ed., 1960).

[10] See Professor Lissitzyn's book review in 1959 Cornell Law Q. 293–295.

[11] That is why the occasional remark by W. Friedmann, that the book is an exercise in drafting rather than a contribution to contemporary international law, can be justified.

national law." This dissatisfaction with the "traditional international law" was often coupled with a dissatisfaction with the whole "traditional" science of international law. This science, wrote Professor Percy E. Corbett[12] from his present "neo-realistic" point of view, must have a new approach, a sociological approach, better connected with the forces determining world political activities and must be less inclined "to imprint the elegant patterns of law upon the unruly interactions of governments." The late Judge Alvarez even blamed the unsatisfactory status of international law on "faulty study" by the science of international law, not connected with the *"vie actuelle des peuples."* On the other hand, the burden of reconstructing, of creating new international law is put on the shoulders of the science of international law. A radical change, not only of international law, but also of the science, study, research, and teaching of international law, is postulated.

For some even a reconstruction is not enough; what is necessary is the creation *ex novo* of a new international legal order. The very name "international law" is attacked. Some speak of the "World Rule of Law." Others demand that the name "international law" be as rapidly as possible replaced by the term "World Law," which allegedly is different from the narrower international law and which, we are told, is "a new field of law." It seems clear to us that the quality of international law does not depend on its name. International law, like common law, is not a static, but a dynamic, legal order. There is no dogma that international law is "the law between sovereign states"; this was an adequate definition for the international law of an earlier period, but it is no longer true for present international law. On the other hand, the "law between the sovereign states" is still a very important part of international law. Sovereign states are no longer the only members, but they are still by far the most important members of the international community. The tendency to ignore the states is strictly unrealistic.

There is at the present time important literature on the concept of the "Rule of Law."[13] The Rule of Law is the guiding star, the highest value, for the International Commission of Jurists[14] which is composed of individual lawyers of the democratic countries. Its ideal is the dignity of man and his protection in this dignity by law. It takes, therefore, a fighting attitude against the violation of human dignity, primarily by Communist states but, as the fight against the "apartheid" of the Union of South Africa shows, if necessary, also by non-Communist states. It has proclaimed its ideas in three Congresses of Jurists, held on three

[12] The Study of International Law (1955).

[13] See the special number: Post-War Thinking on the Rule of Law, 50 Mich. Law Rev. 483–613 (1961). W. B. Harvey (*ibid.* 487–500) distinguishes three concepts: the constitutional (A. V. Dicey), the American (due process of law), and traditional natural law. See also W. W. Bishop, "The International Rule of Law" (*ibid.* 553–574). See further, *e.g.*, Judge Robert N. Williams, "World Rule of Law," 63 W. Va. Law Rev. 118–129 (1961); W. McClure, World Legal Order (1960).

[14] See its pamphlet: Basic Facts (1961). It publishes the Journal, The Bulletin, Newsletters, as well as special monographs.

continents: "The Declaration of Athens" (1955); the "Declaration of New Delhi" (1959) and the "Law of Lagos" (1961).[15]

The movement "World Peace through Law" was initiated by Charles S. Rhyne, a former President of the American Bar Association and Chairman of the Special Committee on World Peace through Law,[16] first appointed in 1958. The idea is to explore what lawyers can do of a practical, concrete character to advance the rule of law for achievement of world peace. Like the International Commission of Jurists, it relies on private individual lawyers; it shows the same respect for the Rule of Law. But there is an important difference: it tends toward an advancement of international law as such; its dominating goal, its supreme value, as for the book by Clark and Sohn, is peace. Like the International Commission of Jurists it works through conferences of jurists. First a series of regional conferences were held in the United States, followed by four continental conferences to culminate in a world conference. The first continental conference, attended by lawyers of the Western Hemisphere, took place at San José, Costa Rica, in June, 1961. The resolution there adopted —the "Consensus of San José"—asks for compulsory jurisdiction of the International Court of Justice and expansion of its jurisdiction so as to embrace all legal questions arising from commercial or private matters. A consensus of universal principles was adopted, on which a structure of world law can be built. There must be a struggle of lawyers to obtain the collaboration of governments for drafting treaties to create an international legal system. It is fully recognized that the task will be hard and long.[17] The second of these conferences was held at Tokyo in September, 1961, the third at Lagos, Nigeria, December 3–6, 1961. The last conference will be held in Rome in April, 1962.

The idea of "World Law"—not in the sense used by this writer as the municipal law of a world state—is often met. It is interesting to note that Dean Roscoe Pound,[18] recognizing that a world state seems hardly attainable at this time, has recently voiced his belief that a world law for world relations *is* attainable. Based on his distinction between "law" and "laws," he denied that a universal legal order presupposes a universal political order and sanctions. He considered that there exists a world regime of due process of law, a generally recognized and received body of principles to which men are expected to adhere in international relations, without any political super-organization behind them.

At the Duke Law School there is a "World Rule of Law Center." Its

[15] It has also published Reports on the Rule of Law in the United States, Italy and the Federal Republic of Germany (1958), three Reports on Hungary, two on Tibet, and one against apartheid in the Union of South Africa. See also Dudley B. Bonsal (American member of the International Commission of Jurists), "The Judiciary and the Bar," 40 Texas Law Rev. 2–17 (1961).

[16] We may recall the old French Association: "La Paix par le Droit."

[17] On the Rule of Law and "World Law," see also the special number: Next Steps in Extending the Rule of Law, 30 Notre Dame Lawyer (1961).

[18] Roscoe Pound, A World Legal Order (Fletcher School of Law and Diplomacy, 1959).

Director, Arthur Larson, has published a *Design for Research.*[19] His problem is nothing less than to *create* a world legal order; for him "world law" is a new topic, a "new and very important field of law"; world law is here identified more or less with "transnational law." His principal object is peace, the avoidance of nuclear war. World law, he states, is wider than international law; it must be universal; it must be based on all legal systems. While the philosophy of world law is not to be neglected, we need first of all "activist," practical projects. The great responsibility of science and research for obtaining this world law is proclaimed. The "Design" contains in 233 pages the outline of 111 research projects on everything, from the "marshalling of existing materials on the body of world law" to "educational requisites to support world law." For the new world law we need a new casebook, a new treatise, a new full course on world law. Enthusiastic innovators must create not only new names—world law—but also speak in new phraseology; we need "pilot studies" for a successful "break-through" toward "world law."

IV

The late Judge Alejandro Alvarez[20] proposed that the International Court of Justice directly apply the "new" international law, a proposal to make the Court a legislator, a proposal in which his colleagues could not follow him. There are many "wishful thinkers" who try to persuade themselves and others that, *e.g.,* there is already a working system of collective security in the United Nations, that the United Nations *is* an adequate means for maintaining international peace. There are excellent international lawyers who do not want to create an international legal system *ex novo,* because, in a mood of generous over-optimism, they over-estimate the present law. Thus, García Amador,[21] a leading Latin American international lawyer, is convinced that international law, even if it has not yet reached the fullness of its development, has nevertheless already made enormous progress. He teaches that contemporary international law definitely guarantees the international protection of human rights, that the individual is the subject par excellence of international law. Hence his proposals for the responsibility of states in the International Law Commission; he holds that both the "international minimum standard" and the Latin American principle of "equality of foreigners with citizens" are obsolete under *present* international law; the individual is protected as such, not as a national. The *Nottebohm* Judgment has shown again that this is certainly not the international law actually in force.

Dr. Jenks is a man of great knowledge, of vast experience in international organizations, of strong capacity for work, of lovable enthusiasm,

[19] Arthur Larson, Design for Research in International Rule of Law (1960, mimeo.); now in printed form (1961, pp. 111).

[20] See his dissenting opinions as a Judge of the International Court of Justice; and his last book, Le Droit International Nouveau (1960).

[21] F. V. García Amador, Introducción al Estudio del Derecho International Contemporáneo (1959).

a brilliant writer. But there is a certain over-optimism in his work, and for that, as well as for certain methods, applied or proposed, he has been criticized.[22] He already sees in *present* international law the "Common Law of Mankind," although admittedly only in an early stage of its development. He hardly speaks of the great political crises of today, some of which at this time seem to defy a solution by peaceful means; he skillfully uses the fine British art of understatement; his proposed "multicultural" method, so his critics say, poses not only an endless task, but one which is not appropriate. The over-optimism of others is already expressed by their diagnosis of the present crisis of international law as a mere "crisis of growth."

"Re-thinking international law" puts the accent on the future. Hence the debate on the correct methods of our science. There is nowadays a general attack on analytical jurisprudence; it has come from two sides: natural-law and sociological, "realist" jurisprudence. Spanish international lawyers want to reconstruct international law by a "value-oriented" science, going back to the foundations of Suárez. There is a general revival of natural-law theories.[23] But the principal attack comes from the sociological side, from the postulate of the "functional" approach. This writer has often shown that this attack is not justified. On the one hand, the analytical approach will always be indispensable in order to know and present actual law systematically; that will always be the first task of the science of law. On the other hand, the analytical method by no means excludes sociological-historical investigations, nor the valuation from the point of view of ethics. To the contrary, they are very necessary to complete a full understanding of the law in force; but these are different investigations; they have to be made by different methods; they never can substitute for the analytical method. It is also clear that the international lawyer is entitled to make proposals *de lege ferenda* for new law. But that is a political task. Further, such proposals must start from the law actually in force; politics of law necessarily presupposes a theory and a science of law.

These methodological problems are very pertinent, if we consider the pattern of "re-thinking international law" as presented by Professor McDougal.[24] He stands and falls theoretically with "American legal realism." "Law is a decision-making process." What he has added is

[22] C. Wilfred Jenks, The Common Law of Mankind (1958). As to critical review articles, see R. A. Falk and S. M. Mendlowitz, "Some Criticisms of C. W. Jenks' Approach to International Law," 1961 Rutgers Law Rev. 1–31; Julius Stone's review article in International Studies (New Delhi, India), 1960, pp. 414–441.

[23] See this writer's editorial in 55 A.J.I.L. 951–958 (1961). We read also in J. M. Hendry's "Canada and Modern International Law," 39 Can. Bar Rev. 59–77(1961): "Our goal is the establishment of the international Rule of Law." (p. 63.) It needs a value-oriented jurisprudence: "Aiding our quest for a new international legal order is the revival, in some form, of natural law doctrines." (p. 62.)

[24] *Cf.* Lasswell and McDougal, in 52 Yale Law J. 203 ff. (1943); McDougal, 56 *ibid.* 1345–1355 (1947); *idem,* in 1 A. J. Comp. Law 24–57 (1952); *idem,* "International Law, Power and Politics: A Contemporary Conception," 82 Hague Academy Recueil des Cours 137–258 (1961).

no longer to restrict himself exclusively to the decisions of the courts, but also to take into consideration the decisions of many other "decision-makers." He is glad to state that "legal realism" has brought an end to a frightful confusion in legal thinking. The "verbal propositions, known as law" can only be meaningfully understood if they are put into the continuous community process. With the help of a new jargon, partly taken from the Lasswellian vocabulary, he asks for an end to the destructive phase of legal learnedness and for a creative science of international law. A science, he holds, which is nothing but scientific does not suffice; it must apply not only the normal, but also other integrated and interrelated methods. He feels that in this shrinking world more and more men demand common values, transcending national frontiers. Fortunately, we need today no longer torture ourselves with circuitous deductions from metaphysics; we know today how to verify values. We must study with precision the variable factors of environment which influence human behavior all over the world—a task no less endless than Dr. Jenk's multicultural approach. We must adopt methods for classification of goal values, for description of historical and contemporary trends in the realization of values, critical perfection of trends into the future, imaginative invention and evaluation of alternatives of policies by which goal values can be most fully attained. His is a contemporary and an American concept as to contents. We must maintain a position of power and make such use of our power as to achieve a compromise with rival ways of life which diminishes the anti-democratic elements in them. We need a new understanding of law as an instrument for community values. For all that we need a "policy-science" and, in the field of teaching, law students must be stimulated to think of themselves as "policy-makers." He is a policy-maker, a strategist, a protagonist of—again a new name—Public World Order of Human Dignity.

Professor McDougal is a man of great gifts, of a great capacity for work and of no small self-confidence. His writings are interesting and valuable from many points of view. But his theoretical basis has all the faults of American "legal realism." The latter was certainly by no means without merits, but as a movement it is already over: "Its premises were shaky and its promises overstated."[25] First, sociological statements as to facts are not rules of law. Sociological statements connecting facts with facts on the basis of the principle of causality state what is. Norms of law prescribe what ought to be. It is significant to compare the attitude of Professor McDougal with that of Judge Charles De Visscher.[26] The latter attacks theory, stresses sociological conditions and their importance as the substratum of law or as necessary pre-conditions for making possible a reform of the law. But in spite of his attacks on Kelsen, in spite of the emphasis put on sociological considerations, he is far from confusing a

[25] Grant Gilmore, "Legal Realism: Its Cause and Cure," 70 Yale Law J. 1037 (1961).

[26] Charles De Visscher, Theory and Reality in Public International Law (English trans., 1957). See this writer's book review in 70 Harvard Law Rev. 1331–1335 (1957).

sociological statement of facts with a legal rule; he always remains a normative jurist and, contrary to McDougal's anti-metaphysical attitude, close to the Catholic natural law. Second, just as sociological statements or predictions are not rules of law, thus Professor McDougal's "goal values" are not values, but only factual preferences of behavior. Third, law is not fact, law is not identical with policy. Finally politics of law is, as the name indicates, a part of politics; it is not identical with the science of law. The mistake is *to identify* his "policy science," that is, politics of law, with the science of law.

"Re-thinking international law" covers, as we have seen, innovations in international law and its science, in the study, research and teaching of international law. Contrary to many earlier complaints about the relative neglect of international law in American law schools, international law is now being taught in an increasing number of law schools and is being made obligatory. Introductory courses and advanced courses on international law, as well as seminars, are being offered. The reasons for this increase lie not only in the general world situation and in the particular position of the United States, but also stem partly from the particular, professional character of the American law school. It has been recognized and expressed in many recent articles that international law is becoming more and more *necessary* for the practicing lawyer, particularly in a metropolitan practice. The practicing lawyer is no longer seen exclusively as handling his client's case in court, but also as a counselor, adviser, drafter, and negotiator out of court.

The teaching of international law in American law schools has not only increased, but this teaching has also been expanded into what is now known as "International Legal Studies." This expansion is generously subventioned by the Ford Foundation through grants to leading law schools. At the same time the American Society of International Law has greatly expanded its activities and, in its regular and many new regional meetings, also treats, apart from international law and international organization, a great number of topics belonging to "International Legal Studies," such as organizing business abroad, legal aspects of foreign investment, problems of international taxation, extraterritorial effects of antitrust laws, legal problems of the American manufacturer in the European Common Market, and so on. As for the contents and methods of this new branch of "International Legal Studies," [27] Dean Griswold stated a few years ago [28] that they will continue to be based on international law and international organization, but that they will go farther, although exclusively devoted to legal problems. They will include also comparative law and conflict of laws, and the leading aspects of international transactions of the American Government, American corporations and citizens.

[27] Milton Katz, "International Legal Studies: A New Vista for the Legal Profession," 42 ABA Journal 53 (1956); David F. Cavers, "The Developing Field of International Legal Studies," 47 Pol. Sci. Rev. 1056–1075 (1957); John B. Howard, "International Legal Studies," 1959 Univ. of Chicago Law Rev. 577–596.

[28] Report on Harvard School for 1954–55, pp. 1–11.

This corresponds to "transnational law." Judge Philip C. Jessup, a great scholar in the science of international law, devoted some of his talents to explorations on the periphery of this science and arrived at certain proposals *de lege ferenda*.[29] In a study dealing with particular cases, where no easy answer was at hand to solve the problems of jurisdiction and of what law governs, he suggested a possible use not only of international, but also of municipal law and conflict of laws, and spoke tentatively of "transnational law." But it is not a question of generally mixing up all types of law; the problem discussed by Judge Jessup arose in very particular and unusual cases. It is also restricted now to legal problems posed by international economics. This development concerning "transnational law" is by no means new or unique. On the Continent Erler [30] had emphasized so-called "international economic law." In problems of international economics, he pointed out, municipal laws are closely interwoven with international law; there is also a strong interconnection here between public and private law, both municipal and international private law.

For this "transnational" law we already have a new casebook by Katz and Brewster.[31] The sophisticated authors skeptically state that such phrases as "international legal order" or "international community" do not necessarily mean that these things do exist in fact. Being skeptical of the existence of an international community or of what it consists, they start their inquiry "with the practical everyday experience of individuals, business corporations and governments which engage in productive transactions spanning national boundaries." [32] The authors concentrate on "foreignness" and how that affects "a lawyer's job." Each problem is studied from the angle of opportunities and risks under the foreigner's own municipal law, under the foreign law and under international law. It is an interesting book and contains many useful cases and materials. The authors are fully justified in stating that this book is a departure from the familiar teaching materials in the international field. On the other hand, it is certainly not a casebook on international law; nor do the authors make any such claim; to the contrary, they themselves declare that "they do not reach the actual and potential role of international law in providing a framework for international governmental relations and settling international disputes which threaten the peace. [33]

V

The preceding remarks are restricted to the science of international law in different countries of the democratic Occidental world. But in order to see the change in full depth it is necessary also to examine the science of international law outside of the democratic Occidental world. It is not

[29] Philip C. Jessup, A Modern Law of Nations (1948); Transnational Law (1956); The Use of International Law (1959).

[30] G. Erler, Grundprobleme des internationalen Wirtschaftsrechts (1956).

[31] Milton Katz and Kingman Brewster, Jr., The Law of International Transactions and Relations. Cases and Materials (1960).

[32] *Ibid.* 3. [33] *Ibid.* 4–5.

possible here to go into any details. Only a few words will be said in order not to leave the picture incomplete.

There are, first, the countries of the totalitarian Communistic regime, whether or not they belong to the Occident. The Soviet science of international law is the leading one in this group. It has been studied often by writers of, or living in, countries of the democratic Occidental world. Although there are outstanding international lawyers in the Soviet Union who, like Professor Tunkin, have a perfect knowledge of the "classic" law of nations and are fully acquainted with the science of international law in the different languages of the democratic Occident, the ideological basis, the political goals and concepts, the fact of being bound by the "party line," the attack against rules of international law as having been made by the "capitalists," all that is reflected even in questions of what looks to be a problem of theoretical construction.[34]

There are, second, the countries of non-Occidental civilization, even if they are democratic. Here belong particularly the many new states of Asia and Africa which have become independent since 1945. The Indian science of international law may be named as representative. Even this development is not without precedent. The Latin American Republics, although now independent for one and a half centuries, overwhelmingly Catholic, and emphasizing with pride their belonging to the Occidental culture, have, through their statesmen and international lawyers, developed for a hundred years a series of "doctrines" all destined to weaken norms and institutions of general international law, as a protest and defense of the weaker states against the powerful ones, first of Europe, later of the United States. And they have done so with considerable success, as the development of Panamericanism and now the Charter of Bogotà prove. It is therefore not to be wondered if Indian international lawyers invoke, *e.g.*, the Calvo clause.

These new states of non-Occidental culture attack certain norms and institutions of general international law as having been made by "colonialist" Powers of Europe exclusively in their own interest—rules to which these countries have never consented, which belong only to the "general" customary Western, but not to "universal" international law and are, in consequence, not binding on them. An extremely interesting example of this approach is the study by Judge Guha Roy dealing specifically with the diplomatic protection of citizens abroad.[35] It is also instructive to study the speech made recently by the Indian representative on the Security Council on the occasion of the incorporation of Goa by force into India.[36] The defense and accusation, based on general inter-

[34] As a recent example, the defense of the obsolete and fictitious construction of international general customary law as *pactum tacitum*, a construction so dear to nationalistic writers, some time ago: G. I. Tunkin, "Remarks on the Juridical Nature of Customary Norms of International Law," 49 Calif. Law Rev. 419–430 (1961).

[35] S. N. Guha Roy, "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?" 55 A.J.I.L. 863–891 (1961).

[36] The New York Times, Dec. 19, 1961. We speak in the text only of the Indian arguments against Portuguese rights under general international law. That the Indian

national law, by the Portuguese representative was for the Indian representative only an "echo of the past." "Who gave Portugal," he asked, "sovereign rights for any part of India they occupied illegally and by force? Who gave them that right? Not the Indian people." And coming to the point of the science of international law, he remarked:

> There can be no question of aggression against your own frontier . . . and if any narrow-minded legalistic considerations, considerations arising from international law, were written by European international law writers, these writers are, after all, part of the atmosphere of colonialism.

The writer began this comment in the philosophical mood of "being amazed" at the change in international law and its science between 1911 and 1961. The change is indeed great. But it is probable that the change will be much greater and more radical fifty years from now.

JOSEF L. KUNZ.

---

representative defended also the taking of Goa by force, "Charter or no Charter, Council or no Council," is of course a very different matter, for the use of force, except in self-defense against an armed attack, is illegal even for enforcing a right. And here the Indian representative could not refer to a law made by the "colonialists." The U.N. Charter was drafted with the collaboration of India and was voluntarily ratified by India.