

1973

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Recommended Citation

Leonard M. Salter, *International Law in Transition: New Norms for Old*, 7 INT'L L. 687 (1973)
<https://scholar.smu.edu/til/vol7/iss3/10>

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International Law in Transition: New Norms for Old

The new priorities are apparent and they have been set by the vast majority of the developing countries of the world. They do not deal with such classical concepts as national egotism, national armaments and alliances, balance of power, deterrence, challenges and responses, national security and interests. The global concept of peace is now an amalgam of disarmament, population control, eradication of hunger, ignorance and disease, quality of environment, trade and economic development [and] human rights . . .

DARIUS S. JHABVALA

Alvin Toffler, in his widely read "*Future Shock*," writes:

We are simultaneously experiencing a youth revolution, a sexual revolution, a social revolution, a colonial revolution, an economic revolution, and the most rapid and deep-going technological revolution in history. We are living through the general crisis in industrialism.¹

As a result of this catastrophic upheaval on so many fronts, the realm of international law—the rules which guide nations in their relations with each other and each other's nationals and their property—must perforce, also change. The central problem, given the accelerating and meteoric changes occurring on so many fronts is this: Can the inertia built into the law as a social science, and especially that branch of the law dealing with the relationships between sovereign nations, change quickly enough to meet the new challenges adumbrated by Jhabvala in the headnote above?

Can the new legal concepts necessary to control and educate international man in his new world environment, be effective at an early enough date so that mankind does not either incinerate itself, or drown in a sea of its own refuse? Whether man, confronted with global problems on a size never before presented, can rise to the intellectual level required to

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¹Random House, Inc. (1970) p. 186.

solve these pressing problems, is the ultimate question of the last three decades of this century. As a lawyer, it is the author's belief that a legal framework is the skeleton on which to weave the infra-structure necessary for survival.

At the threshold of this discussion, it is quite apparent that no one expects to force any sizable power to adhere to agreements that it believes to be inimical to its interests.² When Russia and France decided that they did not want to contribute to the U.N. peacekeeping costs in Korea, they refused to do so, in spite of Article 17(2) of the U.N. Charter. If a nation is big and powerful enough, it considers itself above the law and no one can make it adhere to the rules.³ Abram J. Chayes, former legal adviser to the Department of State and now Professor of Law at Harvard points out⁴ that there are two exceptions to the U.N. Charter prohibition⁵ against the threat or use of force in international relations.

The first is the use of force by authorization of the U.N. or some other competent international body.⁶ The second exception is the use of force in the exercise of the right of self-defense. The validity of this latter argument depends on whether one believes that the safety of the U.S. forces in South Vietnam is immediately threatened, and that mining Haiphong Harbor and direct naval confrontation with Soviet shipping in the waters of North Vietnam is necessary to save them. Professor Chayes goes on to indicate that the "measures taken would not have been permissible under the old law of blockade. It is hard to argue that they are available under the U.N. Charter, which was designed to limit further the permitted use of force."

New times bring more varied problems, and the area of international law is one of the areas where novel concepts and new directions will have to be fashioned to cope with problems being posed under new circumstances. A conference convened at Geneva in May, 1972, with the purpose of making the 1949 Geneva Convention more relevant to modern warfare.⁷ Search was to be made for agreement on two new protocols to be added to the four conventions drawn up after World War II. The conference was called by the all-Swiss International Committee of the Red Cross (ICRC); one of the key issues which the ICRC hopes will be resolved is a clause forbidding nations to make reprisals against civilians by aerial bombardment.

²WEINTAL & BARTLETT, *FACING THE BRINK*, Charles Scribner's Sons (New York) p. 109.

³It will be remembered that Russia was evicted from the U.N. in 1951 for its attack on Finland. Neither Germany, Italy nor Japan were punished by the League of Nations for their violations of international order in central Europe, Ethiopia and Manchuria respectively.

⁴Boston Globe, May 14, 1972.

⁵U.N. CHARTER, Article 2(3) and (4).

⁶In the Cuban Missile Crisis, the U.S. claimed the quarantine (admittedly a threat of force) was properly authorized by the Organization of American States.

⁷Boston Globe, May 3, 1972.

The two protocols which are being promulgated relate (1) to new codes of conduct to govern international conflicts providing for better regulation of security and medical personnel, Red Cross medical mercy flights and improved treatment of prisoners of war and civilians.⁸ The second protocol deals with civil wars; considering the sensitivity of all nations concerning "sovereignty," this appears to be the most difficult of the problems on which to get agreement. It is to be noted that most of the conflicts since 1945 that have drawn in outside protagonists, *i.e.*, Korea, Vietnam, the Middle East, India and Pakistan have been civil or regional. The question of whether the Vietnam War is civil or international crucially affects the interpretation of the Geneva Convention. The North Vietnamese do not consider the American airmen as prisoners of war but as "war criminals."

The United Nations Conference On the Human Environment opened in June, 1972, in Stockholm with the declaration by its chief organizer that global environmental demands required new concepts of sovereignty, new codes of international law, and new international means of managing the ocean and the atmosphere for the benefit of mankind.⁹ The necessity for even closer international collaboration is required in view of the search for methods of financing this entente.

Such methods might include use of levies or tolls on certain forms of international transport (ships, planes), or on the conception of certain non-renewable resources, such as a number of basic minerals. One of the implicit conflicts between the developed and the developing nations is readily apparent in the environmental area; developing countries have often contended that a clean environment is impossible with the industrial growth they so urgently need. The point was clearly made that 70 percent of the world's environment—the oceans and the atmosphere—were beyond any national jurisdiction, and protection could be assured only by international action.

In a full page advertisement in the Washington Post,¹⁰ 66 distinguished Canadians protested the authorization of a nuclear test in Alaska, asking, "Has any nation the unlimited right to contaminate the air and water its neighbors breathe and drink?" Congress had voted to deny further funds to the \$200 million testing of a 5-megaton warhead called Cannikin unless President Nixon personally approved it. He did so, and a U.S. Court of Appeals refused to grant a stay on the testing,¹¹ turning the issue of

⁸"If the nuclear stalemate continues between the major powers, guerrilla warfare will persist as the principal military factor of our time." Vladimir Dedijer, *The Poor Man's Power*, UNLESS PEACE COMES, Ed. Nigel Calder, Viking Press (New York) 1968, p. 19.

⁹New York Times, June 6, 1972.

¹⁰Oct. 28, 1971.

¹¹In *Committee For Nuclear Responsibility vs. Seaborg*, (CCA) the Court said: "While the Government's assertions of monetary damage from an injunction is not minimal, it does

releasing certain environmental impact statements back to the lower Federal District Court, which had twice ruled in favor of the test.

The argument¹² in favor of the nuclear explosion stated that the warhead must be tested before a missile could be deployed, that cancellation of the test would set a bad precedent for future weaponry, and that the U.S. must go through with the test in order to negotiate from a position of strength at the SALT disarmament talks, later to be resumed in Vienna. On the other hand, responsible scientists pointed out that an explosion 250 times greater than that which destroyed Hiroshima, to be set off in a tributary of the San Andreas Fault, could launch an earthquake or a tidal wave and emit radioactive material into the air or the sea. Here is certainly a vivid example of how nations cannot be trusted to evaluate world environmental danger as against their own selfish interests.

When man applies his scientific acumen to the problem of destroying his fellow man, there really are no limits to the imaginative scenarios available. Gordon J. F. MacDonald, in an essay entitled "*How To Wreck The Environment*,"¹³ asserts that clouds composed of super-cooled water droplets can be transformed into ice-crystal clouds by seeding them with silver iodine, "dry ice" (frozen carbon dioxide) and other suitable agents. Rainfall from some types of clouds and storm systems in temperate regions, can be increased by ten to fifteen percent by seeding. Preliminary experiments have been carried out on the seeding of hurricanes; a controlled hurricane could be used as a weapon to terrorize opponents over substantial parts of the populated world.

One of the natural constituents of the atmosphere is ozone, and chemical or physical means are available to attack it. A low concentration of ozone in a layer between 15 and 50 kilometers has the utmost significance for life on earth. It is responsible for protecting the greater part of the world from the sun. A temporary "hole in the ozone" layer over a target area could be created, which would be fatal to all life, including farm crops and herds that could not take shelter. If stress patterns of the earth's crust can be accurately determined, phased or timed release of energy from smaller faults may be arranged to trigger a larger fault at some distance. MacDonald even speculates as to how melting of the Antarctic ice cap through the release of thermal energy in nuclear explosions, would create massive tidal waves in sufficient size and strength completely to wreck coastal regions, even in the Northern Hemisphere.

not weigh as heavily with us, as its assertion of potential harm to national security and foreign policy—assertions which we obviously cannot appraise—and given the meagre state of the record before us, we are constrained to refuse an injunction." *U. S. LAW WEEK*, November 9, 1971, 40 L.W. 2250.

¹²*Boston Globe*, October 29, 1971.

¹³*Op. cit.*, n. 8, p. 185.

The above is a prognosis of what our accelerating technology can do to make the world a more unsafe place to live in. But the future is already here. Senator Claiborne Pell (D. Rhode Island) charged that the U.S. military forces have used advanced rain-making technology to cause flooding and death in Vietnam.¹⁴ The Senator said he believed that the military began in 1966 to seed clouds to clear them away for the bombing of North Vietnam, and that seeding produced rains that washed out North Vietnam infiltration routes and caused floods that resulted in thousands of deaths.

Seymour Hersh alleged¹⁵ that the dropping of silver iodide into clouds is the first confirmed use of meteorological warfare and is not covered by any international conventions on warfare. Some sources stated that a chemical treatment of the clouds resulted in acidic rainfall which would spoil the functioning of the North Vietnam radar equipment in directing surface-to-air missiles.

P. K. Menon, formerly a staff member and consultant to the U.N. Secretariat, suggests¹⁶ the need to explore the possibility of establishing an international mechanism to examine the need for cooperation in, and regulation of the exploration and use of clouds and to examine the scientific, technical, economic and legal problems involved. This could be done under the aegis of the United Nations or one of its specialized agencies—the World Meteorological Organization, the Food and Agricultural Organization or UNESCO. Most constitutional authorities agree that the Security Council is the only body in the world authorized to give orders to sovereign governments.

That certain tentative steps toward the extension of the Rule of Law are taking place, is apparent in the recent change of view in the American Bar Association toward the ratification of the Genocide Convention.¹⁷ Former Justice Arthur Goldberg and Richard N. Gardner have commented on the fact that the principal reason the U.S. has failed to ratify this convention was the opposition of the American Bar Association recorded in a decision of its House of Delegates in 1949. In 1970, a proposal to reverse the 1949 position of the ABA and record it in favor of the Genocide Convention failed by a vote of 126 to 130.

On March 10, 1972, a Senate Foreign Relations Subcommittee heard arguments against ratification presented by two distinguished members of the ABA. After considering these arguments, the full Senate Foreign Relations Committee reported favorably on the Convention by a vote of 10 to 4 and recommended that the Senate advise and consent to ratification.

¹⁴New York Times, June 27, 1972.

¹⁵Boston Globe, July 3, 1972.

¹⁶New York Times, July 10, 1972.

¹⁷New York Times, March 28, 1972.

Messrs. Goldberg and Gardner applauded the refutation of the legal arguments opponents of the Genocide Convention have employed to justify their opposition for nearly a quarter of a century. They said:

The Genocide Convention curtails action that is repugnant to the American people and to our constitutional philosophy. We should not decline to affirm our support for principles of international law and morality in which we believe . . . [Our adherence] will put us in a better position to protest acts of genocide in other parts of the world and will enhance our influence in the United Nation's efforts to draft satisfactory human rights principles.

Paul Ehrlich, Professor of Biology at Stanford, points out that the population of the U. S. will grow by 75 million people by the end of the century.¹⁸ Population growth has a disproportionate effect on environment deterioration.¹⁹ Ecological conditions, continues Professor Ehrlich, indicate that only 50 million Americans, living as they do today, could entirely destroy the planet. It is apparent that 300 million people could accomplish the same thing in the long run.²⁰

The solution to this problem varies with the particular country and individual involved. Many Mexicans still believe that birth control is an American plot to commit genocide against the Latin race.²¹ (The Japanese, at one time, felt that it was an American plot against the Yellow race.) A Mexican public opinion poll showed that more than half of all Mexican women, and half of all men, consider the production of children the prime function of marriage. A Mexican women's hospital, operated with a grant from the U. S. Ford Foundation, was accused of using foreign money for sterilizing women.

Within two years from this incident, on April 27, 1972, the government announced²² that it was embarking on a major national program in family planning. Family planning was termed an unavoidable need. It was reported that in 1971 more than 2 million babies were born; and, said President Louis Echeverria Alvarez, "We don't have enough resources." It has been

¹⁸New York Times, November 4, 1970. See also the same authors *THE POPULATION BOMB*, Ballantine Books, Inc., the first bestseller to expound the dogma of Zero Population Growth.

¹⁹Cf., Jan Breslaw, *Economics and Ecosystems*, in *ECONOMICS RELEVANT*, Heilbroner and Ford, ed., Goodyear Publishing Co. (1971) p. 87, "The essential cause of environmental pollution is overpopulation, combined with an excessive population growth rate; other anti-pollution measures can be used temporarily, but so long as the central problem is not solved, one can expect no lasting success."

²⁰Cf., the opposite view, as expressed by Samuel McCracken, "*The Population Controllers*, 53 *COMMENTARY* 45 (May, 1972). "For in identifying the major problem as one of too many people consuming too much, the population controllers tend to forget that these same people are also in the habit of paying taxes and contributing to corporate profits, wherefrom must be paid the costs of whatever needs to be done about the environment."

²¹Boston Globe, November 18, 1970.

²²New York Times, June 22, 1972.

pointed out that unless Mexico took proper steps, millions of children will not find opportunities for education, health and employment. Recent studies indicate that unwanted children (usually in large families below the poverty line) generally suffer from various hardships—learning and psychological problems, among others. They soon learn that they are a burden and suffer the pains of a pariah.

At a parley of family planners, convened in July, 1972, under the auspices of the United Nations Fund for Population Activities, dramatic decline in the birthrate in Hong Kong and Singapore were detailed, and the downturn in India, South Korea, Pakistan and elsewhere was most optimistic.²³ Genuine momentum had developed in Asia. In Latin America, there is a breakthrough with Chile's first nationwide program.

A report indicated that in the last year a dozen African leaders have agreed to accept aid in census and demographic statistics. This is traditionally the first step in persuading developing nations that unbridled growth threatens to nullify whatever economic gains are won. This is, in brief, the status of the population control program as of the middle of 1972.

Did changing norms of international law have anything to do with the change in attitudes? Family planning was formally accepted as a basic human right in the Declaration on Population by World Leaders, signed by twelve heads of State on Human Rights Day, December 10, 1966,²⁴ as follows:

*We believe that the majority of parents desire to have the knowledge and the means to plan their families; that the opportunity to decide the number and spacing of children is a basic human right.*²⁵

Official recognition of the fact that family planning constituted a basic human right came in May, 1968, at the United Nations Conference of Human Rights at Teheran²⁶ where it was provided that:

[P]arents have a basic human right to determine freely and responsibly the number and spacing of their children and the right to adequate education and information in this respect for all couples.²⁷

Trade and economic development is the last item in the list of new priorities set out by Jhabvala in the headnote to this article. Jean Fourastie,

²³New York Times, July 16, 1972.

²⁴Luke T. Lee, *Law, Human Rights and Population; A Strategy For Action*, 12 VA. J. INT'L L., 309, 316 (April, 1972).

²⁵U.N. Population News Letter, April, 1968, at 44 (published by the Population Division of the U.N.), cited in n.24 (*supra* at 316).

²⁶Teheran Proclamation on Human Rights, UN, December A/CONF 23/41 (1968) para. 16.

²⁷See Resolution XVIII of Teheran Proclamation On Human Rights: Human Rights Aspects of Family Planning.

in an essay entitled "Remarks On Conditions of World Order,"²⁸ asserts that nearly all the nations of the world hold economic progress as their chief goal. The annealing of fissures in the world econosphere is really the only way to attain some modicum of stability—and, therefore, order in the world. (Econosphere = read the concept of a world-wide economic common denominator which ties all of the nations together).

Some of the reasons for this fragmentation are set out below. They start with the fact that the mineral resources necessary to keep the techno-structure of a developed country in high gear are getting scarce.²⁹ It follows that those countries that must safeguard their sources of supply, need armies, deployed worldwide in strategic places. In many such places, such armies are engaged in supporting repressive regimes against the best interests of the local populace.

With widely diffused protective armies overseas and the development of substantial offshore facilities (airports, roads, depots, warehouses, banks, a whole army of satellite hangers-on), the government supplying these armies and facilities puts its trade in an unbalanced position; it spends more money abroad than is coming in. This causes an outflow of gold preventing the particular nation from balancing its accounts in the world economy. When the outflow of gold runs to such a large degree that the nation can no longer afford this hemorrhage, it must, like England recently, let its currency float in the international monetary market (the pound was permitted to float for the first time since 1931). By thus devaluating, one country merely invites the next country to devalue *its* currency, thus leading to the chaos which the Dunbarton Oaks Agreement in 1944 tried to ameliorate, if not cure.

Now, when countries start to devalue their currencies in competition with each other, it is true that for a short while, there is a benefit to the local exporters who can sell more cheaply in foreign markets, but as the devaluation spreads from country to country (as it did in the 1930s) the entire world monetary system is destabilized. This also raises havoc with the domestic populace, the value of whose pensions and life savings are eroded, and reprisals set in.

Restrictive tariff laws are put on the books in an attempt to block imports; trade wars break out between the developed economies. Further, writes Eugene B. Rostow,³⁰ no Western country (save Japan) has thus far succeeded for long in achieving wage rates compatible with full employ-

²⁸DAEDALUS, Spring, 1966, p. 558, 63.

²⁹In the book *RESOURCES AND MAN* (W. H. Freeman, San Francisco), the geologist Thomas S. Lovering points out that all industrial nations, except probably the Soviet Union, are net importers of most of the minerals and ores used by them.

³⁰New York Times, September 5, 1971.

ment at stable prices. None has been willing, as yet, continues Mr. Rostow, to develop Keynes' proposal of fixed money wages, despite the obvious fact that rising money wages do not increase labor's share in national income. When wages increase at different rates in different countries, the modern system of fixed exchanges becomes unmanageable.

It is obvious to all that a new international monetary system, to improve the problems of restrictive trade, over-evalued currencies, insufficient foreign exchange for the developing countries, and too many American dollars in the hands of Germany, France and Japan—among many other problems, is on the agenda for the very near future. [Finance Ministers of the European Common Market are meeting currently (Spring, 1972) on ambitious plans to establish a single-currency area.] Here again, a new theory of cooperation and compromise, in solving a mutual and worldwide problem, will call for a wide extension of international legal concepts. A narrow, provincial outlook will never be able to solve the myriad of challenges which confront the monetary problem-solvers today.

A letter in the *New York Times*³¹ by Albert Szent-Gyorgyi, the Nobel Laureate, concerning the tenuous position in which we find ourselves, is titled "Fifteen Minutes to Zero." Two radars, he writes, attached to computers, are watching one another, one in the Soviet Union, the other in the United States. If the one sees missiles coming it must order the firing of bombs on its own side, to have them in the air before the other's bombs arrive. There are fifteen minutes left for decision, and there is no human being who can evaluate such a complex situation in such a short time.

Before computerized warfare, we realize, there was the opportunity to weigh and consider whether a particular warlike action or reaction would, in the long run, have either beneficial or detrimental consequences. Now, writes T. C. Schelling,³² we must compress a catastrophic war within the space of time during which a man can stay awake. This drastically changes the politics of war, the process of decision, the possibility of central control and restraint, the motivations of people in charge and the capacity to think and reflect while war is in progress.

Now, whether the *Gotterdammerung* of a nuclear holocaust can be avoided by the advent of the reign of the Rule of Law, whether this philosophy will supervene in time to save mankind from self-destruction, and whether the changing norms of international law can help in the dire straits in which the world finds itself—is the question, the answer to which is not readily at hand. Let us all fervently hope that we are still around when the decision is finally reached.

³¹September 25, 1970.

³²ARMS AND INFLUENCE, Yale University Press (1966), p. 20.