■ Today international law must be adjusted to contemporary interests and conditions to make it acceptable and useful.

INTERNATIONAL LAW IN ACTION

The problem of settling disputes is as old as man himself, and it is a matter in which the international lawyer has long had a keen interest. International law provides the rules which should govern any particular inter-state controversy, and international lawyers can try to provide the techniques whereby these rules stand the best chance of being obeyed. The degree to which they will be successful in any given situation will depend partly upon whether they have established suitable machinery, and partly upon how far the rules laid down by international law appear to support or conflict with the vital interests of the countries involved. It is frequently said that, when the chips are down, governments do not obey international law. The answer to this is that as they do obey it when it supports their interests, the task of the contemporary lawyer must therefore be a continual search for common interests, and a continual willingness to erect legal principles upon those common interests. This in turn involves admitting that certain old, traditional rules may havé served their usefulness and no longer represent the needs of the international community.

It should also be said that, unless their very existence is threatened, nations do often obey international law even when it runs against their short-term interests, because the sanction of reciprocity is here effective. For example, when the spy in the suitcase, destined for Egypt, was discovered at Rome airport last November, the Italian police did not keep the Arab diplomats concerned under arrest. No doubt it would have been to their advantage to retain them for prolonged questioning, but the law of diplomatic immunity prevented it, and the Italian Government was wise enough to know that there

might come the time when it, too, would wish to rely on the rules of diplomatic immunity.

The international community is comprised of powerful, sovereign states, and I have said that I believe that international law, to be effective, must be based as far as possible upon common interests. For the newer nations this presents an immediate difficulty. Many of them feel that the present system of international law is purely European and Christian in origin, developed without their participation, and protecting the interests only of the older, white states. There is, of course, something in this; modern international law is largely European in origin, and to some extent it reflects a distribution of power which no longer exists. On the other hand, legal historians can now show that in the seventeenth and early eighteenth centuries, even though not later, Europe — and especially England, Holland, France, and Spain — treated the countries with which they traded in the East as equals, and that international customs about how countries in dispute dealt with each other owed at least something to this experience.

Moreover the substance of international law does not have to be static. New legal arrangements may be made by treaties, and the new states are now in a position to negotiate these as equals; again, law is developed through time by the diplomatic practice of states, to which the Afro-Asian world will make a substantial contribution; and these countries are also represented on the International Law Commission, a body specifically set up by the U.N. General Assembly to promote the development of international law.

So much for the rules themselves. But what about the techniques and methods of settling disputes? Some people want to draw a line here between 'political' and 'legal' disputes, but I do not think that this is possible. Virtually all disputes are both political and legal in nature, and in theory, at least, the International Court of Justice could be used to settle many of them. But the newer Afro-Asian nations have

shown a marked reluctance to adopt this procedure, for reasons completely apart from the delay that the legal process involves. The jurisdiction of the court is based upon consent, which may be given *ad hoc* in a specific case; or in advance in a particular treaty providing for reference to the Court if its terms become disputed; or by accepting the so-called 'optional clause'.

This clause – Article 36 of the Court's statute – provides that states may declare that they recognize the jurisdiction of the Court, in relation to any other state which also accepts the Court's jurisdiction. All the Efta countries, all the Common Market countries, Scandinavia, and the United States, have accepted the Court's jurisdiction, with or without reservations. Yet in the Middle East only Israel – and, since Suez, the United Arab Republic – have accepted the Court's jurisdiction. In non-white Africa the list only extends to Liberia, Ethiopia, Sudan, Somalia, Uganda, Ghana, and Tunisia: a list which includes not one of the French-speaking African states. Of the Asian countries, only Cambodia, India, Japan, Turkey, Pakistan, and the Philippines agree to the Court's jurisdiction.

The reason is not hard to find: the newer nations fear that the Court might apply rules of law which do not fully take account of their aspirations. While by and large the rules of traditional international law – for example, airspace, diplomatic immunities, state sovereignty – are acceptable, there remains a range of questions, including the regime of the territorial sea, the validity of treaty obligations formerly assumed on their behalf by colonial powers, and the nationalization of property, upon which they are unwilling to accept the traditional law. In this last, for example, the old states point to the traditional rule of law by which a state expropriating the property of aliens is bound to pay compensation which is 'adequate, prompt, and effective'; while some newly independent nations assert that they must have a truly independent economic policy, which would not in

their present poverty be possible if their freedom to nationalize were fettered by these legal requirements.

On occasion one hears it said that the newer nations are not interested in going to the World Court, because the judges there will be biased against them. I do not believe the accusation is justified, and nor do I believe that the new nations really believe it. The fifteen judges on the Court are by no means limited to western Europe or white Commonwealth: at the present time the only ones who could be so classified are the judges from Australia, the United Kingdom, the United States, Greece, France, and Italy. The other nine judges come from Pakistan, Senegal, Mexico, Peru, Japan, the United Arab Republic, Russia, Poland, and China.

All the evidence, it seems to me, goes towards the belief that the reluctance of the newer nations to use the Court to settle disputes has nothing to do with impartiality of the judges, but rather reflects a fear that the rules the Court would apply are not in their interests. The only long-term solution lies in the new nations and older nations collaborating in developing the law and making it as fair as possible to all parties, using the means I suggested before — treaty-making, diplomatic practice, and the International Law Commission. The important point is this: the non-aligned nations have no doctrinal objection to recourse to the judicial process as a means of settling disputes. Indeed, in a limited number of cases they have done so — Cameroon recently brought a case against the United Kingdom concerning the conduct of the plebiscite in the former Northern Cameroons; and at this moment Ethiopia and Liberia are engaged in litigation against South Africa over South-West Africa. Even more important, the non-aligned nations have no objection in principle to third-party settlements of disputes whether that third party be an international court, or an arbitrator, or a mediator, or a United Nations fact-finding mission.

It is here that we notice a great contrast with the position of the communist nations. The dislike of the So-

viet Union for the International Court of Justice and for all third-party settlement is rooted in dogma and in ideology, and runs very deep indeed. How this has come about is a complex question, and one worth looking at more closely.

According to Leninist theory, the world is now in a transitional period, during which revolution will transform capitalism into communism. During this period international law is acceptable —but only in so far as it is not 'reactionary', and will not impede progress towards the classless society. Unhappily, it hardly needs adding that what is or is not 'reactionary' international law is a matter solely for determination by the Marxists themselves.

In addition to this selective attitude towards international law, the communists have been urging recognition of what they term 'legal principles of peaceful coexistence'. The principles of coexistence, we are told are, to use their phrase, 'qualitatively higher' than the existing rules of international law. These principles, promoted actively by the communists since they received approval in Moscow in 1956, have a curious origin. They are based on the five principles of Panch Shila, originally set out in a treaty between India and China in 1954, and later copied in treaties throughout the Far East. They make interesting reading: the first principle is 'mutual respect for territorial integrity and sovereignty'; the second is 'mutual non-aggression'; the third, 'mutual non-interference in internal affairs'; and the fourth, 'equality and mutual benefits'. None of these is new or revolutionary — indeed, all are to be found in the United Nations Charter. All that is new about them is that they are being promoted as something special, something not thought of before. The fifth principle of peaceful coexistence *is* something of a surprise, however, because it is 'peaceful coexistence'. Thus 'peaceful coexistence' is both a principle and the concept embracing all the principles.

Added to these five principles are some others which have emerged in detailed discussions held at the United

Nations. They include general and complete disarmament (a noble aspiration, but hardly a rule of international law), and significantly, the duty of states to settle disputes by direct negotiation.

Principles of peaceful coexistence

What are these 'principles of peaceful coexistence' all about, and why are they being promoted? The nuclear stalemate, the fears caused by the prospect of an enlarged nuclear club, the efforts of both East and West to woo the non-aligned nations, and above all the growing preeminence of China in Asia, provide cogent reasons for urging 'peaceful coexistence'. If world events dictate this coexistence, then one might as well try to extract the most favourable conditions possible. The Russians have thus included the old United Nations Charter rules of non-aggression, sovereign equality, and non-interference in the list of 'new principles of coexistence', in the hope of rewriting them and interpreting them in such a way as to advance their interests. The U.N. discussions on these topics have made it clear, for example, that, in the Russian view, 'non-intervention' need not necessarily exclude support for so-called 'wars of national liberation'. Some principles — such as general and complete disarmament — have been thrown in for political effect; while others, such as the duty to negotiate bilaterally, go to the whole heart of the legal techniques for settling disputes.

The U.N. Charter provides a variety of methods for settling disputes: mediation, or conciliation, or the use of good offices, or arbitration; and of course resort to the International Court. The Russians are making it clear that they reject all of these methods, and that a 'higher rule of law', which they must obey — namely, the principles of peaceful coexistence — requires that they only engage in direct negotiation. Third-party settlement is out.

Communist opposition

There has long been communist opposition to using the International Court of Justice: no communist nation has ever appeared in litigation before the Court, even though both a Russian

and Polish judge of great distinction sit upon the bench. The Soviet Union and her allies have felt outnumbered in the international community, and consider that their interests may be protected by not subjecting themselves to majority decision. For them, law should be made by treaties resulting from bilateral negotiation, and not from the decisions of judges. Equally unacceptable are the attempts of majority of nations at the United Nations to impose their views, and it is this which lies behind the Russian opposition to U.N. forces as a means of settling disputes. The U.N. force in Gaza — UNEF — is regarded as undesirable because it was set up by the Assembly, where the majority vote obtains. The U.N. force in the Congo, although set up by the Security Council with the approval of Russia, was paid for through assessments made by majority vote in the Assembly. Russia has refused to regard herself as bound to contribute.

The indication now is that the Russian view is hardening on all forms of third-party, impartial settlement of disputes. Independent mediators or arbitrators are unacceptable because, as Mr. Khrushchev put it, 'while there may be neutral nations there are no neutral men'. This discouraging attitude has now been extended further by communist opposition to suggestions that the United Nations should set up a fact-finding body to investigate particular disputes. Russia has indicated that fact-finding by the U.N. is almost as bad as third-party settlement of a quarrel.

What does all this mean in practical terms? It does not necessarily mean that Russia is against disputes being resolved: in Kashmir, for example, she voted with the United States and Britain in calling for a cease-fire to be supervised by the United Nations. But where her own interests are directly involved — and Berlin and Vietnam come immediately to mind — there is every indication that she will agree only to direct negotiation. Furthermore, even on Kashmir she has recently shown herself reluctant to give the

Secretary General any real authority. All of this, it must be admitted, makes it look as though the role of international law in settling East-West disputes will be small.

I am more optimistic that international law can play a useful part in settling quarrels that involve the developing countries of Africa, Asia, and Latin America. With a little give and take on both sides, progress is possible. The recent decision by the United Kingdom Government to accept the jurisdiction of the European Court is most welcome; though America's acceptance of the jurisdiction of the International Court is subject to conditions which make it almost meaningless. — *Rosalyn Higgins in The Listener, Dec.* 1965.

QUICK THINKING

When Paderewski was visiting Boston some years ago he was approached by a bootblack who called, "Shine?"

The great pianist looked down at the youth whose face was streaked with grime and said, "No, my lad, but if you will wash your face I will give you a quarter."

"All right!" exclaimed the boy looking sharply at him. He ran to a nearby fountain where he made his ablutions.

When he returned, Paderewski held out the quarter. The boy took it and then returned it gravely, saying, "Here, Mister, you take it yourself and get your hair cut."