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United Nations Charter and the World Court

T. O. ELIAS

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The United Nations Charter and the World Court

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It ought also to be noted that Chapter Twelve has been added in order to bring the subject matter of the book up to date concerning one of the main points of the Court – its jurisdiction, and to put the essential role of the Court in its proper perspective as the architect of the search for peace and justice in the world.

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CHAPTER ONE

PREFATORY INTRODUCTION

The United Nations Charter, coming as it does at the end of the Second World War, would seem to envisage an organisation wider and more resilient than the old League of Nations that was given after the First World War. It elaborates a certain number of principles and promotes ideas of human aspiration largely engendered by the experiences of the Second World War based on man's inhumanity to man and the desire, as far as possible, to ameliorate the human condition as well as ensure that certain indignities do not recall in the new world.

Thus in Article 7 has been enshrined some seven principles the first of which envisages the General Assembly of the United Nations as a forum for the propagation and elaboration of the noblest ideas of government under law; a Security Council given the functions, together with the General Assembly, of securing international peace and security by taking all necessary enforcement action to that end, especially in enforcing judgments of the World Court, given or laid down between the parties who have accepted the jurisdiction of the Court according to Article 96 of the Charter, but, as the World Court held in the *Certain Expenses of the United Nations* case, without endowing the Security Council with any monopoly in this task of organizing world peace, and without empowering it with certain safeguards required for the overall world security and rule of law; establishing an Economic and Social Council for the organization and improvement of the economic and social conditions in the field of labour, wealth and welfare of mankind so that, by mutual cooperation and understanding of one another's problems, a new Economic Order might be ensured to guarantee orderly human progress in order to replace the economic and chaotic conditions that previously governed the Second World War. One of the conditions that complemented the idea of colonial dependency, a Trusteeship Council, was not forgotten in the general plan of decolonization of the United Nations Organization and was provided for so that the system should be gradually removed from the new world of free States constituting the new United Nations and who were to constitute the new world order which must replace the old disorder. In order to ensure world peace and security, guaranteed so loudly in the preambular paragraphs of the Charter, as well as in the first Chapter on "Purposes and Principles", provision next assured the establishment, in Article 92, of the International Court of Justice as "the principal judicial organ of the United Nations", functioning in accordance with the annexed Statute, based upon the Statute of the Permanent

Court of International Justice and forming an integral part of the Charter; and, finally, establishing an overall Secretariat under which the entire Organisation should function in order to ensure the new world order and peace, to be run under rules and regulations agreed to by the General Assembly and the Security Council and also to function under a United Nations Administrative Tribunal subject to the final authority of the International Court of Justice in its operation. Such was the vision of the founders of the United Nations in 1945 in San Francisco and such has been the aspiration as well as the inspiration of mankind all over the world.

Thus it has been the governing principle of the new contemporary international law, that its doctrine of universality become its main shibboleth and governing characteristic and main purpose. Universality, rather than limited application within certain historical areas, must now be the catchword in the expanding frontiers of international law under the United Nations Charter.

Following upon the first fifty years or so of experiment and determined effort along the lines outlined in Article 7 of the Charter and attempted to be outlined in the following provisions of the Charter, as proffered by various officials and institutions, the Secretary-General and his advisers decided to invite thirteen "special experts" to give their views of the new organization[1] and of contemporary international law. Particularly significant was the aforementioned volume, including "The Expanding Frontiers of International Law", my own contribution. The other authors dealt with subjects of international law which in their various ways came to loom large in the development and significance of the subject at the United Nations and has worn on since 1945. It is also significant to relate that two of the original thirteen special experts invited by the United Nations Organization itself to contribute what may be regarded as the quintessence of the problems of contemporary international law should later become presidents of the International Court of Justice[2], and that, what is more, their views have largely coincided with those embodied in contemporary international law, both customary and statutory.

It has probably been a happy coincidence that this unanticipated development of the course of modern international law since 1945 has, in some measure, been followed by this book. It is to some extent true to say that there has been much similarity in the series of studies which have made-up the five publications from 1972 to the present. It is an interesting reflection that the subject-matter, as well as the development of the idea to be found in *Africa*

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1. See *International Law in a Changing World*, Oceana Publications, Inc., (New York, 1963), published in cooperation with the United Nations. The authors are: C. Wilfred Jenks, Roberto Ago, Oscar Schachter, Andre Gros, Jimenez de Arechaga, Arthur H. Dean, Grigori I. Tunkin, Paul Guggenheim, Radhabinod Pal, T.O. Elias, Leslie Munro,- Jean S. Pictet and Dag Hammarskjold.
2. Judge Jimenez de Arechaga (Uruguay) and the present author, Judge Taslim O. Elias (Nigeria).

and the Development of International Law, The Modern Law of Treaties, New Horizons in Contemporary International Law, The International Court of Justice and Some Contemporary Problems and *The Charter of the United Nations and the World Court* will be found to trace the origin and development of contemporary international law from the era of decolonization and emergence of the new States of the world in 1945 through the significant elaboration of the Law of Treaties, which underlay the enlargement of the United Nations itself; the new horizons that modern international law open up in relations between States and the new principles that were forged in international relations to govern these new members of the human family, problems which its principal judicial organ has been called upon in some twenty-five years of the existence of the new world to consider and to adjudicate and, finally, the account, though in some ways incomplete, of the nature and extent of the United Nations Organisation itself in tackling its task up to now. Each study will contain a summary of the various aspects of contemporary international law considered in these five volumes.

II. The New States

Probably the most significant event in the development of the modern world has been the emergence of the new States in the United Nations. The enormous growth in number, from fifty-one at its beginning in 1945 to about one hundred and fifty-nine now, less than half a century later, has been remarkable and noteworthy, marking an unprecedented evolution of ideas and growth in human affairs. Under customary international law it is certainly necessary to remember that up to a few years ago we generally regarded international law as belonging to an era which began shortly after the Treaty of Westphalia of 1648, following the break-up of Western Europe which preceded the birth of new nations out of old, almost monolithic Christendom, the cradle of Western civilization. Indeed, it would be true to say that for the next decade or two the position remained much the same until after the Franco-German War of 1870 and probably until about 1911. Kingdoms and empires succeeded one another after the break up, between 1700 and about 1911, and they were governed after a fashion by rules of international behaviour and international relations partly governed by age-old religious scruples and prevailing human political and economic ideas of world order.

Then events evolved almost unprecedentedly, within 1911 and 1914, to produce a change in the climate of world opinion as well as in government and State relations of the big States, leading to the First World War which was, by a twist of world fortune, sparked off in Sarajevo. The inevitable aftermath was the creation of the League of Nations under the League Council, in an attempt to provide the machinery for the administration of the post-war world preceding 1945. It is a great leap, from 1914 to 1945, which legal gap was filled by the Permanent Court of International Justice, established for the purpose of

achieving international peace and security under a kind of international rule of law such as was known and understood in the prevailing circumstances of the world at that time.

Looking back upon some of the institutions and arrangements established and administered, such as the International Labour Organisation in 1919, the Permanent Court of International Justice in 1922, and, not less, the League Council, it would be invidious not to praise the efforts and achievements of the League of Nations at its best.

It would, however, be necessary to recognize the extent of its achievements as well as its limitations, as an instrument for world order and human welfare, especially after the experience of the Second World War through which mankind passed. It is in this light that we turn to the United Nations Organisation into which the new States were admitted after 1945. These new States came from Africa, Asia, the Middle East, South-East Asia, as well as from Latin America, constituting what is now generally termed the Third World within the context of the United Nations and contemporary international law. In actual number they formed much more than a third of all the States and constitute slightly more than two-thirds of the membership of the United Nations. It would be idle not to recognize at once that, despite the abundance in numbers the Third World still has a leeway to make up as compared to the Great Powers in respect of technical and scientific contributions within the framework of the United Nations. No doubt they have made vociferous and sometimes significant contributions in the world of ideas which will certainly increase both in volume and intensity as the work of the United Nations progresses, but it is reasonable to say that they have yet to make the grade.

In this respect we must not underrate the world circumstances in Asia, Africa and Latin America in the years previous to the Second World War and yet the "ages" were not as "dark" for them as some modernists often make out. They too lived an international life after a fashion, some of which has been chronicled for us in the writings of publicists, including the great travels and adventures between West and North Africa as well as between these areas of the world and many parts of Arabia and India. International relations, at some kind of ambassadorial level were conducted since the eleventh century, including the exchange of personal and, in some cases, written communications between themselves. As the number of recent writings about some of these events increases in the so-called Third World, it would certainly be wise and prudent to expect an increase in the knowledge of world affairs in the old pre-modern States.[3]

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3. See, e.g., E.W., Bovill *The Golden Trade of the Moors*, 1958; Oliver and Fage *A Short History of Africa*, London, 1962; Basil Davidson *The Africans: An Entry into Cultural History;* Longmans, London 1969; *R. Robinson, J. Gallagher and A. Denny Africa as the Victorious: The Official Mind of Imperialism, Macmillan* & Co. Ltd., London, 1961; T. O. Elias, in *Foro International*, Mexico (Special Number) Oct. 1970, I. Bajatou *Some Newly Established Asian States and the Development of Int. Law*, 1961; R. P. Anand *A History of the Law of Nations in the East Indies*. Oxford, 1967; S. H. Alexandrowics. *The European-African Confrontation 1973.*

Just now we see evidence, certainly encouraging evidence, of what the new States could do by way of contributions within and without the framework of the United Nations, since it has not been all blank and insignificant, even thus far. For example, steps have been taken, earlier on in the organization of the United Nations, for the enlargement of the composition of certain organs and bodies. Thus the General Assembly itself is in continuous structural evolution since its membership has never remained constant but has enlarged as new nations attain Statehood, always subject to the conditions imposed by Article 4 of the Charter, and joined the Organization as provided in Article 9(1) thereof. Similarly, as regards the other United Nations organs, like the Security Council which, under Article 24, has responsibility for the maintenance of international peace and security, and the decisions, which Member States have pledged themselves under Article 25 to accept and carry out, the new States of Africa and Asia as well as the Latin American States and the Soviet Group of States, have, from the beginning, fought hard for the enlargement of the membership of this powerful organ and have participated in accepting responsibility for human rights and fundamental freedoms and for the preparation of draft conventions on all matters falling under its competence; it also has innumerable responsibilities under the Economic and Social Council. It is important to remember the increase in the number of African and Asian members of the Trusteeship Council which has greatly helped in the attainment of independence or self- determination by reducing to three the number of Trust Territories to attain that status and within a reasonable period of time. It is interesting to note that, on January 6, 1960, there was no African Judge of the International Court of Justice apart from the representative of the United Arab Republic; Asia, had two – Pakistan and China; Latin America had four – Uruguay, Argentina, Mexico and Panama; Eastern Europe had three – the USSR, Poland and Greece; Western Europe had five – the United Kingdom, the United States of America, Norway, France and Australia. Before the election of Judges from Dahomey, Spain and Uruguay in October 1968, the Court was composed as follows: Africa – 2 (Senegal and Nigeria); Asia – 4 (Japan, Pakistan, Lebanon and the Philippines); Latin America – 2 (Peru and Mexico); Eastern Europe – 2 (USSR and Poland); and Western Europe and others – 5 (UK, USA, France, Italy and Sweden). In the result, Africa, Asia and Latin America came to have three judges each; Eastern Europe had two and Western Europe and others had five. It may thus be seen that what the new States achieved has not been at that time an enlargement of the membership of the International Court of Justice as a whole, but an enlargement of their representation within the statutory limit of fifteen members. There was an internal re-distribution of seats so as more truly to reflect "the main forms of civilization and of the principal legal systems of the world" as required by Article 9 of the Charter.

Again, the General Assembly, under Article 13 of the Charter, undertook to

promote the codification and progressive development of international law, to establish the International Law Commission in 1949, with a membership of fifteen, now increased to thirty-four, and consisting of persons "with recognized competence in international law" and representing as a whole "the main forms of civilization and of the principal legal systems of the world". It has, since its establishment, prepared conventions on a variety of subjects such as those on Diplomatic Intercourse, Consular Relations, the First Law of the Sea, Special Missions and The Law of Treaties, all of which contain important elements of the progressive development of international law. These and other pieces of law reform are naturally welcome, especially to the new States, and no doubt to others whose reservation to traditional international law had been largely induced by the presence of the vitiating elements of fraud, error and coercion in the making of treaties, as well as rendering invalid all international agreements which were against *jus cogens,* a peremptory norm of general international law from which nations may not derogate. Through the work of the new nations within the framework of the United Nations has been achieved the widening of the scope and functions of certain organs. For example, the General Assembly has, because of the almost universal representation in its membership, been exercising functions not specifically assigned to it under the Charter. Thus, in the *Certain Expenses of the United Nations* case,[14] the Court boldly approved of its activities and expenditure in the Belgian Congo and denied the monopoly claimed by the Security Council for such purposes, mostly because of the overwhelming majority in the membership of the General Assembly, i.e. the new Member States. But that mere strength of numbers in membership is not always an advantage is shown by the fact that since 1965 when the General Assembly adopted an amendment to Article 109 of the Charter which provides for a general conference of Member States for the purpose of reviewing the Charter to be held at a date and place to be fixed by a two-thirds vote of the General Assembly and by a vote of any nine members (formerly seven) of the Security Council, it has yet to effect this purpose.

It is possible to demonstrate the various other ways in which the new States have demonstrated their ability to make important contributions to the work of the United Nations; for example, its important contribution to UNITAR in the process of training and research, especially for the benefit of the new States; mention may also be made of the United Nations Commission on Human Rights, the Commission on the Status of Women and other bodies under the general auspices of ECOSOC. Even a new branch of law, engendered by decolonization and wars of national liberation has grown up as International

4. A Cassese: *United Nations Peace-Keeping: Legal Essays*, Sijthoff & Northhoff, 1978.

Humanitarian Law and the contribution of the new States has not been unimpressive.[5]

Other important topics relating to the new States concern specialized issues like the Charter of the Organisation of African Unity and aspects of the law of foreign investments in Africa and other similar countries among the new States. But probably enough has been said to show the preliminary character of this book as illustrating the story of the development of contemporary international law beginning with the new States.

An ancillary but important contribution of the United Nations relating to the Congo was not only the quasi-military activities to pacify the Congo as a whole, probably the most important was the establishment by the United Nations of a Constitution Drafting Committee of three, consisting of Nigeria, with myself as Chairman, a professor from Zurich, Switzerland, and an Italian professor. We were sent to Leopoldville from July to September, 1961, and again from July to September, 1962, to help draft the Congo Independence Constitution. This Constitution, which at one stage was considered by the Committee as possibly a Federal one for the six provinces of the Congo, was eventually adopted by the Committee as a unitary one, maintaining the position under the Belgian arrangement. Kasavubu was the President and was constantly consulted by the Committee, while Mobutu acted as unofficial consultant and adviser, he being only a major in the Congolese army at that time. It is understood that the Constitution drafted by this United Nations Committee has continued to play a part in the continuing political arrangement of the country for many years until now.

III. The Great International Conventions Culminating in the Law of Treaties

The evolution of the United Nations in the first twenty years or so can be said to have nurtured as well as to have been nurtured by the emergence of new States and growth of new ideas of human living almost unprecedented in the history of the world up to 1945. What is most significant of this period has been the stupendous challenge posed by two great problems; on the one hand decolonization, which has been a concomitant of the instrument of global Committees to tackle the problems of self-determination of peoples and, on the other, the eradication of the prevailing world-wide phenomenon of racial discrimination which followed in its wake. It is impossible to emphasize sufficient-

5. See generally, Felix Chuks Okoye, *International Law and the New African States*, Sweet & Maxwell, London, 1972; T.O. Elias, *Africa and the Development of International Law*, Sijthoff, Leiden, 1972, Chapter 3; Chapter 4 of this book contains a title "Modern International Law", which includes a good deal of much that is new in contemporary international law, at pages 63 to 87; also, Jean Pictet, *Development and Principles of International Humanitarian Law*, 1985.