

SEPARATE OPINION OF JUDGE AMMOUN

[*Translation*]

1. At the beginning of his separate opinion in the *Corfu Channel* case, Judge A. Alvarez, alluding to the fundamental changes which have taken place in every sphere of human activity in recent decades, and especially in international affairs and international law, wrote:

“It is therefore necessary to consider what is the present state of that law. We must examine it in connection with the questions raised by the dispute submitted to the Court. That does not mean that this Court should pronounce on all the legal issues which those questions connote; but it seems desirable that one of the judges, at least, should examine them, and that is the task I have set myself in this individual opinion.” (*I.C.J. Reports 1949*, p. 39.)

I subscribe to this statement, the more so since the legal questions raised by the case which has been submitted to the Court cannot but feel the effects of the great renovating movement in international law which is evident in the relations between nations and in the activities of international institutions. The development which the modern world is witnessing affects the very structures of international law—including the concept of sovereignty—and even its main sources, namely treaties, custom and the general principles of law recognized by the nations. More than one concept, principle or legal norm of the older classical law has been called into question anew since international co-operation has become common practice, since law has become imbued with morality, and—a point of particular importance—since a considerable number of States have acquired independence and sovereignty, or have siezed them by main force, and have entered into the world community of nations. Linked to this development, which it will be necessary to touch upon, to this dynamism of the law which, it has been said, is a continual creation, is the idea which must be formed of the international responsibility of States, and its corollary, diplomatic protection, upon which the Court is called upon to pronounce.

2. In order to make an exhaustive study of Belgium's *jus standi in judicio* which had been the subject of a preliminary objection, it was recognized by the Judgment of 24 July 1964 as indispensable to refer to certain points of fact and of law relating to the merits of the case, although *jus standi* does not thereby lose its character as an objection.

Belgium has however questioned whether, in view of the subject of the

dispute between the Parties, which it contends deals only with the conditions and limits of the international responsibility of a State towards the foreign shareholders in a commercial holding company, it is possible to speak of a preliminary objection on this point. In other words, what is being debated as a preliminary issue is, it is said, international responsibility, rather than diplomatic protection.

In order to reply to this question, it is sufficient to add to the arguments appearing in the aforementioned Judgment that the right of diplomatic protection, so far as it materializes in a legal action, is to be distinguished from the substantive right which the applicant State claims to have re-established. The question thus involves the distinction between the subject-matter of the action and the subject-matter of the right claimed, a distinction about which legal writers are generally in agreement¹. An objection, considered in opposition to the setting in motion of a legal action, should not be confused with a defence concerning the right at issue. There would in fact be an internal contradiction in the fact of confusing two different things in the concept of a claim, namely its admissibility and its validity. Proof that an applicant has the status required to exercise legal power, or that he has a right entitling him to bring the matter before a court, may, as in the present case, involve raising questions which are not unrelated to the merits, but it cannot have any influence on the nature of the action, or the nature of the objection to the exercise thereof.

At all events, the joinder of the objection to the merits justifies, so far as this may be necessary, extending the present study beyond diplomatic protection to include international responsibility.

3. That much having been said, the solution to the problem of *jus standi*, which calls in question the principle of international responsibility and the rules of diplomatic and judicial protection designed to give effect to that principle, is clearly linked to the overall problem of the development of modern international law in the face of recent transformations in international life. This is a burning question of today, the more complex in that it is conditioned by the essential needs of various peoples, ever since nations have emerged from dependence with interests which are manifold and often difficult to reconcile among themselves or with those of the other nations of the world. This problem must therefore not be lost sight of throughout the present opinion.

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The radical transformations which have occurred in economic affairs in the last half-century, the constantly increasing expansion which has marked the recent decades in a world undergoing rapid social and political development, and the new problems to which these changes have given rise, call for a corresponding development of juridical structures. The

¹ Solus and Perrot, *Droit judiciaire privé*, Vol. I, pp. 94-107, and the Italian and German writers on Continental law to whom they refer.

law, a rigid conservative kind of law, cannot adapt the emerging reality to sacrosanct rules rooted in the remote past. It must, on the contrary, adapt itself to the imperious needs of an international society which is moving towards universalism; it must adapt itself thereto in order to avoid confrontation between peoples, and lest it lose its footing in the upward march of progress towards better justice and the common aspiration towards the ideals of prosperity and peace.

It is well known that the established lead taken by facts and events over the law has had to be corrected more than once in the past². In the sphere of international law, the adaptation of law to factual situations, rendered necessary by the political change which had world-wide repercussions in the middle of this century, was largely accomplished by the solemn enunciation of the principles and purposes of the United Nations. The implementation of these has however been more effective within the political organs of the world Organization than it has been in the domain of international tribunals where problems have arisen on the legal level as a result of the breach between law and social reality. Thus it is in the interests of justice and of law that these problems should be approached with a clear vision of the meaning of history and an overall picture of a world from which no-one should henceforth be excluded, no matter how late he has come on the scene.

This situation could however not escape the foresight of the International Court of Justice. Thus the Advisory Opinion which it delivered in 1949, in connection with the reparation for injuries suffered in the service of the United Nations, must be given its full significance; it stated that: "Throughout its history, the development of international law has been influenced by the requirements of international life³."

This observation is more topical than ever. International life is being influenced by those States which have now rounded out the circle of the community of nations, increasing the number thereof almost threefold. International law cannot leave out of account the aspirations of the world in which henceforth it has its existence, and it is significant that these States are manifesting a certain amount of impatience tinged with apprehension.

We shall see later what their attitude has been with regard to the rules concerning the responsibility of States and diplomatic protection.

² In Rome, by the intervention of the Praetor whose edict, idealistic in outlook, supplemented the formalistic quiritary law, which had lagged behind the development of the quasi-international structures of the Empire; by the blossoming of Moslem law, freed from all outgrown formalism and all illusory symbolism, which set its seal on the basic transformation of legal concepts in most of the countries under its sway; and nearer to our own day, in the United Kingdom and those countries which adopted its law, with the institution of equity which plays an important part in making up for the insufficiencies of the common law; lastly, by the complete renewal of law in the Socialist countries in order to keep pace with the advent of a new ideology and a new way of life which have broken radically with the past.

³ *I.C.J. Reports 1949*, p. 178.

4. The problems confronting the world, now that a large-scale political emancipation of the dependent peoples has been carried out, are those relating to the establishment of economic and social justice and to development. According to one of the great African leaders, President L. S. Senghor, "legal independence without economic independence is but a new form of dependency, worse than the first because it is less obvious"⁴. The Director-General of FAO recently warned the world about the dangers of a world-wide famine in the next 24 to 28 years, unless production is increased in the developing countries. And more recently the Symposium of African archbishops and bishops, which was brought to a close on 1 August 1969 by the Sovereign Pontiff, roundly denounced the increase in the riches of some through the exploitation of the poverty of others⁵.

This problem arises particularly in connection with the great economic, commercial and financial undertakings which have multiplied and grown beyond the confines of their respective countries in such a way as to necessitate a parallel development of international law. International law should certainly avoid trying to fit their action into outworn forms; it should work to bring about a just protection of their interests in the bitter but beneficial struggle of international competition⁶.

On the other hand, the law should be no less concerned with the interests of the countries to which those powerful undertakings and the companies controlling them—trusts or holding companies of pyramidal structure—extend their activities, thereby certainly rendering appreciable

⁴ Extract from his address to the United Nations General Assembly in New York on 31 October 1961 (Official documents of the General Assembly, Plenary Meetings, Vol. II, p. 540).

See in this connection I. Brownlie, *Principles of Public International Law*, 1966, p. 485. He writes: "... The concept of self-determination has been applied in the different context of economic self-determination."

G. I. Tunkin considers that: "... respect for State sovereignty finds itself compatible with ... a *de facto* dependence of the smaller States upon the bigger ones, since their economic dependence means that their sovereignty is merely formal". (*Droit international public*, published in co-operation with the Centre français de la recherche scientifique, p. 237 [Translation by the Registry].)

⁵ *Le Monde*, 2 August 1969.

Reference may also be made to the conclusions of E. McWhinney who writes:

"It becomes clear that the development and completion of a viable system of international *ordre public* in the last third of the century will depend to a considerable extent upon the efforts made to bridge the gap in prosperity that exists between on the one hand the countries of the Soviet bloc and the West, and the Third World on the other" (Latin America, Africa and Asia). *Revue générale de droit international public*, 1968, p. 341. [Translation by the Registry].

⁶ Cf. what was said by Mr. Haroldo Valladão, the then President of the Session of the Institut de droit international, referring to—

"the power of the international companies with investments in the developing countries, [which] has given rise to a special treatment for such investments". (*Annuaire de l'Institut de droit international*, 1967, II, p. 432 [Translation by the Registry].)

service to the economy of the host countries, but also exposing that weaker economy to dangers which it ought to be spared. The States of the Third World showed insight when they agreed to insert in the 1960 Declaration on the Grant of Independence the provision:

“affirming that peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law”. (UN Doc. A/4684, p. 66.)

One cannot help thinking, in this connection, of the large companies which continue to undertake the exploitation of the natural resources of the less developed countries, including their agricultural, timber and mineral wealth, their oil production, and also their transport and other public or municipal services. An equitable sharing of the profits is mandatory. The anxieties of the countries whose resources are being exploited by means of foreign technical and financial co-operation are deeply felt, as will be seen below in connection with the application of diplomatic protection and its possible extension, as in the present case, to new situations, with a view to the increased protection of foreign interests.

The development of international law cannot therefore have as its sole or principal object the protection of foreign nationals and of the international economic activities of the industrialized Powers. It must set itself an objective which is more comprehensive and more just, and a more equitable and more humanitarian ideal, in which the material and intangible interests of the weaker and deprived peoples are factors to be taken into account.

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5. In this connection, it is essential to stress the trends of Latin-American law and that of Asia and Africa, and their undeniable influence on the development of traditional international law.

It seems indeed that among the principles and norms which have sprung from the regional law peculiar to Latin America are the norms and principles whose aim is to protect countries in that part of the world against the more powerful industrialized States of North America and Europe.

An Afro-Asian law also seems to be developing as a result of the same preoccupations, springing from the same causes. In the field of the responsibility of States and of diplomatic protection, the same points of view have been adopted in the countries of the three continents, thus initiating a form of co-operation which will not be of slight effect on the renewal of law ^{6a}.

^{6a} This co-operation received an initial implementation, as regards the effect of

The first reaction to the rules of traditional law came however from the countries of Latin America; witness the vehement speech made by Mr. Seijas, a former Venezuelan minister, at the 1891 Session of the Institut de droit international at Hamburg, which was no mere display of bad temper. Evidence of this too is the appearance of the Calvo Clause, excluding recourse to international adjudication in favour of internal remedies, on which the jurists of Latin America have never compromised, because of their lack of confidence in diplomatic protection as conceived by traditional law and the practices of western nations. This reaction on the part of the Latin American States would, moreover, explain their opposition from 1948 onwards to the draft insurance guarantee agreement proposed by the United States, providing for the exercise of diplomatic protection by that power without local remedies having been exhausted⁷.

This attitude on the part of the Hispanic States, which is shared by the Afro-Asian States, is the more readily understandable if the extra-legal forms and means to which diplomatic protection formerly had recourse are borne in mind. It will be recalled that the claims of great States and their nationals abroad often led, during the period preceding the renewal of the law consequent upon two world wars and the creation of a means of international adjudication, to acute conflicts and to acts of deliberate violence going so far as armed intervention and permanent occupation⁸, or to demonstrations of force⁹, against which the Drago doctrine, which was endorsed by the Pan-American Conference of 1906 and has since become one of the basic principles of Latin American international law, has, since 1926, reacted not without success. Recourse to force, subject to an offer of arbitration, was nevertheless tolerated by The Hague Peace Conference of 1907, which admitted intervention *sub modo* by virtue of the Porter Convention, against which Convention Drago and his Latin American colleagues vainly protested at the Conference. This was not the

economic facts on international law, at the United Nations Conference on Trade and Development held in Geneva in 1964, where 77 Latin American, African and Asian States resolved to meet and negotiate through the intermediary of common spokesmen.

⁷ Mexico had been forced to agree in the 1923 Convention with the United States not to avail itself of the condition of the prior exhaustion of local remedies.

See in this connection the relevant speeches to the Institut de droit international by Mr. Haroldo Valladao and Mr. Kamil Yasseen and by Mr. Jiménez de Aréchaga, who rightly points to the discrimination which the exclusion of prior recourse to local remedies would entail (*Annuaire de l'Institut de droit international*, 1967, II pp. 431, 432, 435-436).

⁸ Occupation of China's western provinces—which brought on the Boxer Rebellion of 1900, of Tunisia from 1881 to 1956, of Egypt from 1882 to 1954 and of Mexico from 1859 to 1866, the conquest of which took the form of the installation of the ephemeral Mexican Empire (P. C. Jessup, *A Modern Law of Nations*, p. 113).

⁹ Against more than one Latin American State: Argentina, Paraguay, Mexico, Brazil, Cuba, Nicaragua, Colombia, Haiti, the Dominican Republic, Venezuela, etc. The Ottoman Empire was also an example (referred to in footnote 64 below).

least of the contradictions which attended it, contradictions which bespeak the still predominant influence of the colonialist era. Accordingly, one is entitled to suspect certain arbitral decisions of having been agreed to or accepted under duress, those decisions having been preceded by ultimata or menaces or by a deployment of force more or less in the spirit of the said Conference, which was struggling to free itself from a tyrannical tradition¹⁰.

If the Drago doctrine has finally triumphed, and if the Porter Convention, on the insistence of Mexico, expressing Latin American opinion at the Chapultepec Conference in 1945, is now recognized as incompatible with the terms of Article 103 of the United Nations Charter, it is nevertheless the case that many decisions have not avoided all confusion between reparation *sticto sensu*, as in private municipal law, and the "satisfaction" demanded by powerful States, which gives reparation *lato sensu* the character of a measure aimed at deterrence or punishment^{10a}. This right to punish, which is arrogated to themselves by certain States, and to which such eminent writers as Bluntschli, Liszt and Fauchille, as well as a 1927 resolution of the Institut de droit international have lent their authority, seems to have been rejected by Anzilotti, who noted that in all forms of reaction against the unlawful act there were present "... an element of satisfaction and an element of reparation, the notion of punishment of the unlawful act and that of reparation for the wrong suffered"¹¹. Thus, the opposition of Latin American or Afro-Asian jurists to the western conception of responsibility and diplomatic protection is founded not only on memories of a painful past, but also on serious apprehensions.

The development of Latin American thought concerning diplomatic protection and its limits must be particularly stressed in the present discussion, on account of the influence which it can have on the development of that institution. This thought is at present centred on the following aspects of the problem:

A. The 20 States of South and Central America all reject the rule laid down by Vattel and endorsed by the Permanent Court of International Justice, according to which the right of diplomatic protection is "to ensure, in the person of its subjects, respect for the rules of international law". They hold it to be a fiction, which one of their most eminent jurists,

¹⁰ Of the 44 States which took part in the 1907 Conference, there were only four Asian States and one African State.

^{10a} See in this connection the report by Mr. García Amador to the 13th Session of the International Law Commission. (*Yearbook of the I.L.C.*, 1961, Vol. II, paras. 4 to 6, 17, 26, 53, 56, 75, 102, 140, 142 and 145.)

See also the dissenting opinion in the *Corfu Channel* case of Judge Azevedo, who regarded measures of satisfaction as reminiscent of ultimata of a "mediaeval" nature (*I.C.J. Reports 1949*, p. 114).

¹¹ *Cours de droit international* [Translation by the Registry from] Fr. trans. by G. Gidel, 1929, p. 522.

Garcia Robles, has described as "a product of Hegelian influence, resulting from the expansionism of the nineteenth century"¹². And all these States, at inter-American conferences, in the writings of publicists, in the positions adopted by governments, are united in their efforts for its elimination, on the understanding that the individual's status as a subject of the law is to be recognized, thus enabling him to seek legal redress himself, and not under the cloak of his national State^{12a}. But before what tribunal? Before an American regional tribunal. The resolution submitted to the Inter-American Conference at Buenos Aires and adopted almost unanimously reads: "American legal controversies should be decided by American judges . . . and a correct understanding of acts pertaining to the Americas is more readily to be obtained by Americans themselves".

Since the same causes produce the same effects, the States of the Organization of African Unity wrote into the Addis Ababa Charter the same objective of the creation of a regional tribunal¹³.

The countries of Latin America have gone further still. In 1948 they unanimously adopted a resolution at Bogotá whereby they undertook not to bring a claim before a court of international jurisdiction, not excluding the International Court of Justice^{13a}.

B. The States of Latin America remain firmly attached to the Calvo Clause, which they habitually insert in contracts entered into with foreign undertakings. Their constitutions and laws generally make it compulsory. Their doctrine with regard thereto, founded upon the two principles of equality between States and non-intervention, was forcefully expressed by Judge Guerrero, a former President of the Court, in the report which he submitted on behalf of the Subcommittee set up by the Committee of Experts of the League of Nations to study the responsibility of States. Several non-American countries were not hostile to this point of view. China, Holland and Finland were frankly favourable to it.

¹² At the Third Session of the Inter-American Bar Association, Mr. Garcia Robles won over to the Latin American cause Mr. F. R. Coudert, the North American President of the Association, and all its members.

^{12a} The status of the individual as a subject of the law, which has its supporters outside America, was to a certain extent recognized in the 1926 award by the Mexican-American Commission in the *North American Dredging Company* case.

¹³ E. McWhinney has pointed out that—

"there has in the past been a notable reluctance on the part of numerous States, and, in particular, of the new States, to accept the compulsory jurisdiction of the International Court of Justice, because those States have felt that the Court would apply the old rules, in the elaboration and development of which they had not participated and a great number of which they regarded as unreasonable or unjust" (*op. cit.*, p. 331 [*Translation by the Registry*]).

^{13a} "The High Contracting Parties bind themselves not to make diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available the means to place their case before competent domestic courts of the respective State." (Art. VII of the Pact of Bogotá, 1948.)

Finally, the United States, which had found in Borchard a vigorous defender of the thesis that the individual cannot dispose of a right which, according to Vatelian doctrine, is that of the State and not his own, allowed itself to be won over, with the inauguration of the "good neighbour" policy of F. D. Roosevelt, to the doctrine of its southern neighbours¹⁴.

C. The Calvo *clause*, which on the other side of the Atlantic is regarded merely as a compromise, was destined to prepare the way for the adoption of the Calvo *doctrine*, which is aimed at nothing less than the abolition of unilateral diplomatic protection in order to substitute for it a protection exercised by the collectivity on the basis of human rights.

The path towards this unconcealed objective is certainly a long and arduous one; its success seems bound up with the progress of mankind towards an inter-American or international organization less removed than the United Nations from the concept of the Super-State.

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It was the more necessary to recall these features of American law in that other States are treading the same path towards the limitation of diplomatic protection. The States of Africa and of Asia, since they too have come to participate in international life, share the same concerns,—as witness the proceedings of the International Law Commission. At its Ninth Session in 1957, Mr. Padilla Nervo stated that:

"... the history of the institution of State responsibility was the history of the obstacles placed in the way of the new Latin American countries—obstacles to the defence of their . . . independence, to the ownership and development of their resources, and to their social integration".

And he added:

"With State responsibility . . . international rules were established, not merely without reference to small States but against them¹⁵."

And Mr. El-Erian, of the United Arab Republic, stressed the twofold consequence of the privileged condition accorded to nationals of Western countries in their relations with the countries of Africa or Asia, which on

¹⁴ See also the important award in the *North American Dredging Company* case in 1926 between the United States and Mexico, which took a clear step in this direction and has since become an authoritative precedent. The Calvo Clause was unanimously upheld in order to dismiss the claim, notwithstanding the provisions of the 1923 Treaty exonerating the claimant from having to exhaust local remedies. The scope of the clause is, however, limited to the individual's right and leaves untouched that of the State in the event of a violation of international law.

¹⁵ *Yearbook of the International Law Commission*, 1957, Vol. I, p. 155.

the one hand had led to the system of capitulations and on the other afforded a pretext for intervention in the domestic affairs of States¹⁶.

The similarity of the essential views and objectives of the States of the three continents of America, Africa and Asia, and the action they are able to take to develop a positive international law of world-wide ambit, will tend to direct them toward a universalist concept of law and bring them back to a system of international adjudication which will no longer be of an exclusive nature but will, through its effective composition, meet the wishes expressed in the United Nations Charter, which would have it represent the main legal systems and principal forms of civilization of the world.

It is in the light of these preliminary considerations that the connected problem of diplomatic protection and the *jus standi* of the applicant State should have been approached.

6. It is generally recognized that the attribution of nationality to a company, or the recognition of its legal allegiance, on the basis of its *siège social* or of the law of the place of formation or registration, confer upon the national State of the company, by virtue of a rule of law enshrined in jurisprudence and of a constant practice¹⁷, the right to take action for the reparation of damage resulting, to the prejudice of the company, from an international tort.

Is it, however, necessary in addition that there should exist between the national State and the company a link of effectiveness, consisting of a substantial participation in the company by national capital or of control of the company's management? Since intervention by a State in favour of its nationals is a discretionary act, the practice of States which take up a case for their nationals only on this condition does not give rise to a legal obligation. Furthermore, no less than a dozen arbitral awards reported by Mr. J. de Hochepeid¹⁸ have held that the nationality of the company alone justified diplomatic intervention. As for those arbitral or judicial decisions that might be cited in support of the concept of effectiveness or connection (*Canevaro, I'm Alone, Nottebohm* cases), they do not amount to precedents affording any analogy based upon essential factors with the question of the nationality of companies in international law. It will be observed in particular that the *Nottebohm* Judgment had to determine a conflict of a particular kind, that of dual nationality. It was based upon concrete facts peculiar to the situation of the former German citizen Nottebohm and his endeavours to "substitute for his status as a national

¹⁶ *Ibid.*, p. 161. See also S. Prakash Sinha, *New Nations and the Law of Nations*, pp. 91-93 and 140.

¹⁷ This practice goes back to the beginning of the nineteenth century, when the United Kingdom intervened with the Kingdom of the Two Sicilies on behalf of 19 companies, and it was endorsed by the Committee of Experts of the League of Nations in 1927. With respect to the jurisprudence, in addition to a number of arbitral awards at the turn of the century, see the *Panevezys-Saldutiskis Railway* case, *P.C.I.J.*, Series A/B, No. 76, p. 16.

¹⁸ *La protection diplomatique des sociétés et des actionnaires*, pp. 95-101.

of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein”^{18a}. Does not this reasoning in the Judgment seem to fall into line with the practice of the courts or of the administration, taking into account the motive for the act, of ignoring changes of nationality effected for the purpose of obtaining, for example, a divorce, or changes of religion or belief in order to overcome an obstacle to a marriage or to an election, in a State where seats in the elected chambers are distributed between members of the country’s various religions and beliefs.

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The right of protection of the company by its national State being the rule, does this right leave room, in appropriate circumstances, for an action by the national State of the shareholders?

This question relates, within the framework of the third preliminary objection, to the basic legal condition governing the exercise of international judicial protection, in other words, to the existence of a rule of law which would, in the instant case, authorize recourse to a judicial action. It is of a preliminary nature in relation to the fourth preliminary objection, concerning the exhaustion of local remedies, as well as to the other questions raised by the third objection, namely the nationality of the claim and the connected question of the continuity of the nationality and that of legal owners and nominees. It is in fact the legal rule which, in appropriate cases, gives access to the Court. In the absence of this rule, access to the judicial tribunal is denied the claimant, even if his claim be absolutely justified from the point of view of such other questions as might be raised at this preliminary stage of the proceedings.

Since, however, the Court has affirmed the preliminary character of the question of the possible existence of the legal rule, could it embark upon one or other of the subsidiary questions and yet manage to avoid, in the rigour of would-be logical reasoning, disregarding its first decision and, as it were, going back on itself? That decision had the unavoidable consequence of putting an end to the proceedings, and it is not open to anyone to restore it to life in order to embark upon a new discussion which would not only be *obiter dicta*, but would be reasoning based upon an hypothesis which the Court has already rejected, and which would introduce an internal contradiction into the judgment.

This being my point of view on the problem, my separate opinion will deal only with the legal question the solution of which has of itself, to my mind, led to the rejection of Belgium’s Application.

7. The question occasions no difficulty if the members of the company or shareholders complain, *ut singuli*, of direct damage, as is generally the case in municipal law; if, in other words, he is injured with respect to his subjective interests, as distinct from those of the company: e.g., in

^{18a} *I.C.J. Reports 1955*, p. 26.

the case of individual despoilment or discriminatory measures. He is then in the position of any individual claiming the diplomatic or jurisdictional protection of the State of which he is a national¹⁹.

But what will be the position if the shareholder's claim relates to an indirect injury resulting from a measure which affects the company as such? The charges which may be expressed as denials of justice, abuse of right or misuse of power are those which, according to Belgium, affected the company, beginning with the refusal to allocate foreign currency and the bankruptcy judgment. It is no longer a question of the corporate action to be exercised on behalf of the company, but of proceedings limited to the right or legal interest of the shareholder, to the extent that he is indirectly injured as a result of a measure affecting the company.

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Since the theory of the reality of the personality of companies has generally been abandoned in favour of the theory of artificial or juridical personality, it has seemed to certain writers that arbitral awards have taken a line which, whilst rejecting this fiction to the extent that it is absolute or excessive, has opened a fresh perspective which is in conformity with the international character assumed by numerous companies. As between the right and the fiction, which thus stand opposed to each other, which must give way? Are we not faced with one of those cases where the adjustment of law to the reality of human affairs and to the sense of justice must carry the day?

There is no doubt that the personality attributed to the group of corporate interests was so attributed with a view to giving to the elements contained therein and bonded together thereby, common means of action and effective protection. Accordingly, the moment that that protection proves insufficient, or even harmful, in the field of international relationships, should not legal personality give way, to the extent that this is necessary and possible, in favour of a more realistic concept and one which is more in accordance with the nature of things, that of corporate reality, in order to leave individuals and capital appropriately revealed, in the interest of the community and in their own interest?

Is there not ground for thinking that it is above all in the world of fiction that value-judgments, applied to the law, should be based upon teleological considerations? Jhering stated that: "The end in view is the creator of all law." Let us also recall the proposition of Saleilles, put forward half a century ago, and which is more mandatory than ever: "Nothing is important", he wrote, "other than the object to be attained; often our most learned constructions serve only to compromise the realization thereof." Curiously enough, one of those learned constructions is the legal fiction. A fiction is indeed "a representation which is contrary to the truth". P. Roubier, to whom I owe this formula, recommends

¹⁹ Cf. I. Brownlie, *op. cit.*, p. 401.

“direct enquiry as to what is the object of the legal rule which has thus been laid down in this dissimulated form ²⁰”.

It might therefore be considered that the fact of maintaining the fiction of juristic personality contrary to the avowed interest of its component parts would create a situation contrary to the object thereof.

And in fact, however stubborn the fiction of juristic personality may be, as fictions generally are, the diplomatic practice of the creditor Powers and of capital-exporting countries, as well as certain arbitral decisions, have not, after the hesitation prior to the First World War, been slow in accepting, though not without a certain amount of circumspection, the rule which permits the interests of members or shareholders to be dissociated from the abstract personality covering them and given independent consideration—though only where, since the company has the nationality of the respondent State, an action in the name of the company could naturally not be brought against the latter except by local means of redress.

8. However, this arbitral jurisprudence, upon which international courts have not yet had to pronounce, is neither unanimous nor decisive on all points.

In the first place, we must leave out of consideration awards given *ex aequo et bono*, which are not merely without relevance to the present case, but are clearly out of place in this discussion. Thus, it should be recalled that the Special Agreement between the United States and Chile in the *Alsop* case empowered the arbitrator to decide in equity and as *amiable compositeur*. The same was the case with the awards delivered on the basis of the 1923 General Convention between the United States and Mexico, which empowered the arbitral tribunals it set up to decide in accordance with justice and equity, a customary expression for authorizing decisions *ex aequo et bono*.

Nor can account be taken of awards dealing with partnerships, since the personality of the members is not absorbed into the corporate personality, as the personality of the shareholders would be in the case of a joint-stock company ²¹; nor of awards dealing with companies described as “defunct”, or which were obligatorily judged according to the terms of the Special Agreement ²², nor, finally, of awards couched in uncertain or ambiguous terms, nor of awards—in particular those given by heads of State ²³—where the absence of reasons for the decision deprives such awards of any absolute relevance.

²⁰ P. Roubier, *Théorie générale du droit*, p. 116. [Translation by the Registry.]

²¹ Thus, there must be excluded from this discussion the opinion expressed by Mr. Huber in the report of the *Mohammed Ziat, Ben Kiran* case, which related to a partnership.

²² The awards in the *Delagoa Bay Railway Company, Standard Oil, Pierce Oil* and *Sun Oil* cases.

²³ The award of President Grover Cleveland of the United States in the *Cerruti* case and the award of King George V of Great Britain in the *Alsop* case

The same should be the case for awards suspected of having been given under the influence of other than juridical motives, or which were preceded by a demonstration of power, or by threats on the part of a State which trusted in the force of its arms at least as much as in the force of its rights ²⁴.

* * *

In any case, arbitral precedents and diplomatic practice, supported by part of Western legal writing, do not amount to, as has been said, "a coherent body of doctrine", and consequently do not seem to constitute a custom to the effect that diplomatic protection, and its judicial sequel, might cover damage caused by the national State of a company to shareholders who were aliens in relation to the company. Thus it appears that it is in treaty law that the protection of foreign investments must be sought, whether it be a question of companies which have been obliged to adopt the nationality of the host country, or of nationalizations, "the scandal of the beginning of the century", which followed one another at a rapid rate ever since the First World War, on the part of almost all countries.

9. Be this first hypothesis as it may, namely that of the shareholders who have suffered from the activities of the national State of the company, the problem now to be approached is that of whether diplomatic protection of shareholders is capable of being extended to the situation where the damage is attributable to a third State, as in the present case.

It is of course necessary to exclude at the very outset the possibility of the national State of the shareholders substituting itself for the national State of the company for the defence of the latter, as Belgium claimed to do in its Application filed on 23 September 1958. A bond of legal allegiance connecting the company to the protecting State is a *sine qua non* ²⁵, and this does not exist in this case. The problem must be kept confined within the field of protection of the shareholders themselves. International jurisprudence could not adopt the diplomatic practice by which Belgium seems first to have been inspired, which was that which has been tried more than once by certain Powers, and which may not be unconnected with the outdated theory of control: first by the United States in the *Chilean Alsop Company*, in which the award was given in 1911; then by the same Government in the *Armes automatiques Lewis* case, since from 1927 to 1933 Great Britain had untiringly opposed the action of the United States, which was the national State of the shareholders, acting for the protection of the company, which had been formed under Belgian law; then again by Germany when in 1935 it claimed the right to protect a Mexican company, and finally by France and Great Britain in the

²⁴ *Supra*, Section 5.

²⁵ Above Section 6 and note 17.

dispute concerning the nationalization of the Suez Canal in 1956, when those two powers thought they could intervene, as national States of the shareholders, in defence of a company whose original régime attributed Egyptian nationality to it. In each of these cases, this was to disregard the essential condition of the bond of nationality or allegiance between the State intervening and the entity in whose name it was intervening. The concept of effectiveness, which is not legally required for attribution of nationality to a company, as a condition of diplomatic protection, cannot operate either to transfer to the national State of the shareholders the right of diplomatic protection of the company itself, which right is an attribute of the company's national State. It has of course been pointed out that it was with shareholders' representatives that the United Arab Republic negotiated an agreement concerning the Egyptian Suez Canal Company, as Mr. E. Lauterpacht reports. But those negotiations do not involve recognition of the right to bring an action at law; they amount to an *ex gratia* action, not implying any legal responsibility, as was the case of the provisions of the Agreement of 8 September 1923 between the United States and Mexico which set up the Special Claims Commission.

Thus Belgium refrained, in its Application of 19 June 1962, from claiming to protect the Barcelona Traction company, contrary to what it had done in its first Application, already quoted, of 23 September 1958, and limited its claim from then on to the protection of the shareholders of its own nationality. Since this latter Application was deemed to have lapsed as a result of its withdrawal by the applicant Government, and that Government furthermore made no mention of it in its final submissions, the Court only has to deal with the new Application, independently of the earlier one. This was the effect of the decision of the German-Mexican Commission when it accepted the fresh submissions presented by Germany on behalf of German shareholders, after the error which it had made by claiming the right to protect the Mexican company itself²⁶.

10. Since the right of the State to protect its nationals who have been injured by acts, decisions, omissions or measures contrary to international law, and imputable to another State, is undeniable, it would be useful to seek to ascertain the nature or legal foundation thereof, in order to deduce from it the legal consequences and the extent of its application raised by the present case. The question upon which it would be useful to pronounce is that of whether diplomatic protection derives from a general principle of law recognized by the nations (Article 38, para. 1 (c), of the Court's Statute) or from an international custom (para. 1 (b) of that Article).

The Judgment of the Permanent Court of International Justice of 1924 in the *Mavrommatis Palestine Concessions* case²⁷ does not seem to have

²⁶ A. Feller, *The Mexican Claims Commission*, 1935, p. 118.

²⁷ *P.C.I.J., Series A, No. 2*, p. 12.

taken any stand on this point, when it stated, with some emphasis, in an axiomatic form that diplomatic protection "is an elementary principle of international law". One cannot hazard a guess as to the sense in which the expression "elementary principle" was taken, given as it is without any other qualification. And when other judgments have referred to this precedent, they do not seem to have been any more explicit. The terminology of the two international Courts does not permit of there being attributed to them, on this point, an opinion which they seem designedly to have kept *in petto*, following a prudent practice which has already been remarked on ²⁸.

It is true that a special tribunal, the Mixed Claims Commission (United States and Germany), set up as a result of the First World War, decided in more than one case—namely the *Vinland*, *Standard Oil*, *Sun Oil* and *Pierce Oil* cases—that the intervention of the national State of the shareholders "is based on a general principle which such State would have relied on even in the absence of preliminary agreement". However, that Commission did not explain whether it understood by "general principle" a general principle of law recognized by the nations, or a principle drawn directly from the idea of law. It is nonetheless the case that its jurisprudence, although approved by some authors, though not many, has not been corroborated by other jurisdictions. The opinions of legal writers are also divided. Nor was this the first nor the only time that a rule of international law has been considered by some to be a customary norm, and by others to be a general principle of law recognized by the nations, and by others again to be a principle drawn directly from the idea of law. The problem would obviously not be resolved were one to content oneself with the observation that the frontiers between these various concepts are still blurred or uncertain. This is the case of the rule of exhaustion of local remedies, which is the subject-matter of the fourth preliminary objection in the present case, and which is based now on the one, now on the other, of the first two concepts ²⁹. Furthermore, the principle of protection of human rights, which will be referred to below, has been considered to be capable of constituting a legal norm at one and the same time on the basis of the three principal sources of international law, namely: international conventions, international custom, and the general principles of law ³⁰.

11. If my view is accepted, that diplomatic protection and the possible right of the shareholder do not derive from a principle of international law recognized by the nations, it remains to be considered whether the

²⁸ Separate opinion of the writer, *I.C.J. Reports 1969*, p. 138. See also separate opinion of Judge Alvarez in the *Fisheries* case, *I.C.J. Reports 1951*, p. 148.

²⁹ Cf. the report of Max Huber in the *Mohammed Ziat, Ben Kiran* case in 1924, and the decision of the French-Mexican Claims Commission in the *Pinson* case, of 18 October 1928.

³⁰ Dissenting opinion of Judge Tanaka annexed to the Judgment of 18 July 1966, in the *South West Africa* cases, *Second Phase*, *I.C.J. Reports 1966*, p. 300.

international-law custom, upon which diplomatic protection would then, according to predominant opinion, be based, is called upon to extend to all interests which have been injured, in the present case those of the shareholders in a company attached to a third State.

Here we touch on the essence of the problem, the decisive, if not the only, question being that relating to the state of the custom, as it emerges from the conduct of the nations as a whole, and from their declared will.

To this end, it is necessary to re-examine treaty practice, international jurisprudence, the practice of States, and the trend of legal writing, which are the principal constitutive elements of custom.

I would observe, in addition, that the positions taken up by the delegates of States in international organizations and conferences, and in particular in the United Nations, naturally form part of State practice. It is true that some of the great Powers, five or six of which legislated for the whole world up to the beginning of the twentieth century, generally refuse nowadays to admit that resolutions voted in the United Nations framework by a majority of, or even by practical unanimity among, the member States, have any obligatory effect. An attempt at San Francisco by the Philippines to have conferred upon the Assembly, possibly with the concurrence of the Security Council, power to lay down binding legal norms, was rejected. Nonetheless a marked trend in legal writing is becoming apparent, reflecting the new aspects of international life, which is in favour of attributing to the resolutions, and in particular to the declarations of the United Nations General Assembly, the status of at least a subsidiary source of international law, to be added to the classic sources in Article 38 of the Court's Statute³¹.

Certain writers, for their part, see in this an interpretation based upon an argument drawn from the actual text of the Charter, strengthened by a teleological interpretation of that international constitutional instrument, which presupposes the existence of rights and liberties of man which "are not only moral ones, [but] . . . also have a legal character by the nature of the subject-matter^{31a}". They add that such an interpretation should take into account the functioning of the Charter in practice³². The General Assembly itself adopts this point of view, as appears from its resolution of 11 December 1963, in which it "confirms the interpretation of free self-determination which it gave in its resolution

³¹ See the views to this effect of Messrs. Lachs, Mohammed Sami Abdelhamid, Falk, Pechota, McWhinney, Asomoah.

^{31a} Dissenting opinion of Judge Tanaka, *South West Africa* cases, *I.C.J. Reports* 1966, pp. 289-290.

³² See to this effect the dissenting opinion of Judge Alvarez, *Competence of the General Assembly*, *I.C.J. Reports* 1950, p. 21; that of Judge De Visscher, *International Status of South West Africa*, *I.C.J. Reports* 1950, pp. 189-190; G. I. Tunkin, *op. cit.*, pp. 106 and 111, who quotes the declaration of 14 December 1960 on the granting of independence as an example of interpretation of the principles of the Charter.

of 1960 on the grant of independence". This is also the case of the 1969 Vienna Convention on the Law of Treaties, Article 31 of which provides that a treaty is to be interpreted "in the light of its object and purpose" and that for purposes of interpretation of a treaty, the context comprises "any subsequent practice".

Others again deduce the authority of the principles of the Charter from the fact that they are, in their view, general principles of law in the sense of Article 38, paragraph 1 (c), of the Court's Statute, linked at once with the *jus naturale* of Roman law, and with world law, the common law of mankind according to Jenks, or transnational law according to Jessup, a term which has become standard in international law³³.

In any case, to return to State practice as manifested within international organizations and conferences, it cannot be denied, with regard to the resolutions which emerge therefrom, or better, with regard to the votes expressed therein in the name of States, that these amount to precedents contributing to the formation of custom. It is as it were an established fact of which legal writers take note³⁴. What is more, those who hold the views which have just been expressed do not hesitate to accept this concept conjointly with their own views. It has also just been confirmed by Article 38 of the Convention on the Law of Treaties quoted above.

Policy does of course crop up under the veil of resolutions or declarations in the United Nations Assembly. However, it will be conceded that to seek at all costs to erect a partition between policy and law is calculated to bring about this result which is contrary to reality: what is at stake is the attempt to isolate the rule from its social origins, and to snap the link of unity with its historic context. Policy, the policy of the great powers and the colonialist powers, dominated classic traditional law; it cannot be dissociated from law, today any more than yesterday; but it is a new policy, one which does not escape the influence of the

³³ This view is developed in the dissenting opinion of Judge Tanaka annexed to the Judgment of 18 July 1966 in the *South West Africa* cases (*I.C.J. Reports 1966*, pp. 292-296).

³⁴ This is what is observed by Professor Mohammed Sami Abdelhamid in the *Revue égyptienne de droit international*, 1968, pp. 127-128 of the Arabic text.

See also R. Higgins in *The Development of International Law through the Political Organs of the United Nations*, p. 5, who says:

"... the body of resolutions as a whole, taken as indications of a general customary law, undoubtedly provides a rich source of evidence."

Mr. Sørensen too, in his course of lectures at the Hague Academy of International Law, *Recueil des cours* 1960, p. 38, states as follows:

"If the international organization is made up of representatives of States, it is clear that the positions taken up by such representatives may, in principle, contribute to the formation of a custom. On this hypothesis, what is involved is acts attributable to the States, acting through their representatives, rather than acts attributable to the international organization as such." [*Translation by the Registry.*]

great principles which are destined to govern the relationships of modern nations. The 1969 Vienna Conference took this consideration fully into account when it adopted numerous solutions to meet the suggestions included in individual opinions and proposals by new members of the international community.

Thus, through an already lengthy practice of the United Nations, the concept of *jus cogens* obtains a greater degree of effectiveness, by ratifying, as an imperative norm of international law, the principles appearing in the preamble to the Charter. From the domain of theory or legal writing, in which some of these principles, and not the least important thereof, had as it were remained confined, they are passing into the domain of objective existence and practice³⁵. Thus it was that U Thant could say, at the 1969 session of the Organization of African Unity, held at Addis Ababa in the presence of 17 African Heads of State, that the United Nations "had widened the concept of the right of self-determination and independence, so as to cover the recognition of the lawfulness of the struggle carried on by such nations for the exercise and enjoyment of that right in practice³⁶". He might have quoted in addition the principle of equality and that of non-discrimination on racial grounds which follows therefrom, both of which principles, like the right of self-determination, are imperative rules of law³⁷.

12. The documents of the greatest probative force in international treaty law are, in the present case, the Peace Treaties, signed by the Allied Powers and their associates with the Central Powers and their allies, in 1919 at Versailles, Saint-Germain, Neuilly and Trianon, in 1921 and 1922 at Vienna and Budapest, in 1923 at Lausanne; and finally the agreements of 1922 and 1924 to which the United States were parties.

According to the provisions of these Treaties, shareholders who were nationals of the allied countries, holding shares in companies of enemy allegiance, had the right to reparations, without any distinction being made between direct and indirect injury.

³⁵ See I. Brownlie, *op. cit.*, pp. 483-486. For Mr. Brownlie, the following are imperative rules of law: the right of self-determination, racial equality, sovereignty of peoples over their natural resources, the Genocide Convention, the prohibition of aggressive war, of the slave trade, piracy, and all other crimes against humanity.

³⁶ *Le Figaro*, 8 September 1969 [*Translation by the Registry*].

Cf. I. Brownlie, *op. cit.*, pp. 417, 484 and 485, where one reads: "Intervention against a liberation movement may be unlawful, and assistance to the movement may be lawful."

Also R. A. Tuzmukhamedov, for whom the 1960 declaration of the United Nations General Assembly concerning the granting of independence is a *de facto* recognition of the movements for national liberation.

³⁷ Racial equality is an imperative rule of law, particularly since the adoption by the United Nations General Assembly of the declaration of 20 November 1963 on racial non-discrimination (Resolution 1904 (XVIII)).

See in particular Mr. J. Spiropoulos, who upheld this point of view (Sixth Committee of the General Assembly, 7 December 1948).

A quarter of a century later, the provisions of these Treaties just quoted were adopted in the Peace Treaties which brought to an end the war of 1939-1945, which were signed in 1947, as well as in the State Treaty signed in 1955 with Austria.

What value as a customary law precedent may we attribute to these provisions?

It is legitimate to consider that the inclusion of an obligatory clause in a treaty indicates that that clause is not yet an integral part of positive law. In particular, this is what may be deduced from the Judgment of this Court in the *Asylum* case³⁸. This reference does not of course relate to multilateral treaties of which the particular objective, as regards the majority of their provisions, is the codification of certain rules of international law, such as the 1958 Geneva Convention on the High Seas, and the Vienna Conventions of 1961 on Diplomatic Relations, of 1963 on Consular Relations, and of 1969 on the Law of Treaties.

Conventions which do not contemplate the codification of existing rules can nonetheless amount to elements of a nascent international custom, which is what may be said with fair certainty of the Conventions which resulted from the Hague Peace Conferences of 1897 and 1907, of the Treaty of London on Maritime Law of 1909, of the Protocol of 1925 prohibiting the use of asphyxiating gas³⁹, and of the 1958 Geneva Convention on the Continental Shelf⁴⁰.

So far as the Peace Treaties more particularly are concerned, whether these be bilateral or multilateral, they are not such as to amount *ipso facto* to an element of custom. The clauses of these treaties, imposed upon the defeated States, must be respected by virtue of the rule *pacta sunt servanda*. But can the reasoning be pressed so far as to say that their provisions reflect the consent of, or the genuine and effective acceptance by, the defeated State, which acceptance or consent would, on this hypothesis, give rise to the *opinio juris*?

It will be observed first of all that the clauses concerning war reparations only apply against one party, for the benefit of the party which imposed them. Of course it could not be otherwise in a treaty marking the end of a victorious war, even one which was waged for just cause. However, does this mean that such clauses are elements of a legal custom governing the relationships between free and sovereign States? In other words, can a practice amount to a customary precedent if it does not show a

³⁸ *I.C.J. Reports 1950*, pp. 276-277.

³⁹ The 1899, 1907 and 1909 Conventions, and the 1925 Protocol, were so little declaratory of law that during two great world wars, and other comparatively minor wars, and despite their clear prohibitive terms, they were no obstacle to massive bombardments of open cities; deliberate "break up" of entire populations, attempts at genocide before the term was invented; attacks on merchant ships belonging to neutral countries as well as enemy countries, which were sunk with all hands.

⁴⁰ Judgment of this Court of 1969, and separate and dissenting opinions annexed thereto.

conviction, a conviction of law, in the minds of the dominant parties, as well as in the minds of the servient parties, to the effect that they have each of them accepted the practice as a rule of law, the application whereof they will not thereafter be able to evade?

13. When replying in the negative to this question, one should also observe, it is true, that other treaties, quite unconnected with war or peace between nations, were concluded during the inter-war period, which recognize the same rights of the shareholders independently of the company. The object thereof was to resolve claims arising from revolutions or riots, or from nationalizations, which commenced in Latin America, and which were not long in extending to the West, to Eastern Europe, and to the economically weak countries or developing countries: agreements between Switzerland and socialist States, agreements between various States and Latin American States.

The multiplicity of these treaties, upon which the applicant State relies, is as it were a double-edged weapon. The Applicant argues therefrom in order to support its contention, and deduces, from the existence of this treaty-practice, the appearance of a rule of international law.

However it is a question of bilateral treaties the effect of which—apart from the rights of the contracting parties—was only, at the most, to contribute to the eventual formation of custom.

Must it not also be stressed, from a logical point of view, that treaties are the less to be considered as declaratory law in that the States concerned have recourse thereto despite the existence of earlier treaties containing the same provisions? This would be the case, if this point of view is accepted, for the successive treaties concluded, despite treaty precedents, on the occasion of revolutions, riots or nationalizations, as well as for the Peace Treaties of the two world wars, which reproduce similar provisions. Consequently, the concept enunciated by all these treaties would be of no less transitory a nature than the control theory, established in the course of the two wars. In fact, it would appear to be related thereto, if it is observed that the provisions appearing in the Peace Treaties apply, as do those contained in laws and regulations setting up the control test, to nationals of so-called enemy States.

It is true that a certain body of opinion sees no objection to deducing lasting legal effects from the control theory. But what does that theory amount to, if not to exceptional measures born of the circumstances of first one and then a second war, which circumstances disappeared, reappeared, and then again disappeared: in short, measures which are an integral part of methods of economic warfare, or simply of warfare *tout court*. Is it the characteristic mark of a legal norm to be as unstable as this, or rather to be capable of taking up or laying down its life according to the demands of ephemeral events? It could not even amount to a customary-law precedent, unaccompanied as it is by the conditions of generality, continuity, or constancy which are postulated for a con-

stitutive element of custom. Thus recent agreements have specified that it is only by virtue of the agreement itself that a company is considered to be a non-national of the State to which it relates, because of the control exercised over it⁴¹.

14. One last category of treaties deserves examination: this is that of agreements generally called treaties of friendship, establishment and commerce.

A certain number of these treaties, subsequent to the Second World War, touch on the problem, but from standpoints which are different from, and sometimes opposite to each other. Provisions may be gleaned from these which imply the right of protection of the national State of the shareholders. It will however not fail to be noticed that the formulae which these treaties use relate to very diverse concepts: that of majority interest or substantial interest of nationals, that of direct or indirect control by the shareholders, or mixed control; whereas provisions in no less recent treaties do not provide for either of these concepts.

No uniform tradition has therefore become established which permits of some of these bilateral treaty commitments being adopted as customary precedents.

In order to make an end of these treaties, I would observe that diplomatic protection of the shareholders was apparently included in some of them because of special political circumstances. The Treaty of 1955 between France and Switzerland is, according to Mr. Vignes, to be explained by the fact that Tunisia had not yet obtained political independence, and enjoyed merely a régime of autonomy. Furthermore, the 1936 Treaty between France and Germany had as its object the settlement of the thorny problem of the Saar. Finally, the 1946 Treaty between the United States and the Philippines was not unrelated to certain questions raised by the transitional period following the independence of the latter country.

15. From the foregoing it appears that the number of States which have been parties to one or the other of the treaties which have been in question, the provisions of which can be taken into account, so far as consistent with each other, is not such as to attain the degree of generality which is constitutive of custom as provided for in Article 38, paragraph 1 (b), of the Court's Statute. It must also be stressed that many States are in open opposition to obligations resulting from imposed, or unequal treaties⁴², or treaties concluded without their participation,

⁴¹ *Inter alia*, the Agreement signed by Mauritania and the Société des mines de Mauritanie, Article 50 of which provides: "The Company is considered, by agreement, to be a non-national of the Muslim Republic of Mauritania, because of the control exercised over it by foreign interests." [*Translation by the Registry.*]

⁴² As to unequal treaties to which the Asian and African States are opposed, see the Asian-African Legal Consultative Committee, Eighth Session, Brief of Documents, Vol. IV, pp. 471-472, as well as the proposal, mentioned therein, of Burma, Czechoslovakia, India, Lebanon, Ghana, Madagascar, United Arab Republic,

before they were admitted into the international community⁴³. In particular they are hostile to the extension of diplomatic protection other than by way of agreement, and within the relationship of the contracting States alone. And it is sufficiently well known for it to be unnecessary to dwell on the point, what the consequences are, for the growth of a custom, of opposition which is not thought to need to be so massive.

16. What in fact were many of these norms, and what complaints did they give rise to, and do still give rise to, so that one-half of the States of the world dispute essential stipulations thereof, including the scope of diplomatic protection?

It has become apparent that quite a number of States challenge the legitimacy of certain trends of this protection, sometimes going so far as to dispute the principle thereof⁴⁴. This observation is of undeniable importance in connection with the development of custom in this matter. Consequently the advantage once again becomes apparent, in view of the circumstances of the case, of re-examining in some detail the reasons for this opposition, which cannot be dissociated from the problem of elaboration of custom in general, and its application to the present case in particular.

Among the treaties which have been in question⁴⁵, it is necessary to go back to those which organized international society in the eighteenth and nineteenth centuries, and at the beginning of the twentieth century. It is well known that they were concluded at the instigation of certain great Powers which were considered by the law of the time to be sufficiently representative of the community of nations, or of its collective interests. Moreover, the same was the case in customary law: certain customs of wide scope became incorporated into positive law when in fact they were the work of five or six Powers. This was certainly an exercise open to criticism, and even to serious criticism. In addition, of the norms which had thus become established, and which survived the recent fundamental transformations of international society marked by the League of Nations Pact and the Charter of the United Nations, taking into account the liberal interpretation continually given to the latter instrument, some, as we have seen, are disputed by the States which did not take part in their elaboration, and which consider them to be contrary to their vital interests.

17. It will be recalled that the great European States of nationalist tendencies withdrew their support for the universalist theory of the first

Nigeria, Syria and Yugoslavia, to the effect that such treaties should be considered as without validity.

⁴³ The socialist view has been set out by Mr. G. I. Tunkin, who considers that one must avoid imposing on the socialist States and the new States certain norms which these States have never accepted and which are unacceptable to them (*op. cit.*, p. 88).

⁴⁴ *Supra*, Section 5.

⁴⁵ *Supra*, Section 12.

internationalists, such as Vittoria and Suarez—that is, if they had ever recognized it. Thus, Mably was able to enlarge on the notion of a European public law, from the benefits of which other nations—free or independent—had been excluded since the sixteenth century. A closed community, as Sereni most conscientiously put it. The Treaty of Paris, signed at the conclusion of the 1856 Conference, stated for the first time in the history of international relations that one such nation, the Sublime Porte, was “admitted to participate in the advantages of the Public Law . . . of Europe”. This term was, however, to be displaced in subsequent treaties entered into by Western countries, in 1885, in 1904, in 1921 and in the Statute of the Permanent Court of International Justice by another no less discriminatory term, that of “civilized nations”. The Statute of the International Court of Justice has adopted this last form of words, although the Charter of the United Nations abandoned it in favour of the sovereign equality of all the nations of the international community⁴⁶. And N. Politis, who wrote just after the First World War that “the law . . . must, if it is to retain its value, be a faithful reflection of life, change with it, model itself unceasingly upon it . . .”, still limited the area of application of this realistic conception of the relationship between life and the law to Europe and to Europe’s interests, just as he restricted thereto the horizons of his penetrating study of international morality⁴⁷. Politis was nevertheless inspired throughout his book by the Roman-Phoenician jurisconsult Ulpian, rightly regarding him as the founder of international law on account of his remarkable contribution to the development of *jus gentium*⁴⁸, one of the ancient fields of development of this law.

18. Moreover, in the imposing mass of legal norms which make up the modern structure of international law, a number of rules have crept in which owe their origins to duress or illegality; in particular those rules—often enshrined in solemn treaties—justifying racial discrimination, slavery, and, until the middle of the twentieth century, conquest, annexation and colonization in all its forms: colonies of exploitation or of settlement, suzerainty, protectorates, mandates or trusteeships⁴⁹, the two latter forms disguising, by means of a verbal fiction, a colonialist practice and doctrine, the unlawfulness of which has been stigmatized at the United Nations and condemned by that body. This attitude on the

⁴⁶ Until just before the San Francisco Conference in 1945, the Atlantic Charter of 1942 was regarded by most of its interpreters as intended for the use of Western countries.

⁴⁷ The Harvard Law School understood the need to delete the word “civilized” from its revised draft concerning State responsibility. Sir Gerald Fitzmaurice approved the deletion of this word, opting, however, for a different form of words from that of the Harvard Draft (*Yearbook of the International Law Commission* 1960, I, p. 270, para. 56). See in addition the writer’s separate opinion in *I.C.J. Reports* 1969, para. 33.

⁴⁸ A third of Justinian’s Digest is borrowed from the writings of Ulpian (*Encyclopaedia Britannica*, s.v. “Ulpian”).

⁴⁹ Dissenting opinion of Judge V. M. Koretsky in the *South West Africa* cases, *I.C.J. Reports* 1966, pp. 239 ff.

part of the World Organization has been reflected, at the judicial level, in the proceedings on the Advisory Opinions of 1950, 1955 and 1956, requests for which were made to the International Court of Justice with regard to supervision of the implementation of the Mandate for Namibia.

19. It thus becomes easier to understand the fears of a broad range of new States in three continents, who dispute the legitimacy of certain rules of international law, not only because they were adopted without them, but also because they do not seem to them to correspond to their legitimate interests, to their essential needs on emerging from the colonialist epoch, nor, finally, to that ideal of justice and equity to which the international community, to which they have at long last been admitted, aspires. What the Third World wishes to substitute for certain legal norms now in force are other norms profoundly imbued with the sense of natural justice, morality and humane ideals⁵⁰. It is, in short, a matter of a change of course towards natural law as at present understood, which is nothing other than the natural sense of justice⁵¹; a change of course towards a high ideal which sometimes is not clearly to be discerned in positive law, peculiarly preoccupied as it is with stability: the stability of treaties and the stability of vested rights. Thus, for example the notion of effectiveness—the usefulness of which in certain matters is not denied—gives a too unqualified support to the preservation of a *status quo ante* the unlawful origins of which are admitted when it is said: “time sometimes effaces illegality, so that only effectiveness remains”⁵². And this is relevant to the application of this notion to colonial acquisition, where we see the principle of sovereignty give way to the presumption of the so-called right of the first occupant⁵³; so too with those treaties already

⁵⁰ See the writer's separate opinion previously referred to, section 33, bottom of p. 134 and top of p. 135; section 35, bottom of p. 136; section 36, p. 137.

Was not Voltaire giving a definition of natural law when he said: “Morality is in nature”?

⁵¹ Sisnett, Chief Justice of British Honduras and arbitrator in the *Shufeldt* case, took the view that international law should be bound by nothing but natural justice.

See too the separate opinion of Judge Carneiro in the *Minquiers and Ecrehos* case, *I.C.J. Reports 1953*, p. 109.

⁵² The time factor, which has the attribute in private law of consolidating existing situations under certain conditions which generally do not exclude good faith, cannot purely and simply be transposed into international law. It ought not to prevail over manifest rights, whether those of indigenous peoples to their own territories, or those of the community of mankind to *res communis* or *res nullius*, such as the high seas, the sea-bed, the polar regions or outer space.

⁵³ See the dissenting opinion of Judge H. Klaestad appended to the 1960 Judgment of this Court on the *Right of Passage over Indian Territory* case, a judgment still influenced by the static view of law. India, basing itself on the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, maintained before the Security Council that in terms of that Declaration Portugal had lost all claim to sovereignty over Goa and, consequently, all right to protest against the reoccupation of that territory, which constituted an act of liberation, the Security Council preserving a significant silence.

described in Roman law as *leonine*, imposed rather than concluded in a past era and capable of leaving much room for the implementation of the *rebus sic stantibus* clause. In short, these countries wish to take the heritage of the past only with *beneficium inventarii*: which lends significance to Westlake's observation: "The geography of international law has changed considerably." Nevertheless, although the old law has been pruned of many *sequelae* of a past of inequality and domination, in particular by the adoption of the principles of the San Francisco Charter and of those of Bogotá and Addis Ababa, those same principles are not yet imposed without restriction or reservation, nor have any developed all their potentialities. While tribute should be paid to the promoters of declarations concerning great humane principles of a universal nature, from the Wilson Declaration in 1917 with its memorable Point 4, the Atlantic Charter of 1942 and the report of the Dumbarton Oaks Conference in 1944, up to the United Nations Charter, it must be admitted that enthusiasm for the principles proclaimed was not of long duration. There is a gap, which must be filled, between theory and practice. Thus, among these principles there is the right of self-determination—demanded for centuries by the nations which successively acquired their independence in the two Americas, beginning with the 13 Confederate States in North America, and in Central and Eastern Europe; many times proclaimed since the First World War; enshrined finally in the Charter of the United Nations⁵⁴, added to and clarified by the General Assembly's resolution of 16 December 1952 on the right of self-determination and the historic Declaration by the Assembly on 14 December 1960 on the Granting of Independence to Colonial Countries and Peoples, the consequences of which have not yet fully unfolded. The international law-making nature of these declarations and resolutions cannot be denied, having regard to the fact that they reflect well-nigh universal public feeling⁵⁵. They were, moreover, preceded by the similarly worded Pact of Bogotá adopted by the American States in 1948 and the resolutions of the 1955 Bandung Conference, just as they were followed by the Addis Ababa Charter of African Unity of 1963⁵⁶ and the resolutions of the Belgrade Conference in 1961 and the Cairo Conference in 1964 of Non-Aligned Countries, the latter comprising the majority of the Members of the United Nations, and, finally, by the declaration of 21 December 1965 by the General Assembly on the inadmissibility of intervention in the domestic affairs of States and the protection of their independence and sovereignty. Notwithstanding this uninterrupted sequence of precedents

⁵⁴ Article I read with Articles 55 and 56.

⁵⁵ See Section II above.

⁵⁶ It should be noted that the Addis Ababa Charter accepted the "purposes" of the preamble to the San Francisco Charter as "principles" or rules of imperative law, leaving no further room for doubt that they definitely constitute *jus cogens*.

in the life of nations, Western writers, with some few exceptions⁵⁷, persist in refusing to concede to this right—though referred to as a “*droit*” in the French text of the Charter, and in the resolutions and declarations of the General Assembly—the attributes of an imperative juridical norm. The partisans of this doctrine seem to look back nostalgically to the era when it was still possible with impunity, and without infringing “European public law”, to deny the right of self-determination to peoples seeking to free themselves from the yoke of the States which had subjected and colonized them. Against the defenders of the last bastions of traditional law, there thus stand arrayed, once again, with the support of a Western minority, the serried ranks of the jurists, thinkers and men of action of the Latin American and Afro-Asian countries, as well as of the socialist countries. For all of them self-determination is now definitely part of positive international law. As is known, furthermore, a majority of States, through their representatives at the 1969 Vienna Conference on the Law of Treaties, pronounced in favour of a solution to the problem of *jus cogens* capable of giving definitive sanction to the principles of the Charter, regarded by them as imperative juridical norms⁵⁸. It thus seemed appropriate that those principles—not excepting those deriving originally from the spirit of the American or French Revolutions—the religious inspiration of which is not unknown, should be solemnly reaffirmed. They were so in the very heart of Africa by the head of the Catholic church. Addressing himself to the peoples of Africa and, beyond them, to the entire world, His Holiness Paul VI, resuming a tradition, on 2 August 1969, in Kampala, before five Heads of State, denounced racial discrimination, reaffirming the equality

⁵⁷ The whole problem was, however, already solved in an affirmative sense in 1950 by one of the precursors of the new concept, who wrote: “It is already the law, at least for Members of the United Nations, that respect for human dignity and fundamental human right is obligatory.” (P. C. Jessup, *A Modern Law of Nations*, 1950, p. 91.)

Writing a few years later, Prof. G. I. Tunkin noted that: “The representatives of the colonial powers, despite lip-service to this principle, have done their utmost to pare it away to vanishing point, to water it down and to reduce its emancipating tendency to nothing. Sometimes they even deny its existence in international law.” (*Op. cit.*, p. 45 [*Translation by the Registry*].)

⁵⁸ Such had been the opinion expressed in the report concerning State responsibility submitted to the International Law Commission (*Yearbook of the International Law Commission* 1957, Vol. II, pp. 113-114, paras. 2 to 7).

Furthermore, a joint proposal by Burma, Cameroon, Ghana, India, the Lebanon, Madagascar, Syria, the United Arab Republic and Yugoslavia provided that “Any treaty which is in conflict with the Charter of the United Nations shall be invalid, and no State shall invoke or benefit from such treaties” (Doc. UN A/AC.125/L.35, para. 2). Article 64 of the 1969 Convention on the Law of Treaties endorsed the principle of this proposal by providing: “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

of peoples and the rights of each of them to a free and decent life⁵⁹.

20. To conclude this necessary digression, it should be recalled that the progress achieved in the effective application of the principles of the Charter is to a large extent due to the contribution of the representatives at the United Nations of the countries of the Third World, which have espoused a reasonable interpretation of Article 2, paragraph 7, of the Charter, concerning the reserved domain⁶⁰.

It is well known that the wording of that paragraph, despite the opposition of Belgium, departed from the strictness of Article 15, paragraph 8, of the Covenant of the League of Nations, and that it was given its present form on the insistence of the United States, no doubt in order to take account of that evolution in the law that was already perceptible to those attending the San Francisco conference. A consensus was then reached that it was for the organs of the United Nations themselves to interpret the provisions of the Charter they applied. And the application of this new text was subsequently to be adapted to the growing internationalization of the life of the peoples of the world, involving a corresponding constant loss of ground by the concept of absolute sovereignty⁶¹.

It is remarkable to note that the Permanent Court of International Justice was so well aware of this that it stated in its Advisory Opinion in 1923 with regard to *The Nationality Decrees Issued in Tunis and Morocco*:

“The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question ; it depends upon the development of international relations.” (*P.C.I.J., Series B, No. 4, p. 24.*)

But the same Court nevertheless continued faithful to a certain positivism which culminated in the Judgment in 1927 in the *Lotus* case and constantly influenced its subsequent Judgments. It stated in its Judgment in 1932 in the case of *The Free Zones of Upper Savoy and the District of Gex* that “in case of doubt a limitation of sovereignty must be construed restrictively⁶²”.

⁵⁹ *Le Monde*, 3 August 1969.

⁶⁰ Cf. M. S. Rajan, *United Nations and Domestic Jurisdiction*, pp. 521-524.

⁶¹ See, among, other separate opinions of Judge A. Alvarez, all of which were orientated towards what he regarded as the inevitable future, his dissenting opinion appended to the Advisory Opinion on the *Competence of the General Assembly* delivered in 1950 by the International Court of Justice, in which he said:

“The psychology of peoples has undergone a great change; a new universal international conscience is emerging, which calls for reforms in the life of peoples. This circumstance, in conjunction with the crisis which classic international law has been traversing for some time past, has opened the way to a new international law.” (*I.C.J. Reports 1950*, p. 12.)

⁶² *P.C.I.J. Series A/B, No. 46*, p. 167.

In his dissenting opinion in the *Anglo-Iranian Oil Co.* case, Judge Read, on the

It is in this field in particular that the organs of the United Nations, strengthened by the presence of the new countries yearning for a new law, outstripping judicial bodies apparently still attached to tradition, have blazed a trail towards renovation. The General Assembly and the Security Council, when dealing with questions of concern to the international community or touching upon the great principles of the Charter, have, after long debates, session after session, finally overridden the objection based on Article 2, paragraph 7, thanks to a reasonable and extensive interpretation—express or tacit—of its words⁶³. The road was long and arduous between 1946, when Egypt was unsuccessful in obtaining a decision, against the occupying Power, of the Security Council, and the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples—a declaration upon which the peoples struggling for their liberation have, not without success, since relied, and which the Security Council decided to confirm by its resolution of 20 November 1965 endorsing Southern Rhodesia's right to independence and its right to decide its own future.

* * *

It has been necessary to mention this long series of facts in order to elucidate a new aspect of the evolution of international law in general and of its two great sources in particular. That which has been admitted in respect of treaties since the condemnation of the theory of representativity and the increased efficacy of the principles of the Charter—thanks to the ever less strict interpretation of Article 2, paragraph 7—, must probably be admitted in respect of international custom and its application in the present case.

other hand, adopted an approach that took into account the already perceptible evolution in the concept of sovereignty. He wrote:

“The making of a declaration is an exercise of State sovereignty, and not, in any sense, a limitation. It should therefore be construed in such a manner as to give effect to the intention of the State, as indicated by the words used; and not by a restrictive interpretation, designed to frustrate the invention of the State in exercising this sovereign power.” (*I.C.J. Reports 1952*, p. 143.)

⁶³ This was the case with respect to the demand of Tunisia and Morocco for independence from 1951, that of Cyprus and of West Irian from 1954, of Algeria from 1955, of Angola from 1960, of Rhodesia from 1961, and, finally, in 1963, of all the countries occupied by Portugal. The same is the case with respect to the human rights of persons of Indian origin in South Africa since 1946, and with respect to apartheid since 1948.

It will be noticed, however, that those Powers which firmly opposed United Nations intervention in the foregoing cases rejected the objection based on Article 2, para. 7, in respect of interventions in Spain in 1946, in the case of *Greece v. Albania, Bulgaria and Yugoslavia* in 1948, in Czechoslovakia in 1948 and in Hungary in 1956. In this connection, Mr. B. Rajan has stressed the fact that political considerations and the effects of the cold war exercised an undesirable influence in these cases (*United Nations and Domestic Jurisdiction*, pp. 177-178).

It is by taking into consideration the foregoing and the conclusions that emerge therefrom that it will be seen to what extent the custom of diplomatic protection is capable of receiving a sufficient number of adherences to cover new hypotheses such as that which is now submitted for the consideration of this Court.

21. After this indispensable excursion in to the argument raised by the new aspects of the development of custom, and turning now to international case-law, it will be seen that it provides but few precedents which support the right of diplomatic protection in the case of shareholders who complain of indirect injury.

International case-law is itself only an auxiliary source of law and does not take the place of the principal sources, which are treaties and custom. But, considered as an element of the latter, it seems that it does not in the instant case fulfil the conditions necessary for it to be regarded as a precedent establishing a custom.

In point of fact, those precedents which relate more or less directly to the question under consideration have so far, it is hardly necessary to reiterate, only been the work of arbitral tribunals. Judicial tribunals have not been called upon to pronounce upon this matter until the present case. Furthermore, arbitral tribunals, because of the cases submitted to them, have up to the present considered only cases where action was brought in favour of the members or shareholders of a company to which its own national state had caused the damage. Decided cases thus do not, any more than does treaty practice, assist the argument that diplomatic protection extends to shareholders indirectly injured by a State other than the national State of the company.

22. So far as concerns the practice of States, it cannot be denied that numerous positions have been adopted which denote an intention to include within the framework of diplomatic protection the claims of shareholders in a company of a third nationality.

To what extent can the positions thus adopted contribute to the formation of a custom?

In the first place, it is plain that such attitudes can only be counted as precedents creating international custom if those who adopt them do not depart therefrom after having relied thereon. Now, in the analysis of such precedents, more than one State can be found against which there can be levelled the criticism that it has adopted attitudes which are self-contradictory, and thus deprived of any legal effect. The constancy of French practice and, since the turn of the century, of that of the United States, does not suffice to establish a custom supposed to be universal. And this is still more so in that a practice only contributes to the formation of a customary rule if, as has already been said, both the State which avails itself thereof or seeks to impose it and the State which submits to or undergoes it regard such practice as expressing a legal obligation which neither may evade.

An expression of a State's will which is contested by the other party

remains an isolated act without effect. And how often the attitudes of States have met with resistance from opposing parties! This happened, merely by way of example, to France in the following cases: *Société des quais, docks et entrepôts de Constantinople*⁶⁴; *Société Limanova*; *Société du chemin de fer de Tirnova*; *Compagnie royale des chemins de fer portugais*; *Société lettone de chemins de fer*; and, finally, various companies in Mozambique. So too, the United States, in the following cases: *Kunhardt*; *Alsop*; *Ruden*; *Delagoa Bay Railway Company*; *Vacuum Oil Company of Hungary*; *Romano-Americana* and *Tlahualilo*. The United Kingdom in the cases already referred to of the *Delagoa Bay Railway Company* and *Tlahualilo*, and in the *Mexican Eagle Co.* case. Switzerland, in the cases of the *Compañía Argentina de Electricidad* and of the *Compañía Italo-Argentina de Electricidad*. The Netherlands in the *Baasch and Römer* case and in that of *Mexican Eagle Co.* Finally, Italy in the *Canevaro* and *Cerutti* cases.

It is not without interest, moreover, to remark that opposition to such diplomatic protection came, in almost 90 per cent. of the cases, from developing countries.

23. It remains to be seen, with regard to the development of custom, what are the current teachings in respect of the questions which arise.

The views there expressed do not consist solely of proposals *de lege ferenda*. They often constitute a statement of the rules of positive law. They are even sometimes one of the auxiliary factors in its formation, as, following a centuries-old practice, Article 38, paragraph 1 (*d*), of the Statute of the Court confirms. One cannot but refer in this regard to the lasting influence on the development of international law of many of the doctrines advanced in the past by Ulpian, and, in modern times, by Vittoria and Suarez, by Bodin, Grotius, Vattel, Calvo, Anzilotti and Politis, to mention only some of the best-known publicists.

I hasten to add that legal teaching is not represented solely by the writings of the publicists. Such teaching is also expressed, as we know, in the works of legal conferences and of institutions, institutes or associations of international law. Nor must we neglect to seek such teaching—and I would stress this—in the separate opinions of judges, to which I have so frequently felt bound to refer. I must emphasize in the first place that the authority of the precedents of the two international courts derives, *inter alia*, from the very fact that their judgments include the dissenting or separate opinions of their members. This is no paradox; for, in order to assess the value of a judicial decision, it is necessary to

⁶⁴ The opposition of the Sublime Porte was so firm that the French Government threatened to seize the Customs of Mitylene, to administer them and to retain the net revenue until complete satisfaction had been obtained (*Documents diplomatiques français*, Second Series, Vol. I, Nos. 349, 364, 455 and 497, and also the statement by M. Delcassé, Minister for Foreign Affairs, in the Chamber of Deputies on 4 November 1901).

be able to ascertain the extent to which it expresses the opinion of the Court, and what objections judges no less qualified than those who supported it were able to bring against it. Such would seem to be the case with the judgments of the superior courts in the Anglo-American system, where the value of dissenting opinions is not greatly outweighed by the recognized authority of case-law. It is probably this which led Charles Evans Hughes, a former judge of the Permanent Court and subsequently Chief Justice of the United States, as Judge Jessup recalled in his well-reasoned dissenting opinion appended to this Court's Judgment of 18 July 1966, to say:

"A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." (*I.C.J. Reports 1966*, p. 323.)

And do not the opinions of the judges of the two International Courts derive increased authority from the fact that those judges were elected, according to Article 9 of the Statute of both Courts, so as to assure "in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world"?

This authority is nothing other than that of particularly well-qualified jurists and takes its place in the general context of legal teaching. Thus, Mr. St. Korowicz, in a study of the opinion of the seven dissenting judges in the *Customs Régime between Germany and Austria* case, places it under the head of "the teachings of publicists", which are regarded in Article 38, paragraph 1 (*d*), of the Statute of the Court as "subsidiary means for the determination of rules of law".

And, it is hardly necessary to add, what authority as teaching must be enjoyed by the concordant opinions of the dissenting judges when the judgment has been delivered by an equally divided number of votes, thanks to the President's casting vote—in other words, with all the respect due to it, by a "technical or statutory" majority, as Judge Padilla Nervo emphasized in his dissenting opinion appended to the aforementioned Judgment of 18 July 1966.

To come back to the question under discussion concerning the present position of legal teachings regarding the formation of custom in connection with the points raised in the present case, it goes without saying that the teachings invoked must represent, if not a fairly general consensus, at least a predominant current of opinion. Now, in the case of the diplomatic protection of shareholders injured by a third State, teachings are strongly divided, as are also, as to its legal basis, those writers who admit such protection, as has been observed⁶⁵.

24. I would add, solely for the purposes of discussion, that if it were

⁶⁵ See section 10 above.

possible to follow the opinion which sees in the diplomatic protection of shareholders a departure from and a tempering of the rule of respect for the juristic personality of a company, it would still be necessary to enquire whether that exception to the rule could be extended by analogy to the case with which we are concerned.

It is a well-known fact that where the company is of the nationality of the respondent State, corporate action can only be brought against that State in its domestic courts, international action on the claim of the company itself against the State of which it possesses the nationality being ruled out. There can be no assimilation, in the absence of specific provision to that effect, to the law of the European Community. It is consequently the legal impossibility of bringing an international action against the State of the company's nationality that is said to have opened the way to suppletory action by the shareholders indirectly injured, and to have made its exercise lawful.

These circumstances are not present in the case of injury caused by a State of a third nationality. For since the exercise of diplomatic protection is a matter of unfettered competence, the absence of action by the national State of the company is not the consequence of a legal obstacle and may be only temporary. That State, e.g., Canada, enjoys in this connection a discretionary power. There is consequently no ground for enquiring why it refrained from seising the Court concurrently with Belgium, not whether its abstention is final. Whatever its attitude may have been or may possibly be, this does not affect the question whether or not the national State of the shareholders enjoys the right to take up their claim on account of harm which the company itself is alleged to have suffered. This question is a purely legal one, on which the possible wishes of the company's national State would not have any effect.

One should furthermore consider, from a practical point of view, the consequences that the subsequent exercise by the national State of the company of its manifest right as the latter's protecting State would involve. If it decided to seise an international tribunal after the national State of the shareholders had done so, it is not likely that it could in its turn obtain compensation for the injury caused to the company, the compensation that would be due to it having already been awarded to the other State. Not only would the analogy not be logically justified, having regard to the essential difference between the two hypotheses, but its consequences would in addition run counter to the proper administration of justice.

25. The exception which authorizes action by the national State of the shareholders might, however, be extended to cases where the company has ceased to exist. The impossibility of action on its behalf by its national State is again present, though for a different reason, as it is in the case where it has the nationality of the State to which the damage is attributed. There would furthermore be no risk of a conflict between the compensation that could be claimed, in respect of the same complaint,

by the national State of the company and by that of the shareholders. The shareholder's claim would then be justified by a right of his own since, after payment of the shareholders and other creditors, the residue of the company's assets goes directly to the shareholders.

These circumstances would not, however, apply in the present case. A bankruptcy adjudication, like an order for judicial administration or for a receivership, has not the immediate effect of putting an end to the life of the company, at any rate in most legal systems, including those of the two Parties to the case, Spain and Belgium. A bankruptcy judgment, whilst involving immediate effects with respect to the dis-possession of the bankrupt and the administration of the company, the collation of debts owing to and owed by the company, and the fact that such debts become immediately payable, may nevertheless finally result in a composition, under the terms of which the company, which has not ceased to exist, resumes the course of its normal life.

Since Barcelona Traction's bankruptcy had no legal effects other than those just mentioned, it consequently does not authorize an action *ut singuli* by that company's shareholders.

26. The Applicant nevertheless maintains that Barcelona Traction ceased to exist in consequence of certain measures taken by the Spanish judicial authorities, which it describes as denials of justice, usurpation of jurisdiction, abuse of right or misuse of power. The company is said to be "practically defunct", to use the words employed in the arbitral award in the *Delagoa Bay Railway Company* case and subsequently adopted in the *El Triunfo* case. It is thus no longer a question of the legal effects of the bankruptcy adjudication, but of an event pertaining to the merits, which can be considered at this stage of the proceedings in consequence of the joinder to the merits of the preliminary objection relating to *jus standi*.

It is first of all necessary to exclude these two precedents from the discussion; for in both the *Delagoa Bay Railway Company* case and in the *El Triunfo* case it was held that the company had ceased to exist in consequence of the cancellation of the concession which constituted its object. This is not so in the case of Barcelona Traction, the activities of which have not ceased.

But if that company has not ceased to exist for lack of an object, can it reasonably be alleged that the measures referred to have in fact resulted in its disappearance? It does not seem so.

Those measures are said to be the following, in particular:

The declaration of the bankruptcy of a foreign company having no real domicile in Spain, and the dismissal of proceedings to oppose the judgment declaring the bankruptcy notwithstanding the fact that the time-limit therefore had not yet expired; the extension of the effects of the bankruptcy of the holding company to the subsidiary companies, in disregard of their separate legal personalities, on the pretext of their unpersonal nature; the attachment of the shares of the subsidiary

company Ebro and the extension of that attachment to shares that were in a foreign country, in violation of the sovereignty of that country and without regard for the rights of the company holding the above-mentioned shares as security; the powers conferred by the Reus judge on the bankruptcy authorities for the purpose of dismissing the directors of the subsidiary companies and appointing new ones: all these measures, according to the Applicant, constituting a prelude to the realization of the objective in view, which is alleged to have been the transfer at a derisory price to a Spanish group, Fuerzas Eléctricas de Cataluña, of the shares belonging to Barcelona Traction's shareholders. This transfer is alleged to have been effected by the trustees in bankruptcy, who, constituting themselves a general meeting of Ebro, are alleged to have decided:

- (a) that the share register kept at Toronto should thenceforward be kept and retained at Ebro's new corporate domicile, transferred from Toronto to Barcelona;
- (b) that the said company would recognize as shareholders only those mentioned in the said share register created in June 1951;
- (c) the creation of new shares in substitution for the former ones and their entry in the register kept at Barcelona;
- (d) the transfer by judicial decision of the new shares to the Spanish group represented by Fuerzas Eléctricas de Cataluña.

If such were the measures of which the applicant State complains, effected for the purposes of the said transfer, can it be alleged that they involved the extinction of the Barcelona Traction company?

The forced transfer of shares, like a voluntary or amicable transfer, is by no means something calculated to affect the company's existence. The shares of a limited company, such as Barcelona Traction, whether such shares be bearer or registered shares, are specifically designed by law to be transferable during the company's life. A transfer of the *titres* which is void or illegal may, as appropriate, give rise to judicial proceedings to establish that the transfer was void or to have it set aside, but it cannot have any effect on the existence of the company the shares of which have passed into other hands.

Thus, Barcelona Traction was so far from being "practically defunct" that it was able, without losing its juristic personality in consequence of the bankruptcy adjudication, or of the other measures taken against it, to seek and to obtain the diplomatic protection of Canada, of the United States, of the United Kingdom and of Belgium, as well as the judicial protection of the last-named country on the basis of its first Application, that of 1958.

27. In short, since the right claimed by the national State of the shareholder, that of taking up his claim against a third country, does not constitute an exception to a legal rule, the extension of which to a new case is asked for, but such right can derive from the possible existence of

an international custom, it is to be concluded that the elements which constitute the latter, to be drawn in various degrees from treaty or State practice, from international decisions or from legal literature, are not of such a nature as to lend support to this new case.

28. While it appears that diplomatic protection depends not on a general principle of law recognized by nations but on international customary law, it would nevertheless be permissible, in considering the possibility of extending this protection to the shareholders of a company, to have recourse to the analogy which the problem might present in the framework of the relationships for which municipal law and international law make provision. In doing so it would not be a matter of abstracting from municipal legal systems a general principle of law, but of seeking, in accordance with the rules of legal logic, to ascertain the consequences of those relationships on the formation of custom in its various elements.

29. It should be noted at this stage of the discussion that the applicability of categories of municipal law to international law raises the important question of determining whether a State is only obliged to grant aliens those rights which it guarantees to its own nationals or whether it must ensure for them a minimum treatment in accordance with an "international standard of justice", which may, in certain cases or in certain countries, be more advantageous than that enjoyed by nationals themselves⁶⁶.

It is well known that in Latin American public international law, equality of treatment is linked with the Latin American jurists' conception of the responsibility of States and diplomatic protection. Those jurists, who regard it as one of the pillars of their concept of international law, argued in favour of it at the 1930 Hague Conference, basing it upon equality between States and the need for their countries to protect themselves against the interference of powers which were strong politically, militarily and economically. Seventeen jurists of various nationalities supported this doctrine. But the upholders of traditional law, who formed the majority at the Conference, carried the day, and the failure of the Latin American States only reinforces their attachment to their own doctrine. Thus, at the 9th session of the International Law Commission, Mr. Padilla Nervo came forward as its authorized spokesman, and concluded that "[the] international rules [on the point] were based almost entirely on the unequal relations between great Powers and small States"^{66a}.

⁶⁶ As we know, there are those who also envisage the possibility of granting most-favoured-nation treatment, or merely fair compensation, or equitable or reasonable treatment, or, finally, of adopting a compromise solution based on the enjoyment of individual rights and guarantees identical with those enjoyed by nationals and which must not "be less than the 'fundamental human rights' recognized and defined in contemporary instruments". (*Yearbook of the International Law Commission*, 1957, II, p. 113.)

^{66a} *Yearbook of the International Law Commission*, 1957, I, p. 155.

This was also the conception of the African and Asian countries. The Chinese delegate to the 1930 Hague Conference was one of the leading spokesmen therefor, following the jurists of Latin America. And at the same session of the International Law Commission mentioned above, Mr. Matine-Daftary, of Iran, supported "the . . . Latin American theory of the equality of nationals and aliens"^{66b}. Finally, the representatives of the States of Africa and Asia who were called upon to participate in the legal conferences supported the same conception.

* * *

The question is no doubt a fairly complex one. In principle, if a State is bound only to establish equality between its nationals and aliens its municipal law must be considered and its benefits extended to aliens. But it should be noticed right away that the rights to be granted them on the basis of equality are substantive rights. The solution would be quite different with respect to jurisdictional rights, according to which every State is bound to secure domestic judicial remedies to foreigners by adequate laws and an adequate judicial structure in conformity with international standards, failing which international proceedings would be possible.

Now this is indeed the solution that prevails in respect of substantive rights, particularly from the view-point of new or economically handicapped States. It rests upon the principle of the equality of nations proclaimed in the Charter of the United Nations and upon the resolution adopted by the General Assembly on 21 December 1952 concerning the right of peoples freely to exploit their natural wealth and resources⁶⁷.

30. Mention of this solution leads one to wonder whether it is not established, in the legal systems of the generality of nations, that a shareholder—in addition to his own right of action for reparation for a direct injury suffered *ut singuli* which damages his legally protected interests—possesses a right of action which he can exercise in all circumstances, concurrently with the organs of the company, in consequence of an injury suffered by the latter that affects him only indirectly or in mediate fashion.

Ought not international law, following the same reasoning as that just invoked in the preceding section, to align itself on this point with the generality of systems of municipal law, from which, in addition to the legal institutions of the commercial-law system, there derive the concept of juristic personality and the limits assigned thereto? It is true that those

^{66b} *Ibid.*, p. 160.

⁶⁷ See S. Prakash Sinha, *op. cit.*, pp. 94-96, and the speeches in the International Law Commission by the representatives of India, Iran, the United Arab Republic, Syria and Thailand referred to by him.

See too Article 12 of the draft principles concerning the treatment of aliens drawn up by the Asian-African Legal Consultative Committee, quoted by Doctor Mustafa Kamil Yasseen, in *Annuaire français de droit international*, 1964, p. 665.

systems sometimes differ from one country to another. What would however be both necessary and sufficient would be to prove the existence of a common fund, as between these systems, of such essential rights, not excluding those on which Belgium in particular can rely, namely:

- (a) the right to address claims and applications to the authorities on behalf of the company;
- (b) the right to seek judicial or administrative remedies in substitution for and in place of the company, or to defend proceedings brought against it;
- (c) the right to claim compensation on the grounds of a denial of justice or an abuse of right suffered by the company.

Do these different rights appear among those constituting the common fund of the generality of municipal legal systems? Or, on the contrary, do they go beyond the rights generally assigned to the shareholder by those legal systems—and, in particular, the legal systems of Canada, of Belgium and of Spain—these being:

- (a) the right to vote at general meetings, either in respect of decisions affecting the company, or for the appointment of directors and the control of their conduct of the company's affairs and, in appropriate cases, in order to bring action against those same directors in consequence of alleged wrongful conduct by them in the exercise of their powers;
- (b) the right to dispose of the shares owned by them;
- (c) the right to dividends and to a proportionate share in the assets in the event of the company's liquidation;
- (d) that of benefiting from any offers of shares, and of receiving duplicates in the event of loss of their share certificates⁶⁸.

I am inclined to answer in the negative. Subject to one reservation, however, which is that the company should not have been dissolved. This reservation has already been dealt with⁶⁹, and it does not apply in the case of Barcelona Traction.

A further conclusion emerges from this discussion, which can be expressed in interrogative form as follows: since the shareholder does not have, according to local legislation, any possibility of taking action before the courts in order to put forward rights which are peculiar to the company, the objection of non-exhaustion of local remedies cannot be set up against him. If he were nevertheless permitted to exercise such rights before an international tribunal, would he not have been granted a greater right than the company itself?

⁶⁸ The decision of the Arbitral Commission in 1965 in the *Brincard* case referred to most, if not all, of these rights. The new Lebanese Commercial Code, Article 105, gives a more complete list, including in particular the right to transfer the share.

⁶⁹ Section 25 above.

31. The Applicant nevertheless maintains that the specific legal nature of rights and interests of the private parties who have suffered injury is of no importance from the point of view of the right of protection by their national State.

There is no doubt that in international proceedings the applicant State is "asserting its own right". It is not intervening *in favorem tertii*. But is it any less true that that right is "to ensure, in the person of its subjects, respect for the rules of international law"? Both these phrases are to be found in the oft-cited judgment of the Permanent Court of International Justice in 1924 in the *Mavrommatis* case⁷⁰. Is not this tantamount to saying that the right of the applicant State is measured according to the individual right violated and, consequently, subject to the same conditions for its exercise?

It is hardly necessary to add that the responsibility of a State is of course not necessarily restricted to the hypothesis of an injury caused to its nationals. But where an injury lies at the origin of such responsibility, the individual injury cannot be without its effect on the exercise of that responsibility.

32. Is it possible, in order to grant the national State of the shareholders the right to institute judicial proceedings, to have recourse, as the Applicant also argues, if not to a formal right, at least to the notion of interest?

Belgium's charges against Spain, as set forth in the course of the oral argument on the merits, are some of them classified by the Applicant as denials of justice, the others as abuses of right. Abuse of right, like denial of justice, is an international tort, contrary to the opinion which the Spanish Government seems to espouse. This is enshrined in a general principle of law which emerges from the legal systems of all nations⁷¹. The Applicant further sees in certain of these manifestations a misuse of power (*détournement de pouvoir*), of which international law should take account, on the ground that the rights the abuse of which is condemned by international case-law are, as in municipal administrative law, powers or competences. This doctrine cannot but be endorsed. But does it follow that in the international field the institution of abuse of right is aimed, as is misuse of power in municipal law, at protecting a right or an objective interest distinct from the right or subjective interest of the State considered individually⁷²? As complete as possible a study of the notion of an interest is necessary for the solution of this question, and in order to determine, in so doing, the respective fields in international law of the two concepts of objective interest and subjective interest.

⁷⁰ *P.C.I.J., Series A, No. 2*, p. 12.

⁷¹ See the writer's separate opinion previously referred to, para. 35, bottom of p. 136.

⁷² Cf., the reference by Professor Rolin in his oral argument on 16 April 1969 to the course delivered by Professor Guggenheim in 1949 at the Academy of International Law.

33. In private law, the old adage is relied on: "no interest, no action", though there is attributed to it a meaning somewhat different from that which the institution of *actiones legis* gave to it in Roman quiritary law. More correctly, it is asserted that "the interest is the measure of the action". But whatever formula be invoked, this does not of course mean to say that the fate of the action is so intimately bound up with the interest of the plaintiff that it can be deduced therefrom that any interest is capable of giving rise to an action. On the contrary, at the international level as in municipal law, is it not the case that, in order for an action to lie, the interest must, as Jhering puts it, be an interest protected by the law, or, more correctly, as it has been put in the most recent decisions under municipal law, a legally protected lawful interest?

Furthermore, if in private law the interest must, in principle, be direct and personal, must it also be so in international law in order to authorize a judicial action?

This would amount to saying that diplomatic protection is subject to two conditions: that the claimant's interest be a legally protected lawful interest and that, at the same time, it be direct and personal.

34. In order to answer these two questions and clear the way for a solution of the case of shareholders, it seems that it is necessary to recall the various actions to which a right or interest may give rise, namely:

- (a) an individual action exercised on the basis of a subjective interest or right;
- (b) a corporate action, on behalf of a company endowed with juristic personality, similarly exercised on the basis of a subjective interest or right—that of the company itself;
- (c) an action brought in defence of a collective or general interest, the objective being to safeguard legality or the respect due to principles of an international or humane nature, translated into imperative legal norms (*jus cogens*).

This distinction has seemed to me essential for the purposes of this discussion, in particular in order to avoid the confusion between individual interest and general interest, to which the Respondent has pointed, in the award in the *El Triunfo* case and in the judgment relating to the *Northern Cameroons*.

* * *

It is generally recognized that the existence of a legally protected right or interest is a condition for the exercise of any of the above actions. The question is not open to doubt in private law, whether with respect to a natural person or to a juristic person. It will consequently be agreed that it would be paradoxical for international law, one of the functions of

which, when appropriate, is to make up, in the relations between States, for the weaknesses of their municipal laws, to be able to give a State which takes up the claim of its nationals access to international tribunals on the ground of an interest which is not legally protected under the *lex fori*. And by an undoubted analogy, a State which acts *proprio motu* for the defence of a personal interest or of a collective interest, must nevertheless prove the existence of a lawful interest which is legally protected.

There is consequently an identity of views to be noticed on this point—that of a legally protected lawful interest—between the national and the international legal order, dealing respectively with the subjective and the objective aspects of the notion of interest.

The question that remains to be discussed is thus that of proof that the interest on which Belgium relies is a legally protected lawful interest. No such proof can be produced in the present case since it is necessary to go back to the *lex fori*, which does not afford legal protection to such an interest.

35. Does the identity of views noticed above also exist so far as concerns the necessity of a personal and direct interest?

Were it a question of the third action referred to above—that based on a general interest, or an international or humane interest of an objective nature—the fulfilment of this condition would not be demanded, as is clear from the aforesaid Judgment of 21 December 1962 and the opinions of the dissenting judges in the Judgment of 18 July 1966. That 1962 Judgment constituted a definitive judgment, as was amply demonstrated by the dissenting judges, and it might also be regarded as a judgment on a point of principle, which lays down the concept of the general or collective interest which justifies the action that a member State of an international organization, such as in former times the League of Nations and today the United Nations, may bring in defence of the purposes of that Organization which concern its members, as a whole, whose interests are often one with those of all mankind⁷³. The principle which that Judgment enshrines, which underlies many conventions, from Article 22 of the Treaty of Versailles and the instruments of mandate, to the treaties concerning minorities and the Convention on the Prevention and Punishment of Genocide, and is expressly confirmed by the practice of the United Nations⁷⁴, is also to be found in the Advisory Opinion delivered by this Court in 1951 with regard to reservations to that Convention, when it stated: “the contracting States do not have any interests of their own; they merely have, one and all, a common interest⁷⁵.” Thus Judge Forster was able to protest vigorously against the idea that “legal interest

⁷³ In his dissenting opinion referred to above, Judge Forster rightly describes as an abuse of power South Africa's actions contrary to the purpose of the Mandate for South West Africa or Namibia. (*I.C.J. Reports 1966*, p. 481.)

⁷⁴ See Section 20 above.

⁷⁵ *I.C.J. Reports 1951*, p. 23.

can be straight-jacketed into the narrow classical concept of the individual legal interest of the applicant State ⁷⁶”.

36. If, on the other hand, the applicant State is not acting to protect a collective interest, but is complaining of an injury it has suffered as an individual subject of law, it goes without saying that it will only have access to an international tribunal to claim a subjective right on the basis of a personal and direct interest.

To this hypothesis must be assimilated that where a State has taken up the claim of a national, as this Court, following the Permanent Court of International Justice, stated in its Judgment of 6 April 1955 in the *Nottebohm* case, declaring:

“ . . . by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law ⁷⁷”.

In other words, it is on the basis of a subjective right or interest that the State acts when taking up the claim of one of its nationals, even if that national be a juristic person such as a commercial company. For the corporate action of the latter is not in any way to be assimilated to the action based on a collective interest. Whilst the company represents a bundle of individual interests the State is nevertheless acting as an individual subject of the law in taking up its case. Where, on the other hand, it purposes to take up the defence of the general interests of the international community or of humanity as a collectivity, it intervenes in the capacity of a member of that community or of that collectivity.

37. It has been said that Belgium’s action must be founded on a lawful interest which is legally protected ⁷⁸, just like an action on behalf of the collectivity. But, unlike the latter, it must be based on a personal and direct interest.

Neither of these conditions is met by Belgium’s request for authorization to extend judicial protection to the shareholders in Barcelona Traction.

According to the *lex fori* to which it is necessary to have reference in this matter—i.e., the law of the commercial legal order—a shareholder in a joint-stock company has, as we know, no personal and direct right of action instead of and in place of the corporate action *ut universi* if the alleged injury has been inflicted on the company as such. What interest might be substituted for this purported right, if not the shareholder’s interest in having the undertaking run in such fashion as to ensure its prosperity, and in the safeguarding of the economic value embodied in

⁷⁶ Dissenting opinion annexed to the Judgment of 18 July 1966, cited above, *I.C.J. Reports 1966*, p. 478.

⁷⁷ *I.C.J. Reports 1955*, p. 24.

⁷⁸ See Section 34 above.

the shares. Does it follow that he would have the right to act on behalf of the company where the latter has itself suffered damage or loss through unfortunate management? Such is not the case in municipal law⁷⁹, and it ought not to be otherwise in international law. The interest of the shareholder and, consequently, that of the State which takes up his claim, no matter how personal and direct it may be, is nevertheless, as has just been seen, not legally protected. The Permanent Court of International Justice has endorsed this view⁸⁰.

38. Turning to the argument which postulates the cumulative use of the corporate action and the individual action of the shareholders, which is advanced by Belgium, I can only remark the lack of relevance of the examples put forward to support it, namely that drawn from the Advisory Opinion of this Court concerning *Reparation for Injuries Suffered in the Service of the United Nations*, and that of a motor car or aeroplane accident. In the instant case, both these examples encounter the objection raised by the existence, in terms of municipal legislation, of the company's legal personality, which covers the interests of the shareholders and ensures their representation.

So far as the Advisory Opinion is concerned, it is true that a claim by the International Organization for reparation for injuries constitutes no obstacle to a claim by the State of which the United Nations official is a national. It has been rightly said that a single action is capable of involving international responsibility on the part of its author towards various legal *personae* if it simultaneously injures their respective rights. But the doctrine enunciated in the Advisory Opinion is essentially different from the argument advanced by the Applicant concerning the

⁷⁹ See, to this effect, the writings of French publicists and French case-law, where the bringing of judicial proceedings on account of the depreciation of shares as a result of a diminution in the company's assets is only allowed in the case of *faute* by the directors, as was emphasized in Section 27 above.

Cf. G. Ripert, *Droit commercial*, 5th edition, by R. Roblot, Vol. I, paras. 1327 and 1328; and Solus and Perrot, *op. cit.*, para. 227, and the decisions to which they refer.

And, in respect of Anglo-American law, E. Beckett, "Diplomatic Claims in Respect of Injuries to Companies", published in *Transactions of the Grotius Society*, Vol. XVII, pp. 192 and 193, who points to the exceptional case of misconduct by directors as a rule to be found in the laws of most States.

Finally, so far as treaty-law is concerned, mention may be made of the convention between the Malagasy Republic and the Uginé company, under which the parties "will not regard as contrary to their mutual obligations any reduction in activity resulting from chance technical breakdowns of a serious nature or from the development of the general economic situation". [*Translation by the Registry.*]

⁸⁰ Judgment in the *Oscar Chinn* case, *P.C.I.J., Series A/B, No. 63*, p. 88: "No enterprise—least of all a commercial or transport enterprise, the success of which is dependent on the fluctuating level of prices and rates—can escape from the chances and hazards resulting from general economic conditions. Some industries may be able to make large profits during a period of general prosperity, or else by taking advantage of a treaty of commerce or of an alteration in customs duties; but they are also exposed to the danger of ruin of extinction if circumstances change."

claim of a shareholder concurrently with that which a commercial company might submit in respect of an injury of which it itself has suffered the consequences. Any analogy is ruled out by an essential difference between the two cases, resulting from the existence of the juristic personality of the company, which personifies the interests of the shareholders; so that the injury which it suffers is the very same one as that of which the shareholders might complain.

Can it in point of fact be deduced from the consideration that two legal *personae*, the United Nations and the national State of an official of that organization, have simultaneously been affected by the injury which the latter suffered, that, according to the meaning of the Advisory Opinion, there was only one single head of damage? It would appear not. The same act caused two distinct heads of damage, reparation for which can be cumulative, as in the case of the accident already mentioned. It is however a single injury which affects the company, which can only give rise to a single reparation, which can be claimed either by the company, or by a partner or shareholder under the conditions already dealt with.

Is there any need to add that Article 62 of the Court's Statute, which provides for intervention, is irrelevant. What is in question in the present case is not a rule of procedure, but the right of action on the basis of one and the same internationally unlawful act.

39. At the end of this discussion, everything goes to show that the diplomatic protection of shareholders injured by a third State does not constitute an international custom that is unequivocally and unambiguously demonstrated by the web of precedents which form the material element, and definitively established by the conjunction of that element with the psychological element of *opinio juris*.

This conclusion is reinforced by the opinion, already mentioned, held by a multitude of States—new States and other, very numerous, developing States—with regard to the application of diplomatic protection, the rules of which are only accepted by them to the extent that they take account of their state of underdevelopment, economic subordination and social and cultural stagnation, in which the colonial powers left them and in which they are in danger of remaining for a long time, in the face of Powers strong in industry, know-how and culture.

This opinion was expressed at one and the same time by the representatives of the States of the Third World in the General Assembly of the United Nations (Sixth Committee), in the International Law Commission, in the Asian-African Legal Consultative Committee, in the Institute of International Law, and in the works of legal authors⁸¹.

⁸¹ S. Prakash Sinha, *op. cit.*, pp. 92-94; and J. N. Hazard in *American Journal of International Law*, Vol. 55, 1961, at p. 118, where he writes: "... Some of the states where investment has long existed have come to relate these investments in their minds with conditions now politically abhorred."

Thus the Asian-African Legal Consultative Committee, when it met in 1966 in Bangkok, stressed the importance of this problem by recalling the remarks of a number of delegates to the Sixth Committee of the General Assembly in 1964, to the effect that—

“The rules relating to state responsibility and to the protection of foreign investments, profoundly affected the situation of the new or economically weak States and had been established, in part, contrary to their interests⁸².”

As for the Institut de droit international, at its Nice session in 1967 it had to study the problem of investment in developing countries. The jurists of the Afro-Asian group who took part in the proceedings of that session expressed the opinion of their group by replying in the negative to the question whether “shareholders are entitled to ask for diplomatic protection of their State in cases in which the company in which they have invested cannot or will not ask for it itself, as against the developing country⁸³”.

40. It seems definitively established that the precedents that can be prayed in aid to support the attempt to extend diplomatic protection to shareholders indirectly injured by a third State are manifestly insufficient. It is of course clear from the explicit terms of Article 38, paragraph 1 (*b*), of the Statute of the Court, that the practice from which it is possible to deduce a general custom is that of the generality of States and not of all of them; but we are far from even this, having regard to the abstentions or opposition referred to above when analysing diplomatic or treaty practice or discussing teachings⁸⁴. It certainly does not appear that the generality of States have already accepted such a custom. *A fortiori* is this so if account be taken, as it should, of the massive opposition of the new or developing States, which constitute the majority of the members of the international community. A general custom, I am persuaded, can henceforward no longer be received into international law without taking strict account of the opinion or attitude of the States of the Third World.

⁸² *Brief of Documents*, Vol. IV, p. 269.

⁸³ *Annuaire de l'Institut de droit international*, 1967, I, pp. 464, 471, 519 and 526, with the opinions of India (Mr. Nagendra Singh), Iraq (Mr. Kamil Yasseen) and Turkey (Mr. Nihat Erim).

The following observation of Professor Rolin at the same session of the Institut should be noted:

“Thus what the Institut should aim at is not the protection of capital as such, but it is bound to encourage investments for the benefit of developing countries, by giving guarantees on both sides, both to those countries themselves in order to avoid a form of economic neo-colonialism, which would bring about their subjection to the rich countries, and in order to put investors out of reach of certain risks” (*ibid.*, p. 414 [*Translation by the Registry*]).

⁸⁴ *Supra*, Sections 12 to 20, 22 and 23.

41. Two other questions have been discussed:

A. That whether the national State of the shareholders may take action to defend its national wealth, of which shares in companies form an element.

B. Whether it can do so in the sphere of the legal protection of the interests which the State has in international trade.

In each of these cases, the State would enjoy a twofold right of action: that resulting from the fiction, conceived by legal authors and accepted by case-law, to the effect that the State which takes up the case of its nationals exercises its own right; and that which would be attributed to it inasmuch as it is protecting its national wealth or the interests of international trade.

Does this twofold action postulate two heads of damage, for which the State would present cumulative claims, or a single head of damage, for which the State would be claiming reparation on a twofold ground?

Since shares in a company belonging to nationals are among the elements making up the national wealth, the action of the State to protect the rights of its nationals, and that aimed at the protection of the national wealth, would be motivated by a single head of damage, affecting the same subject-matter envisaged from two different standpoints, i.e., the part or the whole.

On the basis of this observation, the State could not claim two different heads of reparation, one for the injury caused to its nationals, the other in favour of the nation—the body made up of those same nationals—whose economy had been affected. It is a case for saying, as before⁸⁵, that cumulative actions which would grant, for one and the same injury, first one and then another head of reparation, would be inconceivable.

Furthermore, this alleged right of action would give rise to the same objections as mentioned above, concerning the alleged right of action in the name of shareholders injured by a third State, namely the non-existence of a received rule of international law authorizing it.

The opposition of the new or developing States, whose determinant influence on the development of international law and on the formation of its rules is already well-known, would in addition be much stronger as to the admission of a legal rule which would authorize the extension of diplomatic protection, beyond the interests of shareholders who have suffered injury by the act of a third State, to the interest of the general economy of the national State of the latter, or to the interest it has in international trade.

It is well-known that J. L. Brierly, without venturing so far as G. Scelle, or as the Latin American jurists, was in favour of recognition, in certain cases, of the international personality of the individual. He said that—

“The orthodox doctrine, by insisting that only States can have

⁸⁵ *Supra*, Section 38.

international rights or duties, leads one to think that injury caused to an individual citizen in a foreign State is an injury caused to his own country . . . and that mysterious, though powerful, abstraction, 'national honour' is easily involved therein ⁸⁶."

And Mr. P. C. Jessup adopted Mr. Brierly's conclusion, observing that the recognition of the rights of the individual would also tend to check "the grave menace of the promotion by States of private economic interests with which they identify national interests ⁸⁷". And indeed it seems that this identification and the concept of national honour were in the background, if they were not the governing motive, of the armed interventions which have taken place in the course of history in Latin America, Africa and Asia.

Would not the menace be still more grave if the State, while supporting the individual interests of its nationals, were to put forward their claim cumulatively with that attributed to the nation for the defence of its economic interests, or its general interests in international trade?

42. Failing a rule of positive law validating Belgium's *jus standi*, the latter State turns to equity to seek therein a justification for its claim.

The applicant Party is mistaken in thinking that in the awards made in application of the General Convention of 1923 between the United States and Mexico, there may be discerned a reference to equity comparable to that mentioned in the Judgment of this Court in 1969 concerning the *North Sea Continental Shelf*. The Convention just referred to called upon the arbitral tribunals which it set up to base themselves upon justice and equity. This expression, justice and equity, which has appeared in numerous general and special arbitration agreements, has always been considered to imply an authorization to decide *ex aequo et bono*; whereas obviously the reference to equity contained in the Judgment of the Court mentioned above should only be understood, and this is explained in one of the separate opinions annexed thereto ⁸⁸, as meaning equity *praeter legem* in the sense which Papinian, the author of that expression, gave to it; in other words, not an extra-judicial activity, as is the settlement of a dispute *ex aequo et bono* according to the terms of Article 38, *in fine*, of the Court's Statute, with a view to filling a *social gap* in law, but a subsidiary source of international law taken, as a general principle of law, from paragraph 1 (*c*) of that Article, appeal to which is made in order to remedy the insufficiencies of international law and fill in its *logical lacunae*.

If the study of the facts of the present case had shown a logical lacuna

⁸⁶ J. L. Brierly, *Recueil des cours de l'Académie de droit international*, 1928, Vol. III, p. 531 [*Translation by the Registry*].

⁸⁷ P. C. Jessup, *A Modern Law of Nations*, p. 99.

⁸⁸ See the writer's separate opinion, *I.C.J. Reports 1969*, para. 37, p. 139.

in the law, the Court would have been called upon to remedy this in the interest of justice. The solution would probably have been to have recourse, as has just been stated, to equity *praeter legem* and a general principle of law emerging from national legal systems. But the Court is not faced with a logical lacuna in the law, since international legal systems do not provide for a right granted, on the facts, to the shareholders to be rendered licit. The lacuna which the argument of the applicant Party would be calculated to fill would be no more than a social insufficiency, which only a special agreement conferring jurisdiction *ex aequo et bono*, which does not exist in the present case, could have remedied.

The system of Equity of the common-law countries has also been referred to in the present case.

It goes without saying that there is no question of identifying Equity of English origin with *l'équité* or *aequitas* of Romano-Mediterranean origin. But if a parallel may be drawn between these two institutions, as to their respective effects, it is with equity *contra legem* or *infra legem* that it may be drawn. In fact, it is said in Snell's *Equity* that equity may be defined as a portion of natural justice⁸⁹. This conception of Equity, which really consists of a possible derogation from general law in a particular case, has never been applied in international law. An international court which conferred such jurisdiction upon itself would appoint itself a legislator. Its decision would create an atmosphere of uncertainty which would drive States away from a tribunal as to which they could not foresee, with any degree of probability, what law would be applied by it. Furthermore, who is better placed to judge of this than the British Government, which wrote to the United States Government to the effect that: "... No shareholder has any right to any item of property owned by the company, for he has no legal or equitable interests therein . . ."⁹⁰ In fact, Equity, like equity *contra legem* or *infra legem*, cannot serve as basis for a judicial solution which is contrary to the rules of law which it seeks to modify, unless it be by agreement of the parties to accept a decision *ex aequo et bono*.

* * *

While I subscribe to the Court's Judgment, such are the supplementary remarks which I have thought I should add to the grounds thereof.

(Signed) Fouad AMMOUN.

⁸⁹ "It is possible to define equity as a portion of natural justice . . ." Snell's *Principles of Equity*, 4th edition by R. E. Megarry and P. V. Baker, p. 9.

⁹⁰ Note of 5 July 1928 concerning the *Romano-Americana* case, Hackworth, *Digest*, V, p. 843.