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ARD-16
A Dream of Eastern Wisdom.

Mr. Richard H. Nolte,
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Dear Mr. Nolte,

There was much to be discussed, if few conclusions to be reached, at the Conference on International Law held at the University of Hong Kong from 2nd to 6th January, 1967. For me the most interesting result of the meeting was the discovery that, for all practical purposes, the international lawyers of several South East Asian countries had apparently abandoned the beguiling idea that there exists, or could be constructed, a body of specifically Asian international law which can or ought to regulate the international relations of the region. Indeed, it seemed that, as to most of the aspects of international law that were discussed, it would hardly be possible to isolate attitudes that could be regarded as characteristic of either states or legal scholars in the region.

As a part of the larger question - widely acknowledged to be a very important one - of the attitude of newly emerged nations as a whole towards existing international law, the matter is of general concern. It is also of significance to people interested in the more particular question of China's past, present and future relationship with the rest of the world, both because of the analogies between the problems faced by China with those of other states in the area, and because the states, large and small, of South East Asia must to some extent form the matrix in which China's relations with her immediate neighbours will evolve.

Although it began to be seen as a crucial problem only with the accession of large numbers of newly independent states to the United Nations (amidst the reverberations of the First Bandung Conference) in the last decade, the question of the position of the non-European states towards international law is not really a new one. It ought, perhaps, to be seen as part of a long historical process which began with the expansion of the Western states, with their rather highly developed, shared concept of a law governing the relations of independent territorial

sovereigns, first as traders, later as colonists and imperialists, into countries where these concepts were alien, and for the most part incomprehensible, if not incompatible with indigenous political and legal theory. Most of these countries (in Asia, at any rate) had developed conceptual systems of their own for rationalizing their relations with other communities, systems which sometimes, as in the Chinese case, made no allowance for relationships on a footing of equality.

Backed with military superiority, the Westerners were able to insist, without exception, on an acceptance, at least at surface level, of their own concepts, which became the basis for the legal regime of the nineteenth and early twentieth centuries. Legally equals, the states of the world were in fact quite ill-matched in terms of real power, so much so that most Asian states were induced to make use of their newly-imputed sovereignty to sign away many or all of their attributes of independent statehood. Such transactions received the full protection of the existing law.

With their re-emergence from their various degrees of colonial tutelage, these countries have not unnaturally given voice to a good deal of criticism of the classical concept of international law that seemed to afford the weak so little protection against the strong. Such criticism has varied in different places and at different times, partly, perhaps, in accordance with prevailing ideas in the countries concerned about the nature and function of law in general. It has not, of course, been based on historical emotion alone. Western lawyers ignore at their peril the defects in the classical fabric of international law, as well as the strong feeling, right or wrong, that the law has discriminated in favour of rich against poor nations, of strong against weak, and of the developed against the developing.

Amidst all the criticism there has also been heard among Asian statesmen and lawyers the assertion that both as a matter of history and as a fact of international relations, Asian states have important political and legal traditions which could in some measure supplement, if not supplant, the rules of classical international law, with their almost exclusive dependence on European legal traditions. Such assertions formed an element in the support given by many Asian intellectuals for the First Bandung Conference (this was the context in which much currency was given to the Five and Ten Principles of Peaceful Coexistence). They have varied too widely for me to attempt here to assess them, or the scholarship with which they have been advanced, though it is not my intention to underestimate their significance.

The recent Conference afforded me a long-awaited opportunity to try to discover to what extent the idea of a special, Asian international law is taken seriously by international lawyers in the region. It was the second such meeting, sponsored by the Carnegie Endowment for World Peace, the Asia Foundation and the Ford Foundation. An earlier conference, held in Singapore in 1964, had discussed the teaching of international law in the universities and law schools of South East Asia. The participants (invited in a personal capacity rather than as representatives of states) were mostly academics, with a number of practitioners, either private or in government service, and a couple of politicians and a judge. Unfortunately there were no participants from many countries of the region - Burma, Indonesia, Cambodia, Laos, Vietnam, or, of course, China (though it was originally thought that a judge from Taiwan would appear) and only about two-thirds of the states of the region were represented. These were Ceylon, India, Japan, Korea (South), Malaysia, Nepal, Pakistan, the Philippines, Singapore and Thailand. Hong Kong, though not a state, was also invited to participate, in the persons of the Chairman of the Bar Association and myself. In addition, there were a number of observers, including academics from Australia, England, the United States and Yugoslavia.

The agenda, by accident or design, was nicely calculated to expose some of the issues to which I have referred. For two days we discussed "The State and Foreign Investment", under four headings - treaty practices relating to foreign investment, national legislation, domestic law and practice on the repatriation of capital and remittance of profits, and law and practice on compensation for expropriated property. The questions raised by these technicalities are, of course, of the greatest economic and social importance to developing - and developed - countries. Their relevance to the subject under discussion arises from their connexion with colonial, semi-colonial, or even "neo-colonial" exploitation. Long standing Western investments in Asian countries, made on what in Western theory at least was a secure legal basis, and often, as where the investor was of the same nationality as the colonial government, not "foreign" investments at all, is in some cases still being liquidated. More typical of the present situation is the search for a new legal basis for investment sufficiently secure to attract private capital, and at the same time leaving enough freedom of action (action which may include taxation, varying degrees of control, and even nationalization) to satisfy the aspirations to national sovereignty of the developing country. In both processes, strong feelings against earlier exploitation, together with a reaction against the system of international law which made it possible, play an important and often noisy part.

There was a certain amount of this sort of feeling at the Hong Kong Conference, but what was notably absent was a belief in the possibility of immediate, sweeping change of a revolutionary kind in the legal system. Not only was it apparently accepted that a universally agreed set of rules on foreign investment, brought about, say, by multilateral treaty, if desirable in theory, was impossible in practice, but it seemed that there was a marked disposition on the part of the lawyers present to accept the major features of the existing system as a basis for discussion. There was little enthusiasm even for the proposal put forward by one or two for a multilateral convention simply to define and clarify some of the ambiguities of the present law (many words, such as "expropriation", "nationalization", "confiscation", "compensation", etc., have no very precise meaning in international law). Rather, the most hopeful means to reconcile the interests of investor states and developing states was seen as the bilateral agreement, based on real mutuality, equality and fairness (whatever these may mean), made without any object or pretension of laying down wider general principles.

It was noticeable that the investor's need for security was generally appreciated. Even a plea (by the oldest delegate present, significantly) for a rule that would settle all ambiguities in the existing law in favour of the "poor country" on "humanitarian grounds" evoked no response. As a Ceylonese lawyer put it, "an investor given a guarantee is more attracted than an investor who receives no guarantee". The pressure of a market in which their countries are to some extent competitors for foreign capital seems to have led to the abandonment by Asian lawyers of the attempt to discover an Asian international law governing the field of foreign investments, and the acceptance of the traditional framework of international law as the best available tool for international cooperation.

Separate from the question whether, from a historical point of view, there is a specifically Asian brand of international law is the question of the utility of regional legal institutions for regional purposes. One question relates to the possibility of discovering legal or political traditions, the other concerns the desirability of creating new law. The only proposal for a regional solution to some of the problems raised by foreign investment, put forward by a Japanese lawyer, met with remarkably little enthusiasm. He put forward the idea of an institution for international (rather than the now familiar national) investment insurance. In the wake of the recent establishment of the Asian Development Bank, one might have thought that such a scheme would arouse some response, but beyond an observation that such insurance would be prohibitively

expensive for the capital importing state (actually it would seem that many investors would be content with lower profits on an insured investment) and that it ought not to be compulsory, as investors should be able to take a risk for a bigger return, the suggestion only seemed to interest the foreign observers.

The relevance of Asian traditions to international law was raised more acutely, though in diverse ways, in the discussion of the second item on the agenda, "State Succession", a somewhat controversial term that may be loosely explained as referring to the extent to which states inherit the rights and obligations of other states when they succeed to their territory, or part of it. It is of particular importance where "new states" have been created out of the old colonial empires, and at the Conference two particular aspects were discussed - succession to treaties and other obligations relating to state boundaries, and succession problems regarding concession agreements in favour of foreign investors, which had been dealt with in part by the earlier discussions.

The boundaries of many Asian states can be directly derived from the actions or transactions of the conquering Western powers to which I have already referred. Where the parties to original agreements misunderstood not only the terms of particular documents, but also their very nature in terms of each other's jurisprudence, it would seem inevitable that disputes about the boundaries thus drawn would eventually occur. The difficulties are of course compounded where there was an element of duress in the original arrangement, with the result that one party accuses the other of relying on the aggressive acts of imperialists. At least five current territorial disputes in Asia turn in part on such issues - those concerning the Sino-Indian border, the Thai-Cambodian border, the Philippine claim to Sabah, and the Japanese claim to Sakhalin, as well as the apparently dormant Sino-Korean border claim. In each case, among the problems affecting any possible solution is the question how much weight should be given to classical Western international law, how much to indigenous Asian concepts.

Orthodox international law must place a highly artificial construction on arrangements made by and with rulers to whom the very idea of territorial sovereignty was unknown, and, what is more important, one party to such a modern dispute is likely to regard such a construction as historically unrealistic and unjust. In the case of the Sabah claim, for example, which turns in part on the proper interpretation of a highly ambiguous traditional land grant made in Arabic, it seems highly irrational to

try to settle the dispute on such an orthodox basis; both disputants are in fact the products of colonialism, having been welded together out of a mass of small sultanates, and both to some extent found their claims on the principle of succession to these small units. It is hardly surprising that in such cases there is strong resistance to the idea of judicial settlement along conventional legal lines.

At the Conference, the participants mostly confined themselves to expositions of their own countries' views of this or that dispute. (Only one, from Nepal, was able to say that his country fully accepted the facts of history, including colonial history, and had no territorial claims against any other state). Reliance on or disregard for the rules of classical international law seemed to be conditioned largely by the facts of each case. Accordingly, it was hard to gather any general view as to the proper effect that ought to be given to specifically Asian concepts, though some of the Western lawyers present tried to stimulate discussion of just this problem. My own persistent questions on the point, illustrated by a reference to the imperial Chinese view of foreign relations, finally provoked a certain response: a number of speakers went through almost ritual statements of their countries' enlightened views of "international law" in the remote past (somewhat after the way in which textbooks writers in the West used to begin with allusions to "international law" among the ancient Greeks). There was so little relation to modern problems that the Japanese chairman rightly stopped what became almost a competition with a slightly contemptuous remark about "the ancient wisdom of the East", though not before another Japanese lawyer had stated unequivocally that his country had wholly abandoned old theories of international relations and had embraced the Western view of international law in its entirety - the only speaker to make this point.

In the discussion of the third item on the agenda, "Peaceful Settlement of Disputes", there was a similar lack of interest in specifically regional views or solutions. In view of the troublous recent history of South East Asia it was hardly surprising that most participants saw the problem as largely a political, rather than a legal, one. They tended to approach the subject at the universal, rather than the regional, level, with a great deal of discussion about the demerits of the International Court of Justice. One participant gave a striking illustration of feeling in his small country about the "torrent of words" at the Bandung Conference on the supposedly Afro-Asian principles of peaceful coexistence - were these principles not already implicit in the United Nations Charter, and indeed the League of Nations Covenant?

Disillusionment with the Court seemed rather general, except for the Japanese lawyers, who in this as in other contexts displayed sympathy with Western rather than Asian viewpoints. In some cases it sprang directly from feelings about unsuccessful litigation; thus the Indians felt strongly about the Case Concerning Rights of Passage over Indian Territory against Portugal, the Thais about the Case Concerning the Temple at Preah Vihar against Cambodia. Other participants criticized the Court more generally for its tendency to apply strictly the classical rules of international law which had been shaped in the colonial era. Everyone deplored the Court's recent refusal to exercise jurisdiction in the South West Africa Case. A Korean delegate probably expressed a rather deeper feeling that may have been characteristic of the meeting in his paper:

> "With regard to the compulsory jurisdiction of the International Court of Justice, however, Korea has been rather negative. I think this is a general trend in Asian states, except a very few, so far as the judicial settlement is concerned.... From the general attitudes of modern states, it seems to be much better for the states in disputes to be satisfied with the peaceful settlements through other rational means than to have the unsatisfied results through judicial settlements".

The same writer pointed to a part of the Joint Communique issued by the First Ministerial Meeting for Asian and Pacific Cooperation last June:

> "The Ministers noted with satisfaction the improvement in the relations between countries in the region, and expressed the hope that the rule of law will be observed in the relationships between countries of the region and that regional disputes will be settled in the spirit of friendly consultations and in keeping with the principles of the United Nations Charter".

He also referred to the recognition, by the Second General Assembly of the Asian Parliamentarians' Union, in September last, of

> "...the importance of attempts made by Asians to solve their own problems for themselves..."

For most of the participants this last principle was realised in what a Thai lawyer described as the growing popularity of "good offices" of third states as the least compulsory means of dispute settlement, particularly for

the less legal, more political kinds of dispute. The same lawyer, after explaining Thailand's increasing disillusionment with judicial means of settlement, allowed that there was some merit in another participant's suggestion for a regional court, but said that the practice of states was still too far away to make consideration of it "realistic". In an effort to get further clarification, I asked whether, in view of the widespread feeling that Western international law, and more particularly the International Court, both because of its reliance on that law and because of its largely Western composition, had not really met Asian needs, there was not something to be said for a regional institution for the settlement of disputes on lines acceptable to Asian opinion. Such an institution need not necessarily beacourt, though it could include a court for certain purposes, as well as panels for conciliation, mediation, and arbitration where appropriate. It could give real expression to Asian views on international life, and it would not have to rely on traditional international law. No one volunteered any reply to my question at all.

I do not pretend to have done justice, in this account, to the seriousness and learning with which the lawyers at the Conference approached their deliberations, which of course had an interest quite apart from the theme with which I have been concerned. The significant point for me was the somewhat ironical one that, at a meeting designed to exchange South East Asian views, the participants (scarcely affected, it seemed, by the minor irony of gathering in one of the last colonies in the region) expressed themselves so little in terms of South East Asia. An observer could be forgiven for supposing that the whole subject of an Asian approach to international law - whether the law of the past, the present, or the future - had become distinctly unfashionable as a subject for serious discussion. He could also be forgiven for wondering whether "Asian" in this context can be more than just a geographical expression.

The distinguished American observer commented on this absence of Asianism as the most remarkable and encouraging feature of the Conference, though he went on to suggest that there must exist specifically Asian problems, and that these might be usefully approached through functional and regional institutions for dispute settlement as part of a larger system of world order. My own views are similar. It is, in one sense, an enormous tactical advantage for Western concepts of internationalism that problems of law and order, even when in substance entirely Asian problems, are discussed, as they were here, in the conceptual language and according to the categories of Western law. I would confess, though, to greater misgivings.

The abandonment of a noisy Asianism of the kind that resounded from Bandung will not occasion too much regret; indeed, in view of its small success in capturing the allegiance of the serious intellectual community of the South East Asian region, it could scarcely have long survived here. Nonetheless, there remain important differences between Asian and European views of the nature and function of law. Legal practice and social observation demonstrate that such features of traditional thinking as a lack of rights-consciousness and a strong distaste for litigation have survived the "reception" of Western-style codes, and that they do and may further modify the supposedly Western-style administration of justice. It seems unlikely that Western ideas of international law will necessarily fit neatly onto the still shifting political and legal structures of these countries, whatever the attitudes of their Western-trained leading scholars and lawyers; even at the Conference a distaste for Western ideals of dispute-settlement was evident. It was disappointing, then, to find so eminent a group of South East Asian lawyers apparently largely unaware of these problems, and unwilling to accept the need to search for ways of grounding the principles of an acceptable international legal system as deeply as possible in the political and legal traditions of Asians, as well as European and American, societies.

Yours sincerely,

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