

THE DEVICE OF FICTION IN PUBLIC INTERNATIONAL LAW

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"*Sharpers*, this tale's for you! Beware,
Or life may teach you as she taught him."
(The Fox and the Stork)
La Fontaine, *Fables*, Book 1, Fable XVIII

I. INTRODUCTION

Claude Du Pasquier¹ referred to fictions as "the most artificial device of legal technique. Fictions hold as legally true that which is false; their reasoning is based on an imaginary and therefore fictive situation." Paul Roubier² emphasizes that "Fiction represents a direct assault on that which seems natural, deliberately distorting the truth in order to impose the desired solutions."

We submit, in other words, that a fiction is a device of legal technique by which a situation is characterized in a manner contrary to reality in order to ascribe to it the legal consequences which flow from such characterization.

Before examining how this device is used in public international law, it is necessary to clarify several points. The fictional device implies that there exists an authority able to create it. What kind of authority in

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¹DELACHAUX ET NIESTLE, *INTRODUCTION A LA THEORIE GENERALE ET A LA PHILOSOPHIE DU DROIT* (3e ed. 1948) at 167.

²SIREY, *THEORIE GÉNÉRALE DU DROIT* (2e ed. 1951) at 115.

public international law can do so, and at what stage in the rule-making process does the fictional device come into play?

In municipal law fictions are categorized, according to the body from which they emanate, as statutory, judicial or judge-made, and doctrinal fictions. Are such distinctions equally applicable in public international law?

It is hardly advisable to transpose these categories to international law since this would imply that there is an analogy between the two systems of law. Thus, while it would be possible to speak of a doctrine in international law, the same would not be possible for statutory and judge-made law since the concept of a legislator is non-existent and the term 'judge-made law' does not have the same meaning and amplitude in public international law.

In international law there are no legislators whose wills are imposed on the States. There simply exist agreements between the subjects of international law, the states, in order to establish between themselves binding rules, provided they have participated in the elaboration of these rules of conduct, whether customary or treaty law, or have subsequently given them their consent.³

The agreement may enjoy varying degrees of acceptance but it is seldom granted the universal application which is characteristic of legislative action; rarely do States universally agree to establish norms. In the 19th and early 20th Centuries an apparent unanimity in international law merely concealed an agreement between the large European powers whose imperialism left to the smaller and less powerful states no choice other than join the greater powers more or less spontaneously, or otherwise to be rejected by them as being barbaric or uncivilized.

Such a view can no longer be maintained today. The system of creating norms is very decentralized, individualized and full of relativity. All levels of generality are to be found in practice, from bilateral to quasi-universal.⁴

Decentralization and relativity are on one hand, consequences of the division of the world into sovereign states, and on the other hand, are the result of differing political, economic and social systems. It follows then, that in public international law, fiction is the work of those who make the rules, that is, not of legislators but of the states who are parties to the agreement.

³See Chaumont, *Cours général de droit international public*, 129 RECUEIL DES COURS DE LA HAYE 332, 417 et seq. (1970); see also Salmon, *La règle de droit en droit internationale public in Perelman, La règle de droit*, 193 (1971).

⁴*Id.* at 202.

Jurisprudence, likewise, does not have the same meaning in public international law, where the judicial role is minimal⁵ and moreover, overrated.⁶ Application and interpretation of the rules of international law falls mainly within the purview of the State's customary practice; States rarely rely for such important matter on international judges.

Legal doctrine, however, plays a significant role in the organization of the law and the spirit. We shall return to this subject below.

Clearly, a fiction may be created at the time of the elaboration or the creation of a rule of law, for example, in a treaty between states. Fiction may also be introduced while interpreting or applying a rule of law, so that in actual practice states may characterize situations in a manner that is contrary to reality. Examples of such situations will be discussed below. Interpretations or applications of this nature may even be *contra legem* and represent a violation of law hidden by the fictional device. If this violation of the rule through use of a fiction is repeated, fiction then becomes a device not only for extending the rule of law but also for its extinction, the contrary practice causing the actual rule to fall into desuetude.

As for doctrine, it is responsible for fictions introduced when rules, constructions and abstractions are organized with no connection with reality. Such abstractions are, in fact, closely akin to the ideology of the ruling classes.

In the following pages we shall examine fictions, whatever their creating source, as well as the actual time of their application. In addition, we shall attempt to determine the functions of this device. Nevertheless, instead of classifying fictions in international law in terms of the authority creating them or of the time of their application, it is more revealing to classify them according to their aims and functions, which leads us to submit the following two distinctions:

A. Fictions as technical legal devices

1) Some fictions strive towards simplification. False characterization is used as a legalistic shortcut in order to facilitate the description of the rule of law.

2) Other fictions are the consequence of a lack of imagination, as when a jurist uses concepts which are inappropriate, but nevertheless convenient, because they are familiar. The false characterization is used be-

⁵*Id.* at 195.

⁶See Salmon, Commentaries, INTERNATIONAL SYMPOSIUM ON THE JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES, (Max Planck Institute for Comparative Public Law and International Law, July 10-12, 1972; in press).

cause of a fear of the new or because of tradition, to explain the rule of law.

3) Still other fictions are used to set aside the application of express provisions or to broaden the interpretation of terms in a given situation.

B. Fictions as a reflection of an ideology

1) The most obvious examples arise from the fact that international law does not regulate the consequences which States must draw from reality. States use false characterizations in the exercise of their sovereign powers which allow them to weight or even to deny reality.

2) Other fictions are created because the States dare neither to recognize the truth nor to express it. The false characterization then, is used as a form of courtesy or hypocrisy (the former is never more than a manifestation of the latter) in order to hide the truth.

3) Still other fictions flow from theories established by legal doctrine, that is, legal formalism. False characterizations are used to systematize, rationalize or organize but with the effect of justifying results for the benefit of special class interests.

The only purpose of the distinctions made here is for the sake of clarity. In fact, fictions of different types are not necessarily mutually exclusive—quite the contrary. On many occasions there is a multiple effect. Thus, a fiction which may be described as legalistic—arising from purely legal technique—will frequently have ideological aims, as we shall see below.

II. FICTIONS AS A DEVICE OF LEGAL TECHNIQUE

A. Fictions for simplification purposes. The false characterization is used as a legalistic shortcut in order to facilitate the description of the rule of law.

This method is found in the terms of international treaties as well as in the provisions of national laws relative to international law. It can occur in two forms: As a deliberate insertion of a fact into a category which it does not belong, to insure that the fact will be accorded treatment of the category: As a deliberate exclusion of a fact from the category to which it corresponds, to insure that it will be treated differently.

1. Fiction by deliberate insertion into a category

The following demonstrate the first form:

—Article 3 of the Treaty of Washington of February 6, 1922,⁷ relating

⁷Limitation of Naval Armament, Feb. 6, 1922, Art. III, 43 Stat. 1655, (1923), T.S. No. 671.

to the use of submarines and noxious gases in warfare provides:

. . . any person in the service of any Power who shall violate any of these rules . . . shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy.

Even if the two situations can be considered in any way analogous - as at the point of disapproval of the act - it is clear that they do not correspond to the same definition. Thus, to assimilate one category into another constitutes a fiction.

—Article 4 of the Convention of May 18, 1956 between Belgium and the Federal Republic of Germany concerning the creation of juxtaposed national customs centers, etc., states:

Statutory and regulatory prescriptions of the country bordering, relative to inspections, are applicable in the zone, . . . such as they are applicable in the district to be specified for this purpose by the government of said country. Any infractions to said prescriptions committed in the territory of the host country, are committed in the territory of the bordering country within this district.

In the same vein, we also note the Royal Decrees relative to the creation of juxtaposed national customs centers on the borders, implementing the Conventions of the type cited above.

—Article 5 of the Agreement of September 6, 1957 between Belgium and France relative to mining along the borders and covering a number of other legal relationships, provides that the law of the state to which the coal is brought on the surface shall be applied even if the coal was extracted beyond the borders of that state.⁸

Fictions of this type are often drafted into the definition sections in either the beginning or final clauses of a treaty. Thus, certain clauses known as territorial or colonial, such as Article 1, 3, b) i) of the North-East Atlantic Fisheries Convention, signed at London on January 24, 1959, provides:

For the purposes of this Convention . . . b) the expression "territories" in relation to any contracting State, extends to, i) any territory within or adjacent to the Convention area for whose international relations the Contracting State is responsible; . . .

—Article 23 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, open for signature at Lake Success, New York on March 21, 1950 states:

⁸*Moniteur belge*, Sept 9, 1959.

For the purposes of the present Convention the word "State" shall include all the colonies and Trust territories of a State signatory or acceding to the Convention, and all territories for which such State is internationally responsible.

One immediately notes that the two preceeding examples also contain ideological aspects. The amalgamation of "Territory" of the colonizing "State" with that of the colonized Territory is a confusion which has been in existence for a long time and which continues to exist, as evidenced by Portugal's continued references to its "African Provinces."

—Article 73, Paragraph 1 of the Belgian Law of June 5, 1928, revising the disciplinary and penal code relative to the merchant marine and fishing stipulates that "any infraction committed on board a Belgian vessel is held to be committed in the Territory of the Kingdom of Belgium."

In all the examples cited in the preceeding paragraph, the fiction consisted of characterizing A, a situation contrary to fact, as a situation B, in order to have situation A governed by the legal status of B.

2. Fiction by deliberate exclusion from a category

In this case the legalistic device works in the opposite manner, the idea being to exclude a fact from a category which should govern it in order that it be treated as though belonging to another category. The so-called attempt clause ("clause d'atentat") provides a typical example. For instance, Article 3 of the Extradition Treaty of August 15, 1874, between Belgium and France, provides:

It is expressly stipulated that the foreigner on whom extradition is granted shall not be tried or sentenced for any political offense committed prior to the extradition nor for any fact connected with a similar offense.

An attempt against the person of a head of a foreign State or against any member of his family when such attempt shall constitute the fact either of murder, assassination or poisoning, shall not be deemed to be a political offense, nor a fact connected with a similar offense,

The fiction is obvious. An attempt against a head of a State is a prime political crime, which makes the fiction all the more striking. It would have been possible to achieve the same result simply by providing an exception to the rule. However, in this instance the fictional device also has an ideological function. In the liberal and individualistic bourgeois civilization, political crime had acquired a certain favorable connotation (romantic heroes, etc.). Thus, in order to deprive individuals committing such crimes of that favorable connotation it was stated that such crimes

were not political. An exception to the rule would not have the same ideological effect.

B. Fictions as a consequence of a lack of imagination by the jurist who utilizes concepts which, while inadequate, are convenient to use since they are known to him. The false characterization is used to explain the rule either because of fear of innovation or because of tradition.

The clearest example of this is the doctrine of "extritoriality" or "extraterritoriality" which has been applied to embassy premises, residences of the heads of missions and even to the diplomats themselves. To the extent that the scope of the doctrine is limited to the idea that embassy premises and residences of the heads of missions are considered, through fiction, to be parcels of territory belonging to the accredited State, such doctrine has been demonstrated to be false on many occasions, not only by definition but also by its total inability to comprehend all that is covered by the modern doctrine of immunity.

Let us review briefly some of the critical arguments against this concept:

— it does not explain the immunity of officials when they are away from the buildings;

— it does not explain certain special limitations on the immunities of officials while away from the premises, such as limitations on matters relating to taxation, civil and criminal jurisdiction, etc.; — it does not explain the fact that inviolability implies not only the duty to abstain but also the obligation on the part of the accrediting State to protect;

— above all, national jurisprudence and the practices of national executive and legislative bodies recognize that the acts occurring on the embassy premises or within the residences of the heads of missions are, for all practical purposes, acts taking place in the territory of the accrediting State. We refer here to cases involving crimes and offenses, domicile of officials, application of the law on war reparations or laws relating to city planning and construction permits, nationality of the children of diplomatic officials, acts concerning adoption, marriage, private agreements, etc. Despite the fact that this concept is wholly improper and has been discredited since the turn of the century, it is still to be found both in court decisions and in text books. Hopefully, the Vienna Conventions of 1961 and 1963⁹ on diplomatic and consular relations which com-

⁹Vienna Convention on Diplomatic Relations, *open for signature* April 18, 1961, 500 U.N.T.S. 96. Vienna Convention on Consular Relations, *done* April 24, 1963, 596 U.N.T.S. 261.

pletely excluded this concept, will impose that of immunity, which is much more flexible and is better suited to explain the privileged status of diplomats.

The doctrine of extritoriality has also been used with the same inefficiency to explain the immunities granted to foreign heads of States, to the Pope, and to troops stationed on foreign territory. This fiction, which is used because of mental laziness and lack of imagination, appears to be completely outdated and should be replaced by the concept of immunity, which is far more flexible and versatile.

The doctrine of extritoriality has also been advanced to explain the legal status of ships on the high seas. It was maintained that they were floating islands of the country whose flag they flew. Belgian decisions, in particular, uphold this theory.

Thus, the Court of Appeals of Ghent rendered the following opinion on February 12, 1883, in which it stated:

Be it known that all Belgian ships on the high seas must be considered as a portion of the territory of the Kingdom, and that Belgian Courts have jurisdiction with regard to the offenses committed thereon even by foreigners.¹⁰

In the famous case of the *S.S. Lotus*, the Permanent Court of International Justice upheld the same idea, stating:

A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for just as in its own territory, that State exercises its authority upon it, and no other State may do so. All that can be said is that by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory; . . . It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies . . . there is no rule of international law prohibiting the State to which the ship on which the effects of the offense have taken place belongs, from regarding the offense as having been committed in its territory and prosecuting, accordingly, the delinquent.¹¹

In his dissenting opinion, Lord Finlay demonstrated the fictive aspect of this assimilation and stated:

A ship is a movable chattel, it is not a place; when on a voyage it shifts

¹⁰*Belgique judiciaire* (B.J.) 510 [1883]. See also Brussels, May 24, 1856, B.J. 1421 [1857]; Ghent, Feb. 2, 1883, B.J. 510 [1883]; Corr. Antwerp, Jan. 26, 1905, *Pandectes periodiques* No. 97 [1906]; Corr. Antwerp, June 15, 1910, B.J. 251 [1911].

¹¹Case of the *S.S. "Lotus,"* [1927] P.C.I.J., ser. A, No. 9 at 25.

its place from day to day and from hour to hour, and when in dock it is a chattel which happens at the time to be in a particular place. The jurisdiction over crimes committed on a ship at sea is not of a territorial nature at all. It depends upon the law which for convenience and by common consent is applied to the case of chattels of such a very special nature as ships. It appears to me to be impossible with any reason to apply the principle of locality to the case of ships coming into collision¹²

We know that the *Lotus* case, decided because of an even split in the voting by the vote of the Presiding Justice, was severely criticized. A solution opposite to that of the *Lotus* case, on exclusive jurisdiction of the flagstate, was finally adopted at the International Convention of May 10, 1952,¹³ for the unification of certain rules relating to criminal jurisdiction in collision matters.

The Judiciary Committee of the Privy Council has shown the deficiencies of the fiction of extrterritoriality as it applies to ships in the oft-cited language of the case of *Chung Chi Cheung v. Rex*:¹⁴

Their Lordships have no hesitation in rejecting the doctrine of extrterritoriality expressed in the words of Mr. Oppenheim, which regards the public ship "as a floating portion of the flagstate." However the doctrine of extrterritoriality is expressed, it is a fiction, and legal fictions have a tendency to pass beyond their appointed bounds and to harden into dangerous facts. The truth is that the enunciators of the floating island theory have failed to face very obvious possibilities that make the doctrine quite impracticable when tested by the actualities of life on board a ship and ashore.

Once again the fiction does not fully explain the complicated situation of the legal status of ships at sea. This rivalry of jurisdiction between the flagstate and other states varies according to the different elements, such as: the location of the vessel (interior waterways, territorial waters, contiguous zone, high seas), the type of vessel (private or state-owned, and in the latter case, either military or commercial, although the non-Socialist States do not recognize the distinction); the type of jurisdiction (customs health, fiscal, criminal, civil, etc.). The Geneva Conventions on the Law of the Sea of April 29, 1958¹⁵ propose very different solutions with provisions expressed in the form of wishes, voluntary absten-

¹²*Id.* at 53.

¹³International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collisions, *open for signature*, May 10, 1952, 429 U.N.T.S. 233.

¹⁴[1939] A.C. 160.

¹⁵Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, [1964] 2 U.S.T. 1607, T.I.A.S. No. 5639, 516 U.N.T.S. 206.

tions out of courtesy and straight immunities for state-owned vessels.

The doctrine of extritoriality has equally been applied to aircraft and one finds *mutatis mutandis* the same problems affecting its application to ships.¹⁶

National laws are most often limited to the type of fictions analyzed in Section 1 *infra*. Thus, Article 36 of the Belgian Law of June 27, 1937 states:

Offenses committed on board Belgian aircraft while in flight are deemed to be committed in Belgium and may be prosecuted even if the accused is not found in the territory of the Kingdom of Belgium . . . Articles 6 to 13 of the Law of April 17, 1878, setting forth the preliminary section of the Code of Penal Procedure apply to offenses committed aboard a foreign aircraft while in flight as though the fact occurred outside the territory of the Kingdom of Belgium.

Article 7 of the Law of June 27, 1937 states:

Births taking place aboard Belgian aircraft while in flight are deemed to have occurred in the territory of the Kingdom of Belgium.

The same provisions apply regarding deaths. In all the examples given in this second section the fiction consists of utilizing an ancient legal category and applying it to a new situation. Extritoriality is the type of concept which has proved to be inadequate and transitory and moreover, one does not dare to pursue this fiction to its logical extremes. Should a vessel actually be considered in law as a floating island of its flagstate its status would in fact be that of an island, that is, it would have sovereignty over the land beneath it and the air space above, as well as over the territorial waters surrounding it. Such extravagant views have never been advocated. Creation of a new concept (immunity) or using several concepts will enable one to give more precise legal status to a new situation.

On the other hand, there are concepts which are quite easily extended. Such is the case of the concept of a "legal person," which, after having been applied to the state, has been extended to international organizations. This is equally true of the concept of "nationality" which originally was intended for individuals and has been extended with little difficulty to legal persons, ships and aircraft so that almost no one notices the original fiction.

¹⁶See generally Cheng, *Analogies and Fictions in Air and Space Law*, 21 CURRENT LEGAL PROB. 137 (1968).

¹⁷Law of June 27, 1937, art. 7 *bis*.

C. *Fictions which have been developed in order to set aside the application of a rule of law or to broaden the interpretation of its terms.*

During the 18th Century and at the beginning of the 19th Century, the naval powers regularly used the blockade as an act of war. This act consisted of surrounding a port or a part of the coast with permanent naval forces in order to prevent all outside communications by sea. The blockade was effected simply by cruising along the portion of the coast (blockade by cruising).

A practice subsequently developed became known as a "cabinet blockade," "paper blockade," or "fictive blockade." The powers were satisfied merely to announce the blockade without effectively assuring it. This form of abusive practice was vividly criticized and the Declaration of April 16, 1856 put an end to its use. Article 4 provided that:

Blockades in order to be binding must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy coast.¹⁸

In fact, the purpose of the fiction was to free oneself from complying with an indispensable condition, as far as the application of the rule was concerned.

The practice of international organizations frequently ended up with the same type of situation. For example, to be validly taken the decisions of the Assembly and the Council of the League of Nations required a unanimous vote. Article 5 section 1 of the Covenant states:

Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting at the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.

In order to soften this rule, it became a practice to consider abstentions as not affecting the unanimous nature of a vote; the result of this practice was to set aside the application of a strict rule by means of a fictive unanimity. Likewise, the United Nations used the same device regarding abstentions in the Security Council, despite explicit provisions of the Charter. Article 27 section 3 states:

Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.

In no case may an abstention be assimilated to an affirmative vote. Such

¹⁸See A. Ghozland, *La fiction en droit international* 1921 at 55 *et seq.* (unpublished thesis in Librairie générale de droit et de jurisprudence, Paris).

practice is therefore *contra legem*, but nevertheless is accepted without objection.¹⁹

Another famous example is found in the 19th Session of the General Assembly. According to the interpretation of the facts as given by the United States and its supporters, by virtue of Article 19 of the Charter, several states, including France and the Socialist States, should automatically have lost their right to vote in the General Assembly after failing to pay their share of the United Nations budget.

In order to avoid having to face the difficult question which would have arisen had a vote been required, a procedure was developed during the Session which substituted a consensus for a vote; thus, decisions could be made without a vote so long as there were no objections. On February 18, 1965 this fiction reached its culminating point after Albania forced a procedural vote on whether or not the Assembly would continue its work without voting. The United States thereupon made it known that it would not consider such vote as jeopardizing the application of Article 19 of the Charter. The Assembly voted to continue not to vote and that its vote was not a vote, thus in actuality setting aside the application of Article 19.²⁰

We have shown elsewhere²¹ that States may set aside the application of a provision by arguing that there is a legal vacuum. Specifically, at the General Conference of UNESCO, in 1962, there was a question as to whether a decision on the project to salvage the monuments of Nubia was to be taken by a simple majority vote or by a two-thirds majority vote. The project involved raising funds through a borrowing by the organization. According to Article IVC section 8 of the Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO),

Decisions shall be made by a simple majority except in cases in which a two-thirds majority is required by this Constitution.

Neither the Constitution nor the rules of procedure of the General Conference required that the resolution in question be adopted by a two-thirds majority vote and it therefore should have been adopted by a simple majority vote. Nevertheless, the magnitude of the projected un-

¹⁹U.N. CHARTER art. 27, § 3. The situation is different with regard to absences; on this point the U.S.S.R. considered that the Resolutions adopted by the Security Council while it was absent during the Korean War were illegal.

²⁰For more information on the question see Salmon and Ismets, *La crise financière et constitutionnelle de l'ONU devant la XIX^e session de l'Assemblée Générale*, 73 SOCIALISME (1966).

²¹Salmon, *Quelques observations sur les lacunes de droit international public*, 1967 REVUE BELGE DE DROIT INTERNATIONAL 440.

dertaking prompted the French representative to argue to the Legal Committee that the drafters of the Articles of Organization and the Statutes had never envisioned such a situation. He claimed they were facing a legal vacuum which, by analogy, called for the application of Article 18 of the United Nations Charter which stipulates that decisions on important questions are taken by a two-thirds majority vote.

Even though the Constitution of Organization of UNESCO contained rules similar to Article 18 of the United Nations Charter, the French thesis of a legal vacuum was adopted by the General Conference. This thesis was nothing more than fiction. It was a screen with obvious political ends, aimed at setting aside a patent provision in the Constitution of UNESCO. The creation of a legal vacuum and filling it immediately with another rule allowed the application of law to be set aside in favor of a newly created rule.

Another kind of fiction consists in the strict observance of legal formalities, which gives the impression of following the law, while at the same time breaching it in spirit. A good example of this is seen in the entry of sixteen states into the United Nations on the 13th and 14th of December 1955, after a five-year period during which all admissions were blocked. The Western States objected to the admission of Albania, Bulgaria, Hungary, Mongolia and Rumania. The Soviet Union countered with a veto in the Council on the admission of the other dozen candidates. For the sake of universality, the Soviet Union had proposed the admission of all states as a single block. However, when consulted on this procedure, the opinion of the International Court of Justice was that each candidate had to be reviewed separately and that it was improper to subject an affirmative vote for the admission of one state for the simultaneous admission of the other states.²²

Nevertheless, in spite of the separate votes cast, it was, in fact, an admission of a single block of sixteen states with Japan and Mongolia postponed.²³ Thus, although all the formalities were observed, faithfulness to the letter of the law was a mere sham since at the very root the principle of a block admission won the day.

²²Advisory opinion on conditions of admission of a State to membership in the U.N. [1948] I.C.J. 57.

²³See 12 U.N. REV. 11-13 (1965).

III. FICTIONS AS IDEOLOGICAL REFLECTIONS

A. Fictions arising from the fact that international law does not regulate the consequences which the States may draw from reality. False characterizations are used by the States in the exercise of their sovereign powers to deny reality.

Some discussion of the general theory of recognition will be useful here. In the present state of international law, since the states are sovereign, there is no obligation to "recognize" certain facts, states or situations. Since recognition is a free act of the states, they can either refuse to recognize reality and deny its existence or recognize that which is not real and consider that it exists.

1. Refusal to recognize reality

There are many examples of this type of situation. With regard to States, Israel is not recognized by the Arab States, and the Democratic Republic of Germany and the Democratic Republic of Vietnam have not until very recently been recognized by the western nations and their third-world allies. Certain states still refuse to recognize Bangla-Desh and the Democratic Republic of Korea. In such case the unrecognized state is labelled an entity. A famous example with regard to governments is that of the People's Republic of China. It took over twenty years for the western nations and their allies to recognize that government, beating the previous record set by the length of time it took to draw the government of the USSR from a similar limbo. The same may be said with regard to other situations, a prime example being the lack of technical recognition accorded the Oder-Neisse border.

Of course, in all these examples it would be possible to argue the difficulty of determining reality since it is not as much a question of a factual situation as it is a legal one, that is, the existence of a "State," a "government" or a "border." However, the difference is smaller than it appears when, after defining these concepts, it is possible to determine that the situation meets the conditions specified in the definition. Moreover, in these matters actuality is an objective phenomenon. The existence of the Democratic Republic of Germany or the Democratic Republic of Korea, or even the government of Mao in mainland China, are facts which are uncontested.

2. Recognition of the false

The phenomenon is all the more striking when one notes that the states consider as existing that which is not, or that which is no longer

existing or that which has yet to come into existence. There are many examples of instances where recognition is maintained for fallen states, for their diplomats, or for treaties signed by them; certain states maintained their recognition of the Baltic States well into the 1960's.

Chiang Kai Shek's government's pretense of representing the continent of China in the United Nations, supported by western allies, was a real challenge to reality as well as a scandalous situation which lasted until October 1971, twenty-two years after Mao Tse Tung effectively took power over the entire continent of China. Among other classic examples of fictions of this sort are the Vatican and the independent State of Congo (1885-1908).

From 1870, following Italy's conquest of the Pontifical States, the Pontiff lost all temporal power, although the Law of Guarantee of May 13, 1871 granted him various privileges. The Lateran Agreements of February 11, 1929, changed this status by creating the Vatican State. Legal scholars almost unanimously call it a fiction, for the special factual conditions which define it a state cannot be isolated under territory (about 110 acres) and a population of some 500 having nationality *ratione muneris*. The Italian legal system, both executive and legislative, generally is applied in the Vatican.

It is possible to discuss at length the need for or the suitability of availing oneself of this fiction, or the obsession with the concept of a territorial grant given to remove the Pontiff from all national sovereignty, since other ways could no doubt, have been found which would have been more appropriate, such as an international organization. Nevertheless, Italy as well as many foreign States hold the Vatican to be a State.

The facts concerning the independent State of Congo during the years 1885 to 1908 are well known. The International Association of the Congo was created in 1884 by Leopold II, King of Belgium, in order to administer the territories which were discovered in the Congo. In 1884, and during the International Conference concluded on February 26, 1885 with the General Acts of Berlin, the Association obtained the right to create an independent State of Congo, neutral and open to trade with all the States.

The first fiction, as regards the "international" character of that state quickly vanished when the one who had organized everything backstage appeared on the scene at the right moment as the head of the new state. It was, moreover, an open secret. A Resolution of the Belgian Houses of Parliament of April 28 and 30, 1885 personally authorized Leopold II to be the head of the State of Congo.

The second fiction, the one concerning Congo's independence, became patent very quickly. The Prime Minister Beernaert declared the following before the House:

The country does not have to fear the military and financial costs which ordinarily are attendant to the establishment of a colony. This is not a case of flying a Belgian flag in Africa. An independent State is being formed and the King intends to rule the international Colony, of which he will be the head, with the resources and forces belonging strictly to the new State.²⁴

On April 28, he again stated:

A personal union leaves the two States absolutely separate and absolutely independent; they have nothing in common either from the military, financial or diplomatic points of view.²⁵

As we note, the colonial character of this undertaking was expressed shamelessly and the only aspect from which Belgium retreated was calling itself owner of the colony, not for any moral reasons since there were none at that time, but because of its parochialism and greed.

The attitude of the Belgians was bound to evolve, but in the meantime the Belgians took charge of the administration of the colony, whose central government was in Brussels. As Ghozland recalls, in certain ministries the signs on the doors read "Ring twice for the Congo."²⁶ Belgian capitalism would not allow this magnificent opportunity to escape. In 1889, King Leopold II announced that in his Last Will and Testament he was leaving the Congo to Belgium. In 1883 the Belgian Constitution was revised in order to permit Belgium to acquire colonies, and in 1908 the Belgian Parliament accepted to proceed with the annexation of the Colony. This was the final renunciation of the fiction and the colonial character of Belgium over the territory was officially recognized.

The status of both Byelorussia and Ukraine, implicitly recognized as states by the United Nations Charter and the Conventions creating the specialized agencies, is also a fiction in the sense that, even if they are Federated States of the U.S.S.R. having international capacity by virtue of the Constitution of the U.S.S.R., they are not independent states. The actual motive behind according them such status, however nominal, was to give a plurality of votes to the U.S.S.R.

²⁴P. VAN ZUYLEN, *L'ECHIGUIER CONGOLAIS OU LE SECRET DU ROI* 132 (1959).

²⁵*Id.* at 133.

²⁶A Ghozland, *La fiction en droit international*, 1921 at 92 (unpublished thesis in Librairie generale de droit et de jurisprudence, Paris).

Other fictive States frequently cited in the legal doctrine are Manchukuo (1931-1945), Slovakia (1940-1945) and the Philippines (1943-1945), which were created by Japan or the Third Reich out of independent states (China and Czechoslovakia), or were created from a United States dependency. In such instances the absence independence resulted from the absence of effective existence or of real autonomy.

By analogy, the socialist states and some of the states of the third world considered South Vietnam as a purely fictive state, artificially created by France and continuing to exist by the grace and support of the United States. Here we come to another problem raised by the consequences which must be drawn from reality while the latter is the result of an illegality.

In international law, the refusal to recognize the consequences of reality or the existence of a situation may be explained by the illegal nature of the particular situation. In this event, the rejection of reality is not the result of an arbitrary characterization by some, but an obligation not to recognize an illegal situation.

Thus, in the case of Katanga, the Security Council in its Resolution 169 of November 24, 1961, deplored "the secessionist activities and the military action now being carried on by the provincial administration of Katanga with the aid of external resources and foreign mercenaries." The Council completely rejected the claim that Katanga was "a sovereign and independent nation." Any other position would have been tantamount to a premature recognition, consisting of an intervention in the internal affairs of the Congo.

The obligation on the part of the members of the U.N. not to recognize situations established by force was again brought up recently by the Security Council in connection with Israeli victories during the Six-Day War, in particular regarding the illegal occupation of Jerusalem. The obligation not to recognize situations which are contrary to the right of people to govern themselves was also brought up by a decision of the Security Council requesting the States "not to recognize the illegal racist minority government of Southern Rhodesia," or to recognize as illegal South Africa's presence in Namibia. Such proceeding, *i.e.* non-recognition, is the only available sanction in the world today, in view of the lack of more effective means (such as economic or military) which are not feasible or whose effectiveness is limited because of the attitudes of the states which should exercise them.

On the basis of the preceding principles, it is possible to justify maintaining the recognition of governments in exile when their removal is occasioned by an illegality, for example, the German occupation of countries during World War II.

We do not believe that one should confuse fiction and the practical impossibility of applying a determined legal order to a given situation. Thus, in its Resolution 2145 (XXI) of October 27, 1966, the General Assembly of the U.N. decided to revoke the mandate of South Africa over South-West Africa, to delegate the administration to the U.N. and to rename the territory Namibia. The fact that South Africa has not to date acceded to this decision does not give the latter a fictive character.

The case of the Status of Jerusalem combines the two effects which were just examined. Before Israel's attack in 1967, the majority of the member states of the U.N. refused to accept the factual status of 1948 under which Jerusalem was occupied in part by the Israelis (New City) and in part by the Jordanians (Old City), as opposed to the U.N. General Assembly's partition plan, which provided international status (*Corpus Separatum*) for the city of Jerusalem and the neighboring holy places, a status which was never effected.

Note in this connection the declarations of Pierre Harmel, Belgian Minister of Foreign Affairs, on January 27, 1971:

I would like to remind the Senate that Belgium remains faithful to the Decision of November 29, 1947, of the United Nations General Assembly, which provided an international territory for Jerusalem *Corpus Separatum*. Thus, the principal nations of the West maintain general consuls in Jerusalem. In respect of the principle of *Corpus Separatum*, *exequatur* will not be requested either from the Israelis or from the Jordanians.²⁷

B. *Fictions resulting from the fact that the States do not dare to state the truth or recognize the truth. The false characterization is used for reasons of courtesy or hypocrisy in order to hide the truth.*

Colonial and imperialist powers have utilized that type of fiction with extraordinary regularity, in order to give an aura of respectability to their acts of plunder; humanitarian concerns, whether actual or assumed, were in the forefront. The powers claimed that their acts were to "bring up peaceful civilization in the general interests of mankind and for the sake of international trade." Everything which in legal vocabulary could have revealed less noble aspirations was veiled by various notions which will be considered below.

One should not think that such criticisms are easy to make *a posteriori*. The fact is that enlightened individuals of the day, whose teachings were carefully rejected by classical and bourgeois scholars,

²⁷See Salmon, *Occupation Militaire*, 9 REVUE BELGE DE DROIT INTERNATIONALE 265 (1973).

denounced these fictions. They simplify our task today.²⁸

1. Occupation of territories without rulers

The traditional doctrine taught that states could acquire sovereignty over a region not under the control of any other state so long as the occupation of such regions consisted of actual possession with the intention of subjecting it to its sovereignty. The region in question was termed *nullius* territory or *res nullius*, or territory without a ruler.

In practice such territories included not only uninhabited regions, but also those with non-western civilizations whose military powers were either insufficient for any effective defense measures or were entirely lacking. "Without a ruler" was extended to mean "without a western ruler," and only a few solidly established states could maintain their integrity, such as China, Japan, Persia and Siam.

The reply to those who maintained that subjugated people had sovereignty was:

It is an exaggeration to speak of sovereignty of savages or semi-barbaric people. It is a historical contradiction to claim that international law subjects the validity of an occupation to a transfer of sovereignty. A treaty of transfer can be made only by the States that recognize international law.

Certainly, the occupation of a territory inhabited by savages will often contain misunderstandings with native leaders. Violence with regard to inferior peoples should be condemned. One could not even strictly say that they are outside the community of *jus gentium*. However, they are not members of that community. International law does not recognize the rights of independent tribes.²⁹

By refusing to grant these people the characteristics of a state, it was arbitrarily decided that their territory had no ruler. One need not emphasize the underlying racism of this so-called humanism.

2. Fictive occupation

In their humanistic and civilizing enthusiasm, the powers developed a habit of declaring occupied territories which had not been subjected to a factual occupation. The fictional nature of such occupation was immediately denounced by competing powers and the device was

²⁸In particular: De Pouvoirville, *Les fictions internationales en Extrême-Orient*, REVUE GÉNÉRALE DE DROIT INTERNATIONALE PUBLIC at 113-25 (1899); L. GERARD, LES CESSIONS DÉGUISÉES DE TERRITOIRES EN DROIT INTERNATIONALE PUBLIC (1904); Perrinjaquet, *Des annexions déguisées de terri-toire*, REVUE GÉNÉRALE DE DROIT INTERNATIONALE PUBLIC 316 (1909).

²⁹Report of M. de Martitz, ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL (ed. abrégée) II at 433.

banned by Chapter VI of the General Act of the Berlin Conference of February 26, 1885, following which this practice ceased once and for all. Instead, notification to third parties of the occupations and protectorates (art. 34) as well as "the existence of sufficient power to defend the acquired rights and, if necessary, freedom of commerce and transit," were required (art. 35).

3. International protectorates

The *Dictionnaire de la terminologie du droit internationale* defines international protectorates as:

Union of two States, generally established by treaty, whereby the protected State, while maintaining its characteristic of a State, obtains a commitment from the protecting State that the latter will defend it against certain dangers, either internal or external, without reciprocity, and the protecting State will exercise certain powers, particularly with regard to foreign matters, and to assume corresponding responsibilities, such powers and responsibilities having been heretofore exercised by the protected State.

In most instances, the true relationship has been less noble and without the equality implied in the notion. Perrinjaquet wrote:

[T]he protected state is generally weak and disorganized both militarily and financially, a prey to internal anarchy, while the protector is a great military power; we see how the mask of a protectorate is but a vain disguise, and that behind the veil of a false association the protected State is legally and factually at the mercy of the protector³⁰

The French Protectorates of Cambodia, Annam, Tahiti and Madagascar ended by becoming true colonial annexations. The Protectorates of Tunisia and Morocco left merely a nominal sovereignty to the Bey and the Sultan. The Japanese Protectorate of Korea and the British Protectorate of Transvaal also ended in annexations.

Under the protectorate system, the protected people are not denied the characteristics of a state, but such people are forced to accept the "protection," while it is loudly proclaimed that the initiative comes from them. The consent of the protected as well as the substance of the relationship is purely fictional, and the latter amounts to political domination and economic exploitation rather than protection. Thus, many problems arose with regard to the practical application of the concept of representation.

³⁰Perrinjaquet, *Des annexions déguisées territoire*, REVUE GÉNÉRALE DE DROIT INTERNATIONALE 316, 324 (1909).

Regarding pseudo-protectorates, or colonialized protectorates, the situation was similar even though the particular territories were less developed politically by the standards of western nations. In fact, the system was no less artificially imposed even when their management was not tainted with impropriety. Ghozland severely criticizes their usage:

Thus, because they are not concluded with real States; because they completely convey the sovereign rights; because their aim is to transfer the rights which do not exist and even those about which the transferee has no knowledge; because they are tainted with theft, error, violence or injury; because they are signed by other than those who legitimately have power, these conventions are not real treaties establishing protectorates and have no legal value as contractual agreements.³¹

The German colonies in Africa and the French settlement in Dahomey are two examples of this approach.

4. The transfer of administration or lease of territories

These two expressions taken from the private law of contracts sound familiar and harmless. In fact, they apply to situations wherein the sovereignty of the transferring state, far from being preserved, is most often permanently affected. From the beginning of this century legal doctrine exposed the fictional nature of transfers of administration and territorial leases,³² such as the transfer of administration by the Ottoman Empire of the territory of Bosnia-Herzegovina to Austria (Treaty of Berlin of April 21, 1879), and of Cyprus to Great Britain (Conventions of June 4 and July 1, 1878).

As to leases, their perpetual or quasi-perpetual nature (99 years and renewable) made them at the time tantamount to disguised annexations. This was the case of transfers of leases in China, Africa (reciprocal leases between Great Britain and the independent State of the Congo), Panama (Canal Zone), Cuba (Guantanamo), the Philippines, etc.

De Pouvoirville analyzed this legal technique and diplomatic method in the following manner:

It preserves the self-respect of the party that is stripped; it does not give the impression to, nor does it legally, transfer the sovereignty; it preserves the self-respect and respectability of the appropriating party since the larceny is infected by the flow of a long period of time.³³

³¹A Ghozland, *La Fiction en droit internationale*, 1921 at 129 (unpublished thesis, Librairie générale de droit et de jurisprudence, Paris).

³²*Cf. supra*, note 28.

³³De Pouvoirville, *Les fiction internationales en Extrême-Orient*, *REVUE GÉNÉRALE DE DROIT INTERNATIONALE PUBLIC* at 118 (1899).

Summarizing all the preceding methods, De Pourvoirville concluded that they were:

[H]ypocritical since they do not respond to the needs nor to the reasonable desires of those who use the methods but they are all arbitrary inasmuch as the powers that profit from the relationship disguise their arbitrariness with pretexts which are often specious and occasionally openly false, while maintaining their prestige of intellectual and civilized superiority.³⁴

5. Mandates, trusteeships, dependent territories

The situation did not improve either with the League of Nations or with the United Nations, at least at the beginning of the latter's existence.

The Mandates of the League of Nations, in spite of the term being borrowed from continental private law, bore no resemblance to the original concept since the term presumes legal equality of the partners, and this was not the case with the Mandates. Mandates which were supposedly accorded to moderators by the League were in fact determined by the Allies who presented the League with a *fait accompli*. The "sacred mission of civilization" did not hide the disguised colonies of Mandates A and B and the desire next by the holders of Mandate C (South Africa with regard to the South West Africa). Those who might labor under a false impression had only to note that the territories belonging to the vanquished states (the Ottoman Empire and Germany) were placed under mandate. Colonies belonging to France, England, Belgium or Holland were exempt from the "sacred mission of civilization" and the open door policy.

The concept of trusteeship was developed by the authors of the Charter who searched for a new label for mandates without changing the contents of the bottle. The concept of representation which is at the base of this institution under private law is just as inadequate as it was for the mandate. Paternalism, indeed racism, so, implicit in the concept was, no doubt, better suited to the sociological realities than the concept under the League of Nations.

Here, once again, there was no question of placing under trusteeship the colonies which were legally baptised in the Charter as "independent territories." In spite of the inducements in the provisions of the Charter, no administering state put a single dependent territory under trusteeship. One of the differences between the two systems was the control of the Trusteeship Council which they did not want to abolish. Instead, the

³⁴*Id.* at 116.

United Nations had to struggle against an opposite phenomenon: the comparison of trusteeships to dependent territories, notably by the administrative unions.

In order to avoid the dangers of having certain colonies strive towards independence, colonial states tried to camouflage to the maximum their analogous character by baptising them their "overseas territories," or provinces, or overseas departments (for example, Algeria and the Portuguese colonies in Africa). Any suggestion of independence for these territories or even for them to be preoccupied with the thought of it was seen as a challenge to the territorial integrity of the administering state, or as meddling in its internal affairs so as to foment secession or civil war!

6. Solicited humanitarian or fraternal intervention

Interventions hold a privileged position as far as fictions are concerned. Officially, they are more often "solicited" and therefore eliminate the need for justification by the intervening party with regard to third parties or its own public opinion. In 1876 Gustave Rolin-Jacquemin wrote the following concerning the French intervention in Lebanon:

Above all concerned with preserving appearances and traditions, the diplomacy again resorted to the legal fiction at the Sultan's initiative, just as it did in 1856!³⁵

With regard to the British intervention in Egypt in 1882 and other permanent interventions, Perrinjacquet stated:

Under the pretext of maintaining order in a country troubled with internal disorders or revolutions, of protecting its nationals against the insecurities and of remedying the impotence of local authorities, one occupies the country and returns justice to it and little by little one substitutes one's authority for that of the local, while loudly proclaiming that one has no intentions of conquest, that one is merely exercising temporary action which is indispensable to the general welfare of civilization and humanity.³⁶

A hundred years later the same fiction with regard to solicited interventions was employed in the case of Hungary and Vietnam.

The Belgian intervention in Stanleyville in 1956 was justified by say-

³⁵Rolin-Jacquemin, *Le droit internationale at la phase actuelle de la question d'Orient*, REVUE DE DROIT INTERNATIONALE ET DE DROIT COMPARÉ 326 (1876).

³⁶Perrinjacquet, *Des annexions deguisees de territoire*, REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC at 332, 339.

ing it was "solicited." A total of 54 white hostages were "freed from the clutches of the rebels" at the cost of 2000 Africans killed, and the rebellion was put to an end.

The United States, likewise, intervened in Santo Domingo to rescue 500 American citizens. From what? The answer to that questions is still a mystery and there was then not even the pretext of hostages. Nevertheless, 30,000 marines were rushed there and remained for three months with a very satisfactory result -Juan Bosch, Camano and other constitutionalists were in no danger of losing power!

The intervention by the U.S.S.R. and certain other COMECON countries in Czechoslovakia for "fraternal" purposes convinced no one, including other Communist states or parties.

C. Fictions arising out of theories established by legal doctrine and legal formalism. False characterizations are used in order to systematize, rationalize or to organize. The fiction's purpose is to justify reality for the benefit of special class interests.

This section deals with fictions in legal doctrine and legal formalism. The doctrine which partakes of the ideology of a system creates an even more powerful set of fictions which, in the final analysis, do more spiritual harm than does the doctrine itself to the virtues of intellectual and scientific spirit and objectivity. The doctrine asserts its freedom from politics and claims only to serve the law although the law which it espouses is but the expression of a conservative policy and its idealism and humanism benefit only the interests of imperialist powers.

This is true of all concepts which liken a state to a subordinate power in relation to a world power or a world order, such as the concept of "World State," when used to explain international organizations or the end to which an application of international law would lead, or the concept of "jurisdiction," when used to explain a state's powers. Similarly, analogies drawn from constitutional law such as "executive", "legislative" and "judicial" powers are all fictions when applied to international law. Since the latter has nothing in common with a domestic legal system, such fictions serve only to express their author's philosophies of history.

The same is true for all theories which impart a federal pattern to international organizations. This does not mean that all the concepts of federal law used in explaining certain mechanisms of the law of international organizations are unwelcome—merely that it should not go beyond this point and their use should be exercised with care. Thus, the concept of "supranationality" has wrought considerable harm to the law of the European communities. Much has been written to advance this

concept in spite of the realities and the terms of the Treaty of Rome. What more can be said of the famous George Scelle's "dedoublement fonctionnel?"

Professor Bourquin criticized the proposed plans to give the United Nations enlarged "capacities" and to visualize it as a Superstate. He stated:

In the plans which significantly increase the powers of the U.N., one often forgets to take into account that these powers would not be accorded to a homogeneous body which would be concerned only with the common interests of international society but to an association of States, each one guided principally by national imperatives and endeavoring to utilize the resources of this Organization for its own political ends. Legally, the power of the Organization would be enlarged and hence the power of the community which it represents. But, herein lies the fiction. Since the decisions of the Organization are taken by a majority vote, the principal beneficiaries of the change would be the majorities, or more precisely, the powers around which such majorities crystallize. In our world which is deeply divided, this would amount to handing over a highly dangerous weapon to the Powers. This situation could lead to the demise of the Organization rather than strengthening it.³⁷

Professor Tunkin uses much stronger terms in decrying this move:

Under present conditions, plans for the creation of a World-State calls to abolish State sovereignty and objectively reflects the tendencies of the imperialist Powers to use international organizations for their own reactionary purposes. Any lessening of importance of State's sovereignty at present only facilitates the intervention of the great imperialist Powers in the domestic affairs of the weaker States for the purpose of repressing the liberation movement and the continuation of the economic and political subjugation of the people.³⁸

In the same vein, Professor Chaumont warned that:

The jurists who exclaim their wish for a system with international authority endowed with executive powers either forget the disparities which make it impossible to have a world government for a very long time, or are prepared to accept the dictates of a Great Power or a foreign State.³⁹

The concept of an international "society" or "community" arouses

³⁷BOURQUIN, *L'ETAT SOUVERAIN ET L'ORGANISATION INTERNATIONALE* 32 (1959).

³⁸TANKIN, *DROIT INTERNATIONALE PUBLIC, PROBLÈMES THEORIGUES* 152 (1965).

³⁹Chaumont, *Cours gégéral de droit internationale public* 129 RECUEIL DES COURS DE LA HAYE 332, 366 (1970).

the same kind of reservations. What is this mythical being from which emanates a universal law valid for everyone when every day realities reveal so many divergent currents and deep contradictions and differences within the so-called "international community?"

Professor Chaumont further states:

Where does one factually find the will for an "international community," the nature or dimensions of which cannot grasp? Is there not a confusion between interest and desire. For R. Aron (*PEACE AND WAR AMONG NATIONS* -p. 705 *et. seq.*), the desire for an "international community" exists only in the minds of certain theoreticians.⁴⁰

The same author further decries the delusion of an international society which would give rise to, as well as be regulated by, international law as follows:

Concepts as general and disembodied as those of solidarity and cooperation, no doubt, express part of the reality but are much loftier than reality when used abstractly and independently of specific cases of agreement. Historical analysis will prove that such concepts are a bad cover-up for violence, injustice and exploitation which characterizes the evolution of the "international society."⁴¹

In asking us to reflect upon classical international law, Professor Chaumont shows that the entire legal doctrine proves to be an accumulation of fiction. Classical international law is "the formalization of situations of predominance of the strong over the weak." Legal formalism is:

[T]he state of international law marked by the triumph of appearance over reality, determination of rules without taking into account concrete situations in terms of the creation and application of the rules, as well as the framework of the States and the international relations in question. It is a combination of cynicism and illusion . . .⁴²

Legal formalism may lead to the making of law as an end in itself; law for the sake of law, while forgetting that the law may not be separated from reality to which it applies, without guaranteeing these realities. It is the reason why classical international law, just because of what it harbors and justifies, is unreal because of what it stabilizes and ignores.⁴³

In adopting Professor Chaumont's view—as we do—huge sections of classical law collapse, like a giant with feet of clay. Built on fiction, it

⁴⁰*Id.* at 361.

⁴¹*Id.* at 344.

⁴²*Id.* at 334.

⁴³*Id.* at 345.

cannot withstand the test of reality. The same holds true for all the concepts of classical international law which are based on the concepts of liberty and equality.

For example, consider the freedom to contract. Where is there the freedom to make contracts between a weak state economically or militarily dominated by a powerful state? Very slight, if one judges the harsh pressure applied at the Vienna Conference on the Law of Treaties by the western powers and their allies to obtain the adoption of the principle that only in the case of threat or use of force (*i.e.*, armed-coercion), as distinguished from an economic coercion, could a treaty be null and void.

Another example is found in the freedom of the seas. Who profits by this freedom, if not those who possess the means which are indispensable to use it and exploit it? That is to say, the powerful or capitalist powers. The new principle, according to which "the sea-bed is the common property of humanity," will it also not end up by being exploited by the Super Powers and the multinational companies?

The principle of equality among nations covers another set of fictions traditionally acknowledged by the expression that there is "a difference between equality in fact and equality in law." A more popular quip is, "[a]ll states are legally equal but some are more equal than others."

All the legal rules which place the developed and the developing nations on an equal legal footing in the economic area, in fact, give an advantage to the former. This could be termed "unequal reciprocity" since it always turns in favor of the industrial powers.

What then could be said about the delusion of "aid to developing nations?" It has now been amply proven that in reality aid hides the framework for domination; quantitatively, it amounts to less than the revenues realized by developed countries from the third-world countries and it maintains, if not aggravates, underdevelopment.

Finally, one should even dare to put into question the concepts of "sovereignty" or "independence" of a large number of states in a system of international relations which continues to be dominated and exploited by the strong.

The jurist, either practitioner or scholar, appears therefore, to carry a tremendous burden of responsibility in using the law as a means of perpetuating domination and exploitation. His traditional pretense of being objective and apolitical is also shown to be completely lacking in substance.