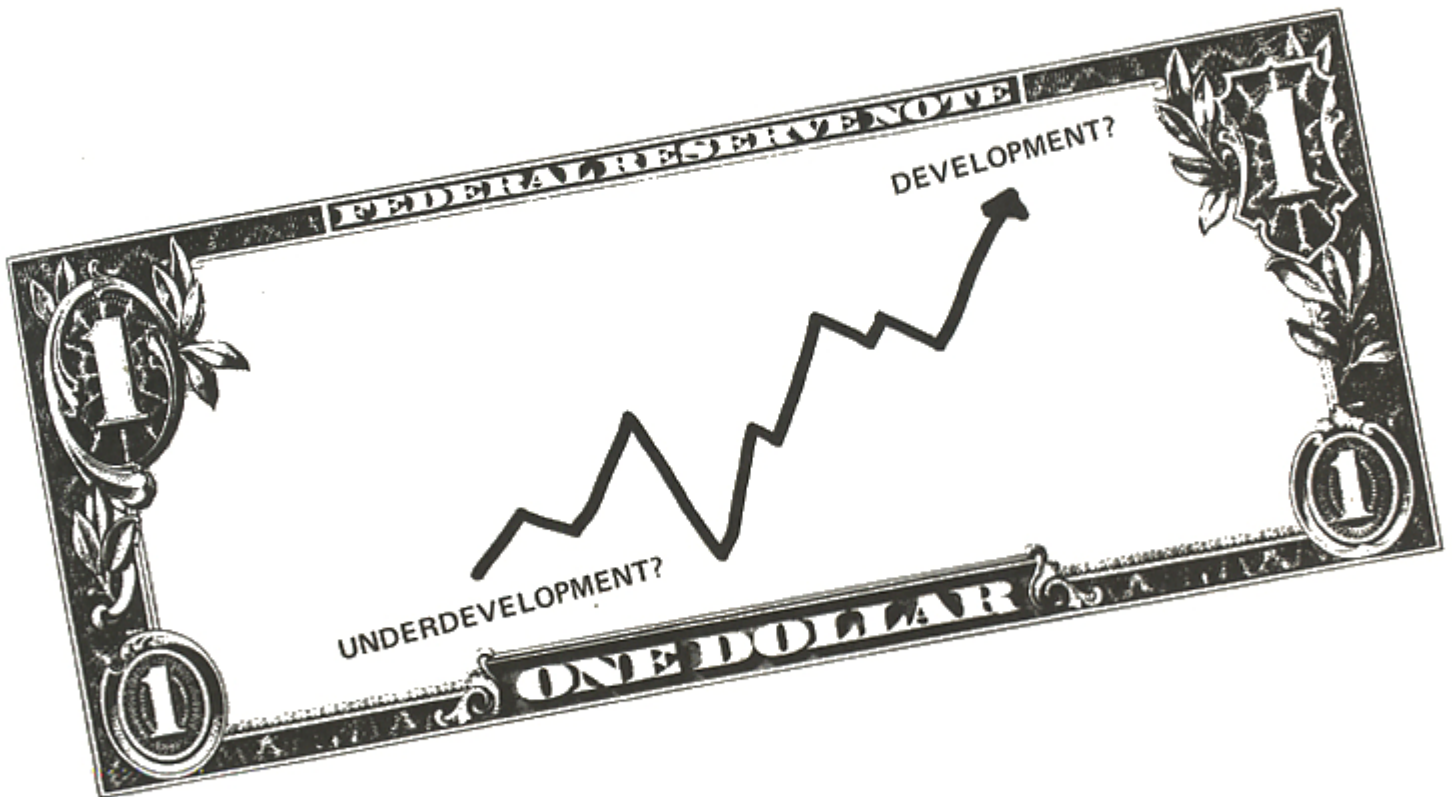


THE RIGHT TO DEVELOPMENT, HUMAN RIGHTS AND THE NEW INTERNATIONAL ECONOMIC ORDER

(EL DERECHO AL DESARROLLO. LOS DERECHOS HUMANOS Y EL NUEVO ORDEN
ECONOMICO INTERNACIONAL).

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RESUMEN

La Parte I del trabajo trata del Derecho al Desarrollo. Se analiza primero el contenido del concepto de desarrollo, especialmente su evolución a través de los tres Decenios de la Naciones Unidas para el Desarrollo, para pasar luego a examinar el concepto de desarrollo como un derecho o un principio de Derecho Internacional.

En la Parte II se enfoca la relación entre el desarrollo y los derechos humanos. El autor analiza la tesis según la cual el desarrollo o los derechos sociales y económicos tienen una jerarquía mayor que los derechos civiles y políticos, así como la posición doctrinal que considera que ambas clases de derechos tienen igual jerarquía y se refuerzan mutuamente en la práctica. Llega a la conclusión de que mientras que el subdesarrollo no justifica que se descuiden o violen los derechos humanos, el pleno gozo de ellos sí depende del progreso social y económico.

La Parte III trata del Nuevo Orden Económico Internacional considerado como equivalente a la supresión de los obstáculos internacionales al desarrollo. Se describen varios aspectos específicos de la necesidad de regular o reestructurar las relaciones económicas internacionales existentes y se resumen los objetivos y metas concretas del NOEI en particular en el campo normativo.

ABSTRACT

Part I of this paper concerns the Right to Development. First the meaning of development is considered, in particular its evolution throughout the three U.N. Development Decades. Second, the concept of development as a right or principle of international law is considered.

Part II focuses on the relationship between development and human rights. The author analyzes the thesis that development or social-economical rights have priority over civil-political rights and the thesis that the two sets of rights are of equal importance and mutually reinforcing, to conclude that, while neither violation nor neglect of human rights are justified by underdevelopment, full realization of civil-political rights is dependent upon economic and social progress.

Part III concerns the NIEO, which is equated with the removal of international obstacles to development. Specific aspects of the need for regulation or restructuring international relations are described and the concrete goals of the NIEO, in particular normative or legal goals, are summarized.

In 1972 the concept of a right to development was first announced in an address entitled "The Right to Development as a Human Right", by Keba Meye, then president of the Supreme Court of Senegal, now member of the International Court of Justice and President of the International Commission of Jurists.¹ Having first appeared in non-governmental circles, the RTD won rapid acceptance in the United Nations. As sometimes occurs in the UN, the concept gained ground rapidly despite -or perhaps because of- the lack of a precise generally accepted definition of its contents or meaning.

This paper proposes, first, to discuss the meaning of the term from the lawyers' point of view, or more precisely to review the attempts that have been made to define its purpose within the UN in particular; secondly, to discuss its relation to human rights, and thirdly, to discuss its relation with a concept born at about the same time which has known even more spectacular growth, the concept of a New International Economical Order.

I. THE RIGHT TO DEVELOPMENT (RTD).

What is the Right to Development? Is it a new right or an aggregate of pre-existing rights? A right or a general principle of international law? If a right, in whom is it vested and what are the corresponding duties? What is its legal nature and origins? Can a right rested in states be called a

human right?

I hasten to add that I do not propose to answer questions, but raise them simply to suggest the controversy which surrounds the concept of a RTD. As I said, my more modest purpose is to report on the history of attempts to explore and clarify its meaning, and to translate it into legal norms. In so doing, it may be useful to focus on two questions: first, the meaning of development; second, the meaning of a right to development.

A HISTORY OF THE CONCEPT OF DEVELOPMENT.

The UN's concern with development precedes the emergence of the RTD by many years, and in fact dates back to the founding of the UN: Article 55 of the UN Charter states that the UN shall promote inter alia "higher standards of living full employment and conditions of economic and social progress and development".

As Phillip Alston has pointed out, the Latin American states tried to raise issues related to underdevelopment in a variety of international fora during the immediate post-war period, but with relatively limited success.² In the 1950's a different task was taken. Emphasis was placed on the right of self-determination -which included not only the right of every people to choose freely their political status but also to choose the type of socio-economic system they believe most suitable for

them- and the corollary right to freely dispose of their natural resources. This right is now recognized as *jus cogens* that is, a universally binding norm of such importance as to override any conflicting normal customary or positive law.

The first comprehensive effort by the Un to address the problem of underdevelopment coincided with the entry into the UN of large numbers of newly independent economically underdeveloped nations, in the late 50's and early 60's: the first UN Development Decade, which began in 1960. The development decades are 10 year strategies which constitute the principle policy-setting instruments for UN development activities, which include legal, economic and technical assistance activities. They constitute the most authoritative indication of what is understood by development in the UN, and clearly reveal a marked evolution of the concept from 1960 to the present.

The First Development Decade was based on the notion that economic growth or "trickle down" reducing poverty and improving the standard of living within a given country.

The simplistic approach of equating growth with development was largely discredited by the end of the decade. On one hand, evidence was accumulating that economic growth did not necessarily result in a serious reduction of poverty in a country; on the other, there was a growing realization that an adequate standard of living is a cause as well as a possible consequence of economic growth. An uneducated, ill-nourished and unhealthy population contributes little to development and national growth.

The Second Development Decade accordingly recognized, albeit in general terms, the importance of social justice and equitable sharing of the fruits of development. The strategy spoke of the need to "bring about a more equitable distribution of income and wealth for promoting social justice and efficiency of production".³ Note the two goals: the promotion of social justice and efficiency of production.

This theme was more fully developed by the ILO and the World Bank under the banner of the "Basic Needs Theory"⁴ With the praiseworthy aim of eliminating the most inhuman consequences of underdevelopment, or as Prof. Espiritu of the University of the Philippines Law School has said, ensuring that "every man, woman and child at least has life, and perhaps even a chance at liberty and happiness",⁵ the basic needs approach emphasized a concept of development centered on the satisfaction of the elemental human requirements of the whole population. Under this approach, for ex-

ample, ILO employment projects or World Bank loans were designed with the idea of meeting the needs of the poorest sectors of a society for safe drinking water, primary health care, housing, literacy and adequate nutrition. Rather than concentrating on growth and assuming that its benefits would trickle down, under the Second Development Decade the emphasis was an equitable sharing of wealth, or where the Basic Needs Approach prevailed, a direct attack on the human living conditions of the poorest sectors of the society.

The concept of participation also was closely linked to the Basic Needs Approach. In UN jargon this is often referred to as "making the individual the subject as well as the object of the development process". A 1975 UN study gives rather more insight into what is meant by the term. Participation is defined as the "active and meaningful involvement of the masses of people at different levels in: a) the decision-making process for the determination of societal goals and the allocation of resources to achieve them and b) the voluntary execution of the resulting programs and projects."⁶

In economic or socio-economic terms the emphasis on participation and its relation to the basic needs approach might be explained, simplistically, by saying that in order to make the maximum contributions to development, it is not sufficient that a population be educated, adequately nourished and healthy: it must also be motivated.

In political terms the link between participation and the satisfaction of basic needs might be explained by saying that political powerlessness, i.e. lack of popular participation in "determining societal goals and the allocation of resources to achieve them", is too often linked to the adoption of development policies which sacrifice the material interests of large sections of the population. An example is policies which emphasize the production of export crops at the expense of food production. In other words, to anticipate slightly the Part II of this paper, the denial of political rights is used to impose unpopular development policies involving the denial of economic and social rights.

Shortly into the Second Development Decade events having profound implications for the economies of developing countries occurred: the oil crisis and inflation in the industrialized countries resulted in sharp increases in the prices of essential products imported by developing countries at a time when prices for many of their traditional exports was falling. This contributed to the realization that aid would never be sufficient to make real progress in the struggle against underdevelopment, but that what was required is drastic adjustment of a number of aspects of the existing world economic order. As the strategy of the Third Development Decade itself states in its second paragraph, referring to the

strategy of DD2 "the limitations of a strategy conceived within the framework of the existing system of international relations soon became obvious... Inequities and imbalances in these relations are widening the gap between developed and developing countries (and) constitute a major obstacle to the development of the developing countries."⁷

The call for a new international economic order was made in 1974 when the UN General Assembly adopted a Declaration on the Establishment of a NIEO and Programme of Action.⁸ While issuing the warning that "the primary responsibility for the development of the developing countries rests upon the countries themselves" the principle difference between the Third Development Decade and the preceding decades is the emphasis given to the establishment of a NIEO. Of course concern for growth and development aid remains, and the strategy for DD3 makes comprehensive and specific recommendations on these subjects.

A second innovation which appears in the Third Development Decade is that it adopts the idea of participation as an essential component of development. "The development process," it says, "must promote human dignity. The ultimate aim of development is the well-being of the entire population on the basis of its full participation in the process of development and a fair distribution of the benefits therefrom."⁹

The fulfillment of basic needs is also part of the strategy of the Third Development Decade and specific goals are set with respect to food, education, housing, water, sanitation and health care policies.

With respect to participation, it is worth noting that the participation of women is expressly recognized as an important aspect of development, including improved access to health services education, employment and financial sources and greater sharing of family and households responsibilities by men.

Although the means of goals and content of development often are not adequately distinguished, this review of the three Development Decades reveals a fair amount of agreement as to what is involved in development: economic growth; the reduction of economic inequalities, both internationally and intranationally; providing a satisfactory standard of living to all persons without discrimination (or at least in the short term satisfying their basic needs for education, food, shelter, health care, employment, etc.); popular participation in decision-making, and the establishment of the NIEO.

One major point of disagreement remains: the criticism has often been voiced, by non-governmental organisations in particular, that UN pronouncements on development are concerned exclusively with the material needs of mankind, and

neglect the importance of realizing human rights, in particular civil and political rights. Mbye, for example, states that "true development is a form of humanism, a moral and spiritual fact as much as a material and practical one. It is an experience of the wholeness of man responding to this material needs -food, clothing and shelter- at the same time as his moral requirements- peace, compassion and charity."¹⁰

The UN has recently commissioned a study on the NIEO and the promotion of human rights, now being prepared by Sr. Raúl Ferrero of Peru. The study emphasizes the need to integrate human rights norms into development planning and perhaps in time will succeed in influencing UN strategies and activities in this sense."¹¹

THE MEANING OF THE RIGHT TO DEVELOPMENT.

In his speech announcing the existence of a RTD, Mbye asserts that the right is implied in already existing international law. It has two origins. The first to be found in the right to life, and right to employment and to adequate wages, the right to an adequate standard of health and well being of all rights set forth in the 1948 Universal Declaration. Since these rights cannot be realized without development, there must be a right to development.

The second source of the RTD is found in the duty set forth in the UN charter of all member states to cooperate in promoting development, the duty of international cooperation set forth in the statutes of a number of UN specialized agencies, and an important individual right proclaimed in the Universal Declaration namely the right of everyone "to a social and international order in which the rights and freedoms set forth in this declaration can be fully realized."¹² The second source or group of sources correspond, of course, to the international dimension of the right to development

The thread was then taken up some years later by Karl Vasak, then Director of the Division of Human Rights and Peace of the UNESCO who proclaimed a new "generation" of human rights.¹³ The first generation are the civil and political rights which, according to Mr. Vasak, enjoin the state from interfering with the freedom of the individual. The second generation are the economic, social and cultural rights, which impose on the state an obligation to take positive action to ensure that the individual enjoys these economic, social and cultural rights. The third generation consists of "solidarity" rights, which require international cooperation between states for their realisation. They include the right to development, the right to peace, the right of ownership of the common heritage of

mankind. A second characteristic shared by this new generation of rights is that none of them is expressly recognised as a human right in the Universal Declaration and International Covenants, which are traditionally considered the definitive source of all international human rights.

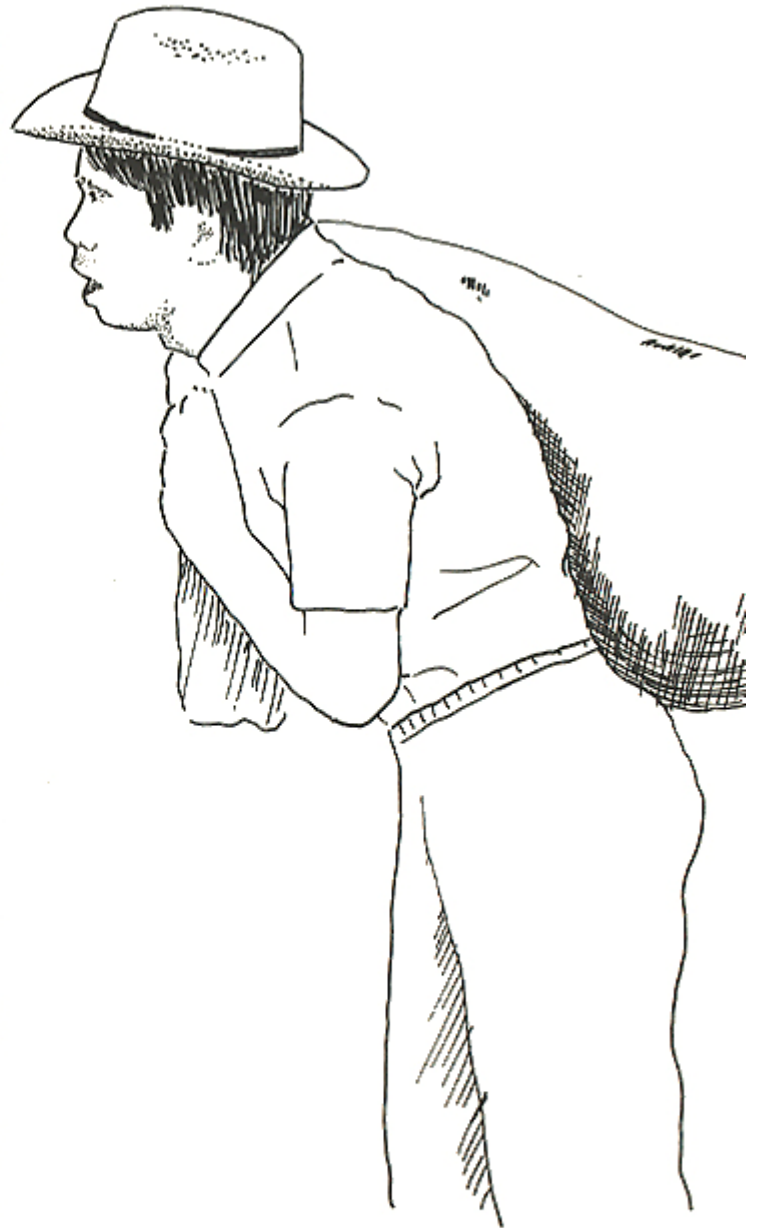
If the right to development exists, in whom is it vested? Answers to this question thus far are characterized by their disparateness. A 1978 UNESCO declaration on race and racial prejudice states that it is the right of "every human being and group."¹⁴ The world's newest regional human rights treaty, the 1981 African Charter of Human and Peoples Rights recognizes the right as a right of peoples.¹⁵ The landmark 1979 UN General Assembly resolution recognizing the right to development states "the RTD is a human right, and that equality of opportunity for development is as much a prerogative of nations as of individuals within nations."¹⁶ Note the suggestion that the right was recognized as an individual right before being recognized as a right of states.

Finally, a 1979 study by the UN Secretariat states that the right to development is both an individual and collective right, vested in states, peoples, minorities and individuals.¹⁷ The study enumerates those upon whom corresponding duties fall with the same generous spirit: the international community, international organisations, states, industrialized states, former colonial powers, regional and sub-regional state groupings, transnational corporations, producers associations, unions and individuals.

With respect to the nature of the right, the fact that its existence is derived in large part from long recognized rights such as the right to life, health and education leads some to maintain that it is not a distinct right at all, but merely a chic way of packaging or restating existing rights, which may even have the disadvantage of diverting attention from the duty of the state to protect specific rights whose content is well established to a duty concerning a rather nebulous socio-economic process, which is widely dispersed among national, international and non-governmental duty bearers and which scarcely lends itself to the traditional methods of enforcement of human rights. In addition there are obvious conceptual difficulties regarding the content of a right which is at the same time a right of states and of individuals.

Theo van Boven, the Director of the UN Division of Human Rights, offered the following defense of the RTD. "The right to development is a holistic concept which seeks to create a synthesis of a whole range of existing human rights which are informed and given an extra dimension by the emergence of growing international consensus on a variety of development objectives."¹⁸

Karel de vey Mestday, in a paper presented at the 1981 ICJ conference at the Hague, suggests



that the RTD is more accurately described as an evolving general principle of international law.¹⁹ He observes that, in contrast to international legal norms which consist of fairly clearly defined rights and duties with identifiable subjects of both, general principles of international law are necessarily broad and unspecific. However, he states: *This is not to say that the right to development is not binding as a general principle of law. On the contrary, if it can be said to be a general principle*

this means that all states have the duty to recognize it and promote it. The international community not only has a legal right to development, but is also under a positive obligation to help in securing its realization by promoting its exercise. (20).

As a principle it becomes part of the foundations of international law, although until it evolves from a principle to a set of specific legal norms states can not be accused of noncompliance with specific legal duties.

As we have seen, development is clearly a concept which has both an international and an intranational dimension. Internationally, the process of transforming the general legal principle into specific legal norms is well under way, as we shall see in our discussion of the NIEO. Intranationally, de Vey Mestdagh suggests that it is a right which is instrumental in nature, i.e. aimed at the realization of all the individual rights set forth in the Universal Declaration and International Covenants. This brings us to Part II of this paper, the relation between development and human rights.

Before leaving the question of the RTD, however, it should be noted that in 1981 the UN established a working group charged with making concrete proposals on a declaration of the RTD (21). Legally a declaration is described as a "solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected" (22). It is supposed to finish its work in 1983, and we may therefore hope that there will be soon a major step forward in clarifying the meaning of the RTD in international law.

II. DEVELOPMENT AND HUMAN RIGHTS.

If respect for or protection of human rights, has not, per se, been recognized as an element of development, it is obvious that protection of the economic and social rights of individuals is an essential element of development. The point that human rights include not only civil and political rights such as freedom of speech and the right of a fair trial but also economic, social and cultural rights hardly needs to be emphasized. It should also be recalled that the concept of development expressed in the Third Development Decade includes the concept of equality, in particular the equality of women, as well as the concept of participation, which corresponds in part to the traditional right to take part in the public affairs of the nation.

The reluctance of developing nations to recognize human rights per se as an integral part of development is based in large part on the belief that a NIEO is a matter of right, of redressing present injustices, which leads to the rejection of anything which is perceived as an attempt to condition the creation of new international economic



relations. In addition there is a fear, which is far from being unreasonable, that the linkage of development assistance or structural concessions to human rights performance in developing countries will be used in such a way as to interfere with the right of every people to choose and create the type of political, social and economic system which it prefers. Nevertheless, both industrialized countries and international organisations such as the World Bank, increasingly do link development assistance to human rights considerations. Unfortunately, this important issue of "linkage" can not be given further consideration here. (23)

Given the close relation between development and the protection of economic and social rights, it may be more useful to approach the question of the relation between development and human rights in terms of the relation between civil and political rights and economic and social rights.

A few years ago it was quite common to speak of a hierarchical relation between the two sets of rights, or the need to sacrifice civil and political rights for economic and social rights. In crude terms this was expressed in terms of the idea that freedom of speech had little importance for a person dying of malnutrition, the idea that the vast num-

ber of persons dying of malnutrition or curable diseases made it somehow morally questionable to be concerned with the comparatively small number of persons killed by government repression, or that the education or legal equality of women is a luxury in countries where the vast majority of them are preoccupied with satisfying the urgent material needs of their family. The precise nature of the purported conflict between these rights was seldom discussed, although one must admit that this attempted hierarchization did have the useful effect of forcing human rights advocates in the developed west to devote more attention to social and economic rights.

Occasionally, more sophisticated arguments about the need to sacrifice civil and political rights were made. A number of them were summarized by Robert Goodin as follows(24):

- respect for these rights tends to impede birth control efforts, which are necessary for economic progress in most underdeveloped countries.
- respect for these rights tends to handicap crime control efforts, which are necessary to increase the productivity of the population and encourage foreign investment.
- respect for these rights results in political instability which likewise discourages both domestic and foreign investment.
- respect for these rights permits a labor unrest, which reduces productivity and discourages investment.
- the system of elected government tends to encourage artificial fluctuations in the economy at election time and spending of public funds for purposes which may be politically astute but economically unjustified.

The Basic Needs Approach which evolved in the mid 70's was one response to this attempted hierarchization, emphasizing the positive, mutually reinforcing interaction between the two sets of rights. It was agreed, for example, that women must be educated and provided with equality of opportunity in order to make their maximum contribution to development.(25). To give another example, quoting from an ILO publication of the period "the role of trade unionism is to serve as a channel for workers discontent, by encouraging its collective, open and rational expression. It is questionable whether (restrictions on the right to strike) are really effective in achieving the desired result and whether strike action does not in fact serve a means of regulating conflict."(25 bis).

The concept of participation implicitly recognizes that important elements of civil and po-

litical rights, such as freedom of speech, association and assembly and the right to participate in governing the country, are not luxuries but rather essential components of the development process.

Official UN doctrine on the question is now encapsulated in the General Assembly's statement that:

"all human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights"(26)

The relationship between these rights, however, remains more complex, and intricate than this statement of principle suggests. In our opinion, the full realization of civil and political rights remains dependent on social and economic progress in three ways.

First, a few rights are directly dependent on the availability of specific human or material resources. The defendant's right to legal assistance, for example, depends on the availability of a certain number of trained legal professionals yet among the "least developed" countries there are some where the number of practicing lawyers does not exceed twenty or thirty in the entire country.

Secondly, while a certain degree of respect for human rights requires no more than a hands-off attitude on the part of the government, the extent to which the whole population is able to enjoy the benefits of a formal liberty depends on concrete progress made in specific economic, social or cultural tasks. For example, not to exercise censorship requires no more than a certain degree of tolerance or enlightenment, but freedom of expression assumes its full importance only when the entire population is literate, when there are sufficient resources to support a variety of newspapers, and radio and television stations, when books and newspapers published in other countries are freely available to the ordinary citizen. Yet in the least developed countries, 30 in number, the average per capita increase is not much more than \$200 per year.(27) *How will scarce foreign exchange be spent? How many public resources will be devoted to women, to children, to agriculture, to education, to housing, to public broadcasting?*

Thirdly, for factors which are too complex to enter into here, economic and social development tend to promote and the world tend must be emphasized: political stability and relatively democratic forms of government.

In short, three relations, civil and political rights and economic and social rights can be summarized as follows:

General assertions that restrictions on civil and political rights are justified by underdevelopment must be rejected categorically; specific claims should be evaluated critically to determine the pre-

cise link between the restriction in question and the economic or social circumstances which purportedly justify it.

On the other hand, while we do not accept that a given level of social and economic development is a necessary pre-condition for accordng a minimal respect to any human right -or in other words a minimum of respect for all human rights is within the reach of all states, even the poorest-economic and social development is not only a right in and of itself but it also enhances the prospects of full enjoyment of civil and political rights.

III. THE NEW INTERNATIONAL ECONOMIC ORDER (NIEO).

The Declaration on the Establishment of a NIEO, adopted in a special session of the UN General Assembly in 1974, begins:

We, the Members of the United Nations... Solemnly proclaim our united determination to work urgently for the establishment of a new international Economic Order based on equity, sovereign equality, interdependence, common interest and cooperation among all states, irrespective of their economic, and social systems which shall correct inequalities and redress existing injustices make it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations... (28)

A more concise definition of its goals is to be found in a 1972 resolution of the UN Commission on Trade and Development, UNCTAD, which refers to the need to adopt specific instruments for a more equitable distribution of world income, knowledge and power; more equitable distribution of world income through new rules on trade, aid and foreign investment; more equitable distribution of knowledge through new rules on the transfer of technology; more equitable distribution of power by reform of international institutions, especially financial institutions. (29)

Since 1974 monumental efforts have been dedicated to the NIEO. They cannot be adequately reviewed here. Our purpose, which parts from the conviction that the establishment of the NIEO is essential to the elimination of transnational obstacles to the realization of the right to development and thus to fuller realization of human rights, is to describe briefly what is meant by the NIEO, summarizing in concrete terms its goals and the status of efforts to realize them. This paper concentrates on certain normative or legal aspects of these efforts leaving aside such issues as development aid, reform of the International Monetary Fund, a moratorium on Third World Debts and increased South-South trade.

THE CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES.

One of the first accomplishments in the pursuit of the NIEO was the adoption by the UN General Assembly in December 1974 of the Charter of Economic Rights and Duties of States. The Charter, which has been called the interstate equivalent of the Universal Declaration of Human Rights, proclaims a number of fundamental norms and principles constituting the foundation upon which the diverse specific norm-setting activities of the NIEO effort are based.

The recognition which the Charter accords to the relationship between international economic relations and development is one of its most important characteristics. All states have the right, it declares, to belong to organizations of commodity producers "in order to develop their national economies to achieve stable financing for their development" (Art.5). Similarly, to give another example, every state has the right to profit from scientific and technological advances "for the acceleration of its economic and social development" (Art.13.1). Nor does the Charter leave open to doubt the type of development aimed at. Every state, it declares, "has the primordial responsibility to promote the economic, social and cultural development of its people (and has) the right and responsibility to select its development goals and methods...so as to bring about progressive economic and social reforms and to ensure the full participation of its people in progress and the benefits of development" (Art.7, emphasis added). Moreover, the Charter recognizes "respect for human rights and fundamental liberties" as one of the fundamental principles governing international relations (Ch.1).

Thus, the Charter has special importance in affirming the interrelation between development, human rights and the NIEO.

The Charter also expands considerably upon the joint responsibility of states in the promotion of development, first recognized in Art 55 and 56 of the UN Charter. States have the duty, it declares, to cooperate inter alia in the efforts of developing countries to accelerate their development by assuring these countries favorable external conditions and providing active assistance (Art.17); to cooperate in establishing more rational and equitable economic relations (Art.8); to cooperate in promoting the expansion and liberalisation of world trade (Art.14); to cooperate in the mobilization and utilization of national (i.e. Third World) resources for development (Art.7); and to cooperate in economic, social, cultural, scientific and technological spheres to promote economic and social progress in the whole world, and in particular in the developing countries (Art.9).

In other areas, the Charter enumerates the basic rights and duties of states with respect to

certain issues encompassed in the NIEO such as the control of transnational corporations, transfer of technology, tariffs and the like, and delineates certain general principles such as non-discrimination, non-interference and the equality of states.

REGULATING INTERNATIONAL COMMODITIES TRADE.

Commodity pricing is a fundamental aspect of the NIEO. The wealth -or poverty- of the Third World is based very largely on commodity production and export. Only 9 percent of the world output of manufactures comes from the Third World, and half of that (in 1972) had its origin in four 'middle income' developing countries.(30) More than 80 percent of the export earning of developing countries collectively are derived from commodities, i.e. agricultural and mineral products.(31) More than half of the developing nations are dependent upon one or two commodities for 50 percent or more of their export earnings.(32) In this region, for example, El Salvador, is dependent upon coffee alone for about 50 percent; Costa Rica and Honduras on coffee and bananas for about 50 percent; Guatemala and Nicaragua on coffee and cotton for about 50 percent; Cuba on sugar alone for 80 percent; Jamaica on bauxite and aluminum for about 70 percent of its export earnings.(33)

There are two principal issues concerning commodity pricing: relative terms of trade, that is the real value of the commodities exported by the developing countries relative to the prices of manufactured imports, and protection against short-term price fluctuations.

Price instability in commodities is a very real problem. To use the example of some of the crops mentioned above, during the years 1970 to 1977 prices for coffee varied from \$1080 to \$3478 per metric ton with an average annual fluctuation of around 44 percent, cotton from \$676 to \$1755 with an average fluctuation of 25 percent and sugar \$81 to \$655 with an average annual fluctuation of around 67 percent.(34) The economies of countries heavily dependent upon commodity exports are, of course, extremely vulnerable to such short-term variations in market prices. But this price instability can also adversely affect Northern economies in a number of ways. Price instability can discourage investment and reduce productive capacity in commodity exporting nations leading to supply insecurity; falling prices aggravate balance of payment problems and consequently debt servicing; sudden price increases spur inflationary trends in northern economies.

Monopolistic control of markets is another characteristic of international trade in commodities. Three US-based transnationals, for example, control more than 90 percent of the US-Canadian

market for bananas and a high percentage of the European market, while in the Americas alone fifteen nations are engaged in commercial production of the crop.(35) The advantage which this gives the purchasers is reflected in the fact that despite the minimal processing involved in the marketing of this product, the producers' share of the retail value of the product is estimated at 11-12 percent.(36) This is not unrepresentative of commodity prices in general. UNCTAD reports "for a range of such commodities (i.e. where trade is dominated by transnational corporations) the share of the developing countries in the final price is of the order of 10-15 percent.(37).

In 1976, UNCTAD adopted an approach to commodity pricing known as the Integrated Programme for Commodities. It has two components: the Integrated Commodity Agreements and the Common Fund. The former is an attempt to establish medium-range (e.g. 5 years) price agreements on seventeen basic commodities, which represent 75 percent of the world commodity trade, by negotiations between importing and exporting states.(38) Floor and ceiling prices would be set as well as production limitations.

Stocks of ten of the most important commodities would be created to be managed in such a way as to dampen price fluctuations. The financing of such stocks is one of the purposes of the Common Fund. The Fund would also provide compensatory funds to developing countries to aid in unexpected shortfalls in commodity earnings, which can result from causes other than price fluctuations, such as crop failures or labor unrest. Finally, the fund would finance 'commodity development', that is, aid to developing countries in areas such as commodity marketing, processing, storage, diversification and productivity.

Much of the controversy surrounding the commodity issue, and indeed the NIEO, centers on the issue of relative terms of trade. W. Hager has written: "No single issue in the field of international trade is approached with so much confusion and ignorance as the Third World's demand to index the price of raw materials to a standard of inflation that maintains the real purchasing power of commodities in terms of manufactured products.(39)

Negotiations about the form which indexing should take are not completed. Yet it seems certain that any agreement which might be reached must take place within certain parameters. On one hand, commodity prices can not realistically be fixed or supported in such a way as to negate long-range price changes due to changes in the size of the market or technological advances affecting the production costs of commodities and substitutes. On the other hand, as Hager observes, it would be "absurd, dishonest and counterproductive to fix floor and ceiling prices in nominal terms" when

world inflation of up to 10 percent per annum can be expected to continue.(40)

Finally, it should be noted that the present difficulties of developing countries in terms of trade is due not only to commodity prices, but also to factors such as the concentration of commodity processing in the North and monopolistic control of exports of manufacturers in the South. Exporting nations, as we have seen, often receive only 10 percent to 15 percent of the final value of commodities, and a 1968 UNCTAD study on manufactured exports showed, for example, that the dominant position enjoyed by French firms in certain countries led to margins over world prices ranging from 8 to 38 percent in electrical products, machinery, motor vehicles, tools and hardware.(41) Improvement of the terms of trade is not expected to be accomplished through shifting a greater share of commodities processing to the producing nations, eliminating abuse of dominant market positions and other structural reforms.

REMOVING OBSTACLES TO NON-TRADITIONAL EXPORTS.

Developing nations, as we have seen account for less than 10 percent of world output of manufacturing. Their weakness in this area is not only the result of 'natural' or historical limitations, but is perpetuated by certain policies. Typically developing countries face low or no tariffs on raw commodities, and increasing tariffs on processed commodities and manufactures. Australia, for example, imposes no tariff on untreated wood but 14 percent on sawn timber; the European Community permits imports of rice from developing countries with no duty, but imposes tariffs of up to 13 percent on processed rice and rice products.(42)

The proposal to promote the development of the South by altering trade patterns, therefore, includes the goal of increasing exports of processed commodities and manufactures to the North in addition to increasing South-South trade (not discussed here) and regulating commodity trading. The diminishing importance of commodities in world trade -from 1953 to 1974 the share of commodities excluding fossil fuels in world trade fell from 40 to 20 percent- underlines the importance of an expansion of non-traditional exports.(43) The program for increasing such exports consists in part in technical and educational assistance designed to help developing countries comply with non-tariff obstacles to trade, such as labeling, product quality and health regulations, the most important issue, however, is the removal of tariff obstacles.

This aspect of international trade was traditionally governed by GATT, the General Agreement on Tariffs and Trade, created for the purpose

of liberalizing and expanding world trade. However reciprocity and non-discrimination principles which had long characterized the GATT approach to trade liberalization, were in conflict with the needs of developing countries. Reciprocity because it conditioned access to Northern markets with allowing Northern penetration of the weak economies of the South; non-discrimination because it precluded preferential treatment of developing nations in international trade. In short, by presuming a fictitious equality between trading partners it ignored the real needs of developing nations with respect to both protection of domestic industries and access to markets.

Even prior to the launching of the NIEO program in 1974, the developing nations won an important battle with the amendment of GATT rules to permit member states to give non-reciprocal preferences to developing nations. Another advance was made with the establishment by the UNCTAD of the Generalised System of Preferences (GSP), which was originally conceived of as an agreement by which all the industrial countries would grant tariff preferences on all manufactured goods to all developing countries. Such a goal was not realistic, and the reality of the GSP has proven to be rather far removed from the original vision. It has been estimated that only 12 percent of the exports of developing countries come within the scope of the GSP, and only about 4 percent of their exports actually benefit from these tariff preferences. (44) The exclusion of processed agricultural products from the GSP, is a major limitation. Others include the exclusions which each industrial state is permitted to make to protect vulnerable domestic industries, technical difficulties in establishing eligibility for preferential treatment, and politically motivated exclusions. The US is particularly guilty of the latter practice, excluding, of course, inter alia, communist nations and members of OPEC or other commodity producers associations in violation of the principle of non-discrimination recognized in the Charter of Economic Rights and Duties of States.(45)

INTERNATIONAL REGULATION OF THE TRANSFER OF TECHNOLOGY.

While it is well known that technological know-how and scientific research are dominated by the industrial societies of the Northern hemisphere, the degree of their domination may not be fully appreciated. According to a 1972 UNCTAD study, less than one percent of the 3.5 million patents then in existence were owned by nationals of the developing countries.(46) The technology market is characterized by a high degree of monopolization, a disadvantage which is often compounded by the lack of technical sophistication of the recipients -purchasers or concerned governments- of the technology. A large part of technology

transfers occur within transnational corporations, which increases the difficulty of adequately regulating such transactions.

For purposes of international regulation, transfer of technology is understood broadly, referring not only to the granting of rights to exploit, patents or produce products protected by trademarks, but also the transfer of machinery or processes in which technology is embodied. Thus the sale of photocopy machines, opening of a Kentucky Fried Chicken outlet or construction of an automobile assembly plant may all represent the transfer of technology. Although the North's monopoly on technology is due in large part to economic and historical factors, -in Africa, Asia and Latin America, for example, there are 8,22 and 69 engineers and scientists per 10.000 population, respectively, as compared to 112 per 10.000 in the West,(47) - it is aggravated by certain policies of the technology owners. Transfer of technology contracts often include, for example, a requirement that technical or administrative services be purchased along with the technology itself, or clauses which prohibit improvement or adoption of the technology or which provide that any improvements or adoptions become the property of the grantor.

Present patterns of technology transfer present serious disadvantages for the economies of developing countries. Technology pricing arrangements within transnationals maximize the benefits to the parent company, so that the transfer of technology often results in low profits or even a net loss to the affiliate or branch in a developing country. Restrictive contract clauses such as price or export limitations, to give only two examples, limit the scope of economic decision-making and the economic advantage to the technology importing country. In a 1972 study of the Andean pact countries, for example, 75 percent of the technical agreements examined were found to contain a total prohibition of exports.

The 'appropriateness' of the technology is another problem. Technology developed in industrial societies where labor costs are high generally has low labor requirements, and is seldom adapted to the needs of developing countries where labor is cheap and unemployment a major social problem. As one UNCTAD study concluded: "The powerful combination of technology, capital and organizational skills at the disposal of firms in developed countries has not contributed optimally to the solution of the employment problems, and may actually have aggravated it where it has replaced traditional patterns of production."(49)

The appropriateness of the product itself is also an issue. On the most general level this concerns the reluctance of most transnational corporations, committed to product standardization and economy of scale, to invest in research

designed to adopt products to the needs of particular societies.

A more specific problem is the allocation of scarce resources to import technology to satisfy the demands of an economic élite rather than the basic needs of the society. To give an example, it is estimated that Bangladesh will save several million dollars annually as the result of the recent prohibition of the sale of some 1700 pharmaceutical products. Many of these products were produced locally under licensing agreements, and most (some 1500) were banned on the sole ground that they were medically superfluous.(50)

In 1974 UNCTAD began to study proposals concerning an International Code of Conduct for the Transfer of Technology (51). A principal function of the proposed Code would be to regulate the conditions of agreements under which technology is transferred, a sort of combination model contract law and consumer protection code for developing countries. The working draft contains a lengthy list of undesired terms of transfer, which include restrictions on production, pricing and exports, any restrictions or payments extending beyond the duration of the agreement, packaging, technology so as to require the purchase of unnecessary or locally available components, supplies or services, restrictions on related research, adoption or the use of other technology, forfeiture of the right to challenge the legality of a patent, and so on. One of the many disagreements concerning the present draft is whether all the enumerated practices should be banned absolutely, or whether a more flexible approach involving a 'prohibition of abuse' doctrine with respect to some practices would be more appropriate.

Other provisions of the draft reflect a more active or aggressive approach to the issue of access to technology. These reflect the philosophy of Art.13 (1) of the Charter of Economic Rights and Duties of States, which declares that "Every state has the right to benefit from the advances and development of science and technology in order to accelerate its economic and social development". In this spirit the draft contains provisions which go far in making the technology owner's right to dispose of this property as he wishes, conditional on the state's (and individual's) right to enjoy the benefits of the scientific advances of mankind.(52) Thus the draft contains provisions for compulsory licensing which would prohibit refusal to grant a license on reasonable terms and provisions which would permit revocation or expropriation of a patent on grounds such as failure to meet market demand.

These provisions are, as one would expect, given the magnitude of the economic interests involved, extremely controversial. Similar issues concerning the transfer of deep sea mining technology, it will be recalled, were among the most

contested issues of the Law of the Sea negotiations. Controversies exist, and progress towards a Code of Conduct for the Transfer of Technology must be considered less advanced than in some other aspects of the NIEO.

THE CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS

One of the most important developments of the post war period is the growing importance of transnational corporations (TNC's) in the world economy. TNC's control an estimated one-quarter to one third of all world production, as much as one-half of world trade.(53) Their power is highly concentrated. Of the 10,000 TNC's which exist and control 70,000 affiliates, only 150 TNC's account for half the total value of these firms(54). In national terms the concentration is still greater: most of these TNC's are headquartered in five countries: The United States, France, Great Britain Germany and Switzerland. (55) Small numbers of these TNC's dominate the production, processing or marketing of a number of commodities, including oil, bauxite, copper, iron, ore, nickel, lead, zinc and tin.(56)

Certain abusive practices by TNC's have received considerable publicity in recent years: the bribery of leading Japanese and European political figures, the role played by US transnationals in overthrowing the elected government of Chile in 1973, the collaboration of TNC's in racist practices in South Africa. Less spectacular but more pervasive problems include collusive manipulation of world markets for manufacturers (see above) and intra-firm pricing arrangements which reduce tax liability and have an adverse effect on the balance of payments of the host company. One writer reports, for example, that trade between TNC's and affiliates "is usually characterized by an over invoicing of imported inputs of at least 50 percent and an under invoicing of exported products of somewhere around 40 percent. Given the percentage of world trade controlled by TNC's the net effect of such practices on the economy of the Third World must be staggering. The low visibility of intra-firm transactions, the remoteness of real corporate authority and in many cases the relative lack of expertise and sophistication on the part of host country authorities compound the problems of regulating TNC activities.

The watershed year of 1974 was also marked by the creation of the UN centre and UN Commission on TNC's, the former part of the UN Secretariat and the latter an intergovernmental commission composed of 48 member states. Much of their work has been devoted to the elaboration of a Code of Conduct for TNC's(58)

In its present draft form the Code establishes norms of good conduct for TNC which include support for the development goals and priorities of

the host country, respect for national law and social tradition, non-interference in international relations and internal politics and respect for fundamental human rights. Other norms concern the non-confidentiality of certain information, taxes, restrictive commercial practices, cash flows and balance of payments, employment practices, environmental protection and so on.

The Code also establishes certain norms for host countries, including the duty to respect international obligations, to provide legislative clarity and stability and to respect the confidentiality of certain information obtained from TNC's. Governments in general -that is, home countries as well as host countries- have the duty to take the Code into account in drafting or revising laws, regulations or practices, to cooperate with other governments with respect to application of the Code, to abstain from using TNC's to interfere in the internal affairs of other countries and to abstain from taking coercive action as behalf of TNC's. The implementation mechanism involves government reports on information concerning application of the Code to the UN Commission on TNC's, an annual review by Commission of questions arising under the Code and an annual report to the UN General Assembly. In short, the Code would have a voluntary compliance mechanism, as would the Code on Transfer of Technology.

The Code of Conduct for TNC's is one of the areas where the normative dimension of the NIEO is most advanced, and it is hoped that work on the Code will be concluded during 1983.

THE NEW LAW OF THE SEA

The deep sea bed is a source of incalculable mineral wealth. Existing reserves of aluminum, magnesium and zircon are estimated to be in the billions or hundreds of billions of tons, enough to meet the world needs for millions of years.(59) Moreover, it is a renewable resource: it is estimated that 10 million tons of polymetallic nodules are formed annually in the Pacific Ocean alone.(60)

The New Law of the Sea Convention, signed in Jamaica in December, 1982, is undoubtedly one of the most far-reaching accomplishments to occur thus far in the creation of the NIEO.(61) Of principle relevance to the NIEO is the provision that the seabed and the wealth found there are the "common heritage of mankind". An international sea bed authority whose structure and functions are defined by the convention, will be set up to grant rights to explore and exploit these resources, and will itself undertake mining operations.

The enterprises receiving mining concessions are under an obligation to put the technology employed in exploiting the concession at the disposal of the international authority for the latter's own use, should it prove impossible to obtain the same

or better technology on the free market at reasonable conditions. Production will be regulated to minimize the effects of sea bed mining on terrestrial exporters of the same minerals, and a compensation fund is to be established for the same purpose.

The governing body of the sea bed authority will be the Assembly composed of 36 states. Half of these will be elected at large, following the UN tradition of equal representation for the five major geopolitical blocks. The remaining seats will be divided among four of the new state groupings which emerged during the 10 years of negotiations which led to the adoption of the Convention: the principle investors in sea bed technology, the principle consumers or importers of the minerals produced, the principle land-based producers of the same minerals, and specially disadvantaged (e.g. landlocked) developing nations. A special tribunal will be established to hear disputes between states parties or between the sea bed authority and holders of mining concessions.

The creation of such an authority and the acceptance of the concept of the common heritage of mankind are of enormous historic importance, laying the basis for a true world economic community. Moreover, one can hope that, as the history of post-war Western Europe suggests, the forging of a real economic community will in the long run create a firmer basis for efforts to enforce international law in other areas, including the international law of human rights.

CONCLUDING OBSERVATIONS.

Shridath Ramphal, member of the Brand Commission and Secretary General of the Commonwealth Secretariat has stated:

"To Third World countries it is a maddening contradiction that some developed states refuse to accept as legitimate at the international level mechanisms that they have employed, indeed devised, for advancing some of the most noble objectives within their own societies. Within every major industrial country and regional economic community it is now accepted that the unrestricted operation of free market forces can lead to results out of time with prevailing concepts of a just...society... One system is continued for the industrialized countries, one which is quite humane. While another is ordained for the developing. For how long can a global society... allow the rule of law in these economic matters to halt at national frontiers?"(62)

The parallels evoked by Mr. Ramphal between the NIEO and domestic social and economic legislation hopefully will have been apparent in the preceding description of certain aspects of the NIEO. Domestically much of this legislation -des-

cribed by Mr. Ramphal with the telling phrase "The rule of Law in economic matters" - was adopted when economic crisis threatened the political and economic stability of the entire nation, that is, when the crisis which permanently afflicted the poorest classes was in danger of spilling over and engulfing the entire society.

Is it stretching a point to suggest that a similar crisis now may be menacing the world community? Just as on the national level a choice must be made between planned, negotiated progress towards a new order based on equality and justice or sudden violent disruptions like the petrol shock of 1973 and the imminent financial crisis represented by the over indebtedness of the Third World. The accomplishment of the NIEO and the development of the poor nations is, of course, a question of justice, but it is also a matter of enlightened self-interest for the industrial nations of the North. Not only their long-term economic interest but the common interest in the creation of a stable world community.

Emphasis in this paper has been on the development of international legal norms. Moving from the acceptance of a general principle to the adoption of specific legal norms is only part of the task: the other part is implementation of these norms, that is, obtaining their universal acceptance and respect. Obviously, this will be a long and difficult process. We have seen the thus far disappointing results of the program to use tariff preferences to increase and diversify exports of developing countries. And while the Law of the Sea Convention presented the industrial powers with a unique opportunity to make a concrete commitment to a more just international order with minimal sacrifice of existing "rights" and since there is no present exploitation of the sea bed and the relevant technology is entirely within the hands of a small number of consortiums, little impact on the socio-economic interests of the ordinary citizen of the North, we have seen the most important industrial powers refuse to sign the Convention because of the sea bed provisions.

Finally, what is the role of lawyers? As early as 1966 the International Commission of Jurists issued the following definition on the role of the lawyer in society: "In a changing and interdependent world, lawyers should give guidance and leadership in the creation of new legal concepts, institutions and techniques to enable man to meet the challenge and the dangers of the times and to realize the aspirations of all people... The skill and knowledge of lawyers are not to be employed solely for the benefits of clients, but should be regarded as held in trust for society."

With relation to the subject of this paper, it is suggested that this principle has two implications: on the intra-national level, there is an urgent need for lawyers committed to working with

most needy sector of the society to seek fulfillment of their basic needs. The idea that the law can not be used to seek fulfillment of economic and social rights is a myth. It does require the development of new legal strategies, a new approach to law and the delivery of legal services.

Every lawyer can not be expected to devote him or herself to this task, of course. But it is essential that there be a commitment of the legal community, that lawyers who dedicate themselves to this task have the understanding and support of their colleagues.

On the international level, it is imperative that lawyers in both industrialized and developing countries devote their energies to the forging of the NIEO, both in the development of appropriate legal concepts and in its implementation.

NOTES

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- 46 UNCTAD, "Technological Dependence" in *The NIEO* (Supra, note 25), at 267.
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- 49 "Technological Dependence" (Supra, note 46), at 272.
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- 52 Compare Art. 13 (1) of the Charter of Economic Rights and Duties of States (Supra, note 29 bis) with Art. 27 of **The Universal Declaration of Human Rights** and Art. 15 (1) of the International Covenant on Economic, Social and Cultural Rights.
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