REVIEWS

A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE. By B. Sen. Foreword by Sir Gerald Fitzmaurice (Judge of the International Court of Justice). The Hague: Martinus Nizhoff. 1965. Pp. xxxiii+522. Guilders 58.50.

NEARLY GONE ARE the days when a diplomat's functions were confined to reporting on the political situation and protecting the interests of the nationals of his home state. The changing structure of international relations, the increasing interdependence of governments in securing for their citizens the basic values of a welfare state and the expanding state initiative in economic planning present a wide variety of problems seldom encountered by a diplomat in earlier times. His services are now required not only in hosting visiting commercial or official delegations and taking care of the trading activities of his government, but also in solving the problems of military pacts, frequent *coups d'états* and civil wars, threats of intervention by certain states in the domestic affairs of other states and restrictions intermittently placed by some states on the freedoms and immunities of diplomatic officials.

The new functions assumed by a diplomat in today's context have made it necessary that he has a working knowledge of legal principles. The fact that a diplomat, by coincidence, is a lawyer-diplomat may make the task, in measure, easier but by no means simple. In the first place, in spite of his orientation in international law, a legal adviser's knowledge can be less than adequate about many of the essential details of his functions. In the second place, the available treatises on international law, though of enormous value, are too general to be useful in finding suitable answers to, or offering technical details for resolving, the specific problems with which a diplomat is confronted in his day-to-day work.

There is also an increasing tendency on the part of nation states to invoke rules of international law and state practice in support of their own particular claims or actions and at the same time in refutation of the claims of their opponents. This necessarily enhances the importance of international legal advisory work in the management of foreign affairs. So great has been the necessity and demand of advice in international law that today many governments have opened special divisions on international law in their foreign offices.

These considerations magnify the necessity for a thorough study which would help the practising diplomat to learn about the legal aspects of his work and which would provide a ready reference when called upon to resolve a particular problem based upon a particular fact situation.

Mr. Sen, in bringing out this monumental work, has accomplished this task with what Sir Gerald Fitzmaurice, Judge of the International Court of Justice, in his foreword calls "grace, clarity, insight and good sense."

It is common knowledge that in the wake of World War II, the structure of the world has undergone several changes.[1] The emergence of independent Asian-African countries has changed the dimensions of international relations, requiring a corresponding reorientation and reordering of traditional international law, which had been largely a product of European civilization. Keeping this goal in mind, the new countries of Asia and Africa have started out on a campaign of new initiatives and new emphases, in terms of both legal institutions and legal doctrines. Indeed their participation in the meetings of the UN Sixth Committee and International Law Commission, conferences on friendly relations and cooperation among states, sessions of Asian-African Legal Consultative Committee and other international meetings represents a most sustained effort to vindicate their claims. It is still arguable, however, whether the achievements of these conferences, even if fortified by the overwhelming support of the General Assembly resolutions, can fit within the pattern of traditional sources of international law, except when specific treaties are concluded. More recently, scholars have recommended introduction of new methods and techniques of international law-making. Professor McWhinney has asked why cannot those General Assembly resolutions with unanimity or at least substantially worldwide support be assimilated to traditional sources of international law as, in effect, "instant customary international law"; and why cannot the conclusions of international scientific and legal conferences be accepted as subsidiary means for determining rules of law under article 38(i)(d) of the Statute of the International Court of Justice.[2] All those committed to the desirability of a "new international law" cannot underrate these recommendations. Mr. Sen's book, by heavily relying on the recommendations of the International Law Commission and the reports of the Asian-African Legal Consultative Committee, has magnified the significance of these materials for the remaking of international law, inasmuch as they represent the legal thoughts and trends in different regions of the world. Not only are these proceedings useful in diplomatic practice, as Mr. Sen indicates in his preface,[3] but they are also identifiable with what Professor

1. For a recent study comprehensively documenting the changes in the world arena since World War II, see Friedmann, *The Changing Structure of International Law* (1964).

2. McWhinney, "The 'New' Countries and 'New' International Law: The United Nations Special Conference on Friendly Relations & Cooperation among States, 60 *Am. J. Int'l L.* 31 (1966).

3. Sen, *A Diplomat's Handbook of International Law and Practice* XIV (1965) [hereinafter cited as *Sen*].

McWhinney would call "sources of law" in the legal realist sense.[4] Mr. Sen has, therefore, good reasons to be confident about the authoritativeness of the basic material used by him.

Structurally, Mr. Sen's book has been divided into three parts. Part I discusses the establishment and conduct of diplomatic relations, functions of diplomatic agents, and diplomatic immunities and privileges including those of subordinate staff. Part II is devoted to immunities, privileges and functions of consular staffs. Part III deals with diplomatic protection of citizens abroad, passports and visas, asylum and extradition, commercial activities of states and immunities relating thereto, recognition of states and governments, and treaty-making.

In part I, while discussing the strength of the staff of the diplomatic mission, Mr. Sen[5] rightly points out that article 11(1) of the Vienna Convention leaves the ultimate right of decision with the receiving state. However, it should be noted that this provision lacks what might be called "legal character" inasmuch as what is "reasonable and normal" is left to the decision of the receiving state, contrary to the recommendation of the International Law Commission's, in whose draft the size of a mission was made a justiciable question to be referred to arbitration in the event of dispute.[6] But Mr. Sen appears to ignore the shortcoming of article 11(2), which provides that the receiving state may on a discriminatory basis refuse to accept officials of a particular category. Under this provision the principle of reciprocity, which is the cornerstone of diplomatic relation, is violated. A sending state may treat the representatives of the receiving state in any form of its choice, yet the receiving state, by this provision, is obligated to treat all foreign diplomatic missions alike.

The Vienna Convention enlists the following functions of a diplomatic mission: representation of the sending state; protection of the interests of the sending state and of its nationals within the limits permitted by international law; reporting to the sending state about the conditions and developments in the receiving state; promotion of friendly relations between the sending and receiving states and developing their economic, cultural and scientific relations. Mr. Sen has presented a thorough survey of current state practice with respect to these functions. However, it seems that he also has no answer as to why the Convention employs the phrase "within the limits permitted by international law" with only one of the functions, namely the protection of the interests of the sending states and of its nationals. One would assume that the remainder of the functions might also be exercised only within the limit prescribed by international law.

4. See McWhinney, *op. cit. supra* note 2, at 30.

5. *Sen* 30.

6. See article 10 of the International Law Commission's draft text, (A/3859) (1958).

The heart of this part, indeed of this book, is the chapter on diplomatic immunities and privileges, where the author seems to be at his best. So much excellence has been displayed by him that there is hardly room for criticism. The brief comment below is therefore only supplemental to author's more general coverage.

The legal basis of diplomatic immunities is founded upon three theories. The extra-territoriality theory justifies immunities on the ground that the premises of a diplomatic mission represent a sort of extension of the territory of the sending state. The representative character theory bases such immunities on the idea that the diplomatic mission personifies the sending state. The functional theory, currently most prominent, justifies privileges and immunities as being necessary to enable the mission to perform its functions. To say, as Mr. Sen does, that it was on the basis of "functional necessity" that the International Law Commission proceeded in preparation of the draft articles on the diplomatic immunities is to state only a partial truth. For one thing, its emphasis on functional theory can be gathered only from the commentary on articles. For another, the Commission quite clearly pointed out that it was guided by the functional theory in solving problems *on which practice* gave no clear pointers and, additionally, while doing so it also bore in mind the representative character of the head of the mission and of the mission itself.[7] These qualifications are significant.

Nor was the Vienna Convention so heavily based on the "functional theory." The words of the preamble, "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states," it may be recalled, were the outcome of a much extended debate. The idea contained in the Mexican proposal was in the form of a demand for a new article incorporating the "functional theory."[8] This was deferred for consideration in conjunction with the preamble. Speaking of this insertion in the operative part, the representative of Rumania apprehended that the question whether an action had been within the functions of the mission might be decided by the receiving state. This switch from the operative part to the preamble undoubtedly diminishes the status of the functional theory.[9] It is also important that before the insertion of the words, "not to benefit individuals but," the fourth paragraph of the preamble was criticized as placing undue emphasis on the "representative character theory." Thereupon, these words were added upon motion by the United Kingdom.[10] Even this amendment, as one authority certifies, did not

7. International Law Commission, Report covering its 10th Session, 1968, U.N. General Assembly, 13th Sess., Official Records, Supp. No. 9, at 16-27 (A/3859).
8. U.N. Doc. A/C O N F. 20/C 1/L. 127 (1961).
9. U.N. Doc. A/C O N F. 20/C 1/SR. 20, at 8.
10. U.N. Doc. A/C O N F. 20/L. 3 (1961).

succeed in converting the preamble into an unequivocal statement of the "functional necessity" theory.[11] It follows that the fourth paragraph of preamble of the Vienna Convention, as in the comment of the International Law Commission, continues to be equivocal, and that no conclusive inferences can be drawn leading to the acceptance of the "functional necessity" theory.

Part III of the book discusses in necessary detail certain selected topics of international law. In the chapter on diplomatic protection of citizens abroad one finds particularly arresting his discussion of property rights of aliens. While a right to hold property is indisputable, a state may acquire, nationalize or expropriate the properties of its nationals. The laws of western countries, while authorizing such measures for public purpose, provide for just compensation, which means the market value, to the dispossessed owner of the property. But in some other countries no such limitation is placed upon the powers of the government whether under their constitutions or municipal laws. The question then arises, what is the position with respect to state acquisition expropriation, or nationalization of the property of an alien or a foreign corporation? State practice as well as opinion of publicists show a great deal of diversity of approaches to this problem.

On one extreme are the capital exporting countries of the West, which permit under their policy and law aliens to acquire property rights in their territories, if such taking of the acquired rights or their deprivation is for public purpose and the dispossessed owner is promptly paid just compensation in terms of the fair market value of the property. This traditional view is based on certain legal premises.[12] In the first place, it is asserted that international law is supreme over municipal law and, therefore, what the municipal law may have to say on nationalization or expropriation is immaterial. In the second place, to the extent alien interests are taken without the payment of prompt, adequate and effective compensation, there is confiscation, which, as in cases of private seizure of private rights, legal systems of all civilized societies render impermissible. In support of this stand, provisions are cited from the United Nations Universal Declaration of Human Rights, judicial decisions of national and international courts, state practice, and the municipal laws of several countries.[13] Thus, as one

11. Kerley, "Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities," 56 *Am. J. Int'l L.* 88, 94 (1962).

12. See generally Report of the Committee on Nationalization of Property, *Proceedings & Committee Reports of the American Branch of the International Law Association* 62 *et seq.* (1957-58); Domke, "Foreign Nationalizations," 55 *Am. J. Int'l L.* 585 (1961); Brandon,"Legal Aspects of Private Foreign Investments," 18 *Federal Bar Journal* 298 (1958); Carlston "Nationalism, Nationalization and International Law," *Révue de Droit International* 1 (Juin 1958).

13. See especially Brandon, *supra* note 12, at 305-19.

study sums up, "as against the international invester, a national taking accompanied by less than full compensation represents injustice compounded."[14] In the third place, it is argued that there exists a positive rule to the effect that governmental treatment of the property of aliens must not fall below a certain minimum international standard. Although supporters of this view generally concede that there is no precise definition of what constitutes this international minimum standard, nevertheless, it may often be a higher standard of treatment than accorded to the nationals of the state.

On another extreme is the view held largely in the newly independent Asian-African countries[15] that it should be permissible for a state as a matter of policy to acquire foreign-owned property or any interest therein, and it may decide at the same time not to expropriate or nationalize similar rights held by its nationals. This discrimination is justified in the interest of security or economic needs of the nation. It is observed that foreign nationals had acquired in these countries vast interests in property and the mineral wealth under permits granted by colonial powers prior to the emergence of these states as free nations. Now that these countries have attained independence, they are free to decide, as a matter of policy, whether it is desirable to leave such vital resources in the hands of foreigners. With respect to compensation, it is generally conceded that some compensation should be paid. Nevertheless, the capacity of the state is regarded as the main determinant.

Between the two extremes, there is one more view, suggests Mr. Sen, according to which aliens cannot be expected to be treated in a preferential manner as compared to the nationals of the state, yet their property rights must be subjected to the same standard of treatment as that of the nationals.[16] It follows that in the matter of compensation the dispossessed alien should be compensated in accordance with the same principles as are applicable to nationals of the state.

The above approaches represent competing policies and national interests of the western countries and new nations. The former subscribe to the traditional doctrine of "minimum standard of treatment," whereas the latter find support for their views in their "paying capacity." The choice between the two is not an easy one in view of the grave consequences in ignoring either. The *via media* suggested by Mr. Sen would uphold "the receiving state's right and competence to take, expropriate or nationalize foreign owned property in the public interest,"[17] but at the same time would provide that "adequate compensation [is] paid to the dispossessed owner."[18] Adequate compen-

14. Report of the Committee on Nationalization of Property, *op. cit. supra* note 12, at 67.

15. For good exposition of Asian-African view, see *Sen* 312-14.

16. *Id.* at 312.

17. *Id.* at 314.

18. *Ibid.*

sation is not the full value of property, nor is it a nominal sum or a discretionary sum fixed by the government of the receiving state.[19] This shift in reference is subtle and confusing. Even if it is not easy to lay down *a priori* test, one would have expected from the author at least to spell out in sufficient detail the factors to govern the quantum of compensation. For instance, it remains unclear what emphasis the author would place upon the market value of the loss and the capacity of the receiving state to pay.

Shifting to the chapter on recognition,[20] the author has restricted his discussion to recognition of states and governments. To practising diplomats such problems as the recognition of neutral states, existence of a state of war, belligerent rights of insurgent groups, and legality of blockade are also of considerable importance. Throughout this chapter the author has focused attention on the formal, ceremonial aspects of recognition, rather than on particular claims, particular facts and particular policy contexts. For example, in stating that, whatever may be the difference between the constitutive and declaratory theory, states which do not recognize a new community can have no official relations with it,[21] is less than adequate.

As for determining whether or not to give recognition, it has to be admitted that through the progression of past declaration and multipartite agreements, a rather unsatisfactory set of criteria for statehood has been evolved. By these criteria, a state is commonly said to consist of a people, territory, government and independence, regardless of the theory adopted. Under the constitutive theory however, it is considered that the act of recognition endows a claimant with statehood or a government with capacity in international relations, while the declaratory theory states that statehood or governmental authority exists quite independent of recognition by other states since it depends merely on facts. A similar problem arises in domestic jurisprudence also. Does a person have a specified right because certain facts are true, or because the judge says he has such a right? The constitutive theory has been followed by the major powers in that they have applied political judgments in recognizing states and governments. Especially in according recognition to new states, they have been careful to make sure that these states adhere to standards of the international community and that there is the requisite stability in the country. Smaller states, on the other hand, have insisted upon determinative standards, fearing that discretion might lead to intervention by the larger nations and reasoning that prompt recognition might help them to consolidate their independence. The choice between these two standards is not an easy one, since each view is based on rationalization of the particular set of

19. *Ibid*
20. *Id.* at 406.
21. *Id.* at 410.

preferred claims. Therefore, from the general community standpoint, it would be much better if we look into particular facts and claims in context to achieve a rational decision. This is the test which Mr. Sen himself recommends be applied in the instances of Germany, Korea and Vietnam.[22] There is no reason why the same general criterion of "reasonableness of the interest of international community" should not be applied to all other cases of recognition.[23]

These comments are only minuscule compared to the wealth of material and ideas presented in this volume. Every student, teacher and practising diplomat should be indebted to Mr. Sen for having presented in this book a meritorious and panoramic survey of problems of enormous practical importance. It will only be fitting to say that *A Diplomat's Handbook of International Law and Practice* has enhanced the scholarly image of Asian writers.

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INDIAN AND AMERICAN LABOR LEGISLATION AND PRACTICES. By Arjun P. Aggarwal. Bombay: Asia Publishing House. 1966. Pp. xiii+329. Rs. 20/-.

ARJUN P. AGGARWAL'S work is a comparative study of the existing labour-management laws in the United States and in India; the constitutionality, impacts and influences of the two systems and how far Indian industrial relations machinery has been influenced by the American laws, practices and decisions.

The author while discussing the aspects of comparability has endeavoured to deal with other allied problems, like employer's rights, interstate and intrastate jurisdictional questions, strikes, discharges and dispute settlement machineries. A comprehensive study of laws and judicial decisions on the right to strike, the protected and unprotected strikes in the United States vis-a-vis the legal and illegal as also the justified and unjustified strikes in India and their manifold implications are some of the notable features of this work.

The chapter on "Discharges" deals exhaustively with the subject of discharges for "cause" and the corresponding laws and practices and judicial and arbitral pronouncements on discharges and dilates on subjects relating to discharges for union-membership, the jurisdiction and scope for authorities deciding "just cause" discharges in the United States and in India; as also about what constitutes a "dischargeable offence" and what are "non-dischargeable offences" and what is the procedure laid down or applied to in such cases, in the two countries.

22. *Id.* at 419.

23. Sen's views on test to be applied in other cases are found in *id.* at 415.

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