International Law Imperatives in the 21st Century

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I. INTRODUCTION

In his book *Theory and Practice in International Law,* Professor Oscar Schachter borrows a metaphor from the atomic physicist Robert Oppenheimer, in describing the intricate corpus of rules, principles and practices in international law today. He depicts international law as a large terrain consisting of towns and villages connected to each other by narrow paths and expansive highways. The specialized branches of the law are said to be the towns and villages, each of which is normally focused on its respective affairs. Interconnecting the communities are the superhighways, or the rules of general application, linking the diverse towns and villages into a greater and larger community, where travelers generally have no inkling on the activities of the towns and villages. Thus, Schachter says that, with few exceptions, those who travel on the highways have no special knowledge of localized branches of international law,

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while those cooped up in the communities have no grasp of the general aspects of international life.[1]

When this writer took the oral portion of the Foreign Service Examinations in 1997, an examiner (a former Ambassador and Law Dean) queried on the relevance of international law at the end of the 20th century. This writer's reply was both optimistic and guardedly cautious, influenced as it were by the unprecedented international unity against Iraq and the incoherent international response to the atrocities in Yugoslavia, two important phenomena that perhaps defined much of the 1990s; one at the beginning of the decade and the other at its tail end. This writer should have said (but did not) that the villages were flourishing[2] but the network of superhighways remained incomplete.[3]

Since then, this writer has been a keen observer of developments in international law, particularly, the impact on the interests and lives of developing countries like the Philippines. Special interest is also given on the implications of efforts to build a body of public law on the political, social, economic and cultural affairs of the world community, vis-à-vis the members of the legal profession. For this writer, it is imperative that Filipino lawyers have at least a reasonable comprehension of the superhighways in the international legal regime; and some brave souls should be encouraged to explore and begin to understand the towns and villages.

II. DEVELOPMENT OF INTERNATIONAL LAW

One might be able to divide scholars and publicists into schools of thought and various perspectives on the historical, philosophical and conceptual heritage of international law. But one important strain of writing that is quite relevant to perceiving international law as that governing framework of superhighways and communities is the view that the concept of an international rule of law is intimately related to the development of the modern "State-system." International law is an essential element of international organization.

1. *See* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 21-22 (1982) [hereinafter SCHACHTER, THEORY AND PRACTICE]; *see also* SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE (1991).
2. The villages may be said to be *flourishing* because this was during the time when specialized international rules were being actively discussed and debated at the Uruguay Round, the International Human Rights movement, the international environmental forums after Rio's Agenda 21, the UN Framework Convention for Climate Change, and the International Labor Organization.
3. The superhighways may be said to be *incomplete* because a lot of fundamental questions about international peace and security and international relations remain unanswered even after the end of the Cold War in the early 1990s.

In a system where the units are assumed to serve no higher purpose than their own interests and assume the perfect equality of those interests, the scholar and diplomat Martti Koskenniemi argues that the Rule of Law seems the sole thinkable principle of organization — short of the *bellum omnium*.[4] Indeed, it is pointed out that a long line of distinguished jurists have subsumed the liberal principles of the Enlightenment, such as the rule of law, into the development of international society inasmuch as these principles are considered to successfully manage domestic organization.[5]

This pattern is exhibited in many specific periods of world history where there is enormous pressure on the international community to grapple with historic and challenging realities that directly impact the management and stability of international social organization.

When the old (and stable) system of political, legal and moral authority of the early empires collapsed some time during the 15th century, the emerging independent states had to develop a system of rules that could put some order into international relations. From this emerged a system of law that drew heavily from Roman Law and Canon Law.

In its earliest 17th century forms, international relations could be characterized by increasing international trade, improving military and navigational tactics, and discovering many other distant lands through exploration. These developments established the foundations of an international system of diplomatic practice and modern notions of transnational law. The Hanseatic League was the forum for commercial and diplomatic transactions, which have contributed to the building of the corpus of public law that we have inherited to this day. In Italy, the exchanges of diplomatic agents among the city-republics evolved the rules for diplomatic relations, and increased trade resulted in the building of a complex network of international commercial agreements. Finally, conquest and colonialism triggered deep and diverse scholarship on issues such as national sovereignty, international trade and transnational navigation.

The century or so prior to World War I saw an enormous leap in the substance and volume of international diplomatic and commercial arrangements. International custom and international agreements were multiplying ten-folds every year, thereby increasing reliance on a positivist theory of international legal relations rather than on natural law. However, there were some theoretical hold-outs. John Austin, in his famous University of London lecture, defined the superior command notion of legal relations, and was considered to have reduced all notions of international law to

4. Martti Koskenniemi, *The Politics of International Law*, 1 EUROPEAN J. INT'L L. 4, 4 (1990) [hereinafter Koskenniemi].

5. *See generally* JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT (n.d.); JOHN LOCKE, TWO TREATISES ON GOVERNMENT (n.d.).

"positive morality." The nationalist philosopher Wilhelm F. Hegel conceived of an elaborate dialectic system that glorified the State and denied the acceptability of international law. Of course, this was also the period when Marxism began establishing itself as a radical, alternative perspective of social relations.

The brief period between the two great wars was also an important watershed in the development of the international legal regime. One of the more important developments of this era was the effort to stop another world war from erupting; assaulting the legal right to pursue national policy through war, the Covenant establishing the League of Nations condemned external aggression aimed at the territorial integrity and existing political independence of member States. Moreover, the establishment of the International Labor Organization[6] uprooted the entrenched notion that international law dealt only with managing the relations of States, and the creation of the Permanent Court of International Justice represented the shift in focus from force as an instrument of national policy, to peaceful settlement of international disputes.

But spare the world from yet another world war, the League of Nations could not do. World War II led to another major development in international relations, and that was the creation of the United Nations. More than the creation of the United Nations, the end of the second world war also led to the explosion of numerous international organizations that dealt with the various ills of the international community. Among these, the most far-reaching in effect and reach were the so-called Bretton Woods institutions: the World Bank and the International Monetary Fund.[7]

Secondly, the decolonization process led to the phenomenal increase in the number of independent States in the world community, introducing an unprecedented diversity in cultures and perspectives, particularly in determining the creation or substance of international law. Moreover, the end of the war and the process of nation-building motivated the establishment of international development organizations and agencies that ironically exist to this very day.

Finally, there is the intervention of the Cold War. There are vicious debates on when it exactly ended, but what is important for our purposes is the fact that the Cold War is over.

6. To deal with the improvement of labor conditions and social welfare on the international level.

7. The proposed International Trade Organization never came into being. Instead, the GATT 1947 Secretariat lasted until 1995 (when the World Trade Organization was born) as a *de facto* International Trade Organization.

This rather short survey of the development of international law throughout the span of some odd six centuries demonstrates certain undeniable characteristics of the international system:

1. The evolution of international law tends to be compartmentalized into eras and periods of history, with each period sometimes known for one important aspect than another;
2. State practice and the works of jurists are important elements in the essential process of clarifying, and strengthening, the substance and content of the law;
3. Important developments in international law are associated with major upheavals or dramatic changes in international life; and,
4. Rules are basically systemic responses or adaptations to the realities of international relations.

III. International Law Today

From Emmerich de Vattel (Droit des gens ou principles de la loi naturelle appliqués a la conduite et aux affaires des nations et des souverains.)[8] in the 18th century to President George W. Bush (The Iraqi Regime is a threat to the authority of the United Nations and a threat to peace.) in the 21st century, it seems reasonable to observe that international law has evolved from the fairly easy task of codifying and systematizing widely-practiced diplomatic principles into legal rules, to an effort of balancing sovereign rights and interests with communitarian ideals and aspirations.

It would seem an ambitious — if not gargantuan — task to try to paint an entire canvass of issues and subjects that characterize international law today. This article, therefore, shall focus on specific major characteristics of the international legal regime that mark what is called the "international law imperative of the 21st century," a proposition that will be developed and explained here. Thus, this is only a distillation of many facets of international law, and is intended neither to deny nor disparage other equally important facets that are not so discussed.

Most of what will be described in this paper, the reader will note, are developments in the last decade or so. This is unavoidable because in the interim between the end of the two great wars and the 21st century was the Cold War that "deformed the traditional international law that had developed

8. The Law of Nations or Principles of the Law of Nature applied to the conduct and affairs of nations and sovereigns.

over centuries to facilitate and regulate political, economic and other human relationships across national boundaries."[9]

> It could hardly have been otherwise. For almost half a century, the world lived in a state of neither war nor peace. The independence and rights of choice of smaller states were restricted by larger neighbors in their own interest and, it was often avowed, in the interest of systemic security. The slow effort to centralize authoritative coercive force and to restrict the freedom of unilateral action, the hallmark of civilized political arrangements and the major acknowledged defect of international law, was impeded by an international security system that accorded a veto power to each of the major protagonists. That ensured its ineffectiveness. Even the freedom of the seas, one of the most venerable struts of the international system, which had reserved five-sevenths of the planet as a public highway for exchange, was attenuated to facilitate weapons development. As soon as outer space became accessible, it, too, became part of the military arena.[10]

Today the Cold War is over. Yet the need for international law will be as urgent and vital, or maybe more. In many ways, international law will be burdened with greater expectations and more ambitious hopes. The international community will be hard-pressed to evolve and develop new ways of dealing with bigger problems, and better approaches for coping with enormous concerns. It must look back at the past, but always with an eye to building the future, because the problems and demands today are far more different than those of yesterday.

W. Michael Reisman, a Professor at Yale Law School, articulates it well: "The challenge to international lawyers and scholars must be to clarify continuously the common interests of this ever-changing community, drawing on historic policies but bearing in mind that the constitutive and institutional arrangements that were devised to achieve them may no longer be pertinent or effective."[11]

A. Developing International Law

In 1828, John Austin, as the first holder of the Professorship of Jurisprudence at the University of London, delivered the inaugural lecture that "imprinted a conception of law on popular and scholarly thinking that has endured for almost two centuries. Austin defined law as *the command of a political superior to a*

9. W. Michael Reisman, *International Law After the Cold War*, 84 Am. J. Int'l. L. 859, 860 (1990).
10. *Id.*
11. *Id.* at 866.

political inferior accompanied by the threat of the imposition of a sanction — an 'evil' — for deviation from the command."[12]

But this is not the experience of international rule-making in the community. There is no political superior to command the political inferior, at least in theory. As described earlier, the international system is governed more consensually than our domestic societies because of the fundamental belief in sovereignty and self-determination. The point to be made here, however, is that there have been some tectonic shifts in the international landscape in the last ten to twenty years.

While an International Congress of representatives does not (yet) exist, there are many exercises of auto-limitation in the world, and they continue to occur even today. In the United Nations era, after the end of the Cold War, and when the boundaries of old colonial empires were relatively settled with the independence of Namibia (formerly South West Africa) in 1990,[13] one can see a shift in global opinion in entrenching the prohibition on the use of force as a peremptory norm based on both customary international law and the United Nations Charter.[14]

While there are on-going controversial debates over the legality of acting against Iraq (accused of sponsoring terrorism and developing a biological weapons program) and the war against the Taliban/Al Qaeda (after the World Trade Center bombings), what is more important here is that there is no dissent to the proposition that the use of force must have basis in international law and that terrorism (whether of individuals or States) is totally unacceptable and a menace to international society.

Even while subtly reminding the United Nations that his country was prepared to go against Iraq alone, President Bush clearly painted Saddam Hussein as a "grave and gathering danger... and in one place, in one regime, we find dangers in their most lethal and aggressive forms."[15] He pointed out gross violations of Security Council Resolutions 688 and 1373 as challenging the United Nations' standards of human dignity and system of security. By

12. W. Michael Reisman, *A Jurisprudence from the Perspective of the "Political Superior,"* 23 N. KY. L. REV. 605, 605 (1996) (emphasis supplied).

13. Of course, the writer used the adjective "relatively." East Timor's freedom is not to come until almost a decade later. And around the world, there continues many movements of self-determination.

14. But many publicists and writers will argue that the use of force prohibition has been circumvented many times by dubious claims of extreme necessity (Tehran Hostage case), self-defense (Afghanistan and Nicaragua) and enforcement action (Kosovo).

15. Speech of President George W. Bush, United Nations General Assembly, New York, Sept. 12, 2002.

invoking the "urgent duty of protecting other lives,"[16] President Bush has clearly attempted to characterize the impending action against Iraq — whether or not sanctioned by the United Nations — as a self-defense measure hoping thereby to lend some measure of legitimacy to any American attack depending on how liberal or strictly one would wish to interpret the exception to the prohibition on the use of force.

Recall also that when the United States attacked the Taliban/Al Qaeda regime in Afghanistan last year, American officials took pains to distinguish the action from pure retribution (which they nevertheless would have probably gotten away with in view of the outpouring of global sympathy) and invoked international law principles such as self-defense, State responsibility and our common crusade against the threat of terrorism.[17]

These are important aspects of international diplomacy in the 21st century. Indeed, the concept of self-defense implies a sovereign, non-derogable right that attaches itself to the virtue of being a State. Promisingly, its application in post-Cold War international life has not been founded on the proposition that self-defense is not governed by international law because "power" is more superior than the Rule of Law.

The major proponent of this latter view was Dean Acheson, a respected international lawyer and former U.S. Secretary of State. In remarks before the American Society of International Law about the debates over the legality of the American quarantine during the 1962 Cuban Missile Crisis, he declared that "law simply does not deal with such questions of ultimate power .... *The survival of States is not a matter of law.*"[18]

As Professor Schachter assessed the declaration, the main purport for the remarks was to emphasize that self-defense could not be governed by law when a grave threat to the power of a State or to its way of life was perceived by that State.[19]

16. *Id.*

17. An important international law question that should be subject to further scrutiny would be the issue of whether the responses of the United States to the bombings of their Embassies in Dar-Es-Salaam & Nairobi, and 9/11 have taken on some form of customary international law (i.e. instant custom). Note particularly the lack of widespread official condemnation after their armed responses on bases in Sudan and Afghanistan. The Sudan attacks were put on the Security Council agenda but were never discussed, much more condemned officially.

18. Dean Acheson, Remarks, 57 A.S.I.L. Proc. 13, 14 (1963) (emphasis supplied). Professor Schachter has an interesting observation about the international balance of power system: International society may in Aron's words be "an anarchical order of power" in as much as it lacks a superior authority, but it is far from being a lawless society.

19. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 136 (1991).

Clearly, however, States, including the United States, have embraced the notion that even if self-defense is an inherent prerogative, it must be exercised within the framework provided by international law, particularly custom and the United Nations Charter. While the American motives on the Iraq issue have been interpreted by the media as jingoistic (we will do it if the United Nations does not), a more sober assessment of their position really is that the United States will exercise its individuated right of self-defense if the United Nations does not want to act. On the other hand, the validity of their self-defense claim is an altogether different issue. But still, at the end of the day, they are trying to clothe their actions with the mantle of international law's protection because States "generally conform to [international law] even against their immediate interest."[20] As Professor Louis Henkin loves to recount, there is that witty comment that "*almost all* States observe *almost all* international law *almost all* the time."

A certainly more graphic illustration of auto-limitation is the World Trade Organization (WTO) system that represents a delicate balance in international trading relations; continually preserved by an elaborate scheme of consultations or negotiations but ultimately sanctioned by a *mandatory and binding* dispute settlement mechanism. The WTO system is perhaps our most relevant response to the criticism levied on international law, as being formalistic and not able to provide rules for the resolution of substantive and critical differences among nations. It should tell a lot when countries (all 144 of them who are part of the WTO) find it to their collective interest to surrender some of their most cherished economic prerogatives (many tracing back to the early days of mercantilism), to an ideal of free trade and economic competition.

It also bears noting that the dispute settlement understanding (DSU) of the WTO Agreements is an integral portion of an entire package such that new economies acceding to the WTO are absolutely required to accept the DSU as well. As the WTO proceeds with the mandated progressive liberalization negotiations launched in Doha (2001), many more aspects of trade and economic policy could come under the ambit of the multilateral trading system, and inevitably, of the compulsory dispute settlement mechanism.

More importantly, notice that the Agreement on Trade-Related Intellectual Property Rights (TRIPS) blazes a new trail in this area of international law in two ways. It expands what heretofore was a relatively limited understanding of what is "trade-related," from tariffs, quotas, regulations and standards; to include now even investment measures or incentives and protection regimes of intellectual property rights. TRIPS also moves away from the "negative-integration model" (*i.e.* the GATT rules used to be a complex of negativities or prohibitions on what states can do; no positive act was required from members) to a "positive-integration box" akin

20. *Id.* at 7.

to the European Union, when it requires WTO members to have what we may call an effective "common" policy on the protection of intellectual property rights.

B. *International Adjudication*

But this is not to say that there are no major systemic problems in the processes of international rule-making and adjudication in our world community. Outside the WTO's dispute settlement mechanism, there are very few successful adjudication regimes[21] in view of the traditional notion that jurisdiction of an international tribunal is conferred primarily by the consent of States.

An important place to begin this particular discussion — literally — is the imposing palace that stands in the middle of *Den Hague* (The Hague), surrounded by a large park. Built in the early years of the 20th century, in Flemish style, it housed first the Permanent Court of International Justice (PCIJ), and houses now its successor, the International Court of Justice (ICJ). Known as the Peace Palace, it has come to symbolize not only the common aspiration of humankind for international peace, but the hope for a more defined and stable international legal regime. In the words of the first President of the United Nations General Assembly, the ICJ is a great institution because "peace will not finally be established until all countries have recognized the truth that there can be no civilized world nor any lasting peace, if there be not complete respect for international jurisdiction and its judgments."[22]

The ICJ, however, remains constrained by the inherent strictures of its powers under the ICJ Statute. *Ratione materiae*, the jurisdiction of the Court is exclusively consensual in nature. The sovereign state can only be subject to the Court's jurisdiction in so far as this accords strictly with its own wishes.[23] While the decline of the number of acceptances of compulsory jurisdiction under Article 36(2) of the ICJ Statute has been reversed, the fact remains that jurisdiction of the Court remains vulnerable to the ultimate desires of state-actors. The number of declarations as of 31 July 1999[24] was at 64 member-states of the United Nations, seven of which are declarations under the Statute of the Permanent Court of International Justice that have been carried over to

21. It is noteworthy to examine the International Tribunal on the Law of the Sea (ITLOS) and International Commission for the Settlement of Investment Disputes (ICSID).

22. Remarks of M. Henri Spaak, 1946-1947 ICJ Yearbook 31.

23. Philippe Couvreur, *The Effectiveness of the International Court of Justice in the Peaceful Settlement of International Disputes*, in THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS 83, 89-90 (A.S. Muller, et al., eds., 1997) [hereinafter Couvreur].

24. International Court of Justice at <http://www.icj-cij.org> (last visited Sept. 15, 2002).

the ICJ under Article 36(5) of the ICJ Statute. It bears noting that the United Kingdom of Great Britain and Northern Ireland is the sole permanent member of the Security Council that has on record a declaration of acceptance of compulsory jurisdiction.

An interesting proposition to note here, however, is that "the obligation of recourse to a Court is above all a question of confidence."[25] And the increasing work-load in the ICJ in recent years seems to be a manifestation of such a confidence in the international community; interestingly, many of the States before the Court today would not have done so ten or twenty years ago.

In an interesting lecture, Judge Mohamed Shahabuddeen observed that "the question of confidence is to be answered less by reference to particular episodes than by reference to the long-term disposition of members of the international community."[26] Indeed, ten years after they withdrew their Optional Clause declaration, French President Francois Mitterand declared that "there can be no civil peace without judges, no peace in our international society without judges who are chosen at that level and represent the powerful moral and legal force of this Hall where all the peoples of the world forgather."[27]

However, regardless of the ICJ's level of confidence or the "long term disposition of members of the international community," it remains essential for international social life to have a system of resolving disputes arising from norms or principles. The increasing complexity of international relations require such a system if only to maintain the stability and predictability of international life so necessary for the incumbent way of life.

Perhaps it is important to observe that the system adopted by the ICJ Statute clings to the 1945 notion that States were and will continue to be the sole important subjects of international law. While the rights of individuals to bring actions in the ICJ is an important issue in this regard, this writer will just deal with the emergence of international organizations that conduct the State's common interests. These organizations have asserted their autonomy in such a way that they became the *de facto* and *de jure* interlocutors in an increasing number of fields in international life.[28] But disputes involving them would seem to be without the Court's sphere of jurisdiction.

25. Statement of Nicolas Politis, League of Nations, Documents Concerning the Action Taken by the Council of the League of Nations Under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court 243 (1921).

26. Lecture of Judge Mohamed Shahabuddeen, First Taslim Elias Memorial Lecture, Lagos, Nigeria, May 19, 1994.

27. ICJ Communique No. 84/4 of Feb. 14, 1984, Annex 2.

28. Couvreur, *supra* note 23, at 88.

C. Globalization and Trade Liberalization

Today, globalization also has a deep, phenomenal impact on the state-system that has been the framework of international life in modern history. That system is basically premised as an aggregate of autonomous units with plenary authority over their respective affairs. However, that is no longer reality in the 21st century; because not even perhaps the most powerful nations in the world have retained their absolute sovereignty or are free from the influence of the global community beyond their shores. In an interdependent, global industrial and science-based civilization, no group is truly autonomous.[29]

The astounding mobility of people, capital, information and technology has blurred the traditional lines of space and territory, making geography seem anachronistic in an era of real time international relations and transactions. A few economists have even proposed the conclusion that "the nation-state is just about through as an economic unit."[30]

The size and movement of international capital in the world today is considered to be with no precedence. Over three and a half trillion dollars are daily traded in leading international financial markets. Exchange controls have become almost impossible to apply.[31] And it has even been asserted that the ability of financial traders to move huge amounts of capital around the world cannot be matched by most governments or even by groups of governments. It is no surprise, therefore, that the subject of market discipline and regulation are priority issues on the agenda of international organizations like the G-8, the World Bank, the International Monetary Fund and the Association of Southeast Asian Nations (many of the members of which bore the brunt of the 1997 financial crisis in the region).

But if the host market of international capital is powerless to control speculation, the source markets of the same capital are equally powerless to manage or control the outflows of direct investments by multinational corporations or the portfolio investments of mutual funds. It has been argued that the governments of capital-exporting countries have been marginalized in the decision making processes of their business entities.[32] As such, businesses and corporations increasingly seek profits in markets overseas without regard, or rather, despite of any links to their national governments.

29. W. Michael Reisman, *Autonomy, Interdependence, and Responsibility*, 103 YALE L. J. 401, 415 (1993).

30. CHARLES KINDELBERGER, AMERICAN BUSINESS ABROAD 207 (1969).

31. Oscar Schachter, *The Decline of the Nation State and its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 8 (1997) [hereinafter Schachter, *Nation-State*].

32. *See* John G. Ruggie, *At Home Abroad, Abroad at Home: International Liberalization and Domestic Stability in the New World Economy*, 24 MILLENNIUM 507, 518-22 (1995).

Professor Schachter, in a profound commentary on the impact of global capitalism on state authority, wrote that:

> On the ideological level, the superiority of markets over state control is almost universally accepted, even in countries like China and Vietnam that call themselves communist. Today the market — anonymous, impersonal, pervasive — is viewed as the engine of development. The state steps back; its legal power dwindles over currencies, interest rates, trade flows, rates of unemployment, and foreign investment. Non-state mechanisms develop; private rather than public international rules prevail. A new international business class tends to identify itself with the global aims of its transnational companies rather than with the political objectives of its particular countries. The State no longer commands the primary allegiance of this class though businessmen will still turn to the state for intervention when it seems useful.[33]

Indeed, the WTO Uruguay Round has also contributed to the "demise" of strict geographical demarcations. The emergence of the multilateral trading system in the last half-century radically changed the theory of mercantilism and trade barriers. Although trade policy continues to be intimately related to populist pressure and domestic industry interests,[34] the need for foreign investments and finance capital has given incentive for governments to enter into unilateral and/or multilateral programs of deregulation and trade liberalization. The Philippine experience of the 1990s is in itself a classic illustration of deregulation and liberalization as instruments for the achievement of specific objectives related to macroeconomic stability and economic growth.

D. *Emergence of Civil Society*

The decline of state authority in the modern era is often associated with an increased political role for civil society, a less than precise term now commonly used for the non-governmental associations that seek to influence public policy.[35] These organizations have brought into the realm of international political, economic and social processes, an entire gamut of issues ranging from the promotion of human rights, to poverty eradication and the preservation of a global ecosystem. They have internationalized — and sometimes multilateralized — subjects that used to be perceived as exclusively within the sphere of national sovereignty and internal affairs.

33. Schachter, *Nation-State, supra* note 30, at 10.

34. *See, e.g.*, President Arroyo's declaration on tariff re-calibration at <http://www.inq7.net> (Sept. 21, 2002).

35. Schacter, *Nation-State, supra* note 31, at 12.

While civil society is not a new historical phenomenon,[36] these organizations are unique to our times in the sense that they represent a more diverse enumeration of interests, are well financed and organized across national borders, and the power of computer networks allow them to reach deep and wide into peoples and countries, as perhaps nothing like ever before. They fill the political space between the electoral process and the state administration in their chosen areas of interest.[37]

But civil society can also be a very important and helpful partner in international conferences. In the Philippine Preparatory Process for the International Conference on Financing for Development early this year, this writer co-chaired a core group of senior officials from the National Economic and Development Authority, the Departments of Foreign Affairs, Finance, Trade and Industry, and the *Bangko Sentral ng Pilipinas*, which met periodically to discuss the developments of negotiations in New York. There was also a broader process that involved other agencies like the United Nations Development Program, Board of Investments, Development Academy of the Philippines, Philippine Institute for Development Studies, business and civil society. As a matter of fact, the positions taken in the Preparatory Committee meetings in New York and on the final document from the Conference can be said to be truly "national" in the sense that it was a multi-stakeholder creation, subject of course to the government's final imprimatur. The Vice President's (who led the Philippine delegation) briefing kit included a copy of a Philippine Country Paper (perhaps the only one in the world) on Financing for Development that captured the range of views and ideas from Philippine sectors, highlighting the agreements and differences between Government and civil society/business.

E. *Cross-Cutting Themes*

Finally, there are proposals for a more effective and comprehensive regulatory regime to govern certain cross-cutting and "international" problems facing mankind at the turn of the century. Foremost among these issues is the concern for human rights. There is an assertion made that international law should gradually shift from state values to human values such as the law on human rights promotion and environmental protection.[38] The International Human Rights Movement is still slowly but surely breaching the barricades put up in the international legal system by the entrenched and traditional concept of state sovereignty.

36. Recall non-state bodies which have historically pushed religious, ideological and economic issues.

37. Schachter, *Nation-State, supra* note 31, at 12.

38. See generally the writings of Louis Henkin (Columbia University), W. Michael Reisman (Yale University).

This is particularly important in view of the argument that there really is no international human rights *per se*. Instruments like the Universal Declaration on Human Rights, for example, are mere enumerations of rights and freedoms that States are expected to promote and protect. Human rights and law and remedies are, therefore, inherently rooted in national contexts; thus, human rights and their protection can only be as effective as they are actually implemented in the national legal setting.

Aside from human rights, there have also been perspectives promoting the protection of the environment. Civil society, in particular, has been very vocal and visible in this particular field of international life. The recently concluded World Summit on Sustainable Development in Johannesburg, South Africa was supposed to further that process. While governments will be quick to congratulate each other about the "success" of the meeting, civil society groups describe the meeting as a missed opportunity to come up with concrete timeframes, targets, and funding to implement the 1992 Rio Summit's Agenda 21.

Further related to human rights, but important enough to be considered an issue all on its own, is the creation of the International Criminal Court (ICC) under the Rome Statute of 1998. The idea of an ICC was an early post-war idea that became a victim of the Cold War. It is no surprise, therefore, that work on such a court immensely progressed after the end of the cold war and was ultimately concluded in Rome before the end of the century. Of course, it should also be pointed out that in the exercise of its Chapter VII powers under the United Nations Charter, the Security Council had earlier created the so-called International Criminal Tribunals, prominent among them the ones for Yugoslavia and Rwanda. It is ironic, however, that the United States — a leading proponent of human rights — has refused to join the International Criminal Court because of certain fundamental misgivings.

Last, but definitely not the least, is the cause of women in international law. Observers concede that the 20th century saw the liberation of many — but definitely not all — women. No woman judge has served in the World Court until 1995; no woman has become Secretary General of a major international organization; and very few women have worked with the International Law Commission.

But expect that women will play critical roles in the development of international law in this century, particularly in the setting of the international legal agenda. Louis Henkin in 1994 was profoundly optimistic that in this century "women will help bring political and economic development; [and] *they will help change international law and move its focus.*"[39]

39. Louis Henkin, *Notes from the President*, AM. SOC. OF INT'L L. NEWSLETTER (Jan. 1994) (emphasis supplied).

IV. THE INTERNATIONAL LAW IMPERATIVES

From a comprehensive global perspective, one may today observe that of the effective decisions which constitute the world power process, some are taken inclusively, in the sense that several or many or all States participate in the making of such decisions, and others are taken exclusively, with only a single or a few States making relatively unilateral determination of issues.[40]

It should strike us that this observation from the late Mr. Myres Smith McDougal when he presented the fourth Charles Hall Dillon Lectures in Law and Government at the State University of South Dakota — some 44 years ago — seem to remain true in our world today. It is modern international law imperatives, therefore, to try to shape what McDougal called the "world power process" to be more inclusive, put some effective limitations on the processes that are exclusive, and for a state to be able to fully participate in those processes that are relatively inclusive.

Bearing in mind such imperatives, it is suggested first of all that an important issue that faces the international community today is the question of use of force. It has been comprehensively argued elsewhere that the prohibition on the use of force is both a norm under customary international law and the United Nations Charter. It is *jus cogens*; a peremptory norm from which no derogation is allowed. Of course, the self-defense exception is an inherent right of states that attach to their sovereignty and to the very fact of their objective existence. Thus, while the international community quibbles about whether or not there is justification for any unilateral or collective attack on Iraq, they debate not the essence of the prohibition but the definition of the exception. Part of the so-called Bush Doctrine, however, as contained in the recently released National Security Strategy of the United States, does seem to be a drastic change in US foreign policy because it advocates "the basic principle of pre-emption: you're not going to take the first blow."[41]

However, the prohibition on the use of force remains undisturbed. And this is an essential starting point for a better understanding of the international law imperatives that this paper talks about. To explain why, this writer refers once more to the writings of McDougal. In his essay, *Perspective for an International Law of Human Dignity*, he argues that "the cornerstone of an international law of human dignity must, as the principle of minimal order demands, be fixed in general community monopolization of force to preclude the unauthorized use of force, or too intense coercion, as a strategy in value

40. Myres S. McDougal, *The Impact of International Law Upon National Law: A Policy Oriented Perspective*, *in* MYRES S. MCDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 157, 157 (1960).

41. Paul Jabber, Middle East Policy Adviser, Central Intelligence Agency, at an Institute for War and Peace Studies Roundtable, School of International and Public Affairs, Columbia University, Sept. 23, 2002.

change." [42] Our governments, therefore, must commit themselves to strengthening the United Nations system in this regard. There can be no doubt in our minds that whether in the context of a "war against terrorism" or "in defense of human rights and dignity," that the most fundamental principles of international law must be seriously considered, and should shape any response — whether unilateral or collective — that involves the use or the threat of the use of force. For if such an ideal is abandoned, then an entire generation's institutional memory of what it means for the world when states are free to choose war or armed activities as instruments of national policy is erased. Worse, the demands of the "principle of world public order" become unheard.

At the beginning of this new century, countries all over the world (the Philippines included) also realize that they are no longer as "sovereign" as they used to think. Membership in the international community and participation in the world power process entail inevitable restrictions on the national policy space. Internationalization and even a degree of universalization of certain norms are now being made to bear on certain areas that used to be exclusive spaces for sovereign national prerogatives — with trade policy, environmental protection and human rights promotion as the most classic illustrations. These are the more concrete facets of globalization and trade liberalization.

As such, there is evolving acceptance of what is referred to as "global public goods" ranging from rules, standards and procedures for telecommunications to product standards and environmental protection. The United Nations, its specialized agencies and the entire proliferation of transnational organizations have created a corpus of such rules and regulations that affect "internationalized" areas of the world community. While states continue to be important players in the articulation of the content and substance of these global public goods, it is important to realize that they have actually given up sovereignty on the relevant areas.

Inasmuch as these so-called international and universal norms are being shaped in processes that are relatively inclusive and transparent, it is important to note that countries engage in the negotiations and development of prescribed reform or restructuring programs. And an important requirement here at the national level is to build a national consensus particularly among the most relevant stakeholders. To take a concrete example, the WTO is now in the process of furthering the progressive liberalization in the services sector. There is a need, therefore, for governments and those who will be primarily affected by the reform process to engage in genuine consultations — and constructive collaboration — so as to be able to participate fully *and effectively*

42. Myres S. McDougal, *Perspective for an International Law of Human Dignity*, *in* MYRES S. MCDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 987, 1012-13 (1960).

in the on-going development of the General Agreement on Trade and Services architecture. Here, there is a crucial need for the national team[43] to be completely aware of the interests that are to be promoted *and protected* in the negotiations. Otherwise, the negotiators will have no idea what to ask for and will most likely give away more than what the economy or industry can bear or sustain.

In his Presidential Address to the American Society of International Law,[44] McDougal underscored the demand of fundamental principles for the utmost pluralism in the world decision-making processes. In defining "pluralism," he offered not only the participation of states or international governmental organizations, but also parties, pressure groups, private associations and individual human beings as all appropriate subjects of an 'international law of human dignity.'

More than national consolidation, developing countries (particularly) must also pursue their national objectives[45] by establishing linkages and partnerships with like-minded states. The experience of developing countries in the Group of 77 and the Cairns Group of Agriculture Exporting Countries are successful models of negotiating — leveraging through the formation of such broad coalitions of "interested" parties. Like-minded countries in the WTO, for example, have also been able to use the power of numbers in exacting certain concessions on public health and intellectual property rights during the Doha Ministerial Meeting in November 2001. More recently, it is also perhaps due in no small measure to the common stand taken by many countries that the United States agreed to explore the UN option first in regard to dealing with Iraq and its weapons program.

Such linkages are very critical even in democratic and transparent processes in which developing countries — or countries in general who are not major world powers — are participants. These blocs and coalitions are effective (even possibly majoritarian) instruments to counter-balance the influence and strength of world powers, which will otherwise tilt international balances (of issues and controversies) through the sheer weight of their national power. This is also important, when you recognize that there is no encompassing international adjudication or enforcement body in international law. The collective political, economic, and social response of states around the world to an action or threatened action of one or more states may sometimes be effective sculptors of the latter's national policies or decision-making.

43. By national team, we mean the combined representatives of government, industry, civil society, consumers and other stakeholders.

44. May 2, 1959.

45. Sometimes, national objectives is a better alternative to "national interest" inasmuch as it has less individualistic undertones.

Absolutely implicit in the whole concept of national and international linkages or consolidation are imperative needs for capacity building in the ability of governments, industries and other stakeholders to understand the changing world scenarios, to deal with the science, technology and relationships that will be in flux, and to anticipate[46] their implications to our national communities. This perhaps is the most basic and yet defining challenge for developing countries in the context of the international law imperatives of the 21st century. A possible list of development areas that directly relate with this reality will include *electronic commerce* as a cross-cutting issue for international trade (goods or services) or the domestic economy; management of benefits from *efficiency gains resulting from increased domestic competition*; and the handling of *technology transfer* issues such as biotechnology.

In this context, national governments may want to examine the potential of developing important zones of cooperation with non-government organizations (NGOs). Predictably, many governments are not comfortable with too much intimacy with NGOs and the feeling is probably mutual. But many policy makers from more developed countries will tell us that their respective experiences in the project of national development have, in one way or the other, and in varying degrees, involved an amount of "cautious (suspicious if you wish) collaboration" with NGOs who normally have some specialized competence in an issue and are better equipped with the relevant documentation and facts. Particular reference is made to NGOs in the scientific and technical fields that have been termed as "epistemic communities." This writer's own personal experiences in the last five years at the Foreign Office support the assertion that Government-NGO partnership can be a potent and important relationship if characterized by mutual trust and support.

This writer has discussed primarily about governments, industry and civil society as stakeholders in this great endeavor. But it is imperative to turn briefly to the important role of lawyers in this enterprise. The international law imperatives that this paper refers to can be defined in terms of two branches. The first branch encompasses the international law imperative in its most objective form, that is, as a means for social organization. When one speaks of the prohibition of the use of force, for example, it refers to the use of international law for the establishment of minimum world public order. International law is also comprehended as an imperative under the first branch when one considers the world trading system of rules or the general principles being developed in the sustainable development realm. Here, international lawyers are going to be important players in representing governments and other parties in the negotiation of new international rules as well as in the

46. Distinguish mechanical prediction from a more dynamic anticipatory stance, which should be proactive.

application of international law to the world power process and the conduct of states in the realm of the international community.

The second branch of international law imperatives, however, is equally important. These refer to the demands and challenges imposed on industries and the private sector by the internationalization of many transactions and relationships. World competition and globalization have thoroughly re-shaped the face of business and trade. In this regard, the proper and comprehensive training of international lawyers becomes necessary. The law that lawyers now face in global commerce is no longer just the law of states or state-controlled entities. Much of the law in global commerce are universal and international codes of conduct created not only by governmental negotiations but also by business practice, private contracts, and what are called "organizational routines." The *lex mercatoria* is usually given as the classic example notwithstanding certain challenge from jurists who insist that this is really state law. Schachter adds that "the increase in non-state arbitration for transnational business disputes is a factor in transforming private contract practices into authoritative law for the business community."[47]

To summarize the fundamental international law imperatives in this new era: the management of the world power process remains an all-encompassing concern, particularly with regard to the maintenance of minimum world public order; states are required to develop effective and efficient structures of national coordination; like-minded states will find strength and effective negotiating leverage in collaboration and partnerships; capacity building remains an important catalyst for the pursuit of national objectives or development goals; states have to reappraise their working relationships with civil society and non-governmental organizations; and the legal education systems all over the world must produce a new breed of legal practitioners who are not only global in perspective and thinking, but also well equipped to grapple and deal with the challenges of international life today. To use the analogy adopted by Professor Schachter, international lawyers of the 21st century should be ready to assume positions of leadership in the towns and villages, and put their skills and talent to bear on shaping the future countenance of the superhighways that make the world one.

V. Conclusion

Dr. Allan Goodman,[48] a keen observer and practitioner of international relations, compares the world today to the world of Madeleine Albright after

47. Schachter, *Nation-State*, *supra* note 31, at 12.

48. President and Chief Executive Officer, International Institute for Education. He is former Dean of the Georgetown University School of Foreign Service and former Presidential Briefing Coordinator for the Director of the Central Intelligence Agency, United States of America.

the break-up of the Soviet Union. Albright, then Professor of International Affairs at Georgetown University, had to throw away all her notes and materials on the *Foreign Policy of the Soviet Union*, because the Soviet Union was no more. Goodman is thus the first to admit that he himself is not quite sure of anything anymore, and we live in a world and a time that few people truly understand. Goodman says that many of us are trained by people from a different century and are equipped to grapple with the realities of a different century.[49]

Bearing in mind the characteristics of the international system at this particular point in human history, the fundamental imperatives in the context of the effort to manage and organize international life have been identified. These imperatives are by no means comprehensive, and it is urged upon all who believe in the importance of international law to continue to develop a better understanding of such imperatives. As Dr. Goodman argues, this is an era in the process of being understood, and so the international community will have to adapt, innovate, and improvise along the way. Many of the conceptions and predictions about the world today may be proven wrong; but what is perhaps most important is for the international community to always cling to certain basic premises, or imperatives, as this article puts it. One can then with some degree of confidence fill in the blanks so to speak, as one goes along.

The international community can take consolation from one of the most poignant passages in historical literature that celebrates the greatness and vitality of our humanity:

> The dead civilizations are not "dead by fate;" and therefore a living civilization is not doomed inexorably in advance *migrare ad plures*: to join the majority of its kind that have suffered shipwreck. Though sixteen civilizations may have perished already to our knowledge, and nine others may now be at the point of death, and though Nature, in her wanton prodigality, may be wont to slay the representatives of a species, not by tens or scores, but by thousands and tens of thousands, before she rouses herself to create a new specific mutation, we need fear no evil from the encompassing shadow of Death; for we are not compelled to submit our fate to the blind arbitrament of statistics. *The divine spark of creative power is instinct in ourselves; and if we have the grace to kindle it into flame, then the stars in their courses cannot defeat our efforts to attain the goal of human endeavors.*[50]

49. Keynote Speech of Dr. Allan Goodman, International House, New York City, Sept. 22, 2002.

50. 4 TOYNBEE, A STUDY OF HISTORY 39 (1939) (emphasis supplied).

"The Generally Accepted Principles of International Law" as Philippine Law: *Towards a Structurally Consistent Use of Customary International Law in Philippine Courts*

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