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Closing the UN Decade of International Law and Welcoming the Third Millennium

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CLOSING THE UNITED NATIONS DECADE OF INTERNATIONAL LAW AND WELCOMING THE THIRD MILLENNIUM

I. THE UNITED NATIONS DECADE OF INTERNATIONAL LAW

This year marks the ending of the Decade of International Law as solemnly proclaimed by General Assembly Resolution 44/23[1] on November 17, 1989 to begin on January 1, 1990. The avowed purposes of the United Nations Decade of International Law are[2]:-

(a) *To promote the acceptance of and respect for the principles of international law;*

(b) *To promote means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice;*

(c) *To encourage the progressive development of international law and its codification; and*

(d) *To encourage the teaching, study, dissemination and wider appreciation of international law.*

As may be recalled, reactions of States as gathered and reflected in the Secretary-

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1 General Assembly Resolution 44/23, adopted on November 17, 1989, was moved by the non-aligned countries following the initiative taken by their Foreign Ministers at the Conference in The Hague on June 26-29, 1989.

2 *Ibid.*, paragraph 2, see also UN Doc. A/45/430 (1990) at p. 6, and Add. 1 and Add. 2.

General's first report in 1990[3] have been mixed. Western European countries and others appeared more reserved than countries formerly known as "Socialist", such as the Russian Federation, China, Cuba and Bulgaria. The West on the whole appeared less enthusiastic and reluctant to begin the Decade with great expectations. The European Union thought it useful to review the program in the mid-nineties, as indeed we at the Regional Meeting of the ASIL took occasion to undertake the mid-term review in March 1996.[4] China and the Russian Federation favored convening a Third Hague Peace Conference to adopt a new Convention on Pacific Settlement of International Disputes to pave the way for the passing of the twentieth century and to welcome the third millennium.[5]

As has been noted,[6] the decade that preceded the United Nations Decade of International Law, namely, the nineteen eighties had witnessed a paradoxical transition, a change of attitude or rather an interchange of position between the West and former socialist countries in their declining years until their ultimate defunct.

As the latter began to lose faith in their own "way to socialism" and started to show greater respect for and reliance on the United Nations with the overwhelming support from the so-called third world, which for all practical purposes consisted of members of the Group of 77 and the non-aligned nations, the West, most of all the United States and its closest Western allies, appeared more disenchanted with, if not constantly disillusioned by, the stand taken by the overwhelming majority of member States of the United Nations,[7] and the critical stand taken

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[3] The United Nations Secretary-General submitted his first report on September 12, 1990, UN DOC. A/45/430 (1990) and Add. 1 and Add. 2, containing reactions gathered from the views of member States and international organizations and non-governmental bodies pursuant to paragraph 3 of Resolution 44/23.

[4] See Sompong Sucharitkul, "Legal Developments in the First Half of the United Nations Decade of International Law", submitted to the Regional Meeting of ASIL in San Francisco on March 22, 1966.

[5] See Dr. J. Perez de Cuéllar, Secretary-General of the United Nations, Preface to "The United Nations Decade of International Law", Leiden Journal of International Law, Special Issue, 3 LJIL 90, at p. vii, and also Sam Muller and Marcel Brus, *Ibid.*, pp. 1-14.

[6] See Sompong Sucharitkul, cited in Note 4 supra, at p. 2.

[7] See, for instance, the adoption of the text of the United Nations Law of the Sea Convention 1982 without the affirmative vote of the United States. In spite of the new constructive role of the Security Council in the Gulf War, the United States Government remains chronically in arrears in the payment of its annual contribution to the United Nations budget.

by some Specialized Agencies of the United Nations.[8]

A quick look at legal developments before the closing of the United Nations Decade in the four areas specified in the General Assembly Resolution 44/23 will provide a rough and ready reference reflecting a brief survey of progressive developments, challenges and obstacles which have transpired from the beginning to nearly the end of the Decade of International Law.

II. PROMOTION OF ACCEPTANCE OF AND RESPECT FOR THE PRINCIPLES OF INTERNATIONAL LAW

The current Decade of International Law which is about to close before the year is out may be designated as containing a mixed bag of both the good news and the not so good news.

1) Adoption of Enforcement Measures to Ensure Compliance with Principles of International Law in the Maintenance of International Peace and Security

In this particular area, the United States has excelled in its leadership and the responsible guidance it has provided to the international community in the armed conflict which broke out at the outset of the Decade by Iraq's invasion and occupation of Kuwait on August 2, 1990.[9] Various activities were conducted under the leadership of the United States from operation "Desert Shield"[10] to operation "Desert Storm"[11] and yonder.

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[8] The United States decided to withdraw from Specialized Agencies such as UNESCO. Its membership within that Specialized Agency is still in the state of suspended animation.

[9] See Sompong Sucharitkul, "The process of Peace-Making following Operation "Desert Storm"", in Austrian Journal of Public and International Law 43, pp.1-30 (1992). In its original version, this paper was presented to the First Fulbright Symposium on April 9, 1991, at GGU, San Francisco.

[10] Operation Desert Shield was based on the penultimate preambular paragraph of Resolution 660 (1990) of the Security Council on August 2, 1990, which affirms *"the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait in accordance with Article 51 of the Charter"*, see *Ibid.*, Note 9 at pp. 5-6.

To this end, various measures were adopted by the Security Council of the United Nations which could be classified as *Ex Nunc*, *Ex Tunc* and *Ex Ante*.

For measures *Ex Nunc* (for now), steps taken included such measures as a cease-fire order or arrangement connected with the withdrawal of Iraqi forces from Kuwait and the establishment of the demilitarized zone.[12]

For measures *Ex Tunc* (for then), these included steps such as arrangements for the establishment of a Compensation Fund and a United Nations Compensation Commission to verify, determine and recommend the amount of compensation to be awarded to each of the claims against Iraq, submitted by various Claimant States in connection with losses suffered as a direct result of Iraq's invasion and occupation of Kuwait, without prejudice to the losses arising prior to the invasion and occupation of Kuwait by Iraqi forces.[13]

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[11] See, e.g., "Until What? Enforcement Action or Collective Self-Defense?" Weston, 85 AJIL (1991), p. 506; and Dinstein, "War, Aggression and Self-Defence", pp. 142-143 (1988). The inherent right of Self-defence in any particular instance may continue to exist only until such time as it becomes too late to exercise. Just as "restitution stops where repayment begins". The Operation Desert Shield must stop where Operation Desert Storm begins. If Desert Shield was an exercise of collective self-defence, it was designed for the defence of Saudi Arabia and not Kuwait. Measures designed to "retake" or "restore sovereignty of Kuwait" were reflected in Operation Desert Storm, distinguishable from the exercise of any inherent right of self-defence. See *Ibid.*, Note 9, at pp. 7-12.

[12] For doctrinal analysis, see the Second Report of Professor Willem Riphagen, Special Rapporteur on the Topic of State Responsibility, UN Doc. A/CN4/344, Yearbook of the ILC 1981, Vol. II (Part One), pp. 79-101. The *Ex Nunc* measures in the case under review were declared in UNSC Resolution 687 (1991) of April 3, 1991, 30 ILM at p. 847 (1991), apart from cessation of hostilities against Kuwait and the Coalition forces, Iraq is required to disengage its troops by completely withdrawing its armed forces and military equipment from Kuwait and away from the Security Zone set up by the coalition forces to ensure the security and safety of Kuwait and Saudi Arabia. As part of *Ex Nunc* measures, UNSC Resolution 687 (1991) requires both Iraq and Kuwait to respect the "inviolability of the international boundary and the allocation of islands set out in the "Agreed Minutes between the State of Kuwait and the Republic of Iraq regarding the Restoration of Friendly Relations, Recognition and Related Matters", Baghdad, October 4, 1963, UNTS, 1964, 30 ILM 855 (1991). Two further measures include the Deployment of a United Nations observer Unit to Monitor the Demilitarized Zone, and the obligations incumbent upon Iraq to refrain from "committing or supporting" any act of international terrorism or allow any organization directed towards commission of such acts. This last step is also known as "obligations to cease and desist from acts of international terrorism. See *Ibid.*, Note 9 at pp. 19-21.

[13] The *Ex Tunc* measures, envisaged in the 3900-word Resolution 687 of the Security Council, predicated among other things that for each item of the damage caused by Iraq there must be *restitutio in integrum* or comparable pecuniary compensation. Iraq is held responsible for the death, physical injury, loss of property and assets and environmental damage, including the havoc resulting from its invasion and occupation of Kuwait. These measures include, inter alia, the repatriation of all Kuwaiti and Third-Country nationals, return of all Kuwaiti Property and assets seized by Iraq, reparation for losses, damage and

Finally, for measures *Ex Ante* (for the future), such steps were taken as measures designed to prevent the repetition by Iraq of acts of aggression, invasion and occupation of neighboring territories, as also in the creation of a United Nations Team of Weapon Inspection Experts to search and destroy Iraqi nuclear arsenals and capabilities as well as other weapons of mass destruction including biological and chemical weapons. This last series of measures *Ex Ante* constituted steps necessary for the prevention of repetition and recurrence of acts of aggression by Iraq against any of its neighboring territories and States.[14]

Controversies have arisen regarding the legality *vel non* of the use of force as part of enforcement measures to compel Iraq's compliance with the *Ex Ante* measures, especially in connection with Iraq's unwillingness to comply and its non-compliance or failure to cooperate with the United Nations Weapon Inspection Team. The question was debated whether force could be used without additional or specific authorization from the Security Council. In other words, did the 3900-word Resolution 687 afford sufficient legal basis for the use of force in December 1998 as well as in 1999 subsequent to the cease-fire Resolution 687 of April 3, 1991?

The position taken by the United States and the United Kingdom suggests that the Resolution 687 provides ample justification for the use of force without additional warning.

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depletion of natural resources and other forms of injury and losses. For this purpose, an appropriate mechanism was set up complete with procedure for the settlement of claims. See also *Ibid.*, Note 9, at pp. 21-25.

[14] Beyond monetary compensation, verbal apologies and unsecured assurances, Iraq is required to give more than oral pledges. The Security Council has assumed its institutional responsibility to ensure non-recurrence of human sufferings as the result of repetition of nefarious activities under Iraq. In particular, Part C of the Cease-Fire Resolution 687 (1991) reaffirms the following obligation on the part of Iraq:

a. *Obligation under the Geneva Protocol (1925) and Prohibition of Biological and Toxin Weapons, specifically to destroy, remove and render harmless, under international supervision, all chemical and biological weapons and all stocks of agents and all related subsystems and components of all research, developments, support and manufacturing facilities; and all ballistic missiles with a range of greater than 50 kilometres and related major parts, and repair and production facilities.*

b. *Obligation under the Treaty of Non-Proliferation of Nuclear Weapons (1968), for this purpose the International Atomic Energy Agency (IAEA) and the Secretary-General of the United Nations will receive from Iraq a declaration of locations, amounts and types of all items specified.*

c. *Prohibition of Sale of Arms and Material.*

d. *Obligation not to Support International Terrorism.*

See also *Ibid.*, Note 9, at pp. 25-29.

Other members of the Security Council, including China and the Russian Federation, were less enthusiastic about the whole exercise. But the question was not brought before the Security Council for discussion or resolution.[15]

In regard to enforcement measures, unilateral as well as collective, the United States has been second to none throughout the United Nations Decade of International Law in its readiness, willingness and ability to resort to the use of force upon the slightest provocation or even without any provocation or instigation. The world can rest assured that the United States would stop at nothing to use force if and when necessary to compel compliance with Security Council resolutions or to honor NATO commitments or to satisfy itself as a measure of anticipatory self-defence or preemptive strike.

When the measure was taken pursuant to a United Nations Security Council Resolution, the use of force was less debatable, but when forcible measures were taken in connection with a Collective Defence Treaty Organization such as NATO[16]or OAS,[17] an inherent question remained to be answered. When a strike was exclusively unilateral, based on the alleged ground of self-defence, anticipatory or preemptive, it would always be suspect in the eyes of the outside world. Reactions from the victim of the attack could reflect to some extent the justification or lack thereof on the part of the United States. The cases in point were the missile attacks on Afghanistan, Iraq, Libya and Sudan for instance, which have entailed natural repercussions, both favorable and adverse.[18]

In the field of maintenance of international peace and security, the world is indebted to

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[15] In spite of its detailed contents and its length (3900 words), Security Council Resolution 687 of April 3, 1991 did not contain the magic words "authorized to use all means necessary (including the use of force) to maintain international peace and security", as were incorporated *expressis verbis* in Resolution 678 (1990) on November 29, 1990. It was not clear whether January 16, 1991, the launching of Operation Desert Storm, or rather March 2, 1991, the suspension of combat operation that measures thus authorized were regarded as successfully taken to restore international peace and security.

[16] See the commitments for Kosovo which have led to a satisfactory compromised settlement albeit provisional.

[17] The case of Nicaragua v. United States in the mid eighties have resulted in condemnation of United States activities in 13 counts.

[18] Sudan strongly protested against a recent unwarranted armed attack by United States forces.

the United States for the lead it has taken in connection with Iraq's invasion and occupation of Kuwait. For regional peace and security in the Balkan as well as in the South China Sea, the United States presence and commitments have served to discourage if not altogether deter acts of outright aggression and other lesser violations of the principle of non-use of force enshrined in Article 2, paragraph 4, of the Charter of the United Nations.

In areas of collective security other than the United Nations, such as NATO, OAS and former SEATO, the United States might have erred on the side of the victim of acts of direct and indirect aggression and needed to be reminded by the International Judicial Instance as to the correct understanding and meaning of collective self-defence.[19]

When it relates to self-defence, measures and actions taken by a State need to meet the requirements and conditions set by international law. Self-defence as an inherent right of every State is only necessitated by the occurrence of an armed attack against the State, its territory, or its armed forces whether on the sea, in the air space or on land. Measure of self-defence mistakenly taken by the State could entail legal consequences engaging its State responsibility in international law, such as the downing of Iran Air Flight IR655 in the Gulf of Persia on July 3, 1988.[20]

Clearly a State planning a preemptive strike or anticipatory self-defence must take the risk of its miscalculation, including its misappreciation or misconstruction of the facts or misinformation. The Precautionary Principle which has become an acquired principle in international environmental law should have a general application in other parts of general international law as a whole, especially in regard to any unilateral decision to resort to the use of force for whatever reason and on whatever ground or justification whatsoever. A State such as the United States to attain maturity as a world leading nation must learn to take meticulous

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[19] See Military and Para-Military Activities against Nicaragua, Nicaragua v. USA (1986), ICJ (1986). The Case appeared to have been settled out of Court, the Parties subsequently requested the ICJ to discontinue the proceeding on the assessment of compensation.

[20] See Sompong Sucharitkul, "Procedure for the Protection of Civil Aircraft in Flight", 16 Loyola of Los Angeles International and Comparative Law Journal (1994), p. 513, at pp. 521-534; see also Iran v. USA. 1989, ICJ 132 (December 13). The hearings scheduled by the Court were postponed *sine die* by request of the Parties. A settlement appeared to have been reached at the start of the UN Decade of International Law, when the Court finally removed the case from the registry altogether.

care before launching an armed attack on any territory or aircraft or seagoing vessel and with the fullest knowledge that force can only be used for self-defence, and in no case as a punitive action without proper prosecution and judicial determination of the commission of an international offense by the State under punishment. Failure to take due diligence would violate procedural due process or the Rule of Law in national as well as international settings.

2. Subsistence of Unilateral Sanctions to Ensure Compliance with National Legislation and Trade Regulations despite the Creation of a World Trade Organization (WTO)

The world community has elected to establish a World Trade Organization (WTO) with effect from January 1995[21] to render superfluous if not to replace the outmoded system of unilateral sanctions enforced by a relatively strong State against weaker and helpless developing nations pursuant to a national procedure which is one-sided, where the discretionary governmental power is exercisable by an agency or instrumentality of the State, acting practically as a *judex in sua causa*. It is not surprising that the overwhelming majority of nations prefer international trade to be regulated by an international agency or at any rate an impartial neutral authority, rather than tolerating the imposition of unilateral sanctions as a form of self-help.

If world trade is to be liberalized at all, liberalization should be achieved on a global scale. Universality is a rule which admits of neither exception nor derogation. It would not seem right for anyone to attempt to exclude any State from membership of a global trading community simply for the sake of possible utilization of unilateral sanctions as distinct from regulation and control by an impartial and disinterested international authority and ultimately from objective assessment, conciliation or adjudication by an international dispute settlement mechanism.

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[21] 33 ILM, pp. 1143-1273 (1994). For a list of Annexes, see, for instance, Annex 1A : Multilateral Agreements on Trade in Goods, General Agreement on Textile and Clothing, Agreement on Technical Barriers to Trade, Agreement on Trade-Related Investment Matters (TRIM), Agreement on Rules of Origin, Agreement on Import Licensing Procedures, Agreement on Subsidies and Counter-Vailing Measures, Agreement on Safeguards; Annex 1B : General Agreement on Trade in Service and Annex (GATS). Annex 1C : Agreement on Trade-Related Aspect of Intellectual Property Rights (TRIP).

Several countries are well known for non-compliance with GATT regulations. On top of the list should be mentioned Thailand and the United States. The close of the Decade will probably witness the record of a tie between the two countries. United States has scarcely won a single trade dispute under GATT or WTO except the Cigarettes Case against Thailand's restriction on cigarettes import on grounds of health hazards. On the other hand, Thailand has invariably lost most cases, including trade disputes with the United States, except the most recent decision rendered by the Appellate Body of the WTO confirming the finding by its Panel that the United States ban on import of shrimp and shrimp products from Thailand, Pakistan and Malaysia is inconsistent with Article XI : 1 of GATT and cannot be justified under Article XX and the Panel's recommendation that the Dispute Settlement Body request the United States to bring the latter's prohibition measure into conformity with its obligation under the WTO Agreement.[22]

In principle, with the establishment and functioning of the WTO and its dispute settlement mechanisms, resort to unilateral sanctions by a member State against another member State should subside, as the State imposing unilateral sanctions would be exposing itself to the risk of being found to be out of compliance with the Articles of the Agreement under the aegis of the WTO. An apparent decline in the use of unilateral sanctions is to be welcome as a positive step in the right direction for progressive development of international law at the close of the United Nations Decade, thereby reducing unnecessary tension and friction in the day-to-day operation of global trade.

3. Acceptance of Obligation to Observe International Human Rights

An assessment of the degree of respect for international human rights in a given society should begin, not with how well national constitution protects civil and political rights of the elite classes of citizens within its own borders, but how sincerely the State accepts in good faith its own international obligation to respect human rights by ratifying, adhering or acceding to all commitments of human rights without evasive reservations, elusive understandings, illusory

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[22] See WTO Panel Reports in 37 ILM 832 (1998), at pp. 839-859.

declarations and unintelligible provisos that defeat the object and purpose of any human rights instrument.

Not unlike charity, human rights cannot but begin at home, at the breakfast table and at the local police station or administrative bureau. It would seem meaningless if not pointless to appear charitable outside one's home or to give the appearance of eagerly watching and zealously monitoring human rights violations overseas or across the border without paying any attention to flagrant violations of basic human rights which occur daily in one's own backyard.

A country like the United States can be very persuasive and actively engaging in its genuine desire for other countries to have and to enjoy the luxury of fundamental human rights, while itself remaining insensitive to the dire need for every *homo sapiens* within its national territory to receive a minimum standard of treatment as a human being. There can be no room for human rights to flourish in a national environment where the administration refuses to ratify any of the essential components of the International Bill of Human Rights or any other additional instruments.

In this connection, the United States has come a long way in the United Nations Decade from paying lip-services to the protection of human rights to actually beginning the process of accepting and slowly and shyly trying to re-enter the world community by condescending to face the critics of human rights in an international forum. For the first time the United States ratified the International Covenant on Civil and Political Rights on June 8, 1992, with effect on September 8, 1992. This represented a giant step, a first ever measure taken by this country in support of basic principles of human rights.[23] This giant step was not taken lightly. Indeed it was accompanied by excessive qualifications, *ex abundante cautelae*, namely, five reservations, five understandings, four declarations and one proviso, each of which is capable of overkilling the applicability or availability of international human rights within the territorial confines of the United States, each of which when properly construed is likely to defeat the object and purpose of the Covenant in its entirety.

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[23] See David Stewart, "United States Ratification of the Covenant on Civil and Political Rights : The Significance of the Reservations, Understandings and Declarations", 14 Human Rights Law Journal 77 (1993). See also Newman and Weissbrodt, "1994 Supplement to International Human Rights Law, Policy and Process", (1994), pp. 93-96.

Whatever the drawbacks and shortcomings inherent in the United States instrument of ratification, human rights activists in this country should concede that the United States as a sovereign State has come some distance away from total disregard of international human rights thanks to this giant step taken half-heartedly in 1992 extending its ratification of the International Covenant on Civil and Political Rights.

To pay lip-services in support of human rights is still infinitely to be preferred, although no State has been heard to contest or reject the validity or desirability of any principle of international human rights. The awareness of frequent and blatant violations within their own territories have deterred some States from accepting obligations or commitments to respect them. Other States such as the European and Latin American countries appear to be facing the challenge very squarely regardless of their record of human right violations. We have been encouraged by the possibility of the United States being on the receiving end of human rights critics for a change in international forums such as the United Nations Commission and Sub-Commission of Human Rights.

4. Acceptance and Implementation of Legal Principles Sustaining the Environment

The United Nations Decade of International Law began with an awareness of the need to protect international environment which can only be fulfilled with the cooperation of all States particularly the developed nations which had contributed substantially to the depreciation of environmental conditions, in the air, the water, and the soil. On the other hand, the right to development has received an important qualification, known as "Sustainable Development".

The "Polluter Pays Principle" continues to be more widely accepted in the practice, not as a license to inflict harms on one's neighbors, but as a primary obligation to compensate for the resulting harm. Backed up by the "Precautionary Principle", principles of international environmental law are based on prevention and the protective principle, not merely remedial and corrective, but more particularly as a measure for the reduction, abatement and avoidance or preemption of injurious and harmful consequences flowing from the use or enjoyment of natural territories.

In the Decade of International Law, States have been urged to ratify, accede to, or accept

all multilateral and regional treaties where appropriate, in all fields.[24] Much progress could be expected if each State were better prepared to make further sacrifices rather than expecting others to bear the brunt of abstention.

III. PROMOTION OF MEANS AND METHODS FOR THE PEACEFUL SETT LEMENT OF DISPUTES BETWEEN STATES, INCLUDING RESORT TO AND FULL RESPECT FOR THE INTERNATIONAL COURT OF JUSTICE

Following the mid-term review of the progress made in the United Nations Decade of International Law, international instances for adjudication have mushroomed in several fields of State and human activities, in the Law of the Sea, in the World Trade Organization (WTO), in the World Intellectual Property Organization (WIPO), in the International Labor Organization (ILO) and also in International Criminal Tribunals for former Yugoslavia and for Rwanda, as well as the Rome Statute for the International Criminal Court.[25]

If in the maintenance of international peace and security, the United States has been responsible for the enforcement measures in Iraq as well as in Former Yugoslavia and in Africa, credit must be equally given to the United States where credit is due in regard to the mediation efforts in connection with the "Middle East Peace Plan". Above all, President Clinton of the United States and the Late King Hussein of Jordan have been instrumental in devising a workable "Peace Plan" which hopefully will serve to bring peace and tranquility to the war-torn region which has rarely seen peace since the time of the Old Testament.

While all specialized instances for settling international disputes continue to expand and to grow into the twenty-first century, the very highest judicial instance, the International Court of Justice, presided by a former executive officer of the American Society of International Law,

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[24] For the various international instruments, see Sompong Sucharitkul, "Legal Developments in the First Half of the United Nations Decade of International Law", San Francisco, March 22, 1996, at pp. 21-23.

[25] For a recent survey of "Resolution of International Conflicts", see Sompong Sucharitkul in a paper presented to the Regional Meeting of the ASIL, San Francisco, March 21, 1992, pp. 1-10.

appears to have suffered a serious set-back in a case between Paraguay v. USA 1998.[26] In that case, the Court issued an order on April 9, 1998, indicating provisional measures to the effect that "The United States should take all measures at its disposal to ensure Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of the Order"[27] Although the Order was issued 5 days before the date set for the execution of Mr. Breard, the execution did take place on April 14, 1998. This has provoked a loud outcry from the editorial committee of the American Journal of International Law[28] lamenting the disregard and lack of respect shown by the United States vis-à-vis the International Court of Justice, to which it owes an obligation of top priority under the Charter of the United Nations which is Law for the United States.

It is with this mixed feeling that the United States may be said to be leading the world into the twenty-first century after the passing of the Decade of International Law across the threshold of the twentieth century into the Third Millennium.

Let us hope that this is an isolated incident, not a repetition of the Rescue Party attempt under President Carter pending the United States v. Iran (hostages) Case in 1980.

In the judgment of the International Court of Justice, a gentle reminder was explicit that greater respect should be shown for the highest international judicial instance.[29]

An unexpected turn of event may augur well for yet further expansion of jurisdiction of another institutionalized method of settlement of investment dispute under the auspices of the Centre for the Settlement of Investment Dispute (ICSID).

Just as a decision of the House of Lords is final and without appeal within the United Kingdom it could yet afford a ground for the European Commission of Human Rights and subsequently the European Court of Human Rights to hold the United Kingdom in violation of

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[26] 37 ILM 810, 1998.

[27] Emphasis supplied.

[28] 92 AJIL 679-712.

[29] ICJ 1980 at p.43.

the European Convention of Human Rights, it would be conceivable that through NAFTA and ICSID Convention, the United States could be held accountable for any judicial or administrative denial of justice suffered by an alien, for instance a Mexican or a Canadian national or company, in respect of an investment loss incurred in the United States.

This sudden turn of event deserves our attention. The question has arisen whether the United States would view favorably any protection of Mexican, Canadian or non-American investment within the territory of the United States through the availability of a direct proceeding before ICSID. To be more precise, it is interesting to see whether the United States could maintain a uniform standard of practice with regard to the question and amount of compensation claimed by a Mexican or Canadian national or company suffering investment losses at the hands of confiscatory legislation by United States Congress or as a measure of expropriation ordered by the United States Judiciary through miscarriage or denial of justice without initial espousal by the claimant State, i.e., Mexico or Canada. The prospect of justice and equality before the law is always welcome as long as a uniform and not multiple standard is to be adopted and maintained by State members of NAFTA and ICSID.

The closing of the United Nations Decade promises to give us an answer to this burning question. It is hoped that legal developments will not disappoint our modest expectation. As a leading nation, the United States is in the process of learning how to honor its international obligations. How successful only time could tell.

IV. PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND ITS CODIFICATION

Within and outside the International Law Commission (ILC), codification and progressive development of international law are relentlessly being pursued.[30] The Draft Articles prepared by the International Law Commission have been completed at second reading on Jurisdictional

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[30] See Sompong Sucharitkul, "The Role of the International Law Commission in the Decade of International Law". 3 Leiden Journal of International Law, 1990, at pp. 15-42.

Immunities of States and their Property, Draft Articles on the Law of Non-Navigational Uses of International Water Courses have been adopted into a United Nations Convention. A Draft Code of Offenses against the Peace and Security of Mankind together with a Statute of an International Criminal Court has also been adopted, although the Rome Conference failed to attract the acceptance by the United States of the Statute of the International Criminal Court, understandably because the status of heads of State, particularly former heads of State or Government and their immunities *ratione personae* as well as *ratione materiae* have currently given rise to acute debates in various quarters.[31]

The United Nations Convention on the Law of the Sea 1982, received its sixtieth instrument of ratification and entered into force in November 1994.[32] Several Convention on other matters, such as the Convention on Desertification 1994, have received sufficient numbers of ratification for entry into force.

As a prelude to the Decade of International Law, the General Assembly earlier adopted the Report submitted by the Chairman of the Working Group entitled "Review of the Multilateral Treaty-Making Process" (1984).[33] This report was intended to provide serviceable guidance to a group or body of legal and other experts, to which the preparation of "a draft multilateral treaty within the framework of the United Nations" may be entrusted to serve as a basic document for negotiating the text of a proposed treaty.[34]

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[31] The controversy surrounding Spain's request for extradition from the United Kingdom of former President of Chile, Pinochet, for alleged offenses of torture and hostage-taking may set a stage for progressive development of customary international law, crystallizing existing norms that immunities of former heads of State are confined to acts performed during their terms of office which are recognized *ratione materiae* only.

[32] For a background report, see 32 ILM (1993) 286, pp. 244-246, Resolution II (47/189) of the United Nations General Assembly, 1992, decides to establish an Inter-Governmental Negotiating Committee to elaborate a convention combatting drought and desertification particularly in Africa.

[33] UN Doc.A/C6/39/L.12 (1983); see also the annexed "Final Document on the Review of the Multilateral Treaty-Making Process", II : Preparation and Formulation of the Draft Treaty, paragraph 4.

[34] Codification and progressive development of the main core (*corpus juris inter gentes*) has been entrusted primarily and principally to the International Law Commission. The negotiations on the text of the Law of the Sea Convention of 1982 took place under the auspices of the Third UN Conference on the Law of the Sea (UNCLOS III). Codification of specialized topics of international law including its progressive development has been undertaken by a number of norms-formulating bodies or committees within the

Codification of norms of transnational character in areas other than those covered directly by public international law has been conducted by relevant competent norms-formulating agencies and bodies, such as UNCITRAL for international trade law, UNIDROIT and The Hague Conference for the unification of private international law for uniform laws or model laws, and Non-Governmental Organizations (NGOs) such as the International Committee for the Red Cross (ICRC) for the Geneva Conventions of 1949 and Protocols of 1977 for the Laws of International Armed Conflicts and the International Chamber of Commerce (ICC) for the Interpretation of International Contract Terms (INCOTERMS).

The United Nations Decade, when it reaches its closing date, will have achieved more in the current decade of international law than in any of the preceding periods. The more difficult and pressing problems and challenges facing international legal developments in most areas and on practically all fronts appear to have been reflected in the amount of time it takes for one convention or multilateral treaty of law-making significance to ripen into applicable law through its respective entry into force after the requisite number of ratifications or accessions by States.

The achievements we have witnessed prior to the passing of the United Nations Decade were appreciable. However, patience and careful but timely deliberation must be devoted to the task of facilitating and accelerating the process of ratification and other forms of acceptance of international conventions, so as to allow the rules of international law to crystallize through Treaties implemented by the practice of States with the passage of time. We stand a fair chance of receiving into the international collection additional operational Treaties and Conventions contributing to the corpus of international law through the process of codification and progressive development.

Specialized Agencies concerned, such as ILO. FAO, WHO, UNESCO, UNEP, etc.

V. THE TEACHING, STUDY, DISSEMINATION AND WIDER APPRECIATION OF INTERNATIONAL LAW

This last purpose of the United Nations Decade of International Law will serve as a reminder that to borrow a rowing expression *"GIVE HER TEN"* may represent a shot in the arm, but it should invigorate unending endeavors and efforts to continue the current momentum without relenting or toleration of any complacency.

Without reflecting on any personality in particular, if we were to examine the extent of expertise and wisdom of the Justices of the Supreme Court of the United States of two hundred years ago such as Chief Justice Marshall who led the world and practice of States in international law in the early eighteen hundreds or Justice Gray of the Supreme Court in the nineteen hundreds, no such contemporary talent or expertise could be found. No leadership is currently reflected in the judgement or dictum of the jurisprudence of the United States in the field of international law, and there is little time left before the Decade is over.

What have we done to the "teaching, study, dissemination and wider appreciation of international law"? Have we neglected our job at the law schools or within the American Society of International Law?

The ASIL, the law schools in the United States as well as the AALS and the ABA International Law Section have each been actively contributing an appropriate share in the teaching, study, dissemination and wider appreciation of international law. More courses of study have been offered, wider dissemination of international law has been encouraged beyond the law schools, in other schools with related interest, such as international relations, political science and world affairs.

The practice of States, however, is reflected in the performance of the three branches of the government : the Executive, the Legislative and the Judiciary, each of which must in turn start the process of self-re-education in international law.

First, there must be a constant consciousness of the applicability and binding character of rules of international law, especially an awareness of the basic principle of State responsibility that every internationally wrongful act attributable to the State, by whomsoever committed, whether by the President or other departments of Government, or by the Congress or the Federal

Courts or any of the State Courts, engages the responsibility of the State. Every State is capable of engaging international responsibility irrespective of its size, power or constitution. The United States is a State, and as such is equally vulnerable and capable of committing an internationally wrongful act.

While the activities of the ASIl, the law schools and members of the legal profession must go on, further efforts should be made to bring home to those in the position to violate principles of international law that their acts are attributable to the State whether or not performed with any knowledge or intent or with or without knowledge or instruction of the head of State or Government and that legal consequences follow in the international community.

It is only with this realization of the distinct possibility of being capable of violating the rules of international law that we could cross with due caution , resoluteness and deliberateness the threshold between the twentieth and the twenty-first centuries and gaze over the window-sill into the haze of the Third Millennium.

Sompong SUCHARITKUL

San Francisco, March 19, 1999