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A Preliminary Survey of Recent International Legal Developments

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GOLDEN GATE UNIVERSITY

SCHOOL OF LAW

SEVENTH REGIONAL MEETING

OF

THE AMERICAN SOCIETY OF INTERNATIONAL LAW

**EIGHTH ANNUAL FULBRIGHT SYMPOSIUM
ON INTERNATIONAL LEGAL PROBLEMS**

***RECENT DEVELOPMENTS IN THE REGULATION
OF WORLD TRADE, INTERNATIONAL DISPUTE RESOLUTION,
HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION
IN GLOBAL AND COMPARATIVE NATIONAL PERSPECTIVES***

MARCH 20, 1998

***GOLDEN GATE UNIVERSITY
SAN FRANCISCO, CALIFORNIA***

A PRELIMINARY SURVEY OF RECENT INTERNATIONAL LEGAL DEVELOPMENTS

Sompong SUCHARITKUL*

Every year for the past seven or eight years, Golden Gate University gathers notable legal scholars in residence in various parts of the United States and members of the American Society of International Law in the Bay Area to have an exchange of views and experiences on recent developments and the current trends in international law and comparative practice of States.

It is difficult to cover all or even a greater part of the different areas of legal developments which have taken place in the past twelve months or to mention all the significant events which are unfolding before our very eyes. The most and maximum that could be attempted is to endeavor to identify the areas and highlight some of the salient features of the latest and current occurrences, deserving of our most attentive consideration.

This year, three different time frames appear to commend themselves for our treatment of international legal developments of considerable importance and far-reaching consequences. The first covers the legal developments in the year 1997-1998. The second embraces continuing growth and progress made in the international legal fields within the United Nations Decade of International Law, that is from the year 1990 until today. The third and last is the half-century mark, dating back to 1947-1948.

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A. THE FIFTIETH ANNIVERSARY CELEBRATION

Our survey might conveniently begin with the furthest point of time, dating back to the period 1947-1948. This Annual Conference thus marks the fiftieth anniversary of a many splendored world challenge of the greatest magnitude.

I. HUMAN RIGHTS

First and foremost within our quest for positive legal developments, we shall be celebrating this year the Universal Declaration of Human Rights of December 8, 1948. This Universal Declaration constitutes the first of a series of international instruments known collectively as the International Bill of Rights together with the adoption of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and their Protocols in 1966.

The Universal Declaration of Human Rights, 1948, is a historic document of fundamental constitutional significance. The Declaration was adopted without opposition. Regardless of the binding force that was originally attributable to the Declaration, it cannot be denied fifty years later, today, that every principle enshrined in the First International Bill of Rights is everywhere respected and recognized as legally binding. No one could be heard to deny the legality and necessity to comply with any of the principles embodied in the Declaration, as further elaborated in subsequent international instruments.

On this occasion, I would like to pay a double tribute to the co-authors of this historic Charter of Human Rights, the First Lady of the United States, Mrs. Eleanor Roosevelt, and President René Cassin of the French Conseil d'Etat, founder of the Institut International de Droits de l'Homme at Strasbourg.

The challenges facing the world community in the provision of international safeguards for the protection of human rights are varied persistent and seemingly endless. In celebration of the International Bill of Rights this year, we should hail the belated ratification by the United States of one of the International Covenants, namely, the Covenant on Civil and Political Rights

which is still subject to numerous serious reservations, understandings, declarations and a proviso containing interpretations by the United States.

Every human rights activist or aspirant in this country and around the world should confer to devise ways and means to persuade enlightened circles within the United States Administration to ratify with Covenants and other Human Rights Conventions to ensure adequate international protection of and respect for human rights within the territorial confines of the United States without the kind of reservations, understandings, declarations and provisos that leave little or no room for any shadow of human rights to survive in international arena in the form in which they have been painstakingly conceived and elaborated by the western world.

This year before the close of the United Nations Decade of International Law and at the pre-dawn of the Twenty-first Century, let us all pray together for positive signs that human rights will receive further blessings and more effective international protection in the United States as elsewhere. After all, like charity, human rights must begin, if ever at all, at home.

II. INTERNATIONAL TRADE

In the course of this year, we are celebrating also the fiftieth anniversary of the conclusion of the General Agreement on Tariffs and Trade or the birth of GATT which has now grown since the Uruguay Round into the World Trade Organization (WTO), as if in some way to succeed to the International Trade Organization (ITO), the still-born child of the Havana Charter of 1947.

A satisfactory compromise has been reached at Marrakesh and the new World Trade Organization was born to regulate international trade in goods as well as in services. The expanded dimension of the global trade significantly addressed the concern of developed nations as well as developing economies and the least developed countries, including non-discrimination, most-favored nation treatment, fair and unfair competition in trade in various commodities and services, notably the protection of intellectual including industrial property rights such as microsoftwares, phamaceuticals, trade marks, trade names, domain names and patents of invention.

International Dispute Resolution has received growing global attention and should one day hopefully replace or eliminate the need to invoke unilateral sanctions to ensure national protection of certain rights which closely resembles if not rekindles protectionism, as a counter-measure against an alleged measure of unfair competition in trade.

Without prejudice to the on-going negotiations for the admission of the People's Republic of China and Taiwan to an organization of universal character, it is difficult to imagine how any national entity could be excluded from what is called a World Trade Organization, especially when a territory within a Republic, such as Hong Kong, has been admitted to the Organization.

This is a puzzle that defies the imagination of a rational human being. The turn of the millennium may offer brighter prospect for greater equality and equal opportunity in the tilted field of international trade, global, regional or bilateral.

Let us express the hope that the initial successes of the activities of the WTO, especially also in the field of dispute resolution up to the level of the appellate body will not deter the free world from further liberalization of international trade from protectionism and unilateralism accompanied by national sanctions.

III. REBIRTH OF OLD NATIONS

This year also marks, among other noteworthy events, the rebirth of an old nation, the advent of the State of Israel in 1948 from the British Mandate over Palestine under the defunct League of Nations, in the wake of a turmoil culminating in the assassination of Count Bernadotte, a Swedish diplomat, serving as U.N. Truce Negotiator in the area. The assassination was perpetrated by a private gang of so-called terrorists in the new city of Jerusalem, then in Israeli possession. So-called indeed as events unfolded themselves, a "terrorist" today could be hailed as a "national hero" by night fall.

While the State of Israel is surviving and thriving as a unique partner of the United States in a closely knit bilateral Free-Trade Area arrangement, the prospect of peace in that region is not close at hand. Nor is it reasonably visible in sight. A political balance has yet to be weighted and struck to permit a nation to survive without prejudice to the independent existence,

the friendly cooperation and coexistence and the successful rebirth of another neighboring State.

It is our fondest hope that all is well that ends well on that "troubled" front.

B. THE UNITED NATIONS DECADE OF INTERNATIONAL LAW

At the Regional Meeting of the American Society of International Law in March 1996, precisely two years ago, I had occasion to present a paper reviewing "Legal Developments in the First Half of the United Nations Decade of International Law".¹¹

I. ACCEPTANCE OF THE PRINCIPLES OF INTERNATIONAL LAW

We have reviewed the acceptance of and respect for the principles of international law as the primary purpose of the Decade in three areas, namely,

- 1) Principles governing transnational trade;
- 2) Principles relating to international human rights; and
- 3) Principles of sustaining the environment.

1) Transnational Trade

Entering the eighth year of the Decade of International Law, we have been encouraged by the widening acceptance of the principles governing transnational trade. Without as yet achieving universality in its membership, the World Trade Organization appears to be faring well and to be able to hold its own in most matters, including settlement of international trade disputes. Its rich experience in the past three years shows a healthy sign of its viability as a

¹¹ That paper was later published in the Newsletter of the American Society of International Law, Section on the United Nations Decade of International Law, 1996, and in the Philippines Journal of International Relations, 1997.

global authority to regulate transnational trade. Multilateral actions are clearly preferable to bilateral or unilateral counter-measures.

2) International Human Rights

Despite lip services which continue to be paid to the acceptance of and respect for the principles of international human rights, the situation in the United States, as elsewhere, does not give ground for any gratification or complacency. The advance made to date is not much further forward from where we were in 1996. At that time, our review concluded :

"In short, the United States as a State has come some distance away from total disregard of international human rights to giant steps taken half-heartedly in 1992 extending its ratification of the Civil and Political Rights Covenant subject to numerous reservations, undertakings, declarations and even a proviso, each of which when appropriately construed is likely to defeat the object and purpose of human rights altogether. But to pay lip service in support of human rights is still infinitely to be preferred. although no one is heard to contest or reject the validity of any principle of international human rights."

The only consolation lies in the fact that since United States ratification of the Political Covenant, more accountability and explanation need to be prepared on behalf of the United States before the Human Rights Commission.

3) Sustaining the Environment

In the context of protection of the international environment, the United States is on record as being second to very few nations in support of the preservation and possible improvements of the ecosystem. As noted in 1996, a series of international conventions have entered into force since the Stockholm Conference in 1972 and the Rio Summit of 1992 and our review last year of "Rio plus Five".

Attention continues to be paid to updating provisions earlier adopted which have apparently become obsolete or out of date. The challenges continue to be the search for a correct proportion of the responsibility and contribution to be shared by all countries, developing and developed economies alike.

Regard must be had to the fact that advanced countries had earlier contributed to the deterioration and pollution of the international environment and should not be heard now to ask developing countries to suspend their progress of economic development in order to save the world from further environmental deterioration and global warming. Sacrifices must be made, but the appropriate shares should not be lacking from those who had previously benefited from absence of international control and regulation. Rules on sustainable development must be devised to salvage the global ecosystem and to enhance its conditions for future generations.

II. PROMOTION OF MEANS AND METHODS OF DISPUTE SETTLEMENT

As noted in 1996, the mid-term review of the Decade of International Law, the second purpose of which was the promotion of means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice.

Having regard to the number of contentious cases pending before the Court and resolved by it as well as advisory opinions sought from the Court, it can be said that the post mid-term survey of the Decade of International Law witnesses an increase in the activities of the Court.

It is encouraging to observe that parallel to this trend is the promotion of pacific settlement of international disputes both inter-governmental and between States and nationals of other States or between entities of different nations through arbitration, conciliation, mediation, good offices and other means chosen by the parties to the disputes under the auspices of various organizations, ICSID, WTO, WIPO as well as the Law of the Sea Tribunal in Hamburg.

Even on the criminal side, the Tribunals at The Hague and also for Rwanda have initiated and concluded proceedings, some as far as appellate instance.

III. PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND ITS CODIFICATION

Within and outside the International Law Commission, codification and progressive development of international law are taking place. The Draft Articles prepared by the ILC have been completed at second reading on Jurisdictional Immunities of States and their Property, on the Draft Code of Offences against the Peace and Security of Mankind together with a Statute of an International Criminal Tribunal, and on Non-Navigational Uses of International Water Courses.

The Law of the Sea Convention, 1982, received its sixtieth instrument of ratification and entered into force in November 1994. Several Environmental Conventions, such as the Convention on Desertification, 1994, have received sufficient numbers of ratification to come into force.

The world is about to have more codification and progressive development of the law of nations, and we are moving from law-making and dispute resolutions into the final phase of international law, namely, its compliance, implementation and enforcement.

IV. WIDER APPRECIATION AND DISSEMINATION OF INTERNATIONAL LAW

The final purpose of the United Nations Decade of International Law is the process of its wider dissemination and education, not only at the level of law schools and universities, but also in secondary and elementary education.

The American Society of International Law has widened its horizon by holding bi-continental conferences with its Dutch Counterpart in The Hague in anticipation of the centenary of the first Hague Peace Conference in 1899, which will provide a climax for the close of the United Nations Decade of International Law.

Indeed, within the last few years, San Francisco has hosted many conferences to celebrate the Cinquantenary of the United Nations Charter and regional conferences of the American Society of International Law to discuss the teaching of international law outside of the law schools.

C. THE YEAR 1997-1998

We have had an eventful year, rich in occurrences, challenges and experiences which deserve to be designated as memorable. To illustrate the historic significance of the year just past, two specific areas of international legal studies may be highlighted.

I. INTERNATIONAL DISPUTE SETTLEMENT

Judicial settlement of international disputes figures prominently among the noteworthy happenings of the year just past. We might take a quick glance at the case law generated by the World Court, or to be exact the International Court of Justice.

a. The International Court of Justice

On the merits of the contentious cases, the jurisprudence of the Court in the year preceding last year which could be characterized as indecisive, inconclusive or even hesitating is contrasted by the line of less dubious and more unambiguous decisions this year.

The earlier indecision of the Court is exemplified by a pair of Advisory Opinions handed down on the same day, July 8, 1996, in the Question of Legality of the Threat or Use of Nuclear Weapons requested by the General Assembly of the United Nations pursuant to Article 96, paragraph 1, of the Charter and the Question of Legality of the Use by a State of Nuclear Weapons in Armed Conflict requested by the Assembly of the World Health Organization (WHO) in its Resolution 46/40 of May 14, 1993 whether the use of nuclear weapons by a State would be a breach of its obligations under international law, including the Constitution of the WHO.

While in the latter question, the Court finds by eleven votes to three that it is not able to give the advisory opinion requested since the request does not relate to a question which arises "*within the scope of (the) activities*" of that organization in accordance with Article 96, paragraph 1, of the Charter, and as such an essential condition of founding its jurisdiction is

absent. Consequently, the Court is not called upon to examine the arguments laid before it with regard to the exercise of its discretionary power to give an opinion under Article 65, paragraph 1, of its Charter.

This reluctance in the part of the Court to exercise its discretionary power to give an opinion on the question is circumscribed by the contention that it is an essentially political question, going beyond the scope of the WHO's proper activities which would *in limine* have deprived the Organization itself of any competence to seise the Court of it. The standing of the Organization to request the advisory opinion is questionable.

On the Question of the Legality of Threat or Use of Nuclear Weapons submitted by the General Assembly, the Court is not confronted with the question of standing or scope of activities of the United Nations and has to face the request squarely. The challenge was not met with the greatest hesitancy on the part of the Court in a measure no smaller than the *SS. Lotus Case* (1927)²¹ before the Permanent Court of International Justice or the Advisory Opinion in *South-West Africa Case (Second Phase)*.³¹ Thus, on one particular issue, the Court was split in its opinion. On Paragraph 2:E, by seven vote to seven, President Bedjaoui's casting vote in favor, the Court finds that

"The threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law." ⁴¹

President Bedjaoui, in his rare separate opinion, observes : *"The moral dilemma which confronted individual consciences finds many a reflection in this Opinion. But the Court could obviously not go beyond what the law says. It could not say what the law does not say."*⁵¹

²¹ PCIJ Reports, Series A, No. 10, France v. Turkey (1927).

³¹ ICJ Reports, 1996, p. 6, *actio popularis* was not known in international law.

⁴¹ ICJ Reports, 1996. at p. 270, paragraph 9.

⁵¹ *Ibid.*, paragraph 10.

The President noted also that *"There are some who will inevitably interpret operative paragraph 2:E as contemplating the possibility of States using nuclear weapons in exceptional circumstances. For my part, and in the light of the foregoing, I feel obliged in all honesty to construe that paragraph differently, a fact which has enabled me to support the text."*

President Bedjaoui stated at one point that *"A State's right to survival is also a fundamental law"*, but he reminded us that *"It would thus be quite foolhardy unhesitatingly to set the survival of a State above all other considerations, in particular above the survival of mankind itself."*⁶¹

In contrast to this pair of indecisive opinions, the Court was more forthcoming in its judgement in the case concerning the Gabčíkovo-Nagymoros Project.⁷¹ On A., with regard to Article 2(1) of the Special Agreement, the Court found, by fourteen votes to one, that Hungary was not entitled to suspend and subsequently abandon, in 1986, the works on the Nagymoros Project and the part of Gabčíkovo Project for which the Treaty of September 16, 1977 and related instruments attributed responsibility to it.

However, the majority decision on other issues were less than overwhelming. For instance, the Court held, by nine votes to six, that Czechoslovakia was entitled to proceed, in November 1991, to the *"provisional solution"* as described in the terms of the Special Agreement.

The Court also found, by twelve votes to three, that Slovakia, as successor to Czechoslovakia, became a Party to the Treaty of September 16, 1977, as from January 1, 1993, and by thirteen votes to two, that both Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty of September 16, 1977, in accordance with such modalities as they may agree upon.

As a matter of law, the Court held that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the Parties, in order to reconcile economic

⁶¹ *Ibid.*, paragraph 22, p. 173.

⁷¹ Hungary v. Slovakia, ICJ Reports, 1997, September 25, 1997.

development with protection of the environment, *"should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular, they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms of the river."*

This judgement is to be hailed as another judicial endorsement of the evolution of contemporary norms of international environmental law.

A tribute is to be paid to the American Society of International Law which has made considerable substantial contribution in the codification and progressive development of international law of non-navigational uses of international water-courses, notably the successive American Special Rapporteurs in the International Law Commission from Ambassador Richard Kearney, President Stephen Schwebel, Professor Stephen McCaffrey to Mr. Rosenstock without mentioning the Norwegian contribution through Judge Jens Evensen. American participation through Professor McCaffrey as Counsel and Judge Schwebel as President of the Court also contributed to the better understanding and successful and fruitful deliberation of the legal issues involved, leading hopefully to a new era of compliance and implementation of development projects while upholding the principle of sustainable development.

Another pair of judicial decisions deserve mention in this brief survey. This relates to the decisions of the Court rejecting preliminary objections raised by the United States in one case and by the United Kingdom in another concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie. Both decisions were rendered on the same day, February 27, 1998.⁸¹

The Court found, by thirteen votes to three, that the Application of Libya was within its jurisdiction on the basis of Article 14, paragraph 1, of the Montreal Convention of 1971, and was also admissible, rejecting by twelve votes to four the objections by the United Kingdom as well as by the United States based on Security Council Resolutions 748 (1992) and 883 (1993), although it did not indicate provisional measures as requested by the Applicant, without yet determining the merits of the case which it would examine at a later date after further written pleadings and subsequent hearings. The decision in the case against the United States lacks the

⁸¹ ICJ Reports, February 27, 1998, General List No. 88.

negative vote of Sir Robert Jennings who was Judge Ad Hoc in the case against the United Kingdom.

These decisions open up a new constitutional dimension regarding possibility of judicial review of resolutions adopted by other principal organs of the United Nations, especially the legality, validity and constitutionality of Security Council Resolutions on matters relating to the performance of international obligations under a Treaty or general international law.

b. Other International Instances

This is a rich year for international case law, not only of the International Court of Justice but also of other more specialized international instances. The Law of the Sea Tribunal had occasion to begin its work in the SAIGA Case. The International Criminal Tribunal at The Hague for Former Yugoslavia has been active since its inception, while another Tribunal for Rwanda has begun its functions and delivered its first judgement. A decision will be reached whether or not to create a general International Criminal Tribunal for all cases. This project may be delayed by a number of serious political oppositions. For one thing, it has to have the approval of those who themselves without exception may one day be called upon to answer before the Tribunal for their activities.

II. ENFORCEMENT MEASURES

Since the beginning of the Decade, we have seen the Security Council actively engaged in sanctioning measures of enforcement, including measures necessary to ensure compliance or implementation of its resolutions under Chapter VII of the Charter, in particular the use of force.

We have learned from the Charter and Customary Law as applied in the case involving military and para-military activities in Nicaragua Case that non-use of force is a basic norm of international law and that the only possible use of force must be in self-defense under Article 51 of the Charter, or else authorized specially in each instance by the Security Council and must be reported either before hand or forthwith to the Security Council.

The invasion and occupation of Kuwait by Iraqi forces have opened up a new chapter in

the application of United Nations sanctions which went beyond the measures of collective self-defense. The "Operation Dessert Shield" could be said to come within the concept of self-defense, but the "Operation Dessert Storm" was clearly well beyond any notion of collective self-defense. It represented a collective coalition efforts of States sanctioned by Security Council Resolutions to compel compliance by Iraq and involved the use of all means necessary including the use of force not only in self-defense but also to recover the territory of Kuwait from Iraq and to restore Kuwaiti sovereignty.

In the words of President Bush, "The Rule of Law" has acquired a new meaning, a new dimension, it implies that States should stand ready and willing to use the appropriate amount of force to compel compliance with the Rule of Law.

This past year, we have almost seen a burning question put to a test in addition to the question of legality of the threat or use by a State of nuclear weapons in armed conflict already determined by the Court in an advisory opinion.

Can the United States with or without the United Kingdom and others proceed to bomb Iraq on the ground of failure to comply with a different Security Council Resolution regarding inspection of premises in search for biological and chemical weapons? It is clear that United States forces were ready and probably also willing to launch armed attacks against Iraq if ordered by the President. The question is whether the United States has the necessary authority to use force against another State, not as a self-defense, collective or individual, nor in pursuant of a clear and unambiguous Security Council Resolution specifically authorizing such use of force.

Wisdom and reason appear to have prevailed today which pre-empted an answer to that question.

In the ultimate analysis, the greatest power vested in the President of the United States would not be lightly exercised without regard to popular voice of the American people, nor world public opinion as presented to us through United States mass media and news agencies. Thanks to the free and unimpeded although selected information available, the danger of another conflagration was narrowly averted right before our very eyes.

The Court has prayed for eventual total disarmament and the world has shown its distaste for the use of force by whomsoever authorized.

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San Francisco, March 20, 1998

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