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Globalizing the Rule of International Law at the Pre-Dawn of a New Millennium

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GLOBALIZING THE RULE OF INTERNATIONAL LAW AT THE PRE-DAWN OF A NEW MILLENNIUM

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I. INTRODUCTION

This is the Ninth Regional Meeting of the American Society of International Law for the West, Northwest and Southwest regions which Golden Gate University School of Law has the honor to host this year, prior to the regular Annual Meeting of the American Society in Washington D.C. in April 2000.

It is at the same time the Tenth Annual Fulbright Symposium hosted by Golden Gate University School of Law with the cooperation and cosponsorship of the Council of International Exchange of Scholars (CIES) also with headquarters in Washington D.C.

The combined sessions of the Regional Meeting of the ASIL and the Fulbright Symposium have now become the traditional forum for international lawyers, including publicists, privatists, comparatists and practitioners in the Bay Area and beyond and the Fulbright scholars of various legal disciplines from all corners of the world currently in residence in the United States. The ninth combined session will afford ample opportunities for international legal scholars to meet and exchange their views as well as share their experiences in this critical year of epoch-making transition from nationalization or Americanization to regionalization and eventual globalization.

II. UN21 AND THE PRE-DAWN OF A NEW MILLENNIUM

Following the close of the United Nations Decade of International Law on December 31, 1999, a new era has dawned within the American Society of International Law. The Group or Section involved in the United Nations Decade of International Law has renewed its continuing interests in international legal developments under the newly acquired title of UN21 or United

Nations Legal Developments in the Twenty-First Century.

Setting aside the precise date at which the twenty-first century and the Third Millennium may be truly considered to start running, i.e., on January 1st, 2000 Y2K or 2001 Y2K+1. It is clear that the coming of the twenty-first century and the Third Millennium is imminent and for the overwhelming majority of the international community in the Christian world not only inevitable but has already come to pass. Whatever the method of calculating the calendar year or the almanac, a new world appears to be in the offing. A new dawn can be felt which seems irresistible. One is almost led to believe that a NEW DEAL is somewhere somehow brewing in the air in this year of the Golden Dragon.

For one thing, the opening of the New Year has augured well for the prospect of China, People's Republic of, to gain entry into the community of the trading nations of the world. The historic handshake between the President of China and the Trade Representative of the United States on November 15, 1999 marked the beginning of an end to considerable misgivings bordering on hostilities against the formal entry of China into the family of nations engaging in transnational trade, the long sought-after membership of the World Trade Organization.

Whatever the implications of China's admission to the WTO for the United States, or for Europe and the Western World, for Asia or East Asia and for Africa and Latin America, the reflection China casts on the World Trade Organization itself must also be taken into consideration.

To exclude a country with a sustained national economy and the world's largest population of over 1.2 billion consumers and work force, is admittedly an anomaly which precludes any assertion of the universal character of the World Trade Organization.

From the perspective of the WTO, China's entry symbolizes the never-ending process of globalization in the regulation of international trade. The mission of the WTO itself has acquired a new meaning and a new force.

III. GLOBALIZATION OF THE RULE OF LAW FOR THE UNITED STATES

The "Rule of Law" is an expression coined and known in the Western World as a

standard of justice above which national legal systems should endeavor to achieve, maintain and sustain. In the "free world" during the "cold war", the "Rule of Law" was much used as a tool to enhance the prestige of the Western World in its respect for democracy and the "Rule of Law" as opposed to the "dictatorship of the proletariat" or autocrats and "socialist legality".

In the "free world" of the sixties, whether a jurist belonged to the common law system as the United States, the United Kingdom and members of the Commonwealth of Nations or to the civil law traditions such as France, Germany, Japan, Tunisia and Thailand, the phrase the "Rule of Law" had acquired a certain technically well-defined meaning, implying the existence of democratic institutions, independence of the judiciary and the legal profession, due process of law, equality before the law, human rights protection and the existence of a constitutional system of checks and balance of power as between the various organs of the State, the Legislative or Congress, the Bench or Court of Law, and the Executive or Administration of the nation.

The concept has been digested and formulated at the New Delhi Congress of Jurists in 1958 and further elaborated at Lagos, Nigeria, in a subsequent Declaration. Other non-governmental legal organizations such as the American Bar Association have also tried their hands, e.g., in the Athens Congress of World Peace Through World Law shortly after.

President Bush of the United States gave it a little twist following the outbreak of hostilities in the Iraq-Kuwait armed conflict and the Security Council Resolution to adopt all means necessary in 1991. On that occasion the "Rule of Law" came to include the ability of States to resort to the use of force to strengthen the "Rule of Law"

Thus, the "Rule of Law" in the domestic sense has been extended to apply to States in their inter-governmental relations. By analogy, the "Rule of Law" in the sense of the "Rule of International Law" has emerged, requiring States to observe and abide by the international obligations they have undertaken under the Charter of the United Nations and in accordance with international law.

Consistently with international endeavors to induce respect for the "Rule of Law" among States, UN21 recently sent an alarm signal to the effect that as of February 1, 2000, 45 nations lost their right to vote in the General Assembly of the United Nations for failure to pay their assessed dues which have fallen in arrears for two years. Most of these nations are expected

to pay some of their dues before the next General Assembly Regular Session in September 2000. The majority of one hundred and ninety members do not pay all their dues in time. Only forty-three have paid in full. Seven were permitted to retain their votes by reasons of extenuating financial circumstances. The United States owes it dues which are past due for an amount in excess of US$ 1 billion and has consistently avoided a voting suspension by a partial payment among other reasons.

The Rule of Law for the World Organization also needs to be observed and respected and not to be used or misused as a means to threaten or undermine the proper functioning of the United Nations. Respect for the Rule of Law by the United States in this particular connection could serve to enhance the morale of the World Organization and other right-thinking members of the international community.

If the nation is weak in its respect for the "Rule of International Law" by refusing to pay up its dues in time, it should not be heard to invoke the "Rule of Law", let alone to seek its enforcement against another nation for failure to implement the "Rule of Law" in the absence of an effective collective international sanction.

Much worse, a State should not be allowed to hide behind the coat-tail of its Congress or Supreme Court for failure to fulfil an international obligation under the Charter of the United Nations or under international law. No nation can impose its domestic concept of the "Rule of Law" on other nations. Much less can any State pose as s "Rule of International Law", its own domestic law or international law as understood, accepted, adopted or interpreted by one of its organs, be it by a Presidential Decree, Act of Congress or a judicial decision of its highest instance, these national organs would otherwise only be acting as a ***judex in sua causa***.

Globalization of the "Rule of International Law" is clearly not to be identified with globalization of the "Rule of National Law" of any State. It is diametrically opposite to the process of Americanization of any rule of international law to regulate any area of international relations, whether in trade, finance, criminal justice or crime suppression, political integration or disintegration.

III. HUMAN RIGHTS PROTECTION IN THE GLOBAL CONTEXT

While human rights activists appear to grow from strength to strength in various academic institutions within the United States reflecting increasing violations which remain unthwarted, the trends favoring further infringements have not been pre-empted by recent judicial pronouncements from the United States Supreme Court. Procedural due process continues to be breached by the administrative authorities at various levels, from police brutality to false imprisonment with judicial sanctions based on falsely obtained information and involutary confessions. A comparative study can be made of the recent practice in Turkey, the United Kingdom and Los Angeles where extorted confessions have resulted in unlawful detention requiring remedial measures including compensation for illegal detention and false imprisonment.

International protection of human rights is everybody's business but in practice it is still nobody's business. Civil rights activists have not been unmindful of their uphill tasks against violations within their national communities where little or no relief seems readily available. Frustrated by an apparent lack of judicial or administrative measures to remedy human rights violations or to improve the lot of minorities and ethnic groups against prevalent racial discrimination, activitists have been more vocal against violations of human rights beyond their national borders, believing with a sense of sincere moral duty that the expression of frustration could culminate in constructive measures or affirmative actions to be taken in the global context if not at national or local level.

While the rights of a human being *qua homo sapiens* deserve to be respected and observed everywhere, enforcement measures at the global level can only be invoked with the consent of the territorial State within whose borders the alleged violations of human rights have occurred. The only other alternative may rest with the collective wisdom of the international community. A country which has not ratified or truly accepted obligations under any of the Human Rights Conventions does not incur a record of its own infringements of human rights, because the State remains eminently outside the application of any reproach, criticism or even international moral sanctions. It is ironical when, in the absence of informed national public opinion, such a country has permitted strong protestations against violations of human rights perpetrated beyond its national boundary in the belief that by thus diverting world attention from

its own imperfections, it could still contribute to the respect and observance of human rights elsewhere, anywhere except in its own backyard.

If the name Martin Luther King, Jr., has been placed on record as a constant reminder of the continuing fight for civil liberties and the untold plight of the less fortunate Americans who continue to suffer as victims of racial discrimination, so are place names of equal significance such as "Little Rock" and "Wounded Knees". In this Hall of Fame, "Tiannamen Square" should also occupy a distinctive place to serve as a monumental living testimony of the dedications and sacrifices made by the freedom-fighters in China in a way not dissimilar from native Americans, African Americans and other freedom-loving minorities in this country.

The extent of implementation of international human rights very much depends on the measure of the willingness, readiness and ability of each nation to give effect to the respect and observance of human rights within its own territory. Like charity, human rights to obtain the dimension of global protection must begin at home. There are no short cuts, no deviations, no distortions nor delusions.

For instance, diversionary tactics such as staging demonstration against the World Trade Organization during its session in Seattle in November 1999 not on any trade issues but on human rights or workers' rights and environmental protection could not possibly improve human rights protection or the human environment, but merely serve to undermine world trade or to obstruct the progress and cooperation expected of the deliberation process.

On a more modest scale, a demonstration was organized in Bangkok on February 12, 2000, at the opening of the Tenth United Nations Conference on Trade and Development (UNCTAD X) attended by 190 members of the United Nations. Present were several Heads of States, the Secretary General of the United Nations, the Director General of the World Trade Organization and the Director General of UNCTAD. However, the protest was against IMF, the World Bank and WTO. The demonstration was staged by a group of workers from the Labor Union. The Bangkok workers, like the demonstrators in Seattle earlier, were barking up the wrong tree. One significant fact remains : the Thai public appeared less uninformed than its Seattle counterpart, with less resulting damage to spoil the image of the WTO, IMF or the World Bank. From each of these specialized agencies of the United Nations, both Thailand and the United States stand to benefit from their work. Little did the Bangkok demonstrators realize

that thanks to the IMF and the World Bank as well as the WTO, Thailand is expected to start repaying nearly half a billion US dollars of its US$ 17 billion loan later this year and US$ 4.5 billion next year, and its GNP growth rate for 2000 will be nearly 5 % and close to 6 % in 2001.

"Freedom of Information" is as such an important component of human rights. In the United States, the strength of public opinion lies in freedom of opinion, as guaranteed by the First Amendment. This is further reflected in the well protected Freedom of the Press. In contradistinction to dictatorial regimes, where the press is controlled by the State or the Central Political Party, the American press is free, completely free and independent of any control by the Administration. But "Free Press" may result in absence of freedom of information. In a country of market economy, nothing is really free. Certainly, information is less free. It may have a price or it may be priceless. A strong press may control and even suppress or distort information.

How well-informed is the American public on matters of international concern is a matter of conjecture. How many American people are aware that the United States, as strong supporter of workers' rights, has withdrawn from the International Labor Organization? How many are aware that , inspite of a well-protected freedom of opinion, the lack of "Freedom of Information" may obscure the formation of public opinion? How many of us are familiar with the dispute between the United States and the UNESCO on freedom of information which led to United States withdrawal from that Specialized Agency of the United Nations in the field of education, science and culture.

In another context of global protection of international human rights, the judgement of the House of Lords of March 24, 1999, *ex parte* Pinochet, on appeal from a divisional court of the Queen's Bench Division, especially the opinion of Lord Browne-Wilkinson, confirming an earlier three to two decision of another Committee of the Lords of Appeal in the same House of Lords, leaves no room for any doubt that a former head of State of a foreign nation is not entitled to immunity from extradition proceedings in respect of torture or conspiracy to torture committed during his office as Head of State.

On the global scale, there will be fewer and fewer sanctuaries on earth to harbor former heads of State or officials of foreign governments for violations of human rights anywhere, any

time, by whomsoever committed. This landmark decision of the House of Lords should be hailed as a victory for the international protection of fundamental human rights and the dignity of the humankind.

IV. INTERNATIONAL PROTECTION OF THE HUMAN ENVIRONMENT

The environment which human beings share with other earthly creatures deserves to be protected not only for the contemporary period but also for future generations.

It has been noted that in this particular connection the Supreme Court of the Philippines has been the first to recognize and give effect to the concept of "inter-generational equity" in the protection of the environment.

The "polluter pays principle" adopted in Europe is also accepted in the United States. However, care should be taken and the Precautionary Principle upheld lest the "polluter pays principle" turns into a license to commit pollution, at a price to be paid to the State which in turn will provide remedial measures that are far from adequate in the quest for the equitable assessment of appropriate compensation for the victims who suffer the injurious consequences of the pollution.

The United States has been more energetic in the extension of its domestic protection in the form of trade sanctions against violations of conservation measures to protect the marine mammals such as the dolphins in the catch of tuna and the endangered species such as sea turtles in the fishing of shrimp by banning tuna and shrimp or shrimp product derived from unprotected fishing.

It is encouraging to note from the global conservationist perspective that the Appellate Body of the WTO (WT/DS58/AB/R, October 12, 1998) has not declared to be illegal the legislation adopted by the United States empowering the United States authorities to prescribe means to protect sea turtles as long as it is not arbitrary or discriminatory.

With this timely ruling, it has been possible for the United States and the fishing nations involved to find a satisfactory solution to minimize if not eliminate unnecessary casualties for sea turtles in shrimp fishing, thereby enhancing possible conservation measures as long as

international trade is not thereby impaired or restrained. It is clearly understood that the World Trade Organization is primarily established to promote and regulate international commercial activities and only incidentally to help other international agencies such as the United Nations Environmental Program (UNEP) in the attainment of their respective goals.

On the other hand, no nation is fully equipped to provide necessary measures in all fields of human endeavor to protect the global environment. Thus, in Mayaguezanos Por La Salud y El Ambiente v. U.S.A. (1st Cir. No.99-1412, December 20, 1999), a federal appeal court decided that a British-flag freighter, carrying nuclear waste passed between Puerto Rico and Hispaniola en route to Japan from France did not result in the United States being legally required to regulate shipment of nuclear waste through its exclusive economic zone (EEZ) under international law. The decision might have been different if complaints were brought before an ASEAN nation, having ratified the Nuclear Weapons-Free Zone for Southeast Asia and if the passage were in Southeast Asian waters. The problem remains one of implementation or the means to implement national legislation for ASEAN countries in the field in which even the United States does not feel bound to regulate the passage of nuclear waste, absent a Treaty obligation requiring regulation.

V. GLOBAL REGULATION OF INTERNATIONAL TRADE

The regulation of international trade has hitherto been conducted simultaneously on different footings by various governmental and non-governmental bodies of national, regional, sub-regional and universal or global stature.

Trade negotiations continue unabated on the bilateral basis, both at different governmental levels, i.e., summit, ministerial, senior officials and official as well as non-governmental level of private sectors, chambers of commerce, national and international and through the process of merger and acquisition of multinationals or transnational corporations. Trade talks are also conducted through a series of Multilateral Trade Negotiations (MTN) as in the Kennedy Round, the Tokyo Round and the Uruguay Round, culminating in the formation of the World Trade Organization with all its organs and constituent components, including a Dispute Settlement

Body.

As always, bilateral trade relations continue invariably to be regulated by mutual arrangements in the form of trade agreements with elaborate Treaty provisions for closer economic cooperation, while several groups of States within a sub-region or a region have formed for themselves a number of regional associations for economic and trade cooperation designed to achieve varying degrees of economic, social and monetary integration, such as the creation of a common market, a free trade area or an association tending to promote eventual integration such as the European Union, NAFTA, MERCOSUR and ASEAN or tighter inter-regional cooperation such as the Asia Pacific Economic Cooperation (APEC) and the Asia-Europe Meeting (ASEM).

To strive to attain uniformity in the application of rules regulating international trade, bilateral negotiations need to be more streamlined and brought into further harmony if not completely assimilated for all practical purposes. Side by side with bilateral endeavors and regional undertakings to comply with common principles and sets of rules, a unifying force can be generated thorough global efforts by means of a global approach to trade promotion, trade facilitation and trade dispute resolution.

The world is still divided. The gap has further widened between the "haves" and the "havenots". As has recently been observed at UNCTAD X in Bangkok, the rich have become richer and the poor still poorer, thereby sinking below the social safety nets in the planning and implementation of national development plans for failure to raise the floor of poverty-stricken populace of the world who fell through the social security safety nets.

Regional organizations such ASEAN, NAFTA, SAARC, OAS, OAU, MERCOSUR, the Andean, the Amazon, West Africa, APEC and ASEM should be permitted to carry on their existing missions without interruption, while collective endeavors on a global scale should be further encouraged and facilitated. Regulations of international trade should be unified, so as to achieve harmony between bilateral and multilateral resolutions and between public and private or governmental and non-governmental regulation of transnational trade. The ultimate unification of rules of international trade can be achieved largely through mutual understanding, tolerance and acknowledgement of the need for mutual reconciliation and sympathy as part and parcel of the globalization of transnational trade.

In this important stage of world trade, the evolution of the General Agreement on Tariffs and Trade (GATT) into a wider and more comprehensive World Trade Organization (WTO) in 1995 following the close of the Uruguay Round has inspired international confidence at this juncture of globalization of international trade based on the rule of international trade.

VI. DISPUTE SETTLEMENT AND ENFORCEMENT MEASURES

Globalization of international dispute settlement procedure has followed a slow process, requiring patience and perseverance on the part of those responsible for the wider appreciation and dissemination of international law in the field of peaceful resolution of transnational conflicts, whether in trade disputes, environmental protection or the global protection of human rights.

It is worthy of notice that several new international judicial instances have come into existence proliferating the global horizon. As at present advised, apart from the International Court of Justice which is servicing a full load of international claims, mention must be made of the availability of the International Law of the Sea Tribunal at Hamburg for adjudication of maritime disputes, the International Criminal Tribunal at The Hague for former Yugoslavia and at Arusha for Rwanda for prosecution and trial of alleged offenders for offences against the peace and security of mankind.

In addition, other claims commissions have been operational in specific fields of dispute resolution, such as Investment Disputes (ICSID), claims for compensation under Security Council Resolution 687 (UNCC), some with additional facilities and availabilities of actual payment or implementation. The case law generated by these international instances whether judicial, arbitral, mediational or conciliational deserves further attention.

What is still singularly lacking in the judicial method of dispute resolution at the highest instance has to a limited extent found some measure of relief with the assistance of Security Council Resolutions, designed to place sufficient pressure on alleged offenders to comply with the collective wish of the international community expressed in Security Council Resolutions to back up judicial pronouncements in contentious claims as well as in advisory opinions.

A solution appears to have resulted from the efforts of the Security Council to initiate the delivery of alleged offenders in the Lockerbie incident to be prosecuted and tried by a special neutral court set up on neutral ground and tried by competent neutral judges applying the *lex loci delicti commissi*, i.e., Scottish law as the law of the place where the offenses were committed.

Without the backing of the Security Council, the International Court of Justice appears to remain without power to enforce its order even if only as provisional measures to prevent further deterioration of the existing situation.

The attitude of the United States as party to the proceedings before the International Court of Justice brought by the Federal Republic of Germany, requesting provisional measures for suspension of the execution of Walter Lagrand as reflected in the disposition of the Supreme Court in the Federal Republic of Germany v. U.S.A. (119 S. Ct. 1016, 1996) has served to harden its disregard for the binding character of provisional measures ordered by the World Court. To confuse the Courts's lack of means to enforce its order with the binding nature of the order would tend to undermine the integrity of the highest international judicial instance as observed by President Sir Humphrey Waldock in regard to the rescue party undertaken by the United States under President Carter in the face of the Court order of provisional measures in December 1979.

An order of the World Court indicating provisional measures is not any less binding on the part of the parties to the proceedings, because one nation consistently ignores it when it does not serve its interest to observe although it has not hesitated to request such provisional measures when it is essentially for its benefits so to do. Consistency of attitude appears conducive to the credibility of a nation as a law-abiding member of the world community, especially if that nation often claims to respect and requires others strictly to respect and comply with the "Rule of Law" regardless of the absence of a collective sanction.

VII. CONCLUDING OBSERVATIONS

The fore-going survey of legal developments in the period of twelve months partially preceding and ensuing the beginning of the Year of the Golden Dragon contains a mixed bag of

encouraging signs of progressive international legal developments as well as disappointing retrogression in national judicial decisions and dicta.

While positive signs are visible in the globalization of international trade regulations except for the unhealthy start of the WTO Conference in Seattle last November. The impending irresistible entry of China into the World Trade Community is a milestone in the individual and collective endeavor to globalize the regulation of transnational trade in all its forms and manifestations and at all levels. Problems facing the WTO are still infinite and much is left to be desired.

The progress to be expected in the protection of human rights on a global scale is not any brighter than in the trade relations. Developments in the international protection of human rights cannot prosper without the national will to promote their protection within the confines of national boundaries. Respect for human rights cannot begin anywhere else but at home. No progress towards globalization of human rights protection can be achieved without the conscientious commitment of each and every nation to uphold the respect for human rights and the dignity of man within its respective borders. Payment of lip-services will not suffice to globalize international respect and implementation of international human rights.

Emphasis must be squarely placed on the willingness, readiness and ability of each State, especially the United States as leader of the world community, to submit controversial questions of human rights to the scrutiny of international supervision and determination. No further progress in this field could be expected for the United States if the matter continues to be adjudged by a *judex in sua causa* even at the highest federal instance. It would not be fair for a national bench to determine how much and how far the national court or its government has failed to comply with its international obligation to give effect to human rights under international law in conformity with international as opposed to national minimum standard of treatment of the individual.

The protection of the international environment continues to interest developed nations in the sense and to the extent that developing counties should be required to refrain from adding further injury to the damage already heavily inflicted by the industrially advanced countries in the remote and recent past as is also continuously the case today

It is difficult to reconcile this conflict of interests in terms of reaching a suitable

compromise to mitigate further damage without denying developing countries and the least developed economies equal opportunities to achieve national economic development, even at the expense of utilizing some of their own natural resources such as the rain forests.

In this world of progressive economic development, globalization of international restraints presupposes suspension of wasteful use of energy and further global warming by industrialized countries using coals without in any way impairing the need on the part of the least developed economies to pursue their goals of national economic development to ensure their survival above and beyond the social safety nets.

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