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# ARTICLES

## INTERNATIONAL LAW IN A CHANGING INTERNATIONAL SYSTEM

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THIS lecture seeks to address a theme of interest to international lawyers and non-lawyers alike. Its objective is to explore the implications for international law of the great changes occurring all around us. If international law is meant to serve as the guarantor of international stability, what is its role in this tumultuous international environment in which we find ourselves? Can international law, traditionally viewed as the law between sovereign States, and to be found in treaties, State practice and judicial decisions, have any relevant contribution to make?

This international law is inexorably intertwined with the international system in which it operates. Since World War II international law has become enriched by new norms, "generated from the changed practice of modern times".[1] Such developments have reflected the reality of the international system as it was from 1945 to 1987. It was a system that for many years was essentially bipolar in character, with the relationship between the two main pillars of power resting in equilibrium through mutual deterrence. Growing Chinese political power in the 1950s constituted a new element in the equation, but for many years Chinese relations with the Soviet Union were as difficult as were relations with the West. When communist China became a full participant in the world of international organisations, it surprised us all by playing its hand with great restraint. Its voting record in the UN has largely been characterised by abstention.

The great systemic change that occurred between the end of World War II and the end of the Cold War was the emergence on to the international scene, in the 1950s, of large numbers of newly

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[1] T.J. Lawrence, The Principles of International Law (London 1898).



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independent States from the developing world. The voting structure within the United Nations General Assembly (one State, one vote) gave them—often with the support of the old Eastern European States—a numerical majority. And although the General Assembly resolutions which they promoted were recommendatory, rather than legally binding, they served their purpose as a vehicle of pressure and an instrument for change. For example, through a series of General Assembly resolutions,[2] and forward looking Advisory Opinions of the International Court of Justice, during this era the concept of self-determination changed from an optional political aspiration to a legal entitlement.[3] The ramifications have been enormous.

The late 1960s to the late 1980s saw an associated phenomenon, namely that of a series of great multilateral law-making treaties, arrived at after prolonged preparation and negotiation at inter-State conferences. Frequently the UN, through its International Law Commission or otherwise, had a role in the formulation of texts. The great law-making treaties on Diplomatic Relations,[4] on Human Rights,[5] on the Law of the Sea,[6] on Humanitarian Law[7]—and indeed on the Law of Treaties itself[8]—served various purposes. They allowed the codification of what was agreed, the negotiation of what was still not agreed upon, an opportunity for the newer members of the international community to seek changes in the international law that they found themselves bound by upon independence, and the participation of all States in the world community, so that the socialist and developing States as much as the West would have a stake in the outcome.

One has a sense that, for the most part, this great period of multilateral treaty-making is behind us, save perhaps in the fields of environmental law and arms control, and perhaps bioethics.

While international law saw developments across a broad front reflecting these changes in the international system, bipolar relations remained largely frozen until the mid 1980s, and little progress could be made during this period on matters relating to the use of force,

[2] *E.g.* General Assembly Resolutions 1514 (XV); 1541 (XV); 2625 (XXV); 2229 (XXI).
[3] *The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971,* p. 31; *Western Sahara (Advisory Opinion), I.C.J. Reports 1975* at p. 68.
[4] Vienna Convention on Diplomatic Relations, 1961.
[5] International Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social and Cultural Rights, 1966.
[6] United Nations Convention on the Law of the Sea, 1982.
[7] Geneva Protocol I Additional to Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977; Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict.
[8] Vienna Convention on the Law of Treaties, 1966.

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including the international law rules for its use by the United Nations. But what could be done, was.

The intentions of the Charter that the United Nations should have forces on standby was an early casualty of the Cold War. What the United Nations did, in the event, was imaginatively to circumvent this problem. Initially, in Suez, and then in the Congo—and later in many, many other operations—it embarked upon "peacekeeping" rather than enforcement. From both the legal and the political point of view, there were two clear elements to this. The first was that the United Nations should go to a territory with the *permission* of the State concerned. And the second was that the States of the United Nations would participate in this on a voluntary basis, rather than as a matter of obligation. The peacekeeping forces would thus consist of some, but not all, of the United Nations membership.[9] These peacekeeping activities have had an undeniable utility over the years.

The end of the Cold War has encouraged recourse to third party judicial settlement.

From 1946 to 1966 the International Court of Justice had a moderate but meaningful docket. In the early seventies—for a dozen years in fact—it was hardly used at all. By contrast, it now has a very heavy docket and in the past 18 months has been systematically adjusting its procedures and technology to respond to this demand. The end of the Cold War is part of the story of the current heavy use of the International Court, but certainly not all of it. The upturn in recourse to the Court began in the first half of the 1980s, several years before the arrival of glasnost and perestroika. Many former colonial States who had achieved their independence in the early 1960s had by the 1980s begun to see that international law served their own ends as much as those of the developed countries. But, finally, in the late 1980s, the marxist doctrine by virtue of which there were no neutral men—and hence no place for impartial judicial recourse—was coming to an end.

The evidence that today the Court's work is drawn from States around the world is not hard to find. The Court's current or very recent docket consists of cases concerning Spain and Canada;[10] Qatar and Bahrain;[11] Libya and the United Kingdom;[12] Libya and the

[9] For a resume of these developments, see R. Higgins, "Peace and Security: Achievements and Failures" (1995) 6 E.J.I.L. pp. 445–460.

[10] *Fisheries Jurisdiction (Spain* v. *Canada).*

[11] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain).*

[12] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom).*

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United States;[13] Hungary and Slovakia;[14] Cameroon and Nigeria;[15] Botswana and Namibia;[16] Paraguay and the United States;[17] the United Nations and Malaysia.[18]

The subject-matter jurisdiction of the Court is of a potentially vast breadth. Any matter of international law which is the subject of an inter-State dispute could potentially come before the Court. And those organs of the United Nations and specialised agencies which may ask advisory opinions[19] of the Court themselves have a wide remit. Their questions may also be in respect of a wide subject-matter. And the Court is dealing with a very wide range of international law issues.

All of this is, of course, gratifying. But when one looks at the contemporary international system, it is evident that this phenomenon is but a small part of a much more complicated picture.

### *The Current International System*

Chaos appears to be all around us. It is hard not to share the sentiment that the international order today consists of *dis*order. And yet that disorder is surely not random, but is rather the consequence and result of the overall international system that obtains today. Chaos is an undeniable *part* of the international system, but certainly is not a satisfactory description *of* the international system.

Our contemporary international system—that is, the post Cold War system—has been variously characterised. Few today would want to embrace Fukuyama's theory that history had come to an end.[20] New history seems to have been occurring all too rapidly.

There is an interesting contemporary debate as to how we should properly entitle the current international system. For many, the term "globalisation" suffices as a general nomenclature. For others, it is an empirically narrow and intellectually shallow concept. Rather, the system in which we live is better described as a liberal international order, which comprises a degree of order, but no over-arching governmental structures; a continued diversity of types of States and political systems; a broad consensus, but not unanimity, on market economies; and a degree of consensus on democracy, but without

[13] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America).*
[14] *Gabcikovo-Nagymaros Project (Hungary/Slovakia).*
[15] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria).*
[16] *Kasikili/Sedudu Island (Botswana/Namibia).*
[17] *Vienna Convention on Consular Relations (Paraguay* v. *United States of America).*
[18] *Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights (Request for Advisory Opinion).*
[19] Art. 96 (1) of the Charter of the United Nations.
[20] Fukuyama, "The End of History", *The National Interest* (1989), No. 16, 3–18; *The End of History and the Last Man* (London, Hamish Hamilton 1992).

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general agreement on the forms and true content that it should assume.[21]

I cannot presume to offer an alternative "best descriptive name" for what we see happening all around us. For my purposes, it suffices for me to single out the characteristic features of the contemporary international system. And my motives for doing so, of course, are to trace their impact on international law and the role that international law can now expect to play.

*Globalisation*

That globalisation is the first characterising feature of our age cannot be denied. Tony Giddens[22] elegantly describes it as interdependence without differentiation as to time and space. More prosaically, globalisation represents the reality that we live in a time when the walls of sovereignty are no protection against movements of capital, labour, information and ideas—nor can they provide effective protection against harm and damage. This state of affairs has been arrived at through various factors, high among which is the replacement of the stand-off of the Cold War years by the triumph of free markets. These now prevail even in areas of the world where democracy is still uncertainly bedded (Russia), distinctly qualified (much of Asia) or hardly existent (China). This free market concept has necessarily entailed the free movement of goods and capital. It has accelerated the penetration of ideas, a process already well under way thanks to contemporary information technology.

The traditional sovereign State has been penetrated in a myriad of other ways, also. In the 1960s, loans to developing countries were often tied to preferential trade arrangements with donor countries, and sometimes deeply resented as economic colonisation. In the mid 1990s we see loans—whether through the international financial institutions or bilateral—being conditioned upon good governance and a certain measure of transparency. The mood is such that this is considered reasonable and there is no general well of resentment expressed by recipients.

Closely related to this, of course, but somewhat pre-dating it, is the penetration of the sovereign State by the philosophy of human rights. This phenomenon was already in progress, and is not a product of globalisation. But it has fitted well with the general ethos of our times and the invocation of human rights considerations

[21] See, *e.g.* J.M. Owen, *Liberal Peace, Liberal War, American Politics and International Security* (Cornell University Press 1997), reviewed by Adam Roberts in the *Times Literary Supplement,* 6 November 1998). See also T.G. Ash, "Europe's Endangered Liberal Order", *Foreign Affairs* (March–April 1998).

[22] A. Giddens, *The Consequences of Modernity* (Stanford University Press 1990), p. 64.

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across borders is now considered quite routine. It is easy to forget that throughout the 1950s and 1960s most States in the world insisted that how they treated their own citizens was a matter for them alone. The achievement of the first wave of great human rights treaties of the post-war world—the two UN Covenants on Human Rights, the European Convention on Human Rights, the Inter-American Convention on Human Rights and the African Charter on Human Rights—gave the opportunity for a plaintiff to escape from the unwelcome embrace of the State, and to bring his complaint to an international jurisdiction. And the United Nations political organs, through their resolutions, and the International Court of Justice, through its judgments, have further fostered the idea that fundamental freedoms everywhere are a legitimate concern of everyone.[23]

Good governance, so important a factor in the new globalisation, is closely associated with those human rights directed to free speech, periodic elections and open participation in political life. But other human rights—freedom of religion, freedom from torture, the right to a fair trial, and others—have also received a new impetus from the process of globalisation.

Also predating the concept of globalisation, but equally feeding into it, is the realisation that what every State does affects the physical environment we live in. Both human rights law and environmental law were regarded in their infancy as the province of "do gooders", as "not serious". Today no government can be unaware that others may legitimately use all means to draw attention to decisions being taken that have environmental repercussions. It was at the beginning of this decade that the United Nations began to take an interest in these matters. A series of declarations, treaties, protocols and conferences have followed.[24]

In human rights, with its current emphasis on implementation, law making is probably largely behind us. All current efforts are directed at implementation. But in the field of environmental law the normative processes are just beginning—in treaties, in judicial decisions, in national legislation. As Philippe Sands has correctly observed the future management of these issues—in which non-State actors have also become important players—"will require [a] system

[23] The literature is too vast for any meaningful selection.

[24] *E.g.* United Nations Framework Convention on Climate Change, concluded at New York, 9 May 1992; Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change, adopted at Kyoto (Japan) on 11 December 1997; Convention on Biological Diversity, opened for signature at Rio de Janeiro on 5 June 1992.

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of international rules to achieve an unparalleled degree of complexity".[25]

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*New Actors and New Courts*

There was a time when international law consisted of a manageable corpus or rules over a finite ascertainable subject matter, relevant to the relations of States with each other.

Today the corpus of norms is vast, the subject matter apparently expanding indefinitely, being regulated across national boundaries and concerning not only States but other actors too. The component elements of these phenomena go hand in hand. The more our world is globalised, the more we all have to depend upon each other for our common welfare, the less the State retains its monopoly as an international actor and the more systems of dispute settlement we are likely to find.

The International Court settles disputes between States. Cases cannot be brought by individuals and indeed, neither they nor non-governmental organisations have any standing to intervene in inter-State litigation by amicus briefs. So far as the classic issues that engage States in their relations with each other—territory, boundaries, treaties, etc.—that probably does not matter too much.

But it goes against the very subject matter that is today burgeoning—human rights, environmental matters, globalised trade—for only States to be the players. In fact, multinationals, corporations and non-governmental organisations are increasingly involved in the international legal process. The permeability of State frontiers means that their interests are more and more affected by international legal regulation. It is *individuals* who are the repository of human rights—rights they very often wish to exercise against their *own* States. And non-governmental organisations have long been involved in the work of organs set up under international human rights treaties to monitor compliance with those treaties. When the Committee on Human Rights examines States parties in the periodic reporting process, they are assisted by a wealth of information that has been passed to them by international NGOs and NGOs in the country concerned. NGOs may actually intervene to make presentation in the comparable exercise done by the Committee under the Covenant on Economic, Social and Cultural Rights, where such

[25] Lecture 5 of six lectures delivered at the Université de Paris II (March 1997) on "Institutionalizing Doubt: Modernity and the Challenge to International Legal Traditions".

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matters as food distribution or housing policy may be under consideration.[26]

Non-State actors are particularly active in the field of environmental law. Indeed, they participate not just as potential lobbyists and litigants, but even are present as States engage in international negotiations to arrive at treaties on the subject.[27]

The NAFTA—North Atlantic Free Trade Area—dispute settlement arrangement has a classical inter-State system, but also, in parallel, a system in which corporations may bring legal proceedings. For the moment, rather against the current trend, the World Trade Organisation dispute settlement procedures are open only to States—but through the Internet these are followed closely by corporations, who then use indirect means to make their views known to the governments concerned.[28]

And this indirect influence of NGOs upon States is felt even at the International Court itself—they have been very active "at one remove" in recent cases concerning nuclear weapons[29] and concerning hydroelectricity on the Danube.[30] They have been regarded as the activating force for the request made to the Court in the former and as very concerned lobbyists for one of the Parties in the latter.

The effects of globalisation, as we have seen, have encouraged the realisation that at least in certain technical areas of international law, actors other than States are entitled to access the legal procedures, and indeed, assisted by the revolution in information technology, have become themselves important players in the international system. From the operational point of view, we are seeing an erosion of national boundaries. Globalisation has not meant the end of the State, as was so facilely prophesied. Rather, as Anne-Marie Slaughter has brilliantly termed it, we are instead witnessing a disaggregation of the State,[31] with many of its traditional functions being performed by private parties, based on transnational networks. This has many implications. But for the international lawyer it means that international law is deepening as well as broadening, for it is now

[26] For a recent acknowledgment of the importance that could be made by hearing legal submissions from non-governmental organisations, notwithstanding the absence of any relevant rule of practice to authorise such intervention, see the legal pleadings on behalf of Amnesty International and certain other NGOs in the *Pinochet* case in the appeal in the House of Lords (November 1998).

[27] *E.g.* during the negotiations for the Kyoto Protocol to the Framework Convention on Climate Change.

[28] These observations are made by Sands, *op. cit.*, n. 25 above.

[29] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 226.

[30] *Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997.*

[31] A.M. Slaughter, "The Real New World Order", *Foreign Affairs* (Sept.–Oct. 1997).

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being invoked by corporations and human rights activists in their own courts and in foreign courts. This has to be welcome.

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One of the consequences of the breakdown of the old structures is that we now witnessing a multiplication of international legal institutions. From 1922 to 1960 the International Court of Justice at The Hague stood alone as the forum for the resolution of international disputes. In 1960 the European Court of Human rights started its work, allowing States parties to the European Convention on Human Rights to litigate violations of that Convention in Strasbourg, as well as providing a forum for individuals to bring claims against States. In the event it is the latter element which has proved by far the more important, and a heavy and important case law has built up since. In the human rights field there has followed the Inter-American Court of Human Rights in Costa Rica. The European Court of Justice has its own special responsibilities within the European Union. There also now exists a new International Tribunal on the Law of the Sea, set up under the Law of the Sea Convention of 1992, whose creation was a result of a transient conjunction of events. There is a certain overlap of subject matter jurisdiction between the International Court (with its long history in settling law of the sea disputes) and the new Hamburg Tribunal. But it is also the case that this Tribunal is open, in certain types of disputes, to individuals, corporations, State enterprises and international organisations. In questions within its remit relating to the release of arrested vessels and to deep sea mining the convenience of not having to go through national States in order to resolve a dispute is manifest.

If the human rights courts and the Law of the Sea Tribunal predate globalisation, their accessibility to non-State parties is consonant with it. More recently, the Inspection Panels established by the World Bank and other multilateral development banks encourage both recourse to a highly specialised group of decision makers and access, by individuals, or groups, in cases involving States or international organisations.

In trade law there were, in 1993, fundamental changes agreed to the old GATT system. Under the new World Trade Organisation (WTO) there has been introduced a new dispute settlement system, comparable to judicial settlement. Panel decisions are binding (unless the WTO members by consensus agree otherwise) and an Appellate Body receives appeals on points of law from the panels.

We thus have a certain decentralisation of some of the topics with

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which the ICJ *can* in principle deal to new, highly specialised bodies, whose members are experts in a subject matter which becomes ever more complex, which are more open to non-State actors, and which can respond rapidly. I think this is an inevitable consequence of the busy and complex world in which we live and is not a cause of regret. It is, of course, important that these courts and tribunals should not all be saying different things. But there are intimations that the International Tribunal on the Law of the Sea intends to act in accordance with the jurisprudence of the International Court of Justice. And commentators on the WTO are already noting that the Appellate Body of that Organisation is handing down decisions which rely not only on the specific rules of the WTO but on international law more generally, including reference to the findings of the International Court.[32]

The International Court, while *de facto* shedding some of the more specialised subject matter over which it has competence in principle, none the less retains a central importance. It is the body where the great legal-political issues of the day between States are litigated. These issues—title to territory, treaty matters, issues relating to the use of force, everything to do with the United Nations—are critical in their implications and vast in their presentation. They necessarily take a certain time to handle. The Court remains the primary judicial organ of the United Nations and the only court which can give advisory opinions to the UN and its specialised agencies, and the only court which can deal with the interface of the various fields of international law.

The three new criminal courts are a quite separate story. The existing International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda have been set up by the Security Council to bring to justice those individuals who have violated the laws of war and humanitarian law in those countries. Though the relevant acts are those abhorred and forbidden under international law, these are essentially courts of criminal justice, whose rules and procedure reflect an international legal consensus on criminal legal practice. They exist in part because the international community has become shocked by what it has seen occurring in these countries; and in part because it is easier to agree on punishing individuals than on action to be taken to stop such atrocities. A Statute has recently been agreed for a new Permanent International Criminal Court,[33] with a potentially general remit. For exactly that reason, it appears a much weaker body than the existing criminal

[32] D. Palmeter and P. Navroidis, "The WTO Legal System: Sources of Law", 92 A.J.I.L. (1998) 398–414.
[33] UN Doc. AConf.1839 (17 July 1998).

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courts and much more heavily subject to political control, both regarding the formulation of what will constitute the relevant legal offences and regarding when the prosecutor shall act. There are various other elements in its Statute that, in my view, are a cause for concern, notwithstanding the desirability of such a court.

* * *

It is impossible, speaking in the autumn of 1998, to leave the subject of globalisation and international law without saying something about financial markets. My remarks are not those of a specialist, but simply of an interested observer. What we so recently termed the tiger economies of South East Asia are not recent converts to the benefits of free markets. They have welcomed the export of goods and the inflow of capital. But where they have overextended themselves, where the local banking systems have been too reliant on "cronyism", they have not been able to protect themselves against what some of them term hostile speculation, and what others see rather as investors pulling out of insecure markets.

There is nothing new in IMF loans in troubled times being conditioned upon domestic reforms. There is nothing new in the fact that this brings hardship in the short term to the masses and often riots on the streets. What *is* new, it seems to me, are two factors. The first is that, for the first time, these events are occurring not within countries of relatively low economic importance but rather in countries that have in the past 15 years become the economic powerhouses of Asia and thus important to all of us. Globalisation has ensured that our economic and financial interdependency means that, in such categories of States at least, there are now global consequences for the world's markets. The second new factor is that the fury that is expressed internationally at the hardships, is today directed not only against the IMF, but also against the non-representative nature of certain governments. The crowds in the street are making the connection between financial collapse and the absence of democracy. The consequences are instability and further financial chaos.

There seems no general agreement as to what should be done. To some, it is an overdue admission that the IMF has long "got it wrong" in its loans policy. But to offer loans without the restructuring conditions is merely, it seems to me, to postpone the underlying problems that still need addressing. Some, like Jim Wolfensohn of the World Bank, believe the international financial agencies must push for social justice, because in its absence no amount of financial packages can achieve stability. The demanded economic reform should go hand in hand with improved social justice. And Lamberto

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Dini has urged international financial institutions to look at society as a whole, and not just at the financial dimensions. For him, human rights are a component of institutional strategy. As he recently put it "Fundamental freedoms and prosperity should be the same side of the coin".[34] But others see the answer in IMF authorised erection of walls, for fixed specified periods, against massive capital inflows—a protectionism that would be allowed only to "good States", that is, those following the international prescriptions for internal reform, such as Chile. And there appear to have been certain indications from this country, and from France, that globalisation necessitates a new international financial architecture which would regulate the control of capital flows. But international institutions, with all their cumbersome and slow decision-making, seem inappropriate to this task, even if it were a desirable one.

International law can assist in international problems by articulating agreed norms of conduct and by the dedicating of legal skills to institution building. For example, the former legal adviser to the IMF, Sir Joseph Gold, had a profoundly influential role in the introduction of the concept of Special Drawing Rights (SDRs)[35] to meet the challenge presented by the emergency of the newly developed States nearly 30 years ago. And the current legal adviser of the World Bank, Dr. Ibrahim Shihata, is the intellectual father of the Multilateral Investment Guarantee Agency (MIGA),[36] which is working effectively. But until there is more consensus about the way forward, there is little that international law or lawyers can do to assist.

* * *

The precarious position of Russia is of equal concern, but stands somewhat apart from the problems of South East Asia. The debate rages as to whether the IMF prescriptions were correct, but were, for various internal reasons, unsatisfactorily implemented; or whether the IMF loans should always have been tied to specific programmes. But behind all this, and the implications for the future of democracy, is the realisation that Russia is a nuclear power and massive instability can have the most serious implications for world security.

[34] "Global Markets Need Global Institutions", article in the *International Herald Tribune* (9 October 1998).

[35] J. Gold, "The Fund Agreement in the Courts: XVII: The SDR in the Courts" (Staff Papers, vol. 29) (1982), 647–681; "Development of the SDR as Reserve Asset, Unit of Account, and Denominator: A Survey" (*George Washington Journal of International Law and Economics,* vol. 16 (1981) 1–64.

[36] I.F.I. Shihata, "The Multilateral Investment Guarantee Agency (MIGA) and the Legal Treatment of Foreign Investment", *Recueil des cours de l'Academie de droit international*, vol. 203 (1987), 95–320.

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That thought provides a convenient bridge to an examination of the second characterising feature of the contemporary international system, namely, that it is largely unipolar in its power structure.

*Unipolar Power as a Characterising Feature*

In the Cold War years the General Assembly, with its third world majority, was often supporting positions taken on this or that by the Soviet Union. What the Soviet Union could not achieve in the Security Council—because of the veto—it could hope to see reflected in resolutions of the General Assembly. It was at least understandable that American policy, and in turn public opinion, should be wary of the United Nations in these circumstances.

At the end of the Cold War, all this had changed. The Soviet Union was no longer using the General Assembly as a vehicle for the promotion of certain objectives. The General Assembly had become a passive organ, which no longer had either the will or the inclination to oppose United States vision of a new world order. The United States could now use the United Nations as an important and available instrument to give effect to its policies—policies indeed often in accord with the purposes and principles of the United Nations—and to clothe them with international legitimacy.

And it was just at this moment that, with seeming illogicality, the United States decided to turn its back on the United Nations. Now that the United Nations could indeed do the various things that the United States had for years wanted, financial dues would not be paid. Indeed, a new mood of contempt for the United Nations would pervade the country. Secretary-General Boutros Ghali was vilified and the battle to remove him became the major policy objective of the then US Ambassador to the United Nations, Mrs. Albright. The budget allocations to the United Nations were not paid, or paid only in small part. The United Nations, available as never before to be the instrument of US foreign policy, became financially crippled.

Of course, the picture has been more complicated than that because of the constitutional arrangements of the United States. What has been the will of the Administration has not necessarily been the will of the Congress. And what international matters come to the Congress for action is significantly controlled by the preferences of the Chairman of the Committee for Foreign Relations. For a certain period during the Presidency of Ronald Reagan the Administration itself was insistent that financial dues owed to the United Nations should not be released without institutional reform. The allies of the United States, while not accepting that there was a legal entitlement to exact these conditions for the release of monies owed, were not wholly displeased that pressure might this way be

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brought to bear for reforms they, too, considered desirable. In fact, significant internal reforms then occurred, together with great budget cutting, and the President formally testified to the Congress that the necessary changes had been made. However, the Congress had an agenda of its own—both financial and political—and the owed funds were still not fully released. With the arrival of Kofi Annan as Secretary-General of the United Nations further major structural reforms were embarked upon, as well as diplomatic contacts with Senator Helms and the Congress. But the situation remains essentially the same, though the Clinton administration is publicly committed both to the political advantage to the United States of paying the dues it owes, and to its international legal obligation to do so.

The disregard of financial obligation is not of course solely a product of the unipolar world, but it has undoubtedly been exacerbated by it. It existed already in the classic balance of power system that characterised the Cold War years, when the Soviet Union refused to pay those portions of its dues attributable to particular peacekeeping operations of which it disapproved. That, too, caused significant problems for the United Nations because the Soviet Union was also a big contributor to its coffers, being then required to pay some 11% of the total. It is one of the great ironies of our era that just as the Soviet Union publicly acknowledged the error of its ways as the Cold War came to an end, with Gorbachev stating to the United Nations that all contributions would henceforth be paid—and indeed all past debts to the UN now redeemed—the United States began to assume the mantle of "recalcitrant debtor".[37] And as the United States pays such a large share of the total—around 25% at present, and 31% of peacekeeping costs—the problems for the United Nations have been even greater.

In recent years the pattern of seeking to exact changes for the payment of dues sums legally due has also been extended to other international agencies, including, notably, the International Monetary Fund. President Clinton and the Congress have now reached a deal for the release of the $18 billion owed to the IMF. The release of the funds owed by the United States will be dependent upon agreements by *other* IMF contributors that they all insist upon certain changes within the IMF. And the Executive-Director of the IMF is responding to these power realities by publicly stating that the conditions set would be useful ones for the IMF.

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[37] R. Higgins, Problems and Process (Oxford University Press 1994), pp. 176–180.

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*UN Enforcement*

The transition from the balance of power of the Cold War years to today's unipolar model has also had extremely important repercussions for the legal/political matrix in the area of security.

Just as inventiveness was needed to develop the idea of peacekeeping, so inventiveness has been needed to address the occasional need for military sanctions, given the non-existence of the intended United Nations Force. In 1950 the United Nations gave its authorisation to a military response to North Korean aggression through authorisation of "collective self defence" action under unified command. The intention, obviously, was the bypass of the Soviet veto of operations. By the time the United Nations determined that a military response was needed to Iraq's invasion of Kuwait, the Cold War was over. Indeed, there was significant support within the Arab world, too, for securing the enforced withdrawal of Sadam Hussein from Iraq. But there was still no United Nations Force, and a clear and explicit decision to take military action might still have occasioned a Russian veto. A way had to be found that was at once acceptable to Russia, with its traditional close ties to Iraq, but effective. The technique used in Security Council Resolution 678 (1991) was to authorise "all necessary measures" if Saddam had not withdrawn from Kuwait by 15 January 1992. This was understood by all concerned to be, in reality, an authorisation of military sanctions to be carried out on the United Nations' behalf by a coalition of States.[38] Everyone was satisfied and the successful military action led to great optimism that we were entering upon a new era of effective United Nations collective security.

The optimism has been very short lived. Such oblique formulae would only serve their purpose if there was an underlying consensus about the desirability of the action, and if all that Russia was seeking was a legal formula to allow it to go along with this action, even if not actively participate in it. Such consensus has been hard to find, and has been lacking in relation to Kosovo.

At the same time, the very optimism engendered by the end of the Cold War, taken together with the multitude of international crises that continued to explode, led to demands for a UN military response that it simply could not meet. It was not just a matter of political consensus, it was a military reality, too.

United Nations Secretary-General Boutros-Ghali decided that the answer lay in the mobilisation of regional organisations for this purpose. There was indeed some legal possibility under the United Nations Charter for regional organisations to be used by the Security

[38] *Ibid.*, Chap. 15.

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Council for enforcement purposes. Although Boutros Ghali's *Agenda for Peace*[39] purposely referred to regional agencies in global terms, it was in fact the support of NATO that was sought. No matter that NATO is *not*, legally speaking, a regional organisation; no matter that under its own treaty it cannot act out of area. NATO was looking for a new role at the end of the Cold War and in a series of exchanges with the United Nations confirmed that it would support "on a case by case basis and in accordance with our own procedures, peacekeeping operations under the authority of the United Nations Security Council, which has the primary responsibility for peace and security".[40]

Within that framework NATO was given military tasks in relation to the support of UNPROFOR (UN Protection Force) in Bosnia and then in support of UNCRO (United Nations Confidence Restoration Operation) in Croatia. It was active in support of the designated safe areas.[41] But the very presence of United Nations peacekeeping forces on the ground made the United Nations very, very hesitant to call in NATO, even in the face of a deteriorating military situation on the ground, and the tensions between NATO and the United Nations were palpable and real. NATO has now passed to new tasks in that area under the Dayton Accords.[42]

Recently, all the inherent problems have once again surfaced in connection with the problems in Kosovo. Should the United Nations merely stand by in the face of the atrocities being committed and the terrible agony of the hundreds of those displaced ethnic Albanians? After seven long months there has finally emerged a determination to take military force if necessary, the objective being to secure the return of the dispossessed before winter and to achieve a modicum of security for their position in the future. On this occasion it has not been possible for the Security Council to adopt the so-called "Iraq resolution" model, because this time Russia is adamantly opposed to military action against Serbia. Resolution 1199 of 23 September 1998 is, it is true, like Resolution 678 on Iraq, adopted under Chapter VII of the United Nations Charter—a legal prerequisite to any military measures. But unlike Resolution 678, it contains no euphemistic clause authorising "all necessary measures" against Serbia if it does not comply with the demands of the Security

[39] UN Doc. A47277, 17 June 1992.
[40] Oslo Communique N-NAC-1(92) 51, NATO, Brussels, June 1992, p. 4.
[41] See S/1994/131 and S/RES981 (1995).
[42] See S/1997/81 (27 Jan. 1997); S/1997/193 (5 March 1997); S/1997/257 (27 March 1997); S/1997/369 (14 May 1997); [the Fifth Report was not published as an official document]; S/1997/602 (31 July 1997); S/1997/636 (13 Aug. 1997); S/1997/18 (18 Sept. 1997); S/1997/794 (14 Oct. 1997); S/1997/893 (14 Nov. 1997); S/1997/975 (13 Dec. 1997); S/1998/39 (16 Jan. 1998); S/1998/105 (5 Feb. 1998).

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Council. The member States of NATO have none the less decided that this sufficed for NATO to have been prepared to act militarily if a negotiated agreement satisfactory to members of the NATO alliance had not been reached.

One must necessarily ask whether this is not to stretch too far legal flexibility in the cause of good. In the Cold War legal inventiveness allowed peacekeeping instead of collective security enforcement. Then, at the end of the Cold War, we saw enforcement by coalition volunteers instead of by UN military action under Article 42 of the Charter. In our unipolar world, does now the *very adoption* of a resolution under chapter VII of the Charter trigger a legal authorisation to act by NATO when *it* determines it necessary? If that is so, then we may expect that in the future Russia will again start exercising its veto in the Security Council, to make sure resolutions are not adopted, thus undercutting the possibility of useful political consensus being expressed in those instruments.

I do not underestimate the problem, nor do I see it in clear terms of right and wrong. On the one hand there has been the failure by Russia to use such influence as it still has with the Serbs. On the other hand, we are witnessing not mere imaginative lawyering *within* the UN to achieve a desirable end and alleviating the suffering, but the passing *outside* of the UN altogether of the decision making powers reserved under the Charter to the Security Council. As we wrestle with this dilemma, the long term implications may be considerable.[43]

* * *

*Civil Wars and Failing States*

The problems of civil wars, and the constraints upon the UN in controlling them, has been a phenomenon with us for some considerable time. The ever increasing phenomenon of civil conflict—often exacerbated by outside interests, and frequently with appalling consequences for civilians, has been a long-standing problem for the UN. Throughout the Cold War period it was assumed that nothing could be done to address it.

Since the end of the Cold War there has been more of a political consensus to address this problem. The interdependence of our world, the vivid pictures of suffering on television reaching into homes everywhere, the heightened awareness of fundamental rights and

[43] Since the delivery of this lecture matters at Rambouillet have developed further, raising a further deeply problematic question: does the refusal of a state which has apparently violated human rights to allow international peacekeeping forces on its territory, give legality to NATO bombing raids?

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humanitarian needs, have all come together in the search to find some solutions. To the problem of intervention in civil wars has been added the question of what to do about the much more recent phenomenon of "failed States"—those States where all necessary structures have disintegrated, where there is no correlation between power and legality and where, once again, the outcome all too often is death, destruction, famine. This, too, is seen on our screens.

The United Nations Charter requires respect for human rights, but does not permit enforcement to ensure it. The United Nations is permitted under its Charter to engage in sanctions or to use force only when international peace is threatened, or when there has been aggression by one State against another. One can now see, after United Nations action to alleviate suffering in Haiti,[44] Somalia,[45] Kosovo and elsewhere, the legal technique that the new consensus has used to escape the straitjacket. The sufferings caused by those massive violations of human rights, by chaos and disorder, are *deemed* "threats to international peace and security". The resolutions enabling UN peacekeeping action, or one of the new varieties of UN intervention, stipulate that the *consequences* of the situation constitute a threat to international peace and that the UN can, and must, act under Chapter VII of the Charter. Mention is often made of the exodus of refugees and the problems caused for neighbouring States. Here, too, good lawyering has reflected the changed perceptions of what is, and is not, tolerable in the contemporary world.

* * *

International law is a facilitating discipline—its purpose is to assist in the achievement of an international stability that is consistent with justice and in the realisation of shared values.

Both what is needed from international law and what international law can offer depends upon the international system. What I have sought to demonstrate is that profound and challenging changes are occurring in that symbiotic relationship. We will not be able to understand the possibilities for, and limitations upon, the role of international law in this period of unprecedented change unless we lift our eyes from the detail to look also at the wider picture.

[44] See B. Simma, ed., *The Charter of the United Nations: A Commentary* (1994), p. 587.
[45] *Ibid.*, pp. 48–49.

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