Denver Journal of International Law & Policy

Volume 20
Number 2 *Winter*

Article 2

January 1992

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Keywords

United Nations, International Law: History, Human Rights Law, National Defense

MYER S. McDOUGAL DISTINGUISHED LECTURE

How New Is the New International Legal Order?

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In September 1990, in the midst of the Gulf crisis, President Bush, in an address to a joint session of both houses of Congress, espoused a new goal for the foreign policy of the United States. He expressed the hope that out of these troubled times a new objective can emerge — "a new world order," a new era "freer from the threat of terror, stronger in the pursuit of justice, and more secure in the quest for peace, . . . a world where the rule of law supplants the rule of the jungle."[1]

A few weeks later, appearing before the United Nations General Assembly, President Bush called for a "new partnership of nations" that would be based "on consultation, cooperation, and collective action, . . . united by principle and the rule of law supported by an equitable sharing of both costs and commitment."[2] Its goals would be "to increase democracy, increase prosperity, increase peace, and reduce arms."[3] He was glad to see that the United Nations started fulfilling its promise as the world's "parliament of peace," and that it has become "the place to build international support and consensus" for meeting not only the challenge of aggression but also other challenges, such as threats to the environment, debt burden, terrorism, drug trafficking, and refugees.[4] "Calls for democ-

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1. President George Bush, *Toward a New World Order*, DEP'T ST. DISPATCH, Sept. 17, 1990, at 91-94.

2. President George Bush, *The U.N.: World Parliament of Peace*, DEP'T ST. DISPATCH, Oct. 1, 1990, Currency Policy No. 1303.

3. *Id.*

4. *Id.*

racy and human rights," he said, "encourage our hopes for a more stable, more prosperous world."[5]

This vision of a new world rising from the ashes of a war is an old one. Writing more than a hundred years ago, the eminent British international lawyer William Edward Hall pointed out that over the last couple of centuries, at the close of each fifty years, international law has occupied a more solid position than that which it occupied at the beginning of the period. While he expected that great wars would still occur, unscrupulously waged, he also foresaw that after each such war the world would do penance "by putting itself under straighter obligations than those which it before acknowledged."[6] This happened in the lifetime of some of us, first after World War I when the League of Nations was created "to promote international cooperation and to achieve international peace and security, . . . by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another."[7]

Again, after World War II, in the 1945 Charter of the United Nations, the Governments of the United Nations, acting on behalf of their peoples, agreed "to maintain international peace and security" through "effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace," to "settle their disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered," to cooperate "in promoting and encouraging respect for human rights and fundamental freedoms," as well as "to promote social progress and better standards of life in larger freedom," and "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."[8]

Coming closer to our times, in 1988, in the last year of the Reagan Administration, the Department of State published a booklet setting out in considerable detail the interests and objectives of American Foreign Policy.[9] It might be useful to quote here the list of these interests and objectives; according to the booklet, the United States was seeking to:

> 1. Uphold the principles of freedom, the rule of law, and observance of fundamental human rights;
>
> 2. Promote our domestic prosperity;

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5. *Id.*

6. WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW vii, ix-x, (4th ed. 1895).

7. *See* League of Nations Covenant, *in* Treaty of Versailles, June 28, 1919, Part I. *See also* other Peace Treaties signed in 1919 and 1920, *reprinted in* HUDSON, INTERNATIONAL LEGISLATION 1 (1931).

8. U.N. CHARTER preamble, arts. 1 and 2 [cited in order slightly different than the one used in the Charter].

9. *Fundamentals of U.S. Foreign Policy*, DEP'T ST. DISPATCH, Mar. 1988, at 1.

3. Protect the security of our nation and its institutions, as well as those of our allies and friends;

4. Contribute to a safer world by reaching equitable and verifiable arms reductions agreements with the Soviet Union;

5. Assist the economic development of poorer nations; and

6. Act in a manner consistent with our humanitarian instincts.

Apart from domestic goals affecting the American ability to pursue these foreign goals, the statement emphasized the global goals of "prosperity, security and democratic change." In particular, it supported: (a) "a global trend of democratic institution-building" that requires a "balanced approach to the defense of human rights and fundamental freedoms" as well as easing "the plight of millions suffering from want, violence, and oppression throughout the world;" (b) "the global trend toward greater confidence in free market-oriented solutions to the problems of economic growth, and the movement everywhere in the world . . . to decentralize, deregulate, and denationalize;" (c) the continuance of efforts "to achieve equitable, balanced and verifiable arms control agreements with the Soviet Union that would enhance strategic stability;" and (d) the exploitation of the "possibilities for the United Nations and increasingly significant country groupings to deal with regional concerns and foster global economic development."[10]

Some of these objectives were stated in a tentative fashion, and the comprehensive comments on them in the later parts of the pamphlet show still the "Cold War" mentality and only minimal interest in bringing the United Nations into the picture. The situation changed drastically during the Bush Administration, when several impossible dreams suddenly were realized — the liberation of Eastern Europe, the unification of Germany, the freeing of the Baltic States, the revolutionary changes in the Soviet Union, the collapse of communist ideology, and the return of the United Nations to the role it was designed to play. It is not surprising, therefore, that the Gulf crisis resulted in another chance to fulfill Professor Hall's prophecy. A new world order is in the making, and there is again the hope that the rule of law will supplant the rule of the jungle, that the partnership of nations, hoped for at San Francisco in 1945, will actually be established, based on the one hand on "consultation, cooperation and collective action," and, on the other hand, increased democracy, prosperity through a free market, reduced arms, and a United Nations enabled to both maintain peace and protect human rights.

To assess these developments, in May 1991, the Fletcher School of Law and Diplomacy and the United Nations Association of the United States of America, with the assistance of the Hitachi Foundation, organized a Roundtable given the task of "Defining a New World Order" more precisely. The discussion was chaired by Elliot Richardson and Brian Ur-

10. *Id.* at 1, 4, and 9.

quhart, and was based on a thoughtful paper by Professor Alan K. Henrikson, who was also in charge of preparing the conference report.[11] I was privileged to participate in this conference. Other participants included experts not only from the United States but also from Africa, Asia, Latin America, the Soviet Union, and Western Europe, as well as experts experienced in international organizations and United Nations activities. They agreed on the need to design a more efficient and more effective international system, based on improved international cooperation. The New World Order has to respond to the new challenges brought by "the process of democratization and liberalization," which in turn is connected with the new emphasis on "individual rights, economic freedoms, and political liberty." In addition, "the increased globalization of economic and political issues leads to greater interdependence among states." The breakup of empires and the demands for self-determination in new areas of the world result at the same time in the revival of national, ethnic, and religious rivalries that collide with the trend toward interdependence. Some participants warned that there might develop a tendency for a few strong nations to use strong measures to impose cooperation, but most thought that it will be generally recognized that the new international system would fail if the views of the developing world, which represents four-fifths of the world's population, are not respected. All nations must feel that the decisions of common international institutions do in fact promote both peace and justice, and do it even-handedly; only such decisions will command general acceptance.[12]

In light of this discussion and the many articles and statements that have appeared in newspapers and learned periodicals, I would like to concentrate the remainder of my own statement on a more limited area, the International Legal Order or the World Rule of Law, a concept often mentioned but seldom discussed in depth. This concept has two main ingredients: the rule of law in relations between states; and the rule of law in relations between states and individuals, especially the need to protect individuals against the abuse of power by state authorities.

The current emphasis on self-determination, democracy, and human rights destroys to some extent this dichotomy. The international community's interest in these issues strikes at the roots of traditional concepts of national sovereignty and territorial integrity. The new concept of the World Rule of Law, however, does not allow some states to act as self-appointed guardians of World Order; instead it transfers the duty to

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11. *See* Alan K. Henrikson, Defining a New World Order: A Discussion Paper (May 1991), and Defining a New World Order: The Conference Report [hereinafter Conference Report]. Professor Henrikson, in a prophetic fashion, participated a few years ago in the Negotiating World Order Project of the Fletcher School of Law and Diplomacy, and edited a volume of essays written by "international negotiators" (the diplomatic artisans), and by "world order builders" (the international architects). NEGOTIATING WORLD ORDER: THE ARTISANSHIP AND ARCHITECTURE OF GLOBAL DIPLOMACY (Alan K. Henrikson ed. 1986).

12. Conference Report, *supra* note 11, at 6-8.

monitor compliance with its basic concepts from individual states to international institutions, both global and regional. As the International Court of Justice pointed out in the Corfu Channel Case, the alleged right of intervention was a "manifestation of a policy of force," has given rise to most serious abuses, and, being reserved to the most powerful, "might easily lead to perverting the administration of justice itself."[13] Such abuse of power can be avoided only under a system in which an international institution would decide whether an intervention is necessary, who should be authorized to intervene, and how the intervention will be monitored. To ensure that all these decisions are made properly, and that due process, both as to substance and procedure, is observed, a supervisory role may be assigned to the International Court of Justice, acting though advisory opinions which would be accepted in advance as binding.[14] The following example may illustrate how this system might work.

It is generally accepted that one of the objectives of the World Rule of Law is to protect small and weak states against their more powerful neighbors, not only against direct aggression, as in the case of Kuwait, but even against threats to the peace and breaches of the peace, and other acts below the threshold of aggression which affect a small state's security, independence or free choice of government.

In several recent instances, one of the major powers has intervened either in a civil war in favor of the party with similar ideology, on humanitarian grounds because of a gross violation of human rights, or in order to restore a constitutional government replaced by a military junta. Now that law has been recognized as a social science, a lawyer may perhaps be allowed to simplify the facts of a case to allow more thorough analysis of the interaction among the principal factors. A slightly revised Nicaraguan case may serve as a good example, provided it is restricted to the issue of the support to the contras, thus avoiding the complications caused by the dispute over the facts of prior "attack" of Nicaragua on El Salvador, over the scope of its intervention in El Salvador's civil war, and over the existence of a proper justification for the exercise of the right of collective self-defense. While these parts of the International Court's decision have been severely criticized, the rules enunciated by the Court with respect to the right to intervene in a civil war have been generally accepted.

Assuming these more limited facts, the International Court of Justice has made clear that an intervention by a state in a civil war in another state even through indirect means such as organizing, or encouraging the

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13. Corfu Channel Case (United Kingdom v. Albania), 1949 I.C.J. 34-35.

14. For example, in the Convention of the Privileges and Immunities of the United Nations, Feb. 14, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900, 1 U.N.T.S. 16, Article VII, Section 30 provides that if a difference relating to the interpretation or application of the Convention should arise between the United Nations and a Member State, "a request shall be made [to the International Court of Justice] for an advisory opinion on any legal question involved," and that the opinion given by the Court "shall be accepted as decisive by the parties."

organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state, may be considered as a armed attack, "if such an incursion because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular forces."[15] While the Court did not consider "assistance to rebels in the form of provision of weapons or logistical or other support" as an armed attack, it pointed out that such assistance may be regarded as "a threat or use of force" or as "intervention in the internal or external affairs of other States."[16] In a later part of the case, the Court took a broad view of the principle of non-intervention, which it considered as "part and parcel of customary international law," although it was not spelled out in the Charter of the United Nations.[17] The Court refused, in particular, to permit a State "to intervene, directly or indirectly, with or without armed force," in the affairs of another State, "in support of an internal opposition . . . whose cause appeared particularly worthy by reason of the political or moral values with which it was identified."[18] Only some economic measures are permissible in that case, such as cessation of economic aid, reduction of commodity quotas, or a trade embargo.[19]

This proscription of the use of force or intervention by any State in situations where another State grossly violates international law — for instance, by engaging in genocidal extermination of a part of its population because of ethnic differences — should not deprive the people concerned of help against the aggressor. For instance, a World Rule of Law approach might permit the United Nations Security Council: (a) to declare that such gross violations of an important rule of international law constitute a threat to the peace; and (b) to authorize a State or a group of States to take such measures as may be necessary, including the use of force, to stop these violations. To prevent any abuse of this right of authorized intervention, the State against which the action is being authorized should be allowed to petition the General Assembly to ask for an advisory opinion of the International Court of Justice whether the circumstances of the case justified such authorization. A special legal committee of the Assembly might be authorized to grant such a request, and

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15. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 1986 I.C.J. 14, 103, ¶ 195 [hereinafter Nicaragua Case]. The Court relied in this case, to some extent, on the definition of aggression approved by the General Assembly Resolution 3314 (XXIX), 29 G.A.O.P. Supp. No. 31(A/9631), at 143. That resolution was adopted by consensus on December 14, 1974, after seven years of negotiations.

16. Nicaragua Case, *supra* note 15, at 104, ¶ 195. *See also id.* at 119, ¶ 230, and at 126-27, ¶ 247. Two dissenting judges were willing to consider even such activities as an armed attack. *See id.* at 331-47, ¶¶ 154-71 (Judge Schwebel) and at 543 (Judge Jennings).

17. *Id.* at 106, ¶ 202.

18. *Id.* at 108, ¶ 206.

19. *Id.* at 125-26, ¶¶ 244-45. For a more detailed discussion of these aspects of the case, see Louis B. Sohn, *The International Court of Justice and the Scope of the Right of Self-Defense and the Duty of Non-Intervention*, *in* INTERNATIONAL LAW IN A TIME OF PERPLEXITY 869 (Yoram Dinstein ed. 1989).

might be obliged to do it in any case where the complaint is not frivolous. The Court would be obliged to give this request priority and render promptly its opinion whether the intervention was justified. If not, the Security Council would be obliged to terminate the intervention. On the other hand, the approval of the intervention by the Court would rally the world public opinion in support of the Council's action.

This is just one example of how the Would Rule of Law approach would help in a situation that, unfortunately, still occurs quite often. It illustrates how, step by step, the United Nations may develop new powers able, to paraphrase the words of President Bush, to increase peace, to increase democracy, and to bring us closer to a more stable, more prosperous world.