RULE OF LAW IN INTERNATIONAL RELATIONS: THE PRODUCT OF INTERNATIONAL INSTITUTIONS AND INTERNATIONAL LAW

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I. INTRODUCTION

As we turn another year and enter a new year 2019, any assessment of current trends in international law would better commence with an overview of the role of international institutions as representatives of the international community and international law in sustaining and strengthening the rule of law in international relations. This note would accordingly first identify some essential elements of rule of law and follow through with a review of the structure and substance of the same in international relations. As part of this exercise, the note would map out in broad terms some significant aspects of international law that underpin the current world order. It also underscores some current challenges to the global rule of law and emphasizes the need for sustaining the rule of law on the basis of common interests of the international community to preserve the earth-space environment for sustainable development in the interest of present and future generations of mankind.

II. THE RULE OF LAW: SOME ESSENTIAL FEATURES

Aristotle once famously said that it is better to be ruled by law than by men.[1] Rule of law could however mean different things to different persons and could even lightheartedly be dismissed as 'meaningless', given its 'ideological abuse and general over-use' as a " bit of ruling class chatter."[2] However, in so far it actually came to be symbolized by supremacy of law, equality before law and constitutional system of governance sanctifying separation of powers, independence of judiciary, judicial review, enshrining and ensuring human dignity and fundamental human rights is an ancient and evolving theme.[3] Most importantly, rule of law presumes and is based on centralization of force; and prohibiting individuals from taking law into their own hands. There are several other attributes of rule of law: equality before law; due process of law; prohibition of retrospective penal laws or no crime or punishment

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[1] According to one translation, Aristotle said: It is better for the law to rule than one of citizens, so even the guardians of the law are obeying the laws". See Tom Bingham, *The Rule of Law* 3 (Penguin Books, 2010).

[2] See for the comment of Judith Shklar, quoted in *Lord Bingham's Sixth Sir David Williams Lecture at Cambridge on Rule of Law* (November 16, 2006), reproduced in Francis Neate, *The Rule of Law: Perspectives from Around the Globe* 244 (Lexis Nexis, 2009).

[3] For a history of the evolution of the concept of rule of law, see Francis Neate, "Introduction: A brief History of the Development of the Concept of the Rule of Law", *Id*. at 1-7; for commentary on the Council of the International Bar Association Resolution on Rule of Law (September 2005), *Id*. at 8-17. On the foundations of the rule of law, it is noted that it is 'the only mechanism so far devised to provide impartial control of the use of power by the state' (p.no. 9); no specific definition of rule of law is attempted because it is still an evolving concept, and it took centuries even for those countries which 'now claim to adhere to it' (p.no. 9). Accepting that it is not necessary to rule on what the rule of law meant in any given context, Lord Bingham nevertheless suggested that the core of the principle is "that all persons and authorities within the state, whether public or private should be bound by and entitled to the benefits of law publicly made taking effect (generally) in the future and publicly administered in the courts". Tom Bingham, *supra* note 1 at 8.

except in accordance with law; honoring rights of the accused including right to be silent, entitlement to a counsel, prohibition against self-incrimination and presumption of innocence.[4]

Rule of law in any society is directly dependent upon the values and traditions, culture and beliefs that shape its substantive content. But values and traditions may change from time to time and vary from community to community. A comprehensive and universally accepted definition of the rule of law is therefore not feasible or considered essential. Another reason for the lack of comprehensive or universally acceptable definition of rule of law is that the structure and powers of institutions entrusted with its promotion and protection vary from country to country, depending on the system of governance, levels of social integration and economic growth. Broadly speaking, the essential purpose of a democratic form of government is to promote the rule of law, though in reality no one form of government, without a culture of compliance, guarantee the same or can claim exclusive credentials to sustain and support it. Transfer of power through ballot box or elections conducted on the principle of universal adult suffrage is yet to become a universal phenomenon, only began to be practiced in the US since 1920 and U.K. since 1928. Palace coups or revolutions still operate in some parts of the world, with 'orange' revolution and the Arab spring being the recent examples, for change of regimes and governments. The slow and steady pace at which rule of law and democratic form of government is universally accepted is therefore understandable.

III. THE CONTEMPORARY WORLD ORDER BASED ON THE UN CHARTER

At the international level, the beginning of a world order based on the concept of sovereign equality and the associated principles of inviolability of borders and non-intervention in internal affairs can be traced to the conclusion of 1648 treaties of Westphalia. Conquest and use of force was considered a legitimate means until 1945 to acquire title to territory and consolidate sovereignty over people and resources. Following the World War I, the community of States attempted to rein in use of force and create a legal community of mankind. The League of Nations which epitomized this experiment did not last long. The United Nations Charter established by the San Francisco Treaty of 1945, following the World War II, not only prohibited the use of force as an instrument of national policy but reaffirmed some of the principles that formed the core of the League of Nations and promulgated a number of new principles- sovereign equality, right of self-determination, non-intervention in internal affairs of a State, promotion and protection of fundamental human rights and peaceful settlement of disputes on the basis of international law. The UN Charter also established a framework to promote and protect the world order. The UN General Assembly composed of all the member States, now numbering 193, operates as the conscience of the international community. The center piece of the UN Charter however is the Security Council which is endowed with enforcement powers under Chapter VII of the Charter to maintain

[4] On these and other themes constituting the core of the rule of law, see Tom Bingham, *Id*., sec. 1 on the importance of Rule of Law and chapter 7 on protection of human rights. For an endorsement of these basic elements of rule of law by the United Nations, see the Report of the Secretary General to the Security Council on "The rule of law and transitional justice in conflict and post-conflict societies", where he noted that "The rule of law is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency". Security Council doc. S/2004/616 (August 23, 2004) para. 6, p.no.4.

international peace and security "to save the succeeding generations" of mankind "from the scourge of war."[5]

As part of its system the UN Charter also established the International Court of Justice as its principal judicial organ, with jurisdiction to settle disputes on the basis of international law between States. Its jurisdiction however is not compulsory and is subject to the consent of States parties to dispute. States could confer compulsory jurisdiction upon the ICJ by filing a declaration, "recognizing as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all disputes concerning the interpretation of a treaty or any question of international law or the existence of any fact which if established would constitute a breach of an international obligation or the nature or extent of the reparation to be made for the breach of an international obligation."[6]

The ICJ can also exercise jurisdiction over disputes concerning the interpretation and application of any treaty if it so provides.

IV. THE BASIC MISSION OF THE UN: PROMOTION AND PROTECTING RULE OF LAW

Given the universal membership of the UN and the structure and substance of the Charter, with its distinct powers to promote and defend rule of law in international relations, it is the closest thing we have by way of a constitution of the world. The UN Secretary General highlighted this basic mission of the UN as follows:

> "[T]he rule of law is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."[7]

Once established as the guardian of rule of law in international relations, the UN promptly set out to codify and progressively develop international law to serve the aspirations and needs of the international community.

V. INTERNATIONAL LAW IN THE 'MIDDLE AGES': AN ARTIFACT TO SERVE EUROPEAN INTERESTS AND COLONIALISM

Development of the 'law of nations' was initially based on the principles of natural or moral law. Major interaction among States was limited to manage war which was a legitimate means to expand their borders and conduct trade, exchange of diplomatic or consular agents. Europe witnessed years of conflict between different States, with brief periods of peace as

[5] See Charter of the United Nations, Preamble, *available at*: http://www.un.org/en/sections/un-charter/un-charter-full-text/ (last visited on October 20, 2018).

[6] United Nations, Statute of the International Court of Justice, art. 36(2), *available at*: https://www.icj-cij.org/en/statute (last visited on October 20, 2018).

[7] See the Report of the Secretary General to the Security Council, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", Security Council doc. S/2004/616 (August 23, 2004) para. 6, p.no. 4.

interlude. Following the establishment of the Westphalia system of world order in 1648, international law in Europe was founded on more secular or positivist notions, and based on treaties and uniform and consistent practice accepted by States.[8] The European concept of international law, applicable only among the European powers constituting the privileged club of 'civilized nations' and a few others like Japan and Turkey they admitted to the club became the norm during the Middle Ages. Colonization and exploitation of Africa and Asia by the European Powers was the most dominating feature of the middle Ages, their main objective being to feed on the bountiful supply of raw materials of these continents to sustain their industrial revolution[9] and to capture markets for their international trade. Accordingly, not only the European Powers dominated and exploited the African and Asian continents but their conception of international law became the basis around which modern international law began to be build up. International law as we now know in international relations may be traced back to the "second-half of the Middle Ages", though as a "systematized body of rules it owes much to the Dutch Jurist Hugo Grotius, whose work, *De Jure Belli ac Pacis, libri iii*, appeared in 1625."[10] Its role was limited to regulate relations among States governing diplomatic and consular relations, international trade, law of war, law of treaties, general characteristics of States, and freedom of the high seas. The function of codification and progressive development was aided and assisted by two important professional international law institutions, the *Institut de Droit International*[11] and the International Law Association,[12] both established in 1873.

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[8] For a brief review of the history concerning the need for and attempts at a codified and progressively developed international law in promoting and defending rule of law in international relations, see Christiane Ahlborn and Bart L. Smit Duijzentkunst, "70 Years of the International Law Commission: Drawing a Balance for the Future"(May 3, 2018).The authors credit the thoughts and work of Bentham as the father of the movement on codification of international law and promoter of 'positive law':If Hugo Grotius is the "father" of international law, the progenitor of the codification movement is Jeremy Bentham (1748-1832). A lawyer, philosopher and social activist, Bentham strongly believed in the importance of positive law: "to be without a code is to be without justice", as he put it (*Letter to Daniel O'Connell, Works of Jeremy Bentham,* vol. X, p.no. 597). In his view, a comprehensive, written code would remove legal gaps and inconsistencies and make the law accessible to all. It would also guard against judge-made rules and – even worse in Bentham's eyes – natural law ("nonsense upon stilts") (*Anarchical Fallacies, Ibid,* vol. II, p.no. 501)).
Bentham's codification efforts extended to the international sphere. Like many later codifiers, he hoped that a set of written rules could prevent war and establish a lasting peace. His desire to rid international rules of the vestiges of natural law went so far that he proposed to replace the commonly used term "law of nations", which encompassed an array of moral principles, with a new term: "international law" (*An Introduction to the Principles of Morals and Legislation, Ibid.*,vol. I, p.no. iii*)*". *Available at*: https://www.ejiltalk.org/70-years-of-the-international-law-commission-drawing-a-balance-for-the-future/ (last visited on October 20, 2018).

[9] For a brief review on the stages of industrial revolution, see https://en.wikipedia.org/wiki/Fourth_Industrial_Revolution (last visited on October 20, 2018).

[10] Jennings and Watts (eds.), I *Oppenheim's International Law* 4 (Longman, 1991): Introduction and Part I. For a very comprehensive account of history surrounding the development of international law and for a very persuasive conclusion that 'what most international lawyers have called international law during the sixteenth to the eighteenth century was just one of many normative systems which existed in various regions of the world'. See OnumaYasuaki, "When was the Law of International Society was Born?- An Inquiry of History of International Law from an Intercivilizational Perspective" 2 *Journal of the History of International Law* 63 (2000).

[11] For the history and the work of the Institut de Droit International, and the resolutions it adopted on judicial review of Security Council Resolutions and on mass migration, provisional measures, human rights and private international law, at its latest Session of Hyderabad, India, from September 3-9, 2017, *available at*: http://www.idi-iil.org/en/ (last visited on October 20, 2018). Membership of this body is conferred on professional international law specialists by invitation from the Institut De Droit International, following election by the current membership.

[12] The work and programs of the International Law Association (ILA) is *available at*: http://www.ila-hq.org/. Membership can be sought by anyone interested in international law, for example national judges, advocates, professors, who could be part of national branches.

With the defeat of the Axis Powers (Germany, Italy and Japan), and the conclusion of World War II, a new world order emerged, symbolized by the UN. Maintenance of international peace and security was entrusted to the collective security system under the UN. Any decision of the Security Council composed of 15 members in this regarded required the consensus[13] among the five permanent Members, the USA, the Russian Federation (as the successor to the former Soviet Union), the United Kingdom and France and the People's Republic of China (taking over the UN seat as the sole legal China in 1971, since the adoption of the UN General Assembly Resolution 2758). The permanent membership and the power of veto accorded to the five powers was an inevitable price to be paid by the rest of the members of the UN for the creation of the UN, given their dominant role as part of Allied Powers in securing the defeat of the Axis Powers.[14]

VI. THE NEW WORLD ORDER: UN'S ROLE IN UNIVERSALISATION OF THE FOUNDATIONS OF INTERNATIONAL LAW

Accordingly, a major function of the UN has been the reorientation of the foundations of international law and enlarging its reach to cover different aspects of international relations. Significant achievements of the UN legislative process include the Declaration on Granting of Independence to Colonial Countries and Peoples,[15] recognizing the inalienable rights of States to permanent sovereignty over natural resources spelling out its implications for the right of newly independent States to expropriate foreign assets and determine the amount of possible compensation, and the obligation to settle disputes in this regard by peaceful means.[16]

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[13] Five powers were given the special privilege of veto over any enforcement powers of the Security Council as part of the UN Collective Security system. It is noted that "After much debate, the smaller and medium-sized nations succeeded in restricting the Big Five's use of the veto in the Security Council. Herbert V. Evatt, then deputy prime minister of Australia, who was in the forefront of that fight, declared: "In the end our persistence had some good effect. The Great Powers came to realize that the smaller powers would not accept a Charter unless certain minimum demands for restriction of the veto were accepted, viz., that there should be no veto upon the placing of items on the [Security Council] agenda and no veto on discussion [in the Security Council] …. If this vital concession had not been won, it is likely that discussion of matters in the open forum of the Security Council would have been rendered impossible: If so, the United Nations might well have broken up. "Another major change resulted from the desire of the smaller nations to give the world organization more responsibilities in social and economic matters and in colonial problems. Accordingly, the Economic and Social Council and the Trusteeship Council were given wider authority than was provided for in the Dumbarton Oaks draft, and they were made principal organs of the UN". *Available at*: https://www.nationsencyclopedia.com/United-Nations/The-Making-of-the-United-Nations-THE-SAN-FRANCISCO-CONFERENCE-25-APRIL-26-JUNE-1945 .html.

[14] Allied Powers consisted of China, the USSR, the UK, and the US together with 46 other States which declared war on the Axis powers (Germany, Italy and Japan). The Four powers, the USA, the U.K., the USSR and China also acted as the sponsoring Powers for the San Francisco Conference, attended by all 50 States which earlier signed a Declaration by United Nations of 1January 1942. It took two months for the UN Charter to be adopted unanimously onJune 26, 1945, involving some important changes in the draft agreement prepared earlier at Dumbarton Oaks meeting. For a brief account of the making of the United Nations, see https://www.nationsencyclopedia.com/United-Nations/The-Making-of-the-United-Nations-THE-SAN-FRANCISCO-CONFERENCE-25-APRIL-26-JUNE-1945.html.

[15] UN Resolution 1514 (XV) of December 14, 1960.

[16] UN Resolution on *Permanent Sovereignty Over Natural Resources* 1803 (XVII) of December 14, 1962; 2158 (XXI) of November 25, 1966; 2386 (XXIII) of November 19, 1968; 2625(XXV) of October 24, 1970; 2692 (XXV) of December 11, 1970; 3016 (XXVII) of March 21, 1973; and 3171 (XXVIII) of December 17, 1973. On the background and importance of this set of resolutions setting out the "concept economic self-determination", see Ian Brownlie, *Principles of Public International Law* 516 (Oxford University Press, 2003).

The adoption of the Universal Declaration of Human Rights[17] followed by the conclusion of the two international covenants, one on political and civil rights (1967)[18] and the other on economic or social rights (1966)[19] provided a basic framework for developing international standards for the protection of human rights in the national and international affairs. The UN also took some early and historic steps in reserving the frontier areas, like the outer space and the deep oceans, exclusively for peaceful purposes. It also prohibited national appropriation of these frontier areas by claims of sovereignty on the basis of claims of occupation or use or by other means. The conclusion of the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies,[20] following the example of the 1959 Antarctica treaty,[21] which earlier reserved access to Antarctica only for peaceful purposes, freezing national claims of sovereignty, greatly contributed to consolidate the interests of the international community, distinct from national interests based on sovereignty. The Declaration of Principles governing seabed and the ocean floor and subsoil thereof beyond the limits of national jurisdiction as the common heritage of mankind and the creation of the International Seabed Authority under the 1982 UN Convention on the Law of the Sea has further strengthened the identity of the international community and enlarged the sphere of the rule of law,[22] The 1970 UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States[23] and the adoption of the definition of aggression,[24] and other UN declarations, adopted with near unanimity constitute a new basic structure of the now well-established global rule of law.

VII. ROLE OF THE ASIAN- AFRICAN STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW

The UN membership by 1960s was largely composed of a vast majority of countries which emerged from the yoke of colonialism. They contributed to the process of development of international law with great unity and common purpose. The Bandung Conference and the creation of the Asian-African Legal Consultative Committee in 1958 with headquarters in New Delhi, India provided a forum for the legal advisors of the Asian-African States to come together to forge common positions on the various subjects or declarations of international law reflecting their interest as equal and sovereign States in the world order. As members of the non-aligned movement they succeeded to bring out great changes in field of trade, commerce and economic development. As Group of 77, a negotiating group of developing countries, actually numbering about 100 and more countries, succeeded in fashioning a new constitution for the oceans that takes into account not only the legitimate interests of all

[17] UN GA Resolution 217 A (III) of December 10, 1948.

[18] UN GA like the outer space and the deep oceans exclusively for peaceful purposes. Resolution 2200 (XXI) of December 16, 1966.

[19] UN GA Resolution 2200 (XXI) of December 16, 1966.

[20] *UN Treaties and Principles on Outer Space*: Text of treaties and principles governing the activities of States in the exploration and use of outer space, adopted by the United Nations General Assembly 3-8 (UN, New York, 2002).

[21] For the text of the 1959 Antarctica Treaty, See https://www.ats.aq/documents/keydocs/vol_1/vol1_2_AT_Antarctic_Treaty_e.pdf (last visited on October, 2018).

[22] UN Resolution 2749 (XXV) of December 17, 1970. For a discussion on the resolution, see P. Sreenivasa Rao, *The Public Order of the Ocean Resources* 84-88 (MIT Press, 1975). For the text of the UN Convention on the Law of the Sea, 1982, Part XI in particular, *available at*: http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf (last visited on October 20, 2018).

[23] UN GA Resolution 2625 (XXV) of October 24, 1970.

[24] UN GA Resolution 3314 (XXIX), of December 14, 1974.

seafaring nations but also the interests of developing countries in ensuring a fair and equitable share of the benefits arising from the exploration and exploitation of the resources of the sea.[25] The 1982 Convention on the Law of the Sea is perhaps the last most advanced and comprehensive global compact that took care of both the exclusive interests of the States and their inclusive interests as well to develop a regime of global governance under international rule of law. Their long fight to achieve a new international economic order and getting universal support for a right to development was however remained largely unfulfilled.

One hallmark of the universal rule of law is its success to a great extent in weaning away the development of international law from its 'Eurocentrism'. Some positive features of the evolving rule of law are: value attached to the practices of all 'peace-loving nations', as opposed to only those of the self-styled 'civilized nations' in the development of customary international law, rejection of the concept of *terra nullius*, which denied the rights of native tribes and indigenous population over territories they traditionally inhabited, outlawing 'unjust, unequal or unfair treaties', signaling the demise of traditional colonialism.[26] This marked progress towards the establishment of rule of law at the global level is notable, even if the world order is still best by power politics, super-power hegemony over politically and economically weaker States, operation of spheres of influence, and imbalances in international trade, and denial of human dignity and equal opportunity to millions of poor and impoverished people across and within States.

VIII. THE RULE OF LAW: A SOURCE OF HUMAN DIGNITY AND POLITICAL AND ECONOMIC SELF-DETERMINATION

Similarly, thanks to the UN and many specialized agencies that work in tandem with the UN, the economic, social and cultural goals of the world order are constantly addressed creating ever widening network of universally applicable legal rights and obligations. Fields covered in this regard include conservation of Antarctic marine living resources, international trade in endangered species of wild fauna and flora, long-range transboundary air pollution, regulation of whaling, climate change, and Sustainable Development Goals as part of 2030 Agenda for sustainable development (consisting of 17 goals and 169 associated targets) building upon the earlier Millennium development goals.[27]

The world community has also come a long way in establishing international standards building upon the Universal Declaration of Human Rights and as part of promotion and implementation of the International Covenants on political and civil rights on the one hand and the economic, social and cultural rights on the other, along with a host of other conventions addressing slavery, elimination of all forms of racial discrimination, elimination of all forms of discrimination against women, torture, rights of children, and protection of the rights of all migrant workers and members of their families.[28] By now several principles

[25] See the statement of the President of the Third UN Conference on the Law of the Sea, Ambassador Tommy T.B. Koh of Singapore, "A Constitution for the Oceans" in *International Seabed Authority, The Law of the Sea: Compendium of Basic Documents* lx-lxiv (International Seabed Authority, Caribbean Law Publishing Company, Kingston, Jamaica, 2001).

[26] For these and other developments in international law disengaging it from its colonial foundations, see Abdulqawi A. Yusuf, *Pan-Africanism and International Law* 102-114 (Pocketbooks of the Hague Academy of International Law, 2014), generally Ch.2 and 3.

[27] Many of the themes mentioned are analysed outlining the contribution of the UN and its specialized agencies in short and recent monograph, Nico Schrijver, *Development without Destruction: The UN and Global Resource Management* (Indiana University Press, Bloomington, Indiana, 2010).

[28] For a list of various core international human rights instruments, see https://www.unfpa.org/resources/core-international-human-rights-instruments. See Abdulrahim P. Vijapur, "No Distant Millennium: The UN Human

setting out international human rights standards have been recognized as having achieved the status of customary international law. The International human right norms are increasingly invoked by domestic or municipal courts: in cases involving the interpretation of ambiguous statutes and, possibly, in the review of administrative action. As John Dugard, an authority on international human rights law, noted that the:

> "municipal courts of states that have signed or ratified, but have not incorporated, human rights conventions such as the European Convention on Human Rights or the International Covenant on Civil and Political Rights, may prefer to use these treaty obligations as a guide to the interpretation of statutes—rather than the less precise principles of customary international law".[29]

He suggested further that:

> "a municipal court, faced with lacunae in its own common law in the field of fundamental rights is entitled to enlist the aid of treaties reflecting generally recognized rights, either on the ground that these rights have become part of customary international law or because they provide evidence of widely accepted principles of law, worthy of incorporation into a fertile common law."[30]

IX. THE WORK OF THE INTERNATIONAL LAW COMMISSION: ENLARGING THE SPHERE OF RULE OF LAW

The work of the UN and declarations adopted by the General Assembly provided further strength to the work of the International Law Commission which was created in 1949 under Article 13 of the UN Charter. Together the ILC and the ICJ rendered valuable service to the process of universalization of the foundations of international law and enlarging its sphere of operation in international relations. Thanks to the work of the ILC, several landmark international conventions dealing with the law of the sea, law of treaties, succession of States, relations and treaties between States and International Organizations and between international organizations, diplomatic and consular relations, crimes against internationally protected persons, non-navigational uses of international watercourses, and on jurisdictional immunities of States and their Property were concluded. Most of these treaties codified and progressively developed international law, and are considered as reflecting customary international law in respect of many substantive provisions they incorporated, if not in totality. The concept of *jus cogens*[31] or the peremptory norms came to be recognized as part

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Rights Instruments and The Problem of Domestic Jurisdiction" in M.S. Rajan, *The United Nations at Fifty and Beyond* 103-122 (Under the auspices of the Indian Society of International Law, Lancer Publishers, New Delhi, 1996), for a brief exposition on this matter.

[29] John Dugard, "The Application Of Customary International Law Affecting Human Rights By National Tribunals", Proceedings of the American Society of International Law Annual Meeting, vol. 76 (1982), p.no. 246-247. Judge Dugard noted some of the human rights norms that are regarded as part of customary international law: "the right not to be discriminated against on grounds of race; freedom from torture; and freedom from arbitrary imprisonment". Furthermore, he suggested that, there are other, "long-recognized, customary rules not generated by modern human rights conventions, that may be utilized to secure a benevolent statutory interpretation in favor of human rights; for example, the rule that the police of one state may not exercise their powers of arrest in another state has often been invoked to obstruct the abduction of political refugees". *Id.* at 247.

[30] *Id.* at 251.

[31] The ICJ in its advisory opinion on the legality of the threat or use of nuclear weapons noted that the "question whether a norm is part of the *jus cogens* relates to the legal character of the norm". See I.C.J. 1996, p.no. 226, para. 83.

of the new law of treaties, prohibiting any treating commitments or acts of State in derogation of such norms. Reservations and declarations made concerned mostly with the method and means of compulsory settlement of disputes on the application and interpretation of their provisions.

The work of the ILC in the field of international criminal law and jurisdiction, following the Nuremberg and Tokyo trials, and in developing a draft code of international crimes is also noteworthy. The Rome Statute on the establishment of the International Criminal Court adopted on July 17, 1998, which entered into force on July 01, 2002, was based on a draft prepared and finalised by the ILC in 1994. The International Criminal Court and several other ad hoc or special criminal tribunals established by or in consultation with the United Nations serve a major objective of the rule of law in international relations, that is denying impunity to perpetrators of crimes and restoring dignity of and providing justice to victims of grave crimes, such as genocide, crimes against humanity, war crimes including rape as a war crime. The work of these tribunals is complimented by the exercise of universal jurisdiction in a select few cases and under specified conditions "made a global contribution by developing a rich jurisprudence in the area of international criminal law, thereby expanding and reinvigorating this key pillar of the international legal regime."[32] In the process, "they reflect a growing shift in the international community, away from a tolerance for impunity and amnesty and towards the creation of an international rule of law. Despite their limitations and imperfections, international and hybrid criminal tribunals have changed the character of international justice and enhanced the global character of the rule of law."[33]

In addition, the ILC during the last 70 years of its work was able to finalize declarations, recommendations or draft Articles on a variety of important subjects. For example, we may note its work on State responsibility, diplomatic protection and liability for transboundary harm involving hazardous activities, otherwise considered as not wrongful, issues concerning nationality of natural persons in relation to State succession, unilateral acts, fragmentation of international law, transboundary acquifers, reservations to treaties and responsibility of international organizations, and the effects of armed conflicts on treaties. More recently it completed draft Articles on Expulsion of Aliens (2014), finalized its study report on the most favored nations clause (2015), draft Articles on protection of persons in the event of disasters (2016),Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries (2018); and Draft conclusions on identification of customary international law, with commentaries (2018).

The topics thus finalized by the ILC with draft Articles and recommendations, with some of them awaiting adoption as international treaties or conventions, have since entered the stream of international law decision-making both as a matter of inter-State discourse and as elements constituting the judgments and awards of international tribunals.

Currently, the ILC is considering topics on: Crimes against humanity; immunity of State officials from foreign criminal jurisdiction; provisional application of treaties; protection of the environment in relation to armed conflicts; protection of the atmosphere; peremptory norms of general international law (*jus cogens*); Succession of States in respect of State responsibility and general principles of law.

[32] See for an analysis of the role of international criminal tribunals in advancing the cause of global rule of law, the Report of the Secretary General to the Security Council on "The rule of law and transitional justice in conflict and post-conflict societies, *supra* note 4 at 14, para. 41.
[33] *Id*., para. 40.

X. THE INTERNATIONAL COURT OF JUSTICE: SAFEGUARDING THE RULE OF LAW

The contribution of the International Court of Justice to the rule of law in international relations is valuable for the peaceful settlement of disputes between States, an important objective of the UN and an essential means to maintain international peace and security. The function of the Court to contribute to the maintenance of international peace and security becomes much more enhanced in times or in cases where the Security Council is unable to take action for lack of consensus among its permanent members.[34]By its work the ICJ showed time again that no matter how complex a political dispute is, it is competent to deal with them on the basis of international law.[35] For one thing, the Advisory Opinion on the Reparation for Injuries suffered in the service of the United Nations,[36] established that the UN has a legal personality of its own, distinct from its member States under international law. Second, it declared that under international law the UN "must be deemed to those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."[37]

The significance of the findings of the Court lies in establishing the Charter as a dynamic instrument, a living document possessing the characteristics of a constitutional instrument constantly evolving to meet the challenges of an ever changing world order. It thus identified and specified the powers of the General Assembly, the plenary organ of the UN, to address urgent matters concerning the maintenance of international peace and security, particularly when the Security Council is blocked from taking any action in pursuance of its primary responsibility because of veto. The Court thus paved the way for the UN to engage in peace-keeping, peace-making and peace building operations,[38] distinguished from peace enforcement operations, to become standard features of the UN in field of maintenance of international peace and security.[39]

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[34] The Nicaragua case between Nicaragua and the USA was one of the most telling examples. Most recently, the State of Palestine filed a complaint against the USA in respect of the latter's decision to move its Embassy in Israel to Jerusalem on the ground that it violated its rights under the Vienna Convention on Diplomatic Relations of April 18, 1961. For this purpose the State of Palestine deposited a "Declaration Recognizing the Competence of the International Court of Justice" on July 04, 2018 accepting "with immediate effect the competence of the International Court of Justice for the settlement of all disputes that may arise or that have already arisen covered by the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes, 1961, art. I, to which the State of Palestine acceded on March 22, 2018". See the Order of the ICJ of November 15, 2018, https://icj-cij.org/files/case-related/176/176-20181115-ORD-01-00-EN.pdf. The US decision in this case could also be questioned on the ground that it is in violation of the United Nations 1967 resolution, which asks Israel to vacate all the occupied territories of Palestine and work toward building peace in the region.

[35] For a short but a succinct discussion on the role and procedures of the ICJ in promoting rule of law and peaceful settlement of disputes, A Dialogue at the Court, Proceedings of the ICJ/UNITAR Colloquium held on the occasion of the Sixtieth Anniversary of the International Court of Justice at the Peace Palace on April 10 and 11, 2006 (UNITAR, UN Sales No.918).

[36] I.C.J. Reports, 1947, p.no. 174.

[37] See *Id*. at 182. For a review of the contribution of the ICJ to the effective functioning and enlarging the membership of the UN, see Shabtai Rosenne, "The Contribution of the International Court of Justice to the United Nations" in M.S. Rajan (ed.), *supra* note 28 at 131. See also Ian Brownlie, *supra* note 16 at 657.

[38] On peacekeeping operations and observer missions, the differences between peacekeeping operations on the one hand and preventive diplomacy, peacemaking, peacebuilding and on, peace enforcement on the other and for some notable citations on these matters, see M. N. Shaw, *International Law* 1100-1118 (Cambridge University Press, 5th edn., 2003).

[39] There are currently 15 peacekeeping operations and one special political mission – the United Nations Assistance Mission in Afghanistan (UNAMA). As for the special UN mission in Afghanistan, it is a political mission, mandated by the Security Council in 2002 to help Afghanistan in laying the foundations for sustainable peace and development in the country. On March 17, 2014, the 15-member UN Security Council unanimously adopted resolution 2145 (2014) renewing the mandate of the United Nations Assistance Mission in Afghanistan

The recognition of UN's legal personality paved the way for it to assume a variety of powers and functions over the years, which we now take as granted and inherent in its capacity, such as: conclusion of treaties, enjoying privileges and immunities, capacity to espouse international claims, functional protection of agents and associated persons, bear international responsibility for its acts or of its agents, such as peacekeeping or technical assistance or authorization of the use of force, and administration of territories.[40]

The Court in the Barcelona Traction case (second phase) (Belgium/Spain),[41] introduced for the first time into the discourse of international law the concept of *erga omnes* obligations. These are obligations, according to the Court, a State owes to the international community as a whole, as opposed to obligations it owes to any other State in the field of diplomatic protection, which it noted "are neither absolute nor unqualified."[42] The Court noted that:

> "In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes.*"[43]

"Such obligations", it added, "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and

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(UNAMA) and set out the scope and range of activities it must undertake over the coming 12 months, as Afghanistan continues its political and security transition. Overall, the resolution calls for UNAMA, led by the Secretary-General's Special Representative, JánKubiš, to continue leading and coordinating international civilian efforts in assisting the South Asian nation with its transition – within the mandate and guided by the principle of reinforcing Afghan sovereignty, leadership and ownership.

In all, the UN was engaged in nearly 56 peace-keeping operations over the years. The approved budget for UN Peacekeeping operations for the fiscal year July 01, 2013 to June 30, 2014 is about $7.83 billion.

See UNGA document, A/C.5/68/21. By way of comparison, this is less than half of one per cent of world military expenditures (estimated at $1,753 billion in 2012). The top 10 providers of assessed contributions to United Nations Peacekeeping operations in 2013 [A/67/224/Add.1] are: United States (28.38%), Japan (10.83%), France (7.22%), Germany (7.14%), United Kingdom (6.68%), China (6.64%), Italy (4.45%), Russian Federation (3.15%), Canada (2.98%), and Spain (2.97%). Many countries have also voluntarily made additional resources available to support UN Peacekeeping efforts on a non-reimbursable basis in the form of transportation, supplies, personnel and financial contributions above and beyond their assessed share of peacekeeping costs. For details see the UN website on peace-keeping operations.

[40] Ian Brownlie, *supra* note 16 at 651-656. Brownlie referred to the attributes of legal personality of international organizations: "1. a permanent association of states, with lawful objects, equipped with organs; 2. a distinction in terms of legal powers and purposes, between the organization and its member states; 3. the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states" (p.no.649). While several international organizations are thus conferred under their constituent instruments an international legal personality, there could be differences in "their particular capacities" in respect of its relations to members, third states, and other organizations. Moreover, it is the constituent instrument of an international organization that determines the nature of powers it possesses, whether expressly stated or implied in it, to perform a variety of functions (p.no.650, 651).

[41] *Barcelona Traction, Light and Power Company, Limited, Judgment*, I.C.J. Reports 1970, at 3.

[42] *Id*. at 32, para.33.

[43] *Ibid*.

Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p.no. 23); others are conferred by international instruments of a universal or quasi-universal character."[44]

The Court thus contributed to the emergence of *erga omnes* obligations in international law and in doing so, as the President of the Court noted "it enabled all States parties to multilateral conventions containing such obligations to serve as guardians of the compliance with those rules."[45]

The development of the law concerning the peremptory norms and individual and State responsibility associated with its violations achieved further strength following the adoption Articles 40 and 41 in Chapter III by the ILC of the draft Articles on State responsibility in its second reading in 2001.[46]

The Court's contribution to the world order is significant in an area in which the interests of the international community as a whole have been seeking recognition in law since 1969 as distinct from the interests of States and even the interests of the 'international community of States'. The interests of the 'international community as a whole' now could be said to encompass the interests of States, international organizations, and institutions like the ICRC which is the trustee of the promotion and implementation of the international humanitarian law.[47]

The Advisory Opinion on the Legality of threat or use by a State of nuclear weapons, of July 08, 1996,[48] made some important observations on the matter: *First*, it noted that there is no specific authorization in international law for the threat or use of nuclear weapon.[49] However it is of the view that the " emergence, as *lexlata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinion juris* on the one hand, and the still strong adherence to the practice of deterrence on the other."[50].*Second*, it affirmed that threat or use of nuclear weapon

[44]*Id*., para. 34. This was a case which was mainly concerned with the right of Belgium to sponsor by way of diplomatic protection the claims of its nationals in respect of damage or injury they suffered, at the instance of Spain, as shareholders of the company registered in Canada. The Court rejected the right of Belgium in this regard, noting that it was for Canada to take the necessary action.

[45] See the Statement of the President of the ICJ of November 09, 2018, para.12, *available at*:https://icj-cij.org/files/press-releases/0/000-20181109-PRE-01-00-EN.pdf (last visited November 20, 2018).

[46] See James Crawford, *The International Law Commission's Articles on State Responsibility*35-38 (2002). See also James Crawford, Jacqueline Peel, *et.al.*, "The ILC's Articles on the Responsibility of States for Internationally Wrongful Acts: The Completion of the Second Reading" 12(5) *European Journal of International Law*963-991 (2001). On the relationship between peremptory norms (*jus cogens*) and obligations to the international community as a whole (*erga omnes*), see M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon Press, Oxford, 1997). See also, the work of the *Institut de Droit International* on "Obligations and Rights Erga Omnes in International Law" and "the First and Second Reports of Giorgio Gaja as Rapporteur" and the comments of members, Annuaire De L'Institut de Droit International, Session de Cracovie, vol. 71-I (2005), p.no. 117-212. For a discussion on the question whether States have a duty under international law to ensure compliance with obligations ErgaOmnes by other States, see Pemmaraju Sreenivasa Rao, " The Concept of International Community in International Law: Theory and Reality" in I. Bufford et.al (ed.,) *International Law between Universalism and Fragmentation: Festschrift in honor of Gerhard Hafner* 94, 95 (2008).

[47] See Crawford, Peel and Olleson, *Id*. at 973. Reference to the 'international community', however does not mean, according to the authors, that there is a legal person. It only means "that there is only one international community to which all States belong but that it is no longer limited to States (if ever it was)" .

[48]I.C.J. Reports 1996, p.no. 226.

[49]*Id*., para. 52.

[50]*Id.*, para. 73.

not in conformity with Article 2(4) and the requirements of Article 51 as unlawful. *Third*, even where it is considered lawful, the threat or use of nuclear weapons must be compatible with the requirements of international humanitarian law,[51] adding however that, in view of "the unique characteristics of nuclear weapons … the use of such weapons in fact seems scarcely reconcilable with respect for such requirements."[52] The Court nevertheless stopped short of pronouncing on the illegality of the threat or use of weapons, noting that "in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake."[53]

For all the disappointment it caused to all those who actively work for a nuclear-free world, the opinion of the Court, an apt example of judicial caution, is not without its blessings and benefits. First it is now clear that the threat or use of nuclear weapons is not above rule of law in the world order and any such threat or use should respect and be in conformity with applicable principles of international environmental law,[54] in addition to the principles governing the use of force and right of self-defence laid down in Articles 2(4) and 51 of the UN Charter and the law governing international armed conflict including international humanitarian law.[55]Second, it emphasized that there was an obligation on the part of nuclear weapon States to pursue in good faith and to conclude negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.[56] It may be noted that Issues concerning the good faith obligations in this regard indeed were recently raised, albeit unsuccessfully,[57] in an application filed by the Marshall Islands against the U.K,[58] India,[59] and Pakistan.[60]

The survey of some limited case law and advisory opinions of the Court reveals that it has exercised its jurisdiction with dynamism and pronounced on matters of crucial importance to world order without undermining its own credibility and future promise.[61]It is discharging its role as the principal legal organ of the UN with great success and asserted itself even on politically sensitive issues. It contributed to enlarge the competence of the General Assembly and the UN through creative interpretation of the provisions of the Charter. It pronounced on issues as fundamental as use of force and self-defence in the context of acts of non-State actors, the principle of non-intervention distinguishing it form general aid and assistance. Even on the issue of the legality of the nuclear weapons, it reiterated several settled principles. It came close but stopped short of pronouncing in favor

[51] For an elaboration of the applicable principles of international humanitarian law, see *Id.*, para. 78-84.
[52]*Id.*, para. 95.
[53]*Id.*,para. 97.
[54]*Id.*, para. 33.
[55]*Id.*, para. 42.
[56] For a reference in this connection to the Treaties, such as the Treaty on the Non-Proliferation of Nuclear Weapons, as well as Security Council resolutions 255 (1968) and 984 (1995), see *Id.*, para. 61.
[57] According to the Court, "no dispute existed between the Parties prior to the filing of the Application, and consequently it lacks jurisdiction to consider these questions".
[58] I.C.J. Reports 2016, p.no. 833.
[59] I.C.J. Reports 2016, p.no. 255.
[60] I.C.J. Reports 2016, p.no. 552.
[61] Only once in the 60s the Court did not live up to the expectations of developing third world countries when it refused to rule upon the violation of the League of Nations mandate by the then South African government. See P. Sreenivasa Rao, "The South-West Africa Cases"6 *Africa Quarterly*236-253(1967). With the result the Court had a sparse case load during 1960-78. The tide again got turned with Niacaragua succeeding in establishing the jurisdiction of the Court in its case against the USA in 1980s when it succeeded in getting some declaratory judgments in its favor.

of prohibition of nuclear weapons only in deference to the current political realities. It thus hinted that certain problems are better solved elsewhere than taking recourse judicial forums.[62]

XI. INTERNATIONAL TRADE AND RULE OF LAW WITH WTO AS THE PIVOT

Contemporary trends in international relations are significantly characterized by the globalization of trade, digital and information technology, increasing spheres of regional economic and political unions as well as security arrangements following the example of the European Union and the NATO. Since 1991, with breaking up of the former Soviet Union and the ending of the cold war that gripped international relations since 1945, the world order controlled by a select few super-powers gave way to a multi-polar world. The global economy also got diversified with several emerging economies playing an important role in the world economy along with the US, West Europe and other States as well as Japan, with China and India occupying a pre-eminent role in the process.

The World Trade Organization (WTO), established since 1995, built on the earlier global arrangement on trade and tariffs, known as the 1947 General Agreement on Trade and Tariffs (GATT), occupies a central role in regulating international trade, with a compulsory settlement of disputes mechanism settling hundreds of trade disputes.[63]The WTO agreements[64] are based on some basic principles: non- discrimination, lowering trade barriers, providing for a stable, predictable and transparent legal regime to govern international trade, discouraging unfair practices, according greater flexibility and special privileges to developing countries and countries in transition to market economies, and protection of environment. In sum, these WTO agreements are aimed at promoting free trade and discouraging protectionist policies or measures, with a view to let consumers enjoy the benefits of competition, such as increased choice and lower prices.

The dispute settlement mechanism of the WTO was built upon the principles and procedures which were evolved informally but on the basis of the principle of consensus during the operation of the 1947 GATT arrangement for over 50 years since 1948. This system though made useful contribution to the settlement of trade disputes between States was not strictly a rule based system and avoided dealing with politically sensitive issues like unilateral sanctions or adopting panel reports that might be politically unacceptable.[65]The

[62] In this the Court appear to have followed the wise observation of Jennings: "It is important to appreciate that there are large and important areas of international relations where what is wanted is not a decision based on law, but a decision based upon political wisdom, or even expediency, and the lessons of political and administrative experience". See Connie Peck and Roy S. Lee (eds.), *Increasing the effectiveness of the International Court of Justice*, Proceedings of the ICJ/UNITAR Colloquium to celebrate the 50th Anniversary of the International Court of Justice 78 (Martinus Nizhoff, 1997).

[63] For a summary of 316 disputes settled by GATT during the period between 1948 to 1995, see World Trade Organization, GATT disputes: 1948-1995,vol. 1: Overview and one-page case summaries. www.wto.org/GATTdisputes. According the WTO Annual Report for 2018,dispute settlement activity intensified in 2017, with the monthly average of panel, appellate and arbitration proceedings increasing to 38.5 compared with 32.3 in 2017. The WTO currently has 164 members, representing 98 per cent of world trade.

[64] These agreements include the General Agreement on Tariffs and Trade 1994, the Anti-Dumping Agreement, the Subsidies and Countervailing Measures Agreement, the Safeguards Agreement, the Sanitary and Phytosanitary Measures Agreement, the Technical Barriers to Trade Agreement, the General Agreement on Trade in Services, the Trade-related Aspects of Intellectual Property Rights Agreement and the Agreement on Agriculture.

[65] It may be recalled that the 1947 GATT arrangement did not provide for a detailed dispute settlement procedure, as it was not conceived as an international organization. Instead, it contained only two brief provisions relating to dispute settlement: art. XXII and XXIII. Under this system, a dispute, which parties failed

Dispute Settlement Understanding adopted at the Uruguay Round of Negotiations remedied the situation by providing for:

> "(1) the quasi-automatic adoption of requests for the establishment of a panel, of dispute settlement reports and of requests for the authorization to suspend concessions; (2) the strict timeframes for various stages of the dispute settlement process; and (3) the possibility of appellate review of panel reports. The latter innovation is closely linked to the quasi-automatic adoption of panel reports and reflects the concern of Members to ensure high-quality panel reports."[66]

The DSU and its ability to resolve scores of disputes essentially on the basis of consultations, good offices and mediation and conciliation procedures, combined with political and pragmatic considerations, without however compromising in the final analysis on the legal rights and obligations States parties enjoy under the WTO Agreement is truly a jewel in the crown of the WTO system from the perspective of rule of law in international trade relations.[67]

XII. FOREIGN DIRECT INVESTMENTS AND INVESTOR-STATE ARBITRATION IN A GLOBALIZED WORLD

Simultaneously, globalization also encouraged foreign direct investment. Both developed and developing countries attach high value to FDIs as one of the primary driver their economic growth. While developing countries during the early post- colonial phase depended on expropriation of foreign assets as a tool to nationalize their assets, they soon realized the value of FDIs and transfer technology as essential for their long-term growth. Several bilateral or multilateral investment treaties and regimes now provide a basis for investments and the settlement of disputes between host States and foreign investors through international arbitral proceedings.[68]The Convention on Settlement of Investment Disputes concluded under the auspices of the World Bank, in force since October 14, 1966 and operated by the International Center for Settlement of Disputes is one such mechanism.

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to resolve through consultations, was in the early years of the GATT "handled" by working parties set up pursuant to art. XXIII:2. These working parties consisted of representatives of all interested Contracting Parties, including the parties to the dispute, and made decisions on the basis of consensus. The practice of settling disputes was soon replaced by a panel system whereby disputes are handled first by three to five experts chosen from GATT Contracting Parties not involved in the dispute. Panel reports and recommendations were then submitted to the GATT council consisting of all the members and would have to be adopted by consensus for them to be legally binding.

The major drawback of the 1947 GATT system of settlement of dispute was that the decision on the establishment of a panel, the decision on the adoption of the panel report and the decision to authorize the suspension of concessions were to be taken by the GATT Council by consensus. Accordingly, panels were often tempted to arrive at a conclusion that would be acceptable to all parties, whether that conclusion was legally sound and convincing or not. For an analysis of the 1947 GATT system of settlement of disputes, see UNCTAD, Dispute Settlement: World Trade Organization, 3.1 Overview (UN, 2003), UNCTAD/EDM/Misc.232/Add.11, p.no.39-54.

[66]See *Id*. at 41.

[67] For the reference to the DSU as the crown jewel in the WTO system, see A.K. Koul, *The General Agreement on Tariffs and Trade (GATT)/World Trade Organization (WTO): Law, Economics and Politics*45 (Satyam Books, Delhi, 2005).

[68] The traditional methods of settlement of disputes in the case of foreign investors through diplomatic protection or through recourse to domestic forums of the host State, the normal mode available were considered unsatisfactory. For an examination of the different methods of settlement of investment disputes, see Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International BV, The Netherlands, 2009).

Beginning with the *Maffezini* case (*Argentina* v. *Spain*)[69] bilateral investment treaties concluded between two States to promote and protect investment made in the territory one party by the nationals of the other party also are invoked as a basis for foreign investors to sue the host State for any claims concerning their investment. The jurisdiction of the arbitral tribunal which is often at issue was in most of these cases settled over the objections of the host State through a liberal interpretation of the clauses of the treaty, particularly the most favored nation treatment. The tribunals also enlarged the scope of protection in favor of the foreign investors by interpreting key concepts like, 'investor', 'investment' and the umbrella clauses dealing with the national treatment and most-favourednation treatment principles, the meaning and extent of fair and equitable treatment.[70]

This mode of investor-State arbitration has since been the subject of intense review by several developing countries, which in the main, are hosts to foreign investors and their investments.[71] From the perspective of rule of law, it is also important to reconcile the protection of foreign direct investments with the public policy objectives of the host State to protect the rights of their indigenous population, environment, and scarce resources. Given the lack of human and financial resources needed on the part of the developing countries to adequately "navigate"within the investor-State dispute settlement system, due to lack human, financial and technical expertise, it is also necessary for the international community to provide necessary help to promote capacity building. Towards this end, "Strengthening international institutional capacities to help developing countries manage better investor-State disputes could provide an additional, and probably cost-effective, option in this area."[72]

XIII. GLOBALIZATION AND MULTILATERALISM UNDER ATTACK: THE RULE OF LAW IN JEOPARDY

The global economic melt-down that occurred in 2008 was a wake-up call on the ill effects of globalization, raising "important questions about our global-governance architecture". It is suggested that in today's world, where "the challenges associated with the Fourth Industrial Revolution (4IR) are coinciding with rapid emergence of ecological constraints, the advent of an increasingly multipolar international order and rising inequality"; and 'globalization 4.0' which has only just begun requires us to "draft a blueprint for a shared global-governance architecture" and "avoid becoming mired in the current moment of crisis management."[73]

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[69] See for analysis of the case and its significance for the issue of jurisdiction of the international arbitral tribunals as well as for enlargement of the scope of obligations of the host State under the agreement, see UNCTAD, "Investor-State Disputes Arising From Investment Treaties: A Review", UNCTAD Series on International Investment Policies for Development, United Nations 35-37 (New York and Geneva, 2005).

[70] For a review of the investment treaties and related procedural and substantive issues, see *Id.*, chap. I and II.

[71] For example, India and many countries have been engaged in a review of their policy in this regard: Prabhash Ranjan, "National Contestation of International Investment Law and the International Rule of Law" in Machiko Kanetake and André Nollkaemper (eds.), *The Rule of Law at the National and International Levels: Contestations and Deference*115-142 (Hart Publishing, 2016), ch.5.

[72] See UNCTAD, "Investor-State Disputes Arising From Investment Treaties: A Review", note 24, p.no. 61.

[73]See Klaus Schwab, "Grappling with globalization 4.0", *Gulf Times* (Doha, Qatar), Nov. 13, 2018, p.no. 22.Klaus Schwab, founder and executive Chairman of the World Economic Forum notes that it is important to clearly distinguish between "globalization" and globalism": "Globalization is a phenomenon driven by technology and the movement of ideas, people and goods. Globalism is an ideology that prioritizes the neoliberal global world order over national interests". The former, he suggests, is a fact we have to accept and the latter is a debatable policy choice.

Added to the demands raised by globalization, is the increased flow of refugees, not merely the political refugees, seeking to escape from the armed internal conflicts and economic crises that are gripping large parts of Asia, Africa, and the Latin America. The problem of migration and migrants is today one of the most complex issue faced by the world order. A new class of political activists referred to as 'extreme rightists', demand closing off economies through protectionism and 'nationalists'[74]politics, besides opposing migration and migrants from Asia, Africa and the Latin America. These trends have now succeeded in putting the much cherished values like pluralism, inclusiveness and humanism and the liberal regimes based on them in jeopardy.

Several factors are responsible for this new trend. They include among others: the controversial policies and trade wars the Trump administration is credited with,[75]carried

[74] Nationalism or patriotism is a positive sentiment. However, 'nationalists' sentiment represents altogether a different ideology and sentiment. It aims at negating the reality of globalization and dismembering global economic and political institutions, like the European Union. Nationalists oppose "two strains of internationalism" that Bannon and his allies want to do: "one of the liberal center-right and the other of the liberal center-left". Steve Bannon of the USA is credited with being "the key theoretician of US President Donald Trump's signature brand of nationalism'. See Kemal Dervis and Caroline Conroy, "Nationalists of the world, Unite", *Gulf Times* (Doha, Qatar), Monday, Nov. 26, 2018. This short note compares the current trend to build a federation of nationalist parties with the earlier historic attempt to forge socialist internationalism or global communism, which was firmly rooted in classical Marxism, at the beginning of the last century. Noting that the earlier attempt failed eventually given the force and appeal of market economy embraced by the West and other emerging economies including China, a "nominally communist country, it is suggested that this latest attempt to forge a "neo-nationalist international', an international alliance of the right wing nationalists would also fail because on the face of it 'nationalist internationalism' is an "oxymoron". The authors of this note are Fellows at the Brookings Institution, Washington, D.C. Mr. Dervis was a former Minister for Economic Affairs of Turkey and a former Administrator of the United Nations Development Program (UNDP).

[75] Trump upon his election as the President of the USA decided unilaterally to with draw the US from the Joint Comprehensive Action plan (JCPOA), otherwise known as the 2015 Iran Nuclear Deal, negotiated painstakingly by the Obama administration in cooperation with the EU, Russia and China freezing Iran's nuclear program for ten years, as a first step to settle several other issues including the issue concerning support to non-State actors and Iran's missile development program. Following that the Trump administration also imposed sanctions on Iran, much against the wishes of its European Allies who decided to stay the course with the JCPOA. It is likely that these actions would increase tensions between not only the US and Iran but eventually between Iran and the EU and the West. Similarly, the Trump administration pulled out of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which was once again maintained by the other 11 partner States despite the unilateral withdrawal of the US. This is a great setback to multilateralism and mega-regional trade arrangements which are aimed at filling the vacuum created by the failure of the Doha round of WTO negotiations. On the question of addressing growing migration challenge, a growing number of countries led by the US more recently raised several objections to the agreement developed under the UN auspices on the Global Compact for Safe, Orderly and Regular Migration, setting out some best practices. Even though the Marrakesh Agreement was eventually concluded earlier in December, it is unlikely that this will lead to a uniform global approach to the pressing problem. This is clear from the insistence of the Trump administration to persist with the construction of a wall across its border with Mexico despite lack of support for the same from the US Congress. Finally, mention may be made of the Trump administration's policy to ignore and even reject the urgent appeals world- wide for taking necessary action, by express treaty commitments, to maintain rise of global temperatures "well below 2C above pre-industrial level and [to pursue] efforts to limit the temperature increase to 1.5C above the pre-industrial levels". It is of some comfort that despite doubts raised and opposition expressed by the USA, Russia, Saudi Arabia and Kuwait to accept a key scientific report prepared by the Intergovernmental Panel on Climate Change, the Katowice Climate Change Conference (COP24) held in Poland on 2-14 December 2018, States parties agreed to a rulebook on time to implement the 2015 Paris Climate agreement. It may be recalled the 2015 Paris Agreement on Climate Change, hailed as a breakthrough in climate action and a pioneering approach to global governance, established a framework of overlapping soft and hard obligations. The US decision to pull out of the Paris Agreement would come into effect only in 2020. For an account on these matters see, Ana Palacio, "COP24 deal offers reprieve for global governance", *Gulf Times* (Doha, Qatar), Friday, Dec. 21, 2018, p.no. 14; and Jeffrey D. Sachs, "For Climate Safety, call in the engineers", *Gulf Times* (Doha, Qatar), Saturday, December 22, 2018, p.no. 14.

under the banner, termed as, 'Make America Great Again',[76]constant flow of migrants from Africa and Syria into Europe, resulting in the fall of leaders like Merkel in Germany, 'the yellow west' protests in France,[77] and the decision of the U.K. to leave the European Union, the so-called Brexit, the rise of the 'right extremists' in Europe in general, terrorism and religious intolerance, the rise and role of ISIS, internal conflicts in Syria and Yemen, the unilateral sanctions imposed by the USA on Iran, the heightened tensions between Israel and the Arab nations, following the shifting of the US Embassy in Israel from Tel Aviv to Jerusalem,[78] on the one hand and between the Sunni and Shia on the other, chiefly represented by the open rivalry between States supporting Saudi Arabia on one hand and Iran and the forces aligned with it on the other.[79]

The contemporary trends are disturbing enough for Fischer, a former German Foreign Minister and a leader of the German Green Party to note while assessing the significance of the announced retirement of Angela Merkel, that "international ruptures are shaking the very foundations of Germany's post-war democracy".[80] In this connection, equally noteworthy are developments concerning the Brexit, which is, as Varoufakis, a former Greek Finance Minister and professor of economics at the Athens University puts it, "A mere shadow when compared to the muffled but more fundamental disintegration taking place across the European Union."[81]

According to him the rise in 'nationalism', protectionist policies, xenophobia, inhuman austerity policies to secure budgetary surpluses during deflationary times could lead to the European disintegration of the European Union. One immediate result of the austerity policies, he adds, is the "crumbling infrastructure and deteriorating public services, reflected in overburdened hospitals and underfunded schools."[82] Added to this trend, there is the

[76] For a critical view of this policy, see https://www.nytimes.com/2018/10/23/opinion/midterms-democrats-trump-house-senate.html (last visited on November 20, 2018).

[77] 'Yellow Vests' or low wage earners in general who took to streets recently in France and elsewhere in Europe and even in Sudan more recently to demand higher wages and lower taxes hail from the very bottom of social order. These people who work long hours and accept low-wages are "often overworked and insecure", and because they are not unemployed their problems are easily overlooked by elites". For an understanding of the "Yellow Vests" movement, see Slawomir Sierakowski, "Yellow Wests are here to stay", *Gulf Times*, Saturday, Dec. 22, p.no. 15.

[78] For the application of the State of Palestine before the ICJ challenging the legality of the shifting of the US Embassy from Tel Aviv to Jerusalem and Order passed by the Court on November 15, 2018, fixing May 15, 2019, for the Memorial of the State of Palestine; November 15, 2019, for the Counter-Memorial of the United States of America as time limits, See "Relocation Of The United States Embassy To Jerusalem" (*Palestine* v. *United States Of America*), General List No. 176. For a broad understanding of the position of Israel and the State of Palestine, see James Crawford, "Israel (1948-1949) and Palestine (1998-1999): Two Studies in the Creation of States"in Guy S. Goodwin-Gill and Stefan Talmon (eds.), *Reality of International Law*95-124 (Clarendon Press, Oxford, 1999). On to the US decision of December 6, 2017, to move its Embassy in Israel from Tel Aviv to Jerusalem, see Stephen Farrell, "Why is the U.S. moving its embassy to Jerusalem?", *available at*:https://www.reuters.com/Article/us-usa-israel-diplomacy-jerusalem-explai/why-is-the-u-s-moving-its-embassy-to-jerusalem-idUSKBN1I811N (last visited on November 20, 2018).See also"United States recognition of Jerusalem as capital of Israel",*available at*:https://en.wikipedia.org/wiki/United_States_recognition_of_Jerusalem_as_capital_of_Israel (last visited on November 20, 2018).

[79]Blog Post *by* Steven A. Cook, "Why the Myth of Sunni-Shia Conflict Defines Middle East Policy—and Why It Shouldn't",*available at*: https://www.cfr.org/blog/why-myth-sunni-shia-conflict-defines-middle-east-policy-and-why-it-shouldnt (last visited on December 10, 2018).

[80]Joschka Fischer, "Angela Merkel's long goodbye", *Gulf Times* (Doha, Qatar), Thursday, Dec. 6, 2018, p.no. 2.7, col. 1.

[81]Yanis Varoufakis, "Pre-Condition for ending Europe's disintegration", *Gulf Times* (Doha, Qatar), Monday, Dec. 3, 2018, p.no. 22, col.3.

[82]*Ibid.*

Trump factor which actively encourages the far right, 'populist', 'white supremacy' attitudes producing a real "battle between progressives and authoritarians, whether establishment Austrians or insurgent racists."[83]

The fact is that the world is facing one crisis after another whether it is on political or economic front, while the UN Security Council is completely blocked by lack of consensus on the part of the five permanent members. Without the Security Council having a common minimum program to take any meaningful action to maintain international peace and security, the raging national and international conflicts would remain unresolved.[84] States in Asia, Africa and the Latin America are increasingly finding it difficult to provide political stability, good governance and basic necessities to their citizens being victims of corruption, internal conflicts, and terrorism besides not having the necessary financial, economic and technological means to push their development agenda. Even countries in the world's highly successful economies are struggling to meet their responsibilities towards their citizens, with large sections of their working class taking to streets to protest against low wages, rising unemployment and deteriorating health, education and social services. Sachs, a leading US development economist warns us about the negative impact on "the United Nations system, the European Union, and other multilateral organizations [which are] under great stress, because their budgets are inadequate to meet their responsibilities,"[85] in promoting Sustainable Development Goals.[86]The USA, EU and other developed countries are being

[83]See *Id.*, col.5.

[84] There are several questions that are pertinent in relation to the powers and effectiveness of the Security Council that are debated and still unresolved as any change in the present structure and powers of the Security Council would require amendments to the UN Charter, considered a wholly futile exercise given the fragmented nature of international relations and political rivalry among major powers. There is an ongoing debate about the reformation of the composition and powers of the Security Council, to enlarge its membership, to remove or restrict the right of veto, to subject decisions of the Security Council to judicial review, and to ascribe responsibility for acts considered as wrongful to the UN, to define or restrict the discretion of the Security Council in determining 'threats to peace' or acts of aggression. See for a note on some of these issues at the turn of 50 years of the United Nations, Milan Sahovitch, "The Charter VII of the UN Charter after the End of the Cold War" in M.S.Rajan (ed.),*supra* note 28 at 157-166. For the view that "Not only structurally, but also geopolitically, the United Nations as of 1995, is seriously anachronistic", see Richard Falk, "Explaining the United Nations Unhappy 50th Anniversary: Toward Reclaiming the Next-Half Century", in M.S.Rajan (ed.), *Id.* at284. See also for a review of the UN and its role in evolving a new world order, M.S.Rajan, "The United Nations since the end of the Cold War" in M.S. Rajan (ed.), *Id*. at 1-29.

[85] Jeffrey Sachs, "Financing international Co-operation", *Gulf Times* (Doha, Qatar), Dec.03, 2018, p.no.23, col.1. See also Davesh Kapoor and Arvind Subramaniam, "Can the World Bank redeem itself?", *Gulf Times* (Doha, Qatar), December 7, 2018, p.no. 14. While appreciating the World Bank's role "as a supplier of global public goods and a "knowledge bank" that provides data, analysis, and research to its developing country clients", and for "gathering indicators of economic activity, measuring poverty, identifying deficiencies in the provision of health and education and in the early years designing and evaluating development projects", the authors find fault with the World Bank for kowtowing "to its most powerful shareholders and their vested interests (such as Big Pharma and the financial industry, arguably in exchange for additional resources for its soft-loan window"; and in the process neglecting its "responsibility…to act as an advocate for its poor clients". Stressing in this connection the importance of maintaining an open global system, they caution that the World Bank "will not only fail its clients throughout the developing world; it will also lose whatever is left of its raison d'etre", if it "chooses not to uphold its core tenet of its mission, and instead continues to try integrating itself with its largest shareholders".

[86] Fortunately the cooperation between public and private sector which is increasingly urged and worked out appear to neutralize to some extent the stress and inability of global institutions in this regard. Recalling that the United Nations adopted Sustainable Development Goals in September 2015 to achieve a more sustainable future for all", by 2030, which goal is stressed as essential to prevent the planet from facing an irreversible damage by the recent report of Intergovernmental Panel on Climate Change (IPCC), it is estimated by the Business and Sustainable Development commission that meeting the SDGs could add "some $12tn and 380mn jobs to the global economy by the end of the next decade", encouraging private sector and 69% of business

forced or encouraged to adopt protectionist policies and turn away from seeking solutions through international cooperation and support to multilateral institutions. The decisions of the US Government under the Trump administration to pull out of its membership of the UNESCO (following admission of the State of Palestine as a full member), the Human Rights Council (after it launched a probe into recent killings in Gaza and accused Israel of excessive use of force, criticizing it as having permanent anti-Israel bias) and repudiating some of the international arrangements or agreements, like the Paris Agreement on Climate Change, NAFTA, Trans Pacific Partnership, the 2015 nuclear deal with Iran,[87] and it is also challenging the legal regime governing international trade by resorting to unilateral measures on tariffs and imposing economic sanctions. It is also a matter of some concern that the WTO is unable to make progress on several issues it identified as in need of reform at its Doha round of ministerial consultations.[88] Another cause for concern is the despite the pivotal role the Appellate Body has in the dispute settlement system of the WTO, and the great contribution it has been making the system a rule based one, thus serving the cause of the rule of law, three vacancies on the 7 member Appellate Body remain unfilled, thus increasing the work load on the existing members.[89] If the trend continues and the vacancies are not filled by next year when two more members are due to retire, the work of the Appellate Body would come to stand-still, leaving several appeals pending. That would be a blow to highly rated dispute settlement record of the WTO and might even trigger an unraveling of the WTO system itself.

In this context the warning sounded by the President of the ICJ participating in the meeting of the UN Security Council commemorating the end of the first world war, one hundred years ago:

> "Regulating global issues through a web of bilateral agreements has been tried in the past. It never worked. The spider web simply collapses on itself. It produces no silk. At best, it leads to a fragmented legal order composed of contradictory international

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executives to integrate these Goals into their business strategies. See Paul Polman, "A business model for sustainability", *Gulf Times* (Doha, Qatar), Wednesday, Dec. 26, 2018, p.no. 14.

[87] See for a short press note on these matters, "Trump's top five withdrawals from international agreements",*available at*:https://www.trtworld.com/americas/trump-s-top-five-withdrawals-from-international-agreements-18543 (last visited on December 30, 2018). It is also observed in this connection that "While the US withdraws from several United Nations bodies such as UNESCO, Human Rights Council, Population Fund; cuts its support for the Palestinian peace process; contemplates withdrawal from the World Trade Organization; and criticises the ineffectiveness of NATO, it is crystal clear that the form of globalisation envisioned by Washington DC is going through a qualitative shift", *available at*: https://www.trtworld.com/opinion/a-clash-of-globalisations-between-us-exceptionalism-and-chinese-pragmatism-20288 (last visited on December 30, 2018). In this process, the US is pitted against China which has strong bias in maintaining free access to global markets, vying with the US to gain supremacy as the super-power. The economic and power struggle between the two super-powers is another cause for affecting global peace and security, with other major powers Russia, the EU, Japan and India having to watch their own interests in the future but uncertain world order.

[88] The Doha Round is the latest round of trade negotiations among the WTO membership. Its aim is to achieve major reform of the international trading system through the introduction of lower trade barriers and revised trade rules. The work programme covers about 20 areas of trade. The Round is also known semi-officially as the Doha Development Agenda as a fundamental objective is to improve the trading prospects of developing countries. The Round was officially launched at the WTO's Fourth Ministerial Conference in Doha, Qatar, in November 2001. The Doha Ministerial Declaration provided the mandate for the negotiations, including on agriculture, services and an intellectual property topic, which began earlier. In Doha, ministers also approved a decision on how to address the problems developing countries face in implementing the current WTO agreements. See https://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited on December 30, 2018).

[89] See the latest annual report, 2018, the section on dispute settlement mechanism of the WTO, https://www.wto.org/english/res_e/booksp_e/14_anrep18_disputesettlement_e.pdf (last visited on December 30, 2018).

legal obligations. Predictability, stability and certainty of the rule of law disappear. That is why your initiative is timely today when we are commemorating the end of the first world war, one hundred years ago, which gave a new impetus to the development of multilateralism."[90]

XIII. CONCLUDING REMARKS

The rule of law in international relations is as important as it is in national affairs. Since the First Hague Peace Conferences in 1899, the international community of States has been building the rule of law in international relations brick by brick. The building of a legal community of mankind commenced with the establishment of the Permanent Court of Arbitration in 1899 to settle disputes on the basis of international law instead of resorting to the use of force which until then was the chosen path. The construction of an international system under the rule of law taken to the next and more advanced stage with the creation of the League of Nations and the establishment of the Permanent Court of International Justice in 1922, following the First World War, even if did not survive too long. However, the end of the Second World War in 1945 saw the birth of the United Nations, built upon the foundations of the earlier experience, prohibiting the use of force and the setting up of a collective security system for the maintenance of international peace and security.

The UN and the ICJ, its principal judicial organ, is at the center of promotion of rule of law in international relations. The work of the UN and a host of other international organizations on such areas as climate change, terrorism, corruption, fighting poverty, disaster management, migration and refugees, and helping countries sustain good governance during conflict and post-conflict situations is central to maintenance of international peace as it is for the very survival of the future generations of mankind.

Some of the features of the international rule of law, giving rise to "obligations for States with or against their will"[91] have since become standard and well-accepted are noted above. The thick web of common interests and interdependent, if not totally integrated nature of international relations, particularly in areas of commerce, trade and finance, signifies a stage of globalization that is irreversible. The extensive network of international organizations and the hundreds of international treaties and agreements and the consequent 'multilateralism' moved the international community from "bilateralism" to rely on "community interest" in building international law as a basis for the rule of law.[92] They have also rendered unilateral sanctions counter-productive and even harmful to national interests, not to speak of their adverse effect on peace and security, and justice.

It is noteworthy that the rule of law in international relations is strong and ever expanding, thanks to the necessities of international life and the work of important regional and international institutions harmonizing the common interests of the international community composed of States and a variety of other participants. 'Reciprocity' and the culture of compliance generally provide the basis for effective implementation of international obligations.

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[90] See the Statement of the President of the ICJ, *supra* note 45, para.3.

[91] For an engaging study on this aspect see Christian Tomuschat, "Obligations Arising For States Without or Against Their Will" 241 *Recueil des Cours*195-374(1993-IV).

[92] For an exposition on this theme, see Bruno Simma, "From Bilateralism to Community Interest in International Law" 250 *Recueil des Cours* 221-384 (1994-VI).

While the world wars may have become history, the threat to the survival of mankind not only from the weapons of mass destruction but also from a variety of other sources cannot be under-estimated. These include: slow and inadequate levels of global response to climate change, the number of internal armed struggles and the ever present terrorist attacks carried out by an international network of domestically grown terrorist organizations, not wedded to the rule of law, and the rise of extreme rightist or 'nationalist' movements and populism opposed to pluralism and inclusiveness, trade wars and aggressive political posturing displacing traditional diplomatic discourse in international relations.

The crying challenges facing the international community cannot afford these negative trends. The "requirements of the international life", as the President of the ICJ so eloquently noted, dictates "the necessity of multilateral co-operation in a diverse and complex range of areas of common concern to humanity". "It is this common concern of humanity", he stressed, "recognized in many multilateral conventions, together with the shared values we all hold dear, which render imperative the strengthening and consolidation of multilateralism as well as the rules and institutions underpinning it."[93]

[93] Statement of the President of the ICJ, *supra* note 45, para.14.