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Rebalancing International Law*

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I have the honor of welcoming you to the Seventy-Third Session of the Institute in Santiago de Chile and expressing to all of you our gratitude for your attendance and for having traveled a not too short distance. The very fact that this session is being held here is a powerful indication of how much international law has changed in the process of attaining a genuine universal reach and participation in its formation. This is itself the product of globalization.

Yet, it is the very process of change in the light of globalization that is posing new and greater challenges to international law, a matter which invites our reflection and a renewed effort to ensure that international society is effectively governed by the rule of law. The Institute has much contributed to this effort in the past and it must now be prepared to face the needs of the present and above all of the future.

Allow me to share with you one overall concern that in turn permeates many if not most of the characteristics and issues of contemporary international law. We have worked for long as individual scholars and as an institution to attain the development of international law, but doing so in the frame of a rigorous scientific and legal approach so as to ensure the certainty and predictability of rules and the stability of the international legal system as a whole. In looking at a number of recent and present developments one can wonder, however, whether we have succeeded in our efforts.

It is quite evident that international law has changed much and that it must continue changing. Yet, does this mean that the nature of the legal system has changed and that its basic principles are no longer the same? There are good reasons to believe that this is not really the case. Innovation has come hand in hand with continuity and the essential structure of international law is intact, albeit operating in a new and different

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environment that requires constant adaptation. International law is still an inter-State system of law which has peace, the settlement of disputes and the well-being of the individual as its focal objectives. This has always been of the essence of international law and it must be preserved so as to avoid distortions that could lead to the opposite result, as it has also happened in the past and in the present.

This concern is not an abstract one. If we consider, for example, the current debate about the role of the sources of international law we can readily see that different schools of thought are confronting each other. Treaty-making in particular has much changed in the past few decades and international organizations have acquired a meaningful role in its preparation, but does this mean, as we sometimes hear, that the consent of States is no longer required to bring new rules of international law into being? Or is it true that soft law or other informal political arrangements are replacing the sanctity of treaties? State consent is still essential to this effect, although the manner in which this consent is expressed has many new different manifestations.

Not different is the debate surrounding the role of customary international law. Is State practice no longer necessary or has the passage of time become meaningless? Many qualifications have been introduced in the manner how practice and time can be ascertained, but none points to the abrogation of either. On the contrary, if such elements are absent anyone anywhere will be able to claim that his particular and often interested views are customary law, as we have also seen in not few governmental claims and judicial arguments. This would be quite evidently a most destabilizing feature of the legal system. Indeed, every passing day we hear more about claims that what someone likes is *jus cogens* irrespective of the support of such a rule by practice and time, just as we increasingly hear that what someone dislikes is a crime against humanity.

General principles of law offer importance guidance in the development and application of international law, but they are still law subject to strict interpretation standards. Not anything can be done in the name of general principles as it is sometimes claimed, only what is legally permissible. The resort to equity, while necessary and convenient in the light of circumstances, must be most careful and prudent as otherwise the legal framework risks to be surpassed by peculiar interpretations of which we also hear about. The chancellor's foot appears to be growing bigger. If one adds to this equation the view that all sorts of unilateral acts and decisions of international organizations are autonomous sources of law, Article 38 of the Statute of the International Court of Justice is likely to become void of any meaning, as some authors unequivocally favor.

It would be wrong to think that this debate is circumscribed to the role of sources. The application of international law in domestic legal orders offers yet another example. Much has changed in this respect too but at no

moment could this mean that domestic institutions and national law are to be ignored. There are rules and processes that need to be respected and not just anything can be claimed to be the applicable law, particularly when the source from which it purportedly originates is dubious or tainted by self-interest.

If we turn to the role of subjects of international law we shall find similar conceptual confrontations. Is the sovereign State vanishing in the context of globalization as we so often hear, or is it rather that it is adapting its role to better serve the community in such a context? The sovereign State is not dissipating like fog in a new dawn. It is an essential institution to satisfy the interests of the community in many respects only that, again, it will need to do this in the changing frame of international cooperation, which in turn facilitates the fulfillment of such role. International organizations are equally essential, precisely because they are necessary to attain the objectives of the well-being of society, but they are not the State nor they substitute for it, not even where the transfer of competences has taken place in certain specific matters. The functions and powers of international organizations are derived from the State and it is the State that directly or indirectly sets the limits within which such organizations operate.

One could explore many other elements of present international law and still find the same contrasts. Issues concerning the maintenance of international peace and security and the use of force, like those relating to immunities and the exercise of jurisdiction by domestic courts under international law, the law of the environment and its connections with the law of the sea or dispute settlement and international liability and responsibility, have all been the subject of a contemporary debate where stability and destabilization of the legal order are confronted by opposing views, some legal, some not.

I have purposefully left for the end the role of the individual in international law. There can be no doubt that the individual is the principal concern of the international legal order and must continue be so, a perspective which has become prominent in the development of our discipline and our own work in different aspects of it. Interestingly, this is not a new concern either and has been present since the very beginnings of international law, with more limited manifestations in the past and increasingly larger ones today.

It is precisely the need to protect the individual and ensure its well-being that is actively transforming international law and offers the most encouraging prospects for its future development. This has become evident today in respect of the protection of the rights of the individual, but it is equally found in many other matters, including the features of the development of international dispute settlement, particularly in respect of investments and trade, to the point that it would not be surprising to see in the not too distant future the individual claiming directly before the World Trade Organization and other

mechanisms closely associated to the parallel developments of globalization of markets and the economy. Neither would it be surprising to see the individual before the International Court of Justice, as is already there indirectly.

There is, however, a more profound expression of the individual as the engine shaping the transformation of international law and its limits. Is international law in risk of becoming the new Leviathan, as we have already been warned by distinguished writers? If treaties are made by interest groups irrespective of consent, if customary law is whatever anyone wishes it to be, if general principles are abused and any kind of decision of an international conference is to be regarded as legally valid, later to be implemented domestically as the law through the interpretation of a sympathetic judge or official, the new Leviathan would inevitably emerge. International law would no longer be the rule of law.

Dramatic as this perspective may appear, it is not entirely unreal. We already see that when a government cannot obtain parliamentary approval of a given policy or law, it opts for taking the matter to some international conference or gathering of sorts where it shall be solemnly endorsed by some resolution, to be followed by the argument that this is international law that must automatically be applied domestically. Grave distortion of democracy is evident in this policy of by-pass, which is one of the reasons why parliaments are demanding an increased participation in the formation of international law and referendums are being called for more often. The paradox of it all is that in the name of the individual disrespect for its fundamental rights are thus enshrined.

Neither it is unreal to realize that international organizations are on occasions adopting decisions that interfere with the rights of the individual. Thereby the risks are exacerbated if unchecked. Paradoxically again, it is the vanishing State that will be the only entity able to protect the affected individual by means of court action, of which not few examples are already available.

The test for the vitality of international law is whether ultimately we believe in the individual, its rights and well-being or we do not, however much its name is used. If we opt for such belief, as we have all done already, the limits to the transformation of international law will automatically be set and the yardstick will ultimately be whether they are genuinely compatible with such rights and interests and contribute to their fulfillment.

On declaring opened the Seventy-Third Session of the Institute, this is the perspective I invite you to share in our individual and collective work, so that we may achieve the rebalancing of the law of nations.