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The Future of International Law: Members' Reception and Plenary Panel, Georgetown University Law Center – Remarks by Lori Damrosch

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implementation as well. *Avena* and the attitude of the United States in recent years demonstrate the problem of compliance. It is not simply the question of the old problem of compliance or the question of the political will of the parties to be bound by the judgment. It has that element also, but perhaps more importantly and more complexingly, it involves the question of how you link domestic legal process with the international legal process in such a way that there could be a solution to the problem that will satisfy the requirement of international law as well as domestic law. This is an important point in the context of predicting what is going to happen in the future of international law. The other aspect, of course, is the relationship of the political world. I remember that Oppenheim in his first edition of 1902 wrote about the importance of the validity of international law, one condition of which, according to him, was the existence of equilibrium in power relations between states. Now one might agree or disagree with his prediction, but it is interesting to see that the dis-equilibrium that is taking place in the present situation of the post-Cold War world is something that one must ponder in that context.

So much for the short-term perspective on the question of predicting the future on the basis of what prevails in the present day world. But going beyond that and getting into the field of wide speculation into the future, I would like to make just one point. When I gave a lecture at the Annual Meeting of the American Society of International Law a few years ago, I said this: "The present-day international system requires that sovereign states claim to be both the representative of the public interests of this community in their norm-creating capacity, and at the same time, the representative of the private interests of their own in their norm-receiving capacity." Now, the question is how this dilemma between the dual capacity that states are playing is going to be solved in the future. And the question is not in terms of five years or ten years, but more in terms of 50 years or 100 years. I believe that the essential character of the international system is, at this juncture, slowly and steadily going through a major structural transformation. This is occurring for two reasons. One is the impact of globalization, which makes it impossible for states to behave in the way that they have been behaving. The other is the impact of the notion of the dignity of human beings as the central issue of any order, whether domestic or international. As long as this is going to prevail, I think there will emerge a new paradigm for international law that will be very different in the sense that it will focus more on the dignity of the individual rather than on states' rights as the central issue of the international legal system. Perhaps this may be too optimistic in light of what Dean Slaughter spoke about; nonetheless, I would like to think in the long term perspective that that is going to be something for which we could aspire. Thank you.

Remarks by Lori Damrosch*

It is a privilege to follow Judge Owada and to take up the challenge offered by the theme statement of this panel: to assess trends that we perceive to be shifting the future of international law, while also interrogating claims of their newness. Perhaps everything that we think of as new has some resonance with the past.

In my capacity as co-editor in chief of the *American Journal of International Law*, one of my happy responsibilities in the centennial year was to work on a series of essays published in each of the four issues of Volume 100 and now collected in booklet form. We asked each of the authors of the centennial essays to look back at the role of our Society and our *Journal*,

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as both participant and witness of trends in the twentieth century, and also to look forward to discern future directions. Some thoughts on the links between the past, present and the future can be found in these essays. In my own essay, *The "American" and the "International" in the American Journal of International Law*, as in several of the other contributions, one theme was the existence (or not) of a distinctly American vision of international law, and of the place for this Society as a site of interaction between American internationalists and other constituencies and communities.[1] Against that background, I want to frame my remarks around interactions between the mainstream of the American international law profession as represented in this Society and other views of international law.

The twentieth century has been called the American century in terms of international law as well as in international relations more broadly. For many of us who came of age and became active in this Society in the second half of the twentieth century, the founder's vision—*A Just World Under Law*—is our vision. The Society's Latin motto—*Inter Gentes Jus et Pax*—which is on everyone's program for this meeting and is also on the cover of our *Journal*, expresses the idea of the connection between international law and peace. Because the Society's founders placed high importance on the role of international arbitral tribunals and courts in applying international law in the service of peace, it is entirely fitting that Judge Owada was given first place on tonight's program in order to give attention to the international judicial dimension, which in global terms is now very vibrant. But I share Judge Owada's reticence about taking the view from The Hague as the right frame for thinking about the future.

Another strand of the vision of this Society over time, and the dominant American vision throughout the twentieth century, is the Wilsonian idea of concerted sanctions against violators of fundamental international norms, which became Roosevelt's mid-century idea of the great powers acting in concert through the UN Security Council to preserve the peace. Dominant trends in the second half of the twentieth century included the vision of the spread of human rights as a global idea. That trend accelerated in the post-Cold War period, as did the forces for economic liberalization. Both for human rights and for economic relations, American internationalism has promoted rule-based systems with court-like institutions. In this building, I have to pay homage to John Jackson for his contributions to the rule-based idea of international economic law, which Barry Carter will be addressing later on, and Judge Cançado Trindade will be speaking about rule-based systems of human rights.

Now, what cold water do I throw on this celebration of rule-based systems with sanctions for enforcement? I do not know how much of an overlap there is between people in this room now and those who heard my colleague Professor José Alvarez in his presidential address this afternoon, but on that occasion he unveiled the newest Society pamphlet: *International Law—50 Ways That It Harms Our Lives*, which is both a serious project that is to be widely disseminated and also a humorous and insightful list of our Frankenstein's monster. For example, Number 8 of the *50 Ways* reminds us of the ruling of the World Trade Organization in favor of access to offshore online gambling: we should be shocked, *shocked* that gambling is protected by international law!

If the twentieth century was the American century and if American influence over international law was, in many senses, dominant through U.S. influence over the UN Charter, the twenty-first century is likely to bear quite different imprints. The next century could be

[1] Lori Fisler Damrosch, *The "American" and the "International" in the American Journal of International Law*, 100 AJIL 2 (2006).

marked by a period of contestation between competing conceptions of international law, in which the current family spats between the United States and Europe, or between the United States and other democratic states, could be overshadowed by much more profound disagreements. Exactly how to think about these disagreements is in itself a question for this panel, because our theme statement invites us to interrogate their newness. Because the twentieth century already encompassed global confrontations along East-West and North-South dimensions, it would not be particularly novel to envision a future with variations on the theme of bilateral or pluralistic struggle. Indeed, predictions of a clash of civilizations have been with us long enough to have been fully debated and rebutted within our own field. Nonetheless, I think it is useful to point to some of the ways in which actors other than those in the mainstream profession of international law in this country may shape international law's future directions in the near and intermediate term.

It seems inevitable that in the early decades of the twenty-first century, China will rise to take its full place in the system of international law. I have chosen China to illustrate some of the broader themes of what the future might hold for international law, beginning with a news story from the quite recent past.

On January 12, 2007, China destroyed one of its own weather satellites orbiting about 535 miles above the earth in what was later to be confirmed to have been China's first test of an anti-satellite weapon. Previously, only the Soviet Union and the United States had carried out anti-satellite tests: the Soviet Union ended its testing in 1982, and the last U.S. test was in 1985. It took 12 days for the Chinese foreign ministry to make a statement about the January test and to deny any hostile intentions or any incipient arms race in space.

When we think about the significance of China's anti-satellite test for the field of international law, we can flash back almost exactly 50 years to the dawn of the space era. On October 4, 1957, 50 years ago this fall, the Soviet Union launched Sputnik, the first artificial satellite to orbit the earth. Those of us whose childhood spanned roughly the 12 years from Sputnik to Neil Armstrong's "One small step for man, one giant leap for mankind" probably did not learn enough about a different and dramatically less successful great leap in Mao Tse-tung's China or its disastrous consequences. When President Nixon broadcast his congratulations to the moon mission in July 1969, the distance between Washington and Peking (as we then called it) probably seemed more insuperable than the roughly 240,000 miles to the moon. But by 1972, the phrase "Nixon to China" had entered the lexicon. To bring things right up to yesterday, United Airlines has just inaugurated the first-ever capital-to-capital service between Washington and Beijing (as I learned while trying to figure out the precise distance between these two capitals), which should augur more direct connections between the American Society and Chinese scholars and practitioners of international law. (I did not ascertain how many frequent flyer miles go along with the new United flight, but I did learn that by signing up now, you can get a bonus of 10,000 miles.)

The flurry of media attention to the Chinese anti-satellite test highlighted that the Bush Administration's most recent space policy (issued in 2006) declares that "[f]reedom of action in space is as important to the United States as air power and sea power." The implication of this policy document for legal regimes is apparently to resist any new multilateral treaty-making that would limit U.S. military uses of space. Indeed, there may be an anti-satellite corollary to the notorious Bush doctrine that has been debated at ASIL meetings and in AJIL's pages repeatedly since its announcement in the aftermath of 9/11: the present administration apparently asserts the right to use force against countries seeking to disrupt American satellites. Perhaps for this reason, Chinese officials seeking to explain China's anti-satellite tests to

American audiences have hinted that one purpose of that exercise might have been to induce the United States to enter into serious negotiations for restrictions on the militarization of space.

Though Star Wars is not my topic, I will turn (very much out of my depth) to American pop culture, since the views of international law popularized on American TV are more influential in the culture as a whole than speeches at ASIL. Again I pay homage to my colleague, Professor Alvarez, who is more acquainted with American pop culture than I. In his presidential address, he invoked the popular cartoon series *South Park*, with its spoof on smugness, while I invoke the famous episode of *The Simpsons*, where Homer Simpson steals a boat to go out on the high seas beyond the reach of law. "International waters—the land that law forgot. It's a land of unrestricted freedom!" You have to watch the cartoon to see what they are doing out there beyond the reach of law. My serious point is that the future of international law cannot be one that exalts freedom of action in space over effective multilaterally agreed regulation of space-based activities.

Dean Slaughter

The first thing to say is that President Alvarez has clearly and significantly enlivened the tradition of American Society of International Law oratory! I want to point out an interesting tension between our first two wonderful presentations. When Judge Owada was talking about the view from the court, and I take Lori's point about that being a limiting perspective, he suggested the possibility of the end of international law in a divided world. He noted that the usage of the court is far broader by a much wider spectrum of countries than one might have anticipated—a vision of all countries under the same law fighting in the same courts. Whereas Professor Damrosch, I think, equally and plausibly conjured a specter of fights between many different conceptions of international law—the United States with far less power to impose its conception, a Chinese conception, an Indian conception, a European conception, etc. So I will just mark that, and we will turn to Professor Carter.

Professor Barry Carter*

Thank you, Anne-Marie, for the nice introduction earlier. Because I was involved in organizing this panel, I would personally like to second Dean Aleinikoff's thanks to the American Society of International Law, especially to its President, José Alvarez, and its dynamic new Executive Director, Betsy Andersen. Also, warm thanks go to our co-sponsor, the Fulbright & Jaworski law firm, for its contribution and help in arranging this.

The Future of International Law is a broad topic. So let me narrow it a little by focusing on the Future of International Economic Law—or International Trade and Business Law.[1] Here I would like to talk about a problem that I see emerging in the next 10–20 years. This problem is Network Overload—the proliferation of bilateral and regional agreements and arrangements among countries, with some of the arrangements placing a heavy compliance burden on corporations and individuals. It is not clear if we know how to deal with this problem.

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[1] For my views on the today's broad topic, see Barry E. Carter, *Making Progress in International Law and Institutions*, *in* Progress in International Institutions (Russell Miller & Rebecca Bratspies eds., forthcoming 2008).