

## ADDRESS

### A CALL FOR RENEWED LIBERAL INTERNATIONALISM

*David Suratgar\**

I thank you, the members of the Georgia Society of International and Comparative Law, for the honor of your invitation to speak at your annual banquet. I would also like to thank my old friend and fellow student, Professor Gabriel Wilner and, of course, Dean Ellington and Professors Schoenbaum and Huszagh for gracing the evening with their presence. I know that quite a few of you were probably worried (and I include my son in that category) about my reliability as a guest. Would I make it here on time? Well, I did miss my flight from London to Atlanta yesterday, and as a result had to come through New York. This, however, was an attempt on my part to ensure that I actually got here. I don't know whether you are aware of what the British wit G.K. Chesterton, a great idol of mine, said about such behavior. He said that "the only way to make sure of catching a train is to miss the one before it," and that is just what I did.

It actually has been twenty years since I last spoke to the Georgia Society of International and Comparative Law. I accepted Gabe Wilner's suggestion, and Dean Rusk's kind invitation, to speak to what was then a newborn Georgia Society, and I am absolutely fascinated to see how the Society has since flourished. I think it was some ten years before that, that Gabe Wilner and I (in collaboration with others) were organizing the Columbia Society of International and Comparative Law, and indeed witnessing the emergence of coun-

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terpart organizations at Harvard, Yale, and later Virginia.

It was with particular pleasure, therefore, that I learned, when I accepted a second invitation to come and speak here, that you had won the Phillip C. Jessup International Law Moot Court Competition. This represents a superb performance. As I think Gabe Wilner has said, he and I were involved at the outset of this competition, and indeed we were proud to be members of the Columbia team that competed in the competition's first championship.

I think your chairman has been overly generous in saying that we won the first championship. In fact, at that time there were only three teams competing: Harvard, Yale, and Columbia. We had an extremely tactful group of judges who gave an award to each of the teams. I forget which team won the award for best oral presentation. However, the judges made sure another team got the best written presentation, and then to make sure the third team didn't feel left out, they gave them the award for best overall performance. So we all came away with a prize! The Georgia team gets extra plaudits for winning what is now a much more demanding competition, indeed a world-wide contest. I hope that you will accept heartiest congratulations on winning the championship.

When I reflected on what would be an appropriate topic for this evening, I came to the conclusion that my remarks, in some way, should pay homage to a generation of United States international lawyers who, when serving under Presidents Roosevelt and Truman, set the framework for world organization as we know it today; even if today that framework is in disarray. A brilliant recent book which I recommend to all of you, *The Wise Men*,<sup>1</sup> assesses the impact of certain key men on the New Deal period and demonstrates the dedication and idealism that they brought to bear during their tenures in office. I refer to people like Chip Boland, George Kennan, Abe Lovett, Avrell Harriman, John J. McCloy, and Dean Acheson. If I have any criticism of this book, it is that the author does not do justice to that particular contemporary gentleman of international law and diplomacy, Phillip Jessup.

Western nations all owe that group of statesmen a deep debt of gratitude for their role in putting in place the multilateral framework of organizations that set the basis for the West's uninterrupted economic progress until the 1970's. The United States during that

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<sup>1</sup> W. ISAACSON, *THE WISE MEN* (1986).

period, working in tandem with the United Kingdom, gave the political leadership, and through these organizations international lawyer-diplomats negotiated the institutional framework for economic recovery.

During my ten years with the World Bank's Legal Department, one of my most challenging assignments was to defend the World Bank against efforts by the Soviet bloc countries, and a number of impressionable African governments working with them, to attempt through resolutions of the UN General Assembly to impose political controls over the lending policies of the World Bank and the International Monetary Fund (IMF). This defense required detailed research into the *travaux préparatoires* of the Bretton Woods Agreements and the later Dumbarton Oaks preparations for the UN Charter Conference in San Francisco.

I still am fascinated by two discoveries in the course of my research. The first was the farsightedness and the wisdom of the draftsmen of the IMF and the World Bank articles of agreement. The draftsmen were true international financial lawyers with a heavy emphasis on their internationalism. This is characterized by the willingness, particularly on the part of the dominant United States team, to avoid pressing home the paramount economic power of the United States by ensuring, for example, a formal United States veto over lending policies. It is thus somewhat distressing to note that over the last decade the United States has reversed that farsighted and liberal course of action. We have seen during the last few years several attempts by the United States to interfere with or to seek a veto power over the lending policies of international agencies such as the Inter-American Development Bank. There have been other examples of efforts to impose political control over the lending policies of institutions which for many years had protected their lending policy from any kind of political interference by strong economic powers.

The second discovery concerned the initially dominant, but ever constructive, internationalist role of the United States lawyers in the period after 1945. This was noticed immediately by the international father of the Bretton Woods Agreements. I refer to Maynard Keynes, Professor Keynes, or Lord Keynes, depending on what period you take him, the economist and the leader of the British delegation. He recalled the constructive role the United States lawyers had played in the process of negotiation when speaking at the banquet that marked the successful conclusion of the Bretton Woods Conference in New Hampshire. At the outset of the Bretton Woods discussions he had paid a call on Henry Morgenthau, who was then United States Secretary of the Treasury. Upon his arrival he was shown into

the office of the Secretary of the Treasury, where Morgenthau was sitting surrounded by a number of his advisors. The Secretary's first question to Keynes was, "Where are your lawyers?" To this Keynes replied that he really did not need lawyers and normally did not bring them to such meetings. Keynes was flabbergasted by Morgenthau's response which was, "Well, in that case who does your thinking for you?" Keynes writes in his diary that he went away believing that when the Mayflower crossed the Atlantic, the passenger list must have been composed entirely of lawyers. Keynes, of course, came from the British civil service tradition of mandarins with abhorrence for interference by lawyers. But even he admitted at the banquet that the lawyers had done an essential job with panache. He said they, "had drafted the agreements with an element of poetry."

Recently, another Professor, Richard Gardner at Columbia who taught both Gabriel Wilner and myself, delivered a paper at the Roosevelt Library in Hyde Park in New York City entitled "Has Liberal Internationalism a Future?". He cited a number of key challenges facing liberal internationalism; liberal internationalism being defined as the intellectual and political tradition that believes in the construction of a peaceful world order requiring multilateral cooperation and the leadership of the strong liberal democracies. Professor Gardner identified several issues as challenges, many of which I think most of us here tonight would agree upon.

First, there is the disintegration of the Soviet Empire. This brings with it the danger of nationalism and ethnic unrest and a new crisis of self-determination. In addition, there is the problem of developing human rights standards to address these issues in order to avoid the dangers associated with unstable borders. These sorts of dangers will require very constructive international lawyer work to ensure some form of collective security and some form of rules and supervision to guarantee that we do not again go down the route followed in the 1920's.

Today it is the U.S.S.R., instead of Germany, which is searching for a means of common interest and for common action. This is a period in which international law will have a major role to play. The U.S.S.R. has been a country that has practiced economic autarchy. It is interesting that, at the time when it looks likely that the Soviet Union may be persuaded to join the International Monetary Fund and the General Agreement on Tariffs and Trade (GATT), we see the United States and the European Community and Japan moving ever more threateningly down the road to bilateralism in trade rather than the multilateral approach embodied in the GATT. Indeed, there

is a danger facing the world now of a slide to economic autarchy with three major trading blocs developing as a result of the inability of Western nations to work out their problems through consultation. I refer, of course, to moves to establish a United States-Canada-Mexico axis and for the Japanese and the newly industrialized countries of ASEAN to move from reliance on the United States market towards the creation of an Asian trading area for themselves. One should also cite of course, the problems associated with the way that the European Community is perceived to be proceeding down the route to 1992. Is a slide to economic autarchy inevitable? Will United States mechanisms such as section 301 and bilateral negotiations make it difficult for multilateral systems like the GATT to survive? Here is a challenge for international lawyers during the next decade.

A second area where there is a major challenge is that of North-South relations. Here we face a particular problem with the debt crisis, which as yet remains unresolved. I would like to spend a little time discussing that with you now.

Aid to developing countries was, of course, the United States' idea, fostered by the very same wise men to whom I referred at the outset. The admitted objective was to stop the advancement of communism; an advance which was stopped and now is decreasing. Yet we have at this time a serious problem with continually falling standards of living in the poorest countries. Moreover, it is shocking to consider that developing countries currently are making net transfers of approximately \$50 billion dollars per year to the wealthiest countries that are members of the Organization for Economic Cooperation and Development (OECD). This is an extraordinary development during a period in which the developing countries, because of environmental problems, the drug problem, the danger of nuclear proliferation, and the dangers of missile technology, are in a position, if they get fed up and loose faith in the international system, to create problems far beyond the scale of the problems suffered by the world in the 1920's due to the economic and ethnic problems of central Europe.

The thesis of the new challenge to the old liberal internationalist policies is that the developing countries, while no longer liable to become communist, can slide rapidly away from democracy and begin to effect us in ways with which we will find it difficult to cope during the next decade. Developing countries, such as Brazil, Guyana, or Ecuador can burn down their forests to everybody's detriment, or produce and sell drugs, or manufacture chemical weapons. They are also the source of many of the commodities that, despite our growing service economies, we continue to need. We need a North-South

dialogue to establish a workable basis for the recognition of the real interdependence of nations. Liberal internationalism, as Professor Gardner defines it, is in fact the only policy which can cope with the challenges that the United States and the Western world will face in the twenty-first century.

Let us just look in a little more detail at the international debt crisis. In it, I think, will be an element of the answer to the question, "Has liberal internationalism a future?" because debt is also very fundamental to our ability to solve the other problems to which I have referred.

I suppose the answer to the question is that liberal internationalism has been in retreat as the United States and all the OECD countries have wrestled with the economic crises following the shock of Vietnam and the guns and butter policy of Lyndon Johnson. As they reeled from the oil price shocks of 1973 and 1979 and as they struggled to maintain growth and to meet the military challenge of the Soviets around the globe in the 1970's and the early 1980's, the development effort began to lose momentum. Above all, liberal internationalism has been in retreat as these countries have struggled and failed to coordinate their economies and their economic policies in the fight to control inflation and to remedy the massive balance of payments problems that have produced wildly gyrating exchange rates. These latter problems are especially acute for the developing countries that have massive external debts.

What we have been seeing are the results of failures to adapt existing structures, or to adopt new structures and systems, to deal with international finance and trade affairs. This reflects a failure of leadership in the Western world. Since 1970 and President Nixon's decision to abandon the convertibility of the United States dollar into gold, and the resultant demise of the fixed exchange rate, the system set for the IMF by the Bretton Woods Agreements has, in effect, been inoperative. We have come up with nothing to replace it. We have also, I have to admit, seen a period in which much of Western policy has been driven by banks and bankers and by bilateralism or mercantilism on the parts of Western governments pursuing their own short-term narrow national interests and economic affairs.

The signs of this continuing malaise were all there to see in the early 1970's. The World Bank, where I was working, abandoned its role as a prudent investment banker to the world. The United States perceived foreign aid as a weapon to fight communism, which it was in the 1940's and 1950's, but the United States and other Western governments made less and less effort during this period to meet the

aid targets and to control profligate spending by LDC governments. At this same time the World Bank, under Robert MacNamara, took on the role, unfortunately some would say, of an aid agency less and less willing to impose strict controls on the use of its money and to monitor its projects. The role of the lawyer in the Agency for International Development (AID) and at the multilateral banks became less and less important. Lawyers were seen as negative elements holding back rapid disbursement of loans. This was so much the case that in the late 1960's and the early 1970's those of us working in places like the World Bank would joke that what Robert MacNamara really needed was a polaroid photo of a loan signing ceremony. Written on the back of the photograph would be, "The World Bank promises to loan the Government of X \$Y million dollars and the Ministry of Finance of X promises to repay the World Bank \$Y million dollars in twenty equal semi-annual installments commencing on blank and ending on blank and to pay annual interest on the amount outstanding of the rate of Z%", with the signatures of the President of the Bank and the Ministry appended at the bottom of the backside of the photograph. That is the point at which we had arrived by 1973.

It was at this point that I decided to leave my attorney position at the World Bank and to take up a career as an international banker. If you can't lick them, join them! Originally my business was making commercial bank loans to the LDC's, actually organizing business for them. Then I began advising governments and project sponsors on borrowing strategy—how to borrow as efficiently and as cheaply as possible. Then in due course, I took on project finance, organizing limited recourse finance or off-balance sheet finance. But by the mid-1970's the IMF and the World Bank had lost control over developing countries' borrowings, and they had lost this control to the commercial banks. Walter Wriston of Citibank was able to declare, "Countries do not go bankrupt." The world's major banks and hundreds of new banking intermediaries, established to meet this kind of demand, rushed to face the challenge of taking on deposits from the oil rich Arabs and lending to the developing countries. They called this activity, "taking on assets".

Whenever the IMF and the World Bank urged caution, the United States banks urged Congress to force the World Bank to retreat and to leave such lending to the commercial banks which were more than competent to run these affairs themselves. The United States, and indeed, the G-5 and the G-7 nations, were only too happy to encourage this stampede to lend. A number of warning voices urged the OECD

countries to regulate the Euro-markets and this helter-skelter lending. Nothing was done. Lawyers in London and New York adapted standard loan documentation to facilitate this lending process. Many were the conferences held to spread this gospel and this knowledge. In 1976, I confess, I chaired one such conference attended by some 700 bankers and lawyers—they had to be turned away. I invited an old Columbia friend, Lawrence Collins, a partner at Herbert Smith and Co. of London, a leading firm of solicitors, to present a paper on the treatment of default. He rose to speak and asked that the lights be turned down so that he could show his one and only slide for the afternoon. What we all saw was a blank screen. This, he said, demonstrated the mind of the average financial lawyer when he was informed that his client's loan had gone into default.

What then has happened since the full onset of the debt crisis in 1982? All I can tell you is that unlike the situation of a company going bankrupt, the debt of the developing countries continues to grow, with interest on interest and the build-up of arrears. We had the Baker Plan, announced by then Secretary of the Treasury James Baker. This was designed to encourage new banking flows to developing countries that rescheduled their loans. It was hoped that new lending would enable them to borrow enough money to grow, to pay their interest and keep the loans current, and therefore prevent the banks from getting into trouble with their regulators and shareholders, to say nothing of becoming bankrupt. But the banks did not lend, because the OECD governments had not changed or adapted their rules on taxation, and the regulators did not harmonize their regulations. So to get a group of syndicated banks to agree on a common position, and to work through the Baker Plan, became manifestly impossible; or so difficult that once you had done it for Mexico, everybody went for a long holiday to recover before they tackled Brazil. And so it went on and on. Rescheduling simply made matters worse.

So, we followed the Baker Plan with the Brady Plan. This was a plan we all welcomed because it faced reality—the Emperor has no clothes. It said, finally, the LDC's should not be pushed into expensive, unmanageable rescheduling and taking on new debt. Rather, creditor nations should encourage debt reduction by getting the banks to allow governments to buy back their debt by borrowing money from the IMF and the World Bank and using that money or their reserves to purchase the debt in the secondary markets where the value was quite clearly far less than one hundred cents on the dollar. I may say, for example, in the case of Argentina right now it is

probably only worth eleven cents on the dollar. So, a country borrows money from the World Bank or the IMF, and this is pretty expensive money, and it uses this new money to buy back the debt that it owes the former creditors that are not advancing the debtor country any more money. There is only one defect in this exercise: the debt owed to the international agencies is never reschedulable. So, we are replacing reschedulable debt with unreschedulable debt. This phenomenon will make life especially difficult for the debtor countries if the scheme does not really work out the way it is intended. So, that ladies and gentlemen is the Brady Plan.

Meanwhile, the developing countries are told, and quite rightly so, that they must adjust their economies. They are told they must go in for structural adjustment. They are told they must open up their economies to the goods and services of Western countries and companies. They are told they must facilitate foreign direct investment by international companies into their economy, and that they must welcome back the multinational corporations. Developing countries now have learned their lesson of the folly of past practices such as nationalization and deterrents to foreign investors. They are now generally anxious to welcome foreign investors. But which prudent foreign investor is going to invest in a country with a continuing massive debt overhang, and in effect a long term mortgage over its foreign exchange income over the next twenty or thirty years? There is no light at the end of the tunnel in such cases. It is in fact getting worse.

More recently you have been hearing about debt-equity conversions. That is to say, you sell the family silver by converting the debt which you really cannot really repay into real assets, and you do it on a basis of buying back the debt for so many cents on a dollar. Again, this is not a very palatable type of exercise. The countries that open up their markets and economies and look for foreign investment and adapt their tax rules to make investment look attractive, despite the debt overhang, are now going to find it difficult to compete with Eastern Europe. Eastern Europe has begun to look like an attractive place for companies to invest and produce right next door to the world's biggest market, Western Europe. Third World investments and assets will look less attractive.

We face a situation in which the debt crisis continues, and no framework has been put in place to resolve it. *Ad hoc* solutions or band-aids are being put over the sore; they temporarily cover the problem while people scurry around and look for what they can come up with for a solution. The responsibilities of the various parties

for the crisis are not properly examined. The negligence of the banks in making loans, and of the governments of Western countries in encouraging them to make loans, are not taken into account. The real costs falls on developing countries who, by and large, have taken on the burden and admitted their responsibility for an element of the blame.

The other interesting or disturbing feature about the current situation is that with the succession of systems under which we have been operating, the Baker Plan and the Brady Plan, not all of the creditors are treated equally. It is very interesting that the international lending agencies do not reschedule their loans, nor do bond holders. Those categories of creditors always are paid on time. The people who get rescheduled are the commercial banks. You can say, "Well, a lot of them deserve it." But what about the forgotten, the unwanted guests at the debt rescheduling table, the trade creditors, the people who actually continue to provide money, the people who import raw materials, spare parts, and essential goods to keep the economy in the developing countries working so that they can, in effect, work their way out of their problem? They have been systematically disregarded and treated unfairly in all of these exercises. There has been no genuine settlement, no workout; just temporary half measures continuing to focus on short-term national interests and dealing only with government to government and commercial bank debt.

I have gone into this in some detail because I feel that this is one example of the challenges to which Professor Dick Gardner referred. We need liberal internationalism to be brought into play here. We need people like yourselves to be looking for solutions, to be trying to find analogies in domestic law and general principles of bankruptcy law, in general principles of workout practice, and to apply those to the international arena. Unless we can solve this problem, most of the other problems will grow and become impossible to control by multilateral or international cooperation. We need tailor-made workouts. We need some sort of forum with the power to decide what is a fair deal for a debtor and to establish rules of fair play as between creditors. We need some method of rewriting loan contracts to adapt them to evolving situations totally outside of the control of the parties. Examples would be monetarist measures or bad economic management in the West, which result in higher interest rates which are then passed on as an extra burden to developing countries which have no control over interest rate policy in Western countries.

I am very interested to see, for example, the way that the Indonesians and the Sudanese, to whom I had the pleasure of acting as

an adviser, use a type of international ombudsman as an independent person to look at the country's resources, to find out what the country could pay fairly and could manage to pay while continuing to run their economy and help themselves grow out of trouble. The ombudsman has the role of looking at the foreign exchange resources available and endorsing, if you like, a workout plan. That kind of idea may be one that can be adapted to the developing countries situation in lieu of a forum. But is it possible to use the International Center for the Settlement of Investment Disputes, or a special tribunal at the Permanent Court of Arbitration at the Hague as a forum which could look at each individual debtor country's situation and work out a rational formula for repayment that the country can actually sustain and discharge?

It is very interesting that in the 1920's and the 1930's the German Government faced a lack of credit when the French, the British, and the Americans insisted on unrealistic reparations. These latter governments wanted to squeeze as much money out of the Germans as they could without providing the Germans with access to foreign currency in amounts adequate to make their economy work. What did we get as a result of that behavior: Hitler and the Second World War.

It is very interesting that in 1953, the Germans were able to negotiate, possibly on the basis of everyone's experience with the 1930's, the 1953 London Agreement which, in effect, reduced Germany's external debt by seventy percent. Now, you look at what is being asked of Brazil, Argentina, Ecuador, or Mexico and you will find that we are not making any effort to reduce their external debt; not even by fifty percent or thirty percent. No such effort is being made for developing countries at the moment.

That, I am afraid, is a fairly long list of problems that we face. I think that liberal internationalism can deal with these challenges and that the time is right, as Gabe Wilner said in his introductory remarks, for idealistic, perservering lawyers to bring some degree of leadership to issues such as the Third World debt problem. I hope it is not too late. One recent commentator at the Oxford International Institute, to which I belong, David Knox, formerly vice-president of the World Bank in charge of Latin America, has just published a book<sup>2</sup> which came out last week. In it, he says basically, "the party

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<sup>2</sup> D. KNOX, *LATIN AMERICAN DEBT* (1990).

is over." As someone who has worked with Latin America over the last twenty years, he concludes that debtors must now proceed to a concerted default on all their debt because it is unmanageable. I hope he is wrong, because I think that would be a very bad precedent. It must be possible to work out some system of gradual repayment and debt reduction that would make the problem manageable.

José Ortega y Gasset has said, "Nations are formed and kept alive by the fact that they have a program for tomorrow." Liberal internationalism, I think, is just such a program. It is desperately needed now. We desperately need international financial lawyer-diplomats of the type personified by Phillip Jessup.

I think it is appropriate to conclude, in talking to a group of idealistic, young, international lawyers who are about to start their careers, with the remarks of Albert Camus talking about the role of youth. He said, "Inertia is man's greatest temptation, it is not enough to do one's job. Youth must be active in the world, for the world can be saved by this generation or it will not be saved. The world must accept the solidarity of misfortune." Thank you very much